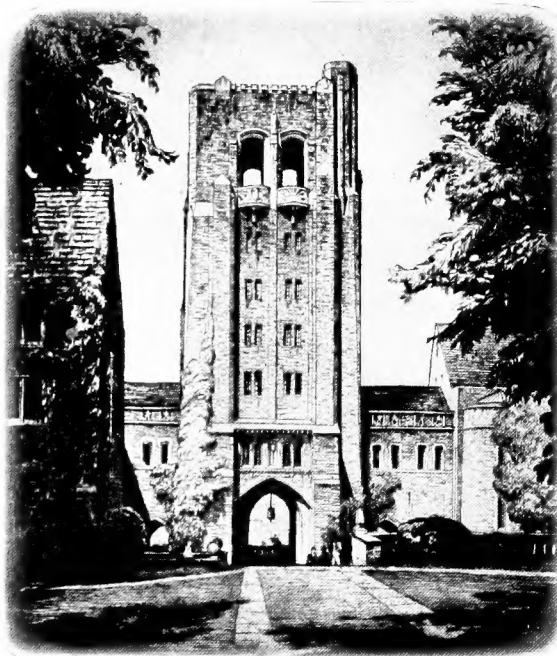


CORNELL LAW LIBRARY

K
1066
C33



Cornell Law School Library

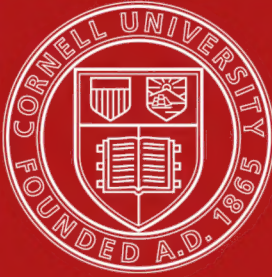
Cornell University Library
K 1066.C33

Case law and index; a complete series of



3 1924 017 622 295

law



Cornell University Library

The original of this book is in
the Cornell University Library.

There are no known copyright restrictions in
the United States on the use of the text.

CASE LAW AND INDEX

VOL. 1.—BANKS AND BANKING

BOARD OF EDITORS.

JAMES DEWITT ANDREWS, CHAIRMAN,
AUTHOR OF THE "AMERICAN LAW" AND CHAIRMAN OF THE COMMITTEE
ON THE CLASSIFICATION OF THE LAW IN THE
AMERICAN BAR ASSOCIATION.

HON. JOHN H. STINESS,
CHIEF JUSTICE OF RHODE ISLAND.

HON. JAMES MCSHERRY,
CHIEF JUSTICE OF MARYLAND.

HON. ALMET F. JENKS,
JUSTICE OF THE APPELLATE DIVISION OF THE SUPREME COURT
OF NEW YORK.

HON. JAMES ALFRED PEARCE,
JUDGE OF THE COURT OF APPEALS OF MARYLAND.

*(This Board will be increased by eight American Supreme Court
Judges, and four English Jurists.)*

CASE LAW AND INDEX

A COMPLETE SERIES OF CONDENSED REPORTS
FEDERAL, STATE, AND ENGLISH

INCLUDING

CANADIAN, AUSTRALIAN, NEW ZEALAND
AND HAWAIIAN REPORTS

VOL. I.
BANKS AND BANKING

UPON THE PLAN AND METHOD
OF

HOWARD ELLIS, EDITOR

EDITOR OF LAW AND EQUITY REPORTER, REPORTER, AND NEW YORK WEEKLY DIGEST

UNDER THE DIRECTION OF
A BOARD OF EDITORS

CASE LAW COMPANY
NEW YORK

MA 5057

COPYRIGHT, 1903, BY

CASE LAW COMPANY

P R E F A C E

In submitting to the profession a publication on a new plan, differing radically in its object, method and scope from anything in the domain of law and jurisprudence, the publisher feels that a word of explanation is necessary.

Many good books have been published in an earnest effort to point the way to the needed precedent in the wilderness of cases which are rapidly passing the possibilities of the time and learning of the profession. Still, they do not seem entirely to fulfill the purpose for which they were created.

From year to year it has become more clearly apparent that some new system of reporting must be adopted. "Case Law and Index" seems, in the opinion of all who have considered and investigated the plan, to fill this want. It is for these reasons that the work has been commenced and will be carried to completion.

"Case Law and Index" is a conception differing materially from any other attempt to reduce the law of the cases to a compact system. It aims at the ready ascertainment of all the decided law by reporting all the cases within a compass of practical utility, supplemented by an index pointing the way to every proposition decided. Its fundamental idea is condensation—the reproduction of the cases in miniature. The guiding principle in the production of the work has been—preservation of the case as adjudged by the court and presented in the official report. The plan includes the presentation of all the cases ever reported in each of the English-speaking jurisdictions. "Case Law and Index" reports the actual case in concise form, giving: (1) The nature of the proceeding. (2) The parties. (3) The material facts. (4) The judgment rendered. (5) The decision and "*ratio decidendi*" *in the language of the Court*.

Each case, as reported, will show at a glance whether it is likely to be "a case in point." In addition, the method employed excludes all scope for editorial interpretation and precludes the substitution of the

author's deduction for the judge's decision ; while it possesses the valuable feature that the work can be continued from year to year, and, by a periodic consolidation of indices, can always be kept up-to-date.

The practitioner will observe at a glance that this is neither a digest nor an encyclopedia. It occupies a field peculiarly its own, and renders a service not attempted by any other publication. It reports, and, with the aid of a thorough and minute index, places the active practitioner in possession of all the decided law bearing on any proposition engaging his attention. It is not the treatise of individuals, but actual adjudications in the language of the judges.

The publisher feels justified in asking indulgence of the profession for a word historical, in reference to "Case Law and Index."

The idea of "Case Law and Index" was conceived some years ago by the late HOWARD ELLIS, whose success in the condensation of reports is well-known through his efforts as Editor of the "Law and Equity Reporter," "Reporter," "New York Digest," etc., etc. The plan was submitted to prominent members of the profession, and the result of their views is shown in the testimonial books distributed by the Case Law Company. The necessary support being promised, the work of preparing the books was begun and prosecuted vigorously until the death of Mr. Ellis, in the latter part of December last.

The plan of the work, and system of reporting have not been in any particular modified or changed, and are being carried out under the direction of the Board of Editors.

The above facts constitute the excuse and reason for the delay in the appearance of the first volume of the work, and will account for some slight modification in the original plan as to the time of bringing out a few of the succeeding volumes.

CASE LAW COMPANY.

CONTENTS

	PAGE		PAGE
ALABAMA	1	MONTANA	767
ARKANSAS	41	NEBRASKA	770
CALIFORNIA	62	NEVADA	808
COLORADO	100	NEW HAMPSHIRE	810
CONNECTICUT	108	NEW JERSEY	821
DAKOTA	125	NEW MEXICO	848
DELAWARE	126	NEW YORK	849
DISTRICT OF COLUMBIA	130	NORTH CAROLINA	1102
FLORIDA	133	NORTH DAKOTA	1127
GEORGIA	137	OHIO	1131
HAWAII	179	OKLAHOMA	1164
IDAHO	179	OREGON	1167
ILLINOIS	180	PENNSYLVANIA	1170
INDIANA	246	RHODE ISLAND	1249
INDIAN TERRITORY	282	SOUTH CAROLINA	1257
IOWA	282	SOUTH DAKOTA	1274
KANSAS	312	TENNESSEE	1284
KENTUCKY	341	TEXAS	1320
LOUISIANA	375	UTAH	1341
MAINE	458	VERMONT	1346
MARYLAND	492	VIRGINIA	1366
MASSACHUSETTS	515	WASHINGTON	1381
MICHIGAN	597	WEST VIRGINIA	1389
MINNESOTA	633	WISCONSIN	1397
MISSISSIPPI	664	WYOMING	1429
MISSOURI	694		

BANKS AND BANKING

ALABAMA

LOGWOOD v BANK OF HUNTSVILLE (1820) 1 Minor 23.

On promissory note, by notice and motion. Defendant's charter authorized it to proceed in collecting bills of exchange, by giving ten days' notice to the debtor; and, producing to the court the certificate of the president of the bank that the debt was really and bona fide the property of the bank, to then move for judgment. It also provided that if the defendant appear and contest the claim, a jury should try the issue. Defendant contended that its right to jury trial was violated. The record did not show that the certificate of the president was produced in court nor that the defendant had ten days' notice. It stated that the defendant was "duly notified." The writ was issued by the clerk of the circuit court after the Act of 1819. Judgment by default. Error.

Lipscomb, J. 1. On the authority of *Dartmouth College v Woodward* (4 Wheat. 668) this charter is held to be a contract which cannot be impaired by the legislature. 2. The summary procedure did not deprive the defendants of the right to trial by jury, since they did not ask to have such trial. 3. The law which allows summary procedure must be strictly construed; due notice under the corporate seal must be shown by something more than an entry on the record. The certificate must be shown to have been under the corporate seal. Ten days' notice is necessary for a sufficient call before the motion. 4. The note itself was sufficient ground for the motion. On technical grounds that the writ was issued after the Act of 1819, case dismissed.

Cited: 1 Minor 150, 155, 171; 2 Stewart 37, 227; 3 Stewart & Porter 20, 26, 279; 4 id. 219; 4 Porter 183; 8 Porter 101, 572; 3 Ala. 714; 6 id. 576; 7 id. 492; 10 id. 378; 19 id. 328; 20 id. 776; 29 id. 374; 39 id. 616; 46 id. 495.

CRAWFORD v THE STATE (1823) 1 Minor 143.

Summary proceeding. Motion in the circuit court to recover a penalty for failure to pay taxes of 1820 accrued against the Tombeckbee Bank, of which the defendant was president. The Act of 1820 to raise revenue for 1821, provided for the recovery on motion, of a penalty for failure to pay taxes, and directed that the motion against the President and the Directors of the Bank be made in the circuit courts. The Act of 1819 to raise revenue for the year 1820 was declared unconstitutional, so far as it provided for judgment on motion in the supreme court for a like failure. This motion was in the circuit court and was based on a failure to pay taxes of 1820. Judgment against the defendant individually. Error.

Minor, J. The Act of 1820 was penal and must be strictly construed. It was prospective and did not apply to the taxes of 1820. The circuit court was not authorized by statute or common law to render judgment against the plaintiff on motion. Judgment reversed.

JUDSON v THE STATE (1823) 1 Minor 150.

Motion for judgment for penalty for failure to pay taxes upon the stock of a bank whose corporate name was "The President, Directors and Company of the Bank of Mobile." The notice of motion was directed merely to the defendant as "President of the Mobile Bank." The Act of 1820, under which this motion was made, provided that notice be given to the Bank. Judgment against defendant individually. Error.

Lipscomb, C. J. 1. This proceeding is summary and the statute must be strictly complied with. Every jurisdictional fact must appear in the record. The bank should have been described by the name given by its charter. The defendant in his private capacity was not liable for the penalty. 2. Bank stock is subject to taxation, unless the right to tax has been expressly relinquished, and the act providing for such tax is constitutional. Judgment reversed.

THE STATE v STEBBINS (1828) 1 Stew. 299.

Indictment, charging that the defendants and others, styling themselves as a body corporate by the name of the S Co., did issue for circulation a bank note. The defendants were the directors of the S Co., organized in 1818, which was incorporated with certain general provisions as to its powers, but was not specifically authorized to engage in the banking business. It did engage in a general banking business and issued a note upon which the indictment was based, which was in form a promise of the company to pay on demand and was signed by two of the defendants as officers. In 1827, the legislature repealed so much of the incorporating act as might seem to authorize the issuance of notes. The offense was committed after this act was passed. Judgment of conviction. Error.

Saffold, J. 1. Under the constitution of the state, the right to exercise banking powers is a franchise. 2. The power to limit the issuance of paper currency, when not issued under previous express authority, is an incident of sovereignty. 3. No corporation can legally exercise banking powers, unless the powers are specifically granted or are necessary incidents. The Act of 1818 did not grant banking powers to the corporation, and the repealing Act of 1827 is constitutional. 4. To one charged with illegal banking, the act incorporating the bank is no defense. Judgment affirmed.

Cited: 1 Stew. 461; 2 id. 30; 4 Ala. 561; 31 id. 83; 36 id. 317; 54 id. 473.

LYON v THE STATE BANK (1828) 1 Stew. 442.

Summary proceeding on a note. The suit was by notice and motion against defendant, who was security on a 90-day note discounted by plaintiff, and two other joint promissors. The notice stated the original amount of the note, how payable, and the date of discount. On the return of the note, the plaintiff presented a certificate of its president, showing the amount due as less than the face of the note. The notice of protest was given to all parties on the note, but the surety only was sued. The state statute as to usury forbade interest over 8 per cent, but the act incorporating plaintiff permitted it to receive interest at 6 per cent only. On discount of the note, 6 per cent was deducted in advance, calculating 360 days to the year. At maturity, the principal had a deposit in plaintiff that was not applied to payment of the note. The judge before whom the case came for trial was a director of the plaintiff, and the defendant challenged his competency to preside. There was no declaration. Judgment for plaintiff. Error.

Saffold, J. 1. There was no usury. The taking of interest in advance and calculating it on the basis of 360 days is legal. 2. The deposit of the principal was no payment or setoff. 3. The notice of motion identified the debt with reasonable certainty, and was sufficient, though it had not the technical precision of a declaration. 4. A declaration was unnecessary. 5. The record must show every material fact to be proved. 6. The judge was not disqualified by interest. 7. Judgment may be taken against one only. 8. No discontinuance against the others was necessary. Judgment affirmed.

Cited: 3 Stew. & Port. 20; 4 Port. 184; 5 id. 546; 8 id. 101, 373; 1 Ala. 436, 550; 2 id. 167, 505; 6 id. 760; 7 id. 210, 841; 8 id. 341, 585; 11 id. 226; 12 id. 188; 15 id. 83, 108, 437; 17 id. 446; 22 id. 124; 29 id. 374; 36 id. 660; 42 id. 353; 59 id. 117.

STATE v TOMBECKBEE BANK (1829) 2 Stew. 30.

Quo warranto against bank to show cause why its charter, granted in 1817, should not be forfeited, alleging failure in 1827 to pay specie on demand; relying on implied charter provision to pay specie, and on an Act of 1821, providing that if any incorporated bank shall not, "at the expiration of six months after passage of act, make regular specie payments," it shall produce forfeiture of its charter. Judgment pro forma for defendant. Error.

Crenshaw, J. 1. Specie payment was not required by the charter. 2. The charter is a contract and cannot be changed by subsequent legislation. Judgment affirmed.

Cited: 43 Ala. 546.

LUCAS v THE BANK OF GEORGIA (1829) 2 Stew. 147.

Assumpsit on a note indorsed by defendant. The plaintiffs were the president, directors, and company of the Bank of Georgia, and declared by attorney. Defen-

dant's motion to non pros. the plaintiff, on the ground that the warrant of the attorney was not produced, was denied. Defendant pleaded the general issue. The plaintiffs produced the note and an authenticated copy of the act incorporating the bank in Georgia and proved its establishment and operation. Judgment for plaintiffs. Error.

Collier, J. 1. A corporation created in another state, may sue in this state. 2. To establish its existence in another state a copy of its charter and parol proof of its being in operation, will be sufficient. 3. Even if an attorney, representing such a corporation, should be required to produce his warrant of authority, the right to such production is waived by pleading the general issue. Judgment affirmed.

Cited: 1 Ala. 245; 5 id. 808; 10 id. 45; 50 id. 335; 103 id. 374.

LUCAS v BANK OF DARIEN (1830) 2 Stew. 280.

Bill to restrain defendant from prosecuting suits on a judgment. The complainant was formerly in partnership with J, in Georgia, and the partnership was dissolved. The complainant removed to Alabama. J, having become a director in the defendant, which was organized subsequent to the dissolution, borrowed money from it, without complainant's knowledge, on notes executed in the firm name, by X, under a power of attorney from J. The defendant discounted the notes. J, becoming insolvent, the notes were sued upon in Georgia, service of process being acknowledged by J, and judgments were recovered against the complainant. The defendant had knowledge of the removal of complainant to Alabama. The defendant having brought an action on the judgment recovered in Georgia, against the complainant, this bill was filed. The defendant contended it never had notice of the dissolution. Decree dismissing bill. Error.

Saffold, J. 1. Actual notice of dissolution of a partnership must be given to persons having previous dealing with it, and notice in a gazette must be given to those who have not so dealt. Change of pursuit by one partner, or removal from the state, is not sufficient notice. The rule is no different as to a bank established after the dissolution. It is not of itself sufficient to charge the bank with notice to show that the partner receiving credit was a director of the bank. 2. A partner may appoint an agent to make or indorse notes. 3. A judgment obtained in another state, where the court had no jurisdiction over the party, is not binding here, and the want of jurisdiction is a good plea at law. 4. A bill in equity will not lie to restrain proceedings at law on such a judgment. Judgment affirmed.

Cited: 1 Stew. & Port. 138; 2 id. 169; 7 Port. 128; 5 Ala. 155; 7 id. 25; 10 id. 741; 12 id. 95, 505, 507; 14 id. 22, 90; 15 id. 244; 17 id. 796; 19 id. 457; 22 id. 226; 28 id. 301; 32 id. 332; 34 id. 645; 37 id. 571, 718; 51 id. 195; 70 id. 211; 72 id. 479; 82 id. 163; 83 id. 403; 88 id. 590; 122 id. 564.

POPE v BRANDON (1830) 2 Stew. 401.

Ejectment. Plaintiffs recovered judgment against the bank on the day the charter expired, and levy was made on its house and lot. On the same day, the bank made a trust deed for the benefit of creditors to the defendant, the president of the bank, to cover outstanding notes and bills due the bank. It was contended that there was no consideration for the trust deed; that a corporation has not the power to make a trust deed. Judgment for plaintiff. Error.

Collier, J. 1. A bank corporation may vest its property in a trustee for the benefit of creditors. 2. The deed is not objectionable for want of consideration. A judgment has no retrospective operation against a bona fide assignee. Judgment reversed.

Cited: 4 Ala. 749, 751; 6 id. 480; 7 id. 101, 650; 11 id. 995; 14 id. 658; 16 id. 569; 54 id. 39; 62 id. 246; 74 id. 367; 83 id. 581; 85 id. 262.

HUNTSVILLE BANK v McGEHEES Ex'r's (1832) 1 Stew. & P. 306.

Debt. By the 10th section of the plaintiff's charter, it was authorized to use the corporate name for liquidation, for two years after the expiration of the charter. On February 1, 1825, the charter of the plaintiff was proclaimed forfeited by the governor, pursuant to an act passed in 1823, providing for a forfeiture under certain conditions, and further providing that, in the event of such forfeiture, the stockholders should continue to enjoy all corporation powers unimpaired for three

years after the date of proclamation. This action was commenced after the expiration of three years, but before the expiration of five years from February 1, 1825. The defendant contended that the plaintiff could not maintain the suit in its corporate capacity. Judgment for defendants. Error.

Perry, J. The plaintiff did not cease to exist until the expiration of three years from February 1, 1825, and, by sec. 10 of its original charter, it could, for two years thereafter, sue in its corporate name to collect its debts. Judgment reversed.

WALKER v BANK OF ALABAMA (1833) 4 Stew. & P. 215.

Summary proceedings, on bill against acceptor. The bill was not paid at maturity. Plaintiff thereafter issued a notice, under the state statute, to the sheriff to serve on defendant. Defendant made default. Plaintiff produced the bill, and proved the indorsement, the certificate required by law, that it was plaintiff's property, the protest and the notice to defendant of non-payment. There was no proof that defendant had accepted the bill. Judgment for plaintiff. Appeal.

Taylor, J. The allegation in the notice that plaintiffs were the "holders and owners" of the bill sued on, is equivalent to alleging that it was the property of the bank. Nothing is taken by intendment or presumption. The record must show that sufficient evidence was introduced to authorize the judgment. A judgment by default in summary proceedings is not an admission of the cause of action. Judgment reversed.

Cited: 9 Port. 318.

In *Roberts v State Bank*, 9 Porter 312, it was pointed out that the foregoing case was incorrectly reported.

BRANCH BANK AT MONTGOMERY v HARRISON (1835) 2 Port. 540.

Summary proceedings. Motion for judgment against the defendant, on a bill of exchange, pursuant to a clause in the plaintiff's charter, providing that, in such a cause of action, it should be lawful for its president, on specified notice, to move for judgment, on producing the president's certificate of title. The notice served by the plaintiff conformed to the statute requirements as to substance, but was not under seal. Judgment for defendant. Error.

Thornton, J. 1. The notice provided for was not the act of the corporation, but of its officer; and the corporate seal was not essential. 2. The summary proceeding authorized against the debtors of the plaintiff, though different from the common-law course, is yet remedial in character, and, if substantially pursued, will not be defeated by scholastic criticism. Judgment reversed.

Cited: 8 Port. 374.

For contrary rule as to seal, see 1 Minor 23.

EDGERLY v BUTLER (1836) 3 Port. 344.

Summary proceedings. Motion for judgment under the second section of the Act of 1830, on a bill of exchange given by the defendants to the plaintiffs in the ordinary course of business. The bill was made payable at the Branch Bank of Mobile, by which it was discounted for the plaintiffs, and was protested at maturity for non-payment. The plaintiffs then served notice of this motion. Judgment for plaintiffs. Error.

Collier, J. The second section of the Act of 1830 applies only to those who have become voluntarily debtors of the Bank of the State of Alabama or its branches, and not to a bill in the ordinary course of business which the holder, without the consent of the parties, has procured to be discounted; it is confined alone to accommodation paper, discounted at the bank. Judgment reversed.

DUNCAN v THE TOMBECKBEE BANK (1836) 4 Port. 181.

Summary proceedings, on note, against the defendants, trading under the firm name of E R B & Co. Defendants C and D were served with the notice. The defendant E made himself a party. Defendant B was never served. The plaintiff filed a declaration, to which C and D pleaded, and a verdict was found against them. The record did not show that the certificate of the plaintiff's president as to title was produced on the trial. Judgment for plaintiff. Error.

Collier, J. 1. To sustain a judgment of the bank rendered on motion, the record must show that the certificate of the president of the bank that the debt was the property thereof was produced. The filing of a declaration does not render the certificate unnecessary. 2. Service of process upon one co-partner of a firm, after dissolution, will not authorize a judgment against all the co-partners. Judgment reversed.

Cited: 8 Port. 102, 112, 525; 10 Ala. 378; 17 id. 758; 26 id. 569.

EVERETT v UNITED STATES (1837) 6 Port. 166.

Assumpsit, against F, maker of a note, and H and E, securities. The note was made to the order of the president of the T Bank and indorsed to plaintiff. The note was extended, at the request of the maker, for one year after maturity. Defendants offered to prove that the maker had obtained an extension of eight years on transferring certain lands and land certificates to plaintiff, and paying yearly instalments on the note. They also offered to prove a sale of the lands by plaintiff. Plaintiff proved the indorsement by the cashier; that he was the cashier; and that the indorsement was in his handwriting. Judgment for plaintiff. Error.

Collier, C. J. 1. The acts of the cashier, done in the ordinary course of business, are prima facie evidence that they were within the scope of his duty. 2. The seal of the corporation was not necessary to the transfer. 3. There was no evidence of the plaintiff's assent to an extension of time of payment given by the plaintiff to the maker. Judgment affirmed.

Cited: 6 Ala. 726; 8 id. 340; 10 id. 924; 49 id. 21; 53 id. 541; 80 id. 3; 99 id. 386.

LEA v BRANCH BANK AT MOBILE (1838) 8 Port. 119.

Summary proceedings. Plaintiff served notice of motion for judgment against defendants as indorsers of a note made by M to his own order and protested for non-payment. Attached to the notice was a certificate by the president that the note was really and bona fide the property of plaintiff. Plaintiff introduced the note, the protest of the notary, the notice served on the defendants, and the certificate of the president as to title. The defendants demurred to the evidence. Demurrer overruled. Judgment for plaintiff. Error.

Ormond, J. 1. On a demurrer to evidence, the only question is whether it is or is not sufficient to maintain the issue. 2. Legal title to a note, made payable to the order of the maker, can only be derived from his indorsement, and until that time the note has no validity and the maker cannot be sued. 3. The certificate of the president, that the note is bona fide the property of the bank, will not of itself support this suit. Judgment reversed.

Cited: 9 Port. 380; 1 Ala. 269, 272, 402.

This case overrules Ramsey v Johnson, Minor 418.

CURRY v BANK OF MOBILE (1838) 8 Port. 360.

Summary proceeding. Plaintiff served notice of motion, signed by its attorneys, for judgment on a note made by S to the order of G. On the back of the note appeared indorsements of G, S, and the defendants. The parties appeared on the motion, but no jury was impaneled. Service of the notice and of a certificate of the president as to the bank's title was proved. The notary's certificate of protest stated that he had demanded payment at maturity, and that the indorsers had due notice of demand, non-payment, and protest, by notice in writing directed "To the indorsers—and left at their offices." These notices were given on the day the note matured. The defendants demurred to the evidence. Plaintiff, notwithstanding the objection of the defendants, struck out the indorsement of S, the name being the same as that of the maker of the note. Judgment for plaintiff. Error.

Ormond, J. 1. As no issue was tendered and no jury impaneled, a demurrer to the evidence will not lie. 2. The fact that the name of the maker and that of the indorser are similar, is not enough to establish prima facie that they are the same person. 3. The protest was sufficient. Notice of dishonor must be given on or before the next day after protest, or sent by the next mail. The notary's certificate, where the parties live in the same town, is sufficient, if it describes the place at which the notice is left as the office of the person so notified. The notary's

certificate is only prima facie evidence of the fact recited. 4. A deliberate cancellation of an indorsement, by a holder of a note, discharges such indorsers. 5. In summary proceedings by banks, every jurisdictional fact must be shown. 6. A notice in writing that identifies the debt with reasonable certainty is sufficient, and may be signed by an attorney in fact, and need not be under seal. 7. The common law rule, that corporations can only act by their common seal, has no application to corporations created by statute. 8. The judgment should, however, be reversed, because the plaintiff was permitted to strike out the second indorsement without explanation. Judgment reversed.

Cited: 9 Port. 316, 380; 1 Ala. 50, 400, 430, 435, 548; 2 id. 39, 167, 346, 691; 3 id. 290, 741; 4 id. 298; 5 id. 285, 638, 681; 6 id. 109, 295; 8 id. 104, 586; 10 id. 378; 11 id. 186, 929; 14 id. 535; 15 id. 83, 108; 18 id. 260; 22 id. 64; 27 id. 418; 28 id. 540; 32 id. 517; 70 id. 413; 72 id. 121; 82 id. 157.

BATES v PLANTERS & MERCHANTS BANK (1839) 8 Port. 99.

Summary proceeding on bank notice. A notice and certificate of the president, that the note sued upon was the property of the bank, were served on the defendant. No plea was filed, but the parties appeared and judgment was rendered for plaintiff. The record did not show that the certificate of the president was produced and shown to the trial court. Such a certificate, appended to the notice to the defendant, was attached to the transcript, but it did not appear that the court had acted on it. Judgment for plaintiff. Error.

Ormond, J. 1. In a summary proceeding on a bank notice, every jurisdictional fact must appear on the record. Where it does not appear that the president's certificate was produced and shown to the court, it has no jurisdiction. 2. Such a certificate appended to a notice to the defendant and attached to the transcript is not a part of the record where it does not appear that the court acted on it. 3. If defendant appear and plead, it is an admission of notice. Judgment reversed.

Cited: 8 Port. 372; 9 id. 380, 424, 472; 2 Ala. 167, 346, 693; 3 id. 714, 739; 6 id. 576; 10 id. 378; 15 id. 108; 17 id. 758; 18 id. 760; 27 id. 676; 29 id. 374; 37 id. 448; 39 id. 616; 56 id. 504.

LEVERT v PLANTERS & MERCHANTS BANK (1839) 8 Port. 104.

Summary proceedings. A notice of motion, containing a description of the note, was served on the defendant, together with a certificate that the note was the property of the bank. Judgment was rendered for the plaintiff on default. The plaintiff's charter provided for summary proceedings on any note "expressly made negotiable and payable at said bank." The record failed to show where the note was payable. Attached to the transcript was the notice served on the defendant. An act passed in 1837 gave to the plaintiff a remedy by summary proceedings in cases where "any person shall become indebted" to it on any note. Judgment for plaintiff. Error.

Ormond, J. 1. The remedy by motion is in derogation of the common law, and one claiming under it must show affirmatively that he is entitled to it. 2. The fact must appear in the record that the notes were payable at the bank, to entitle the plaintiff to recover. 3. The notice attached to the transcript is not a part of the record for that purpose. 4. The Act of 1837 referred only to after-acquired notes. Judgment reversed.

Cited: 9 Port. 424, 472; 3 Ala. 714; 10 id. 378; 17 id. 758; 18 id. 760; 20 id. 548; 27 id. 676; 57 id. 456.

PLANTERS & MERCHANTS BANK v ANDREWS (1839) 8 Port. 404.

Attachment. Motion to set proceedings aside on the ground of irregularity. Plaintiff sued out, on the affidavit of its cashier, an attachment against A upon certain unmatured bills of exchange. The bond on which the attachment issued was defective, as it did not conform with the attachment in reciting the term of court. Although the bills were not due, there was nowhere disclosed in the writ, bond or affidavit, that the defendant's liability was contingent in any way. Indorsed on the writ was a statement of the debt. The motion was made by certain persons summoned as garnishees. Motion granted. Error.

Collier, C. J. 1. A privy in interest or garnishee in attachment, may, at all times, submit a motion to quash. 2. A defective bond is not ground for quashing, unless the plaintiff refuses to execute a perfect bond. 3. Where neither the writ, affidavit, nor bond allege the contingency of the debt, it will be presumed to be absolute. 4. An indorsement on an attachment is no part of the record and will not be examined to ascertain the nature of the demand. 5. The constitution does not deprive banks of the benefit of process by attachment. 6. The affidavit here was properly made by the plaintiff's cashier. The term "person" in the statute includes a corporation. Judgment reversed.

Cited: 3 Ala. 59; 4 id. 334, 530; 10 id. 44; 40 id. 409; 46 id. 414; 53 id. 364.

ROBERTS v THE STATE BANK (1839) 9 Port. 312.

Summary proceeding on bill of exchange. The certificate as to title was signed by the president and was not under seal. It made no reference to the bill but merely certified to a certain amount of indebtedness due from the defendants to the bank. The notary's certificate of protest of the bill certified: "notices of protest given to the drawer and two first indorsers same day." Judgment for plaintiff. Error.

Ormond, J. 1. From the certificate of the notary, it must be intended that the notice was in writing and given personally. 2. The plaintiff is a state institution, and the certificate of its president of the indebtedness of the defendants is conclusive as to the plaintiff's right to sue and prima facie evidence of the genuineness of the signature. 3. It is for the court and not the jury to pronounce on the validity of written evidence. 4. The president's certificate was insufficient to give the court jurisdiction. Judgment reversed.

Cited: 1 Ala. 427, 530; 2 id. 346; 6 id. 295; 7 id. 216, 491.

SAYRE v BANK OF MOBILE (1839) 9 Port. 423.

Summary proceeding, on bills of exchange. The judgments in the court below did not disclose that the bills were negotiable and payable at the Bank of Mobile, or that, if payable at any other banks in Mobile, the plaintiff acquired title after June 30, 1837. These facts appeared in the notices served by the plaintiff, but the notices were not made a part of the record. Judgment for plaintiff. Error.

Ormond, J. The judgment on the bank notice must disclose that the instrument sued on was negotiable and payable at the bank. The existence of these facts in the notice is insufficient. Judgment reversed.

UNITED STATES v FAY (1839) 9 Port. 465.

Assumpsit, on a note made by the defendants, payable and negotiable at the Bank of Mobile, to the order of S E & Co., and by the latter discounted at the Tombeckbee Bank before maturity, and later assigned to the plaintiff for value. The court allowed the defendants to prove in offset, that they were the legal owners, for a valuable consideration, of a paper signed by S E & Co., promising to pay on demand a larger sum than the note sued on, and that they held the same before notice, and that the note was the property of the bank. The charter of the Tombeckbee Bank provided that no note, bill or bond shall be negotiable at said bank, unless it shall be expressed on the face that it is negotiable at the bank. Judgment for defendants. Error.

Collier, C. J. Whether or not the offset was properly allowed by the court is immaterial, as the Tombeckbee Bank is not authorized by its charter to discount a note, unless it be expressed on the face of the note that the same shall be negotiable at said bank. It therefore could not acquire legal title to the note; and the plaintiff, claiming title through it, cannot recover in this action. Judgment affirmed.

FORD v BANK OF MOBILE (1839) 9 Port. 471.

Summary proceeding. The judgment did not show that the note sued upon was negotiable at the Bank of Mobile. The notice served by the bank showed that fact, but no action of the court was had thereon. Judgment for plaintiff. Error.

Ormond, J. In a proceeding against defendants on a notice from a bank, the

judgment must show that the court had jurisdiction. This it does not do in this case, as it nowhere appears that the note sued on was negotiable at the Bank of Mobile. Judgment reversed.

Cited: 10 Ala. 378; 27 id. 676.

BATES v THE PLANTERS & MERCHANTS BANK AT MOBILE (1840)
9 Port. 376.

On notes against indorser. R negotiated the notes with plaintiff. To protect defendant, R conveyed property to B in trust. Plaintiff obtained judgment against all parties to the notes. Appeal. Subsequent to the judgment and appeal, B agreed with the sheriff to permit a levy on the property he held in trust, on the understanding that the proceeds were to be appropriated to the satisfaction of these claims in preference to all other process in the sheriff's hands against R. The sheriff afterward threatened to apply the proceeds to other executions. Defendant obtained an injunction directing the sheriff to apply the proceeds according to the agreement. Defendant assigned errors in the judgment, that the certificate of the president of the bank, required by law, does not appear from the record to have been shown to the court. Judgment for plaintiff. Appeal.

Collier, C. J. 1. By the injunction granted, no execution is stayed or rendered inoperative. 2. This proceeding, commenced by notice, can only be legalized by the production of the president's certificate and action thereon by the court. Judgment reversed.

Cited: 9 Port. 472; 18 Ala. 760.

CLEMENTS v THE BRANCH BANK (1840) 1 Ala. 50.

Motion for judgment on bill of exchange. The notice of motion was served in due time; it set out that the debt was bona fide, and described the bill, but failed to aver indorsement. Judgment for plaintiff by default. Error.

Goldthwaite, J. The case of *Curry v Bank of Mobile* (8 Porter 360) controls this case. It was there decided that the notice should set out the indorsement by the party to be charged. Judgment reversed.

BRANCH BANK OF MONTGOMERY v KNOX (1840) 1 Ala. 148.

Assumpsit, for not collecting a bill of exchange. Plaintiff deposited the bill of exchange, payable in Mobile, with defendant for collection. The bank omitted to present it for payment, whereby the amount was lost to the plaintiff. Plea, non assumpsit. The defendant requested a charge that it was not authorized by its charter to make such a contract as declared on. Refused. The charter provided that the bank receive money on deposit and deal in bills of exchange and notes secured by two sureties. Judgment for plaintiff. Error.

Goldthwaite, J. 1. The bank was authorized by its charter to deal in bills of exchange and to discount notes, made negotiable and payable at the bank. It may therefore undertake to collect bills of exchange on other places. 2. The restriction extends no further than to promissory notes. 3. The bill did not become the property of the bank. It was liable for neglect to use diligence in collection. Judgment affirmed.

Cited: 2 Ala. 465; 3 id. 217, 221; 10 id. 378.

WRIGGLESWORTH v BANK OF ALABAMA (1840) 1 Ala. 222.

Motion for judgment for wages. Section 18 of the charter of defendant provides that on all debts due by or from the bank, on negotiable paper, a summary remedy will lie by notice and motion. The action was for the bank's failure to keep a contract of employment with plaintiff. Motion to quash the notice. Granted. Error.

Collier, C. J. 1. Plaintiff does not show by his notice that defendant owes him what, in technical language, is called a debt. The case made out by plaintiff is one of contract, sounding in damages, the breach of which can only be redressed by the appropriate action, and not by this summary remedy. Judgment affirmed.

BANCROFT v BRANCH BANK AT MOBILE (1840) 1 Ala. 230.

Summary proceeding. The president pro tem. of the plaintiff bank certified that a note sued on was bona fide the property of the bank. Plaintiff's charter provided that in case of sickness of the president, a president pro tem. should be appointed. Judgment for plaintiff. Error.

Collier, J. The duties of the president pro tem. are not expressly pointed out, but as the duties of the president are temporarily cast on him, he is competent to perform all legal acts pertaining to his official character. Judgment affirmed.

Cited: 7 Ala. 216.

GAZZAM v BANK OF MOBILE (1840) 1 Ala. 268.

Summary procedure by notice and motion, against maker of promissory note. The plaintiff bank moved for judgment on the certificate of the president of the bank that the note sued on is bona fide the property of the bank. The note was not payable at the bank. Defendant demurred to the evidence. Judgment for plaintiff. Error.

Ormond, J. 1. The certificate of the president of the bank is not evidence for any purpose, nor can it be considered as before the jury. Its only effect is to give the court jurisdiction. 2. Plaintiff could derive title to the note only by indorsement. Having failed to prove indorsement, it cannot recover. 3. A new trial and not final judgment should be granted. Judgment reversed.

Cited: 10 Ala. 378; 17 id. 758.

BRANCH BANK AT MOBILE v POE (1840) 1 Ala. 396.

Garnishment. In an action of P against G, the bank was summoned as garnishee. The cashier of the bank appeared and made answer. Only a part of the sum claimed was due at the time of service. Judgment for plaintiff. Error.

Collier, C. J. 1. It is not within the scope of the powers conferred upon the cashier of a bank to appear and defend suit against the corporation. His answer, therefore, should not have been regarded by the court as a sufficient basis for its judgment. 2. The answer of the bank should have been under its common seal. 3. Only that part of a debt which had matured at the time of service can be reached by garnishee process. Judgment reversed.

Cited: 2 Ala. 352; 4 id. 754; 5 id. 232; 16 id. 697; 21 id. 63; 26 id. 503; 30 id 73; 115 id. 385.

SALE v THE BRANCH BANK (1840) 1 Ala. 425.

Summary proceedings on promissory note. The certificate and notice to recover the amount of a note made by defendant was issued under sec. 21 of the Act of June, 1837, relating to banks. The certificate did not state how the debt was created, whether by bill, note, or otherwise. Judgment for plaintiff. Error.

Collier, C. J. The certificate must identify with reasonable certainty the debt sought to be recovered. A mere reference to it by its amount, which would quite as well apply to any other debt of the same amount, is too loose and indeterminate to give to the court jurisdiction of the case in a summary proceeding. In this summary procedure, an allegation of non-payment is not necessary. The burden of proving payment is on the defendant. Judgment reversed.

Cited: 1 Ala. 436; 2 id. 346.

WHITE v BRANCH AT DECATUR (1840) 1 Ala. 435.

Summary proceedings on promissory note. The plaintiff produced "the notice of motion with the certificate of the bank president indorsed thereon in extenso." Judgment for plaintiff. Error.

Collier, C. J. The case of Curry v Bank of Mobile controls. The certificate was certainly full enough. By a recital in the judgment as above quoted, it must be intended that the notice and certificate found in the transcript were those produced in the court below; further, the recital and judgment were evidence that they had been there acted on and could be here looked to as part of the record. Judgment affirmed.

Cited: 5 Ala. 285; 8 id, 586; 18 id. 760,

NANCE v HEMPHILL (1840) 1 Ala. 551.

Assumpsit. Indorsee against drawer of bill of exchange. Pleas: 1. Non-assumpsit; 2, failure of consideration; 3, illegality in that certain persons unlawfully engaged in banking, contrary to the constitution, and while so engaged discounted the bill sued on, and, 4, plaintiff has no interest in the note and was the agent and cashier of said banking house and that the discounting was for the illegal purpose of said unlawful banking. Demurrer to this plea overruled. Replication traversing. Plaintiff requested instruction presenting the same question that the contract was not void. The constitution authorized the establishment of state banks, but contained no express prohibition of private banking. Judgment for plaintiff. Error.

Ormond, J. Banking does not necessarily include the circulation of notes as a currency. An individual has the common-law right to do banking and to issue his notes payable to bearer; the design that they shall pass from hand to hand as money will not make them void. The constitution does not prohibit it. Judgment reversed.

Cited: 8 Ala. 835; 59 id. 28.

LIGHTFOOT v BANK AT DECATUR (1841) 2 Ala. 345.

Summary proceeding by motion by payee against maker of a note dated September 6, 1837, for \$2,000, payable in instalments on May 1, 1838-9-40, in payment of a debt due at the date of the note. Sec. 2 of the statute provided all debts due should be payable in instalments. Sec. 26 provided that failure to pay any instalment of a sum due for money borrowed under this act shall render the whole sum due in toto. Default was made on first instalment and judgment entered for whole debt. Error.

Collier, C. J. Sec. 26 does not embrace a debt extended under sec. 2. Recovery could be had only for the instalment due. Judgment reversed.

BATES v BANK OF ALABAMA (1841) 2 Ala. 451.

On a bill of exchange. Plaintiff made a contract by which it loaned a large sum of money, taking bills of exchange at nine months in payment thereof. It received at the same time, as one of the conditions of the loan, a quantity of cotton with authority to ship it to a foreign port, and sell it for the amount, risk and expense of the owner, and to credit his bill with the amount of the net proceeds. The defendant contended that according to sec. 20 of the charter of the bank, it had no authority to deal in goods, wares or merchandise in any manner whatever, unless it be to receive a debt due the bank, incurred by the regular transactions of the same, as is provided for in this act. Demurrer to the plea. Sustained. Judgment for plaintiff. Error.

Ormond, J. 1. The transaction in question was not a purchase of merchandise for the purpose of sale on commission, but was an advance of money, for which the borrower was responsible, with an authority to sell the merchandise for the payment of the debt. 2. Whatever a corporation created by statute may lawfully do it may transact by its agent. 3. The directors of a bank cannot, by splitting up a large loan into fragments and taking several bills from the same parties for the whole amount, evade charter provisions forbidding large loans by directors. Such provisions are merely directory and furnish no defense to the borrower. 4. Words of statute, not technical, are presumed to be used in their natural sense. Judgment affirmed.

Cited: 8 Ala. 380; 477; 9 id. 516, 711; 30 id. 854; 11 id. 716; 12 id. 777; 14 id. 531; 19 id. 293; 44 id. 91; 78 id. 97; 91 id. 152.

TICKNOR v BRANCH BANK AT MONTGOMERY (1841) 3 Ala. 135.

Summary proceeding on promissory note by the acceptor against the maker and the indorser. The note was accepted but was not paid. The holder protested the note and incurred protest fees. Thirty days' notice had not been served on the defendant before the commencement of the term. Judgment for plaintiff. Judgment against plaintiff for the amount of the protest fees. Error.

Collier, C. J. 1. It is not necessary that the notice required by the bank charter be served thirty days before the commencement of the term of court. It is enough if the notice be served thirty days before judgment on it is taken. 2. The acceptor is liable to the holder for the protest fees. Judgment affirmed.

Cited: 122 Ala. 592.

McWALKER v BRANCH BANK AT MOBILE (1841) 3 Ala. 153.

On promissory note. Defendant defaulted. The judgment recited that the bank moved for judgment against defendant as maker of a promissory note payable to A, cashier, or bearer, at said bank. It did not show legal title in the bank. Judgment for plaintiff. Error.

Goldthwaite, J. The intendments arising out of the note do not prima facie show title in the bank. The judgment entry, though by default, must show affirmatively every fact and circumstance necessary to support jurisdiction. Judgment reversed.

Cited: 3 Ala. 189; 5 id. 28, 423; 10 id. 378; 37 id. 483; 65 id. 453.

BANK OF MOBILE v HUGGINS (1841) 3 Ala. 206.

Assumpsit on promissory note. The plaintiff deposited the note with the defendant for collection. Defendant failed to give notice of protest to the indorsers. The maker was solvent. The charge, requested by defendant and refused, was that plaintiff could not recover without showing that the maker was insolvent. Demurrer. Overruled. Judgment for plaintiff. Error.

Goldthwaite, J. 1. A general demurrer can be sustained only when all the counts are defective. 2. Either case or assumpsit is the proper remedy for a broken bailment. 3. An agent for collection is bound to present the note at the time and place fixed for payment. If payment is refused, he must immediately notify his principal. He is not bound to notify the indorsers. If the plaintiff had a remedy against any solvent person, he could recover only nominal damages from the defendant. Judgment reversed.

Cited: 4 Ala. 505; 7 id. 111; 9 id. 178; 14 id. 504.

OWEN v BRANCH BANK AT MOBILE (1842) 3 Ala. 258.

On promissory note. The note made to plaintiff by defendant was for a loan of notes issued by the plaintiff. Plaintiff was incorporated by the authority of the state legislature, with power to emit their bills or notes as the representative of money. Defendant requested the court to charge that, as the notes of plaintiff were bills of credit within the meaning of the prohibition of the United States Constitution, the bank could not recover. Refused. Judgment for plaintiff. Error.

Ormond, J. The notes issued by the bank are not "bills of credit" within the prohibition of the United States Constitution. Judgment affirmed.

Cited: 6 Ala. 815; 7 id. 101; 73 id. 441.

HAZARD v PLANTERS AND MERCHANTS BANK (1842) 4 Ala. 299.

On promissory note. Defendant, as maker of a note, promised to pay the amount for which the note was given to the president and directors of plaintiff. The objection is that the note is not payable to the corporation, and that there is no proof that it was the owner of the note. Judgment for plaintiff. Error.

Ormond, J. The necessary intendment is that this note is payable to the corporation. The president and directors are those who manage the concern. It would be most unreasonable to suppose that the note was meant to be for their benefit as individuals. Judgment affirmed.

Cited: 30 Ala. 497; 97 id. 645.

BANK OF ALABAMA v MARTIN (1843) 4 Ala. 615.

Assumpsit for legal services rendered. The Act of February, 1839, provided that the annual salary of attorneys for the branch banks should be \$1,000. Defendant contended that plaintiff could not recover in excess of that sum. Judgment for plaintiff. Error.

Collier, C. J. The act applies only to the regular attorney in the different banks, who is elected by the directors, and does not inhibit the bank from employing such other professional assistance as their interest may require. Judgment affirmed.

PLANTERS & MERCHANTS BANK v LEAVENS (1843) 4 Ala. 753.

Attachment. The bank was summoned as garnishee, the direction being to summon the president and cashier of the bank. Judgment against bank as garnishee. Error.

Ormond, J. 1. The individual answers of the president and cashier cannot bind the bank corporation. Answer by the bank can only be made under its common seal by authority of its executive officer. 2. Stock held by an individual in an incorporated company, being a mere chose in action, cannot be subjected to the payment of his debts by process of garnishment. Judgment reversed.

Cited: 26 Ala. 503; 115 id. 385.

SMITH v BRANCH BANK AT MOBILE (1843) 5 Ala. 26.

Summary proceedings on promissory note. The note sued on was payable to A B, cashier, but was not indorsed by A B to the plaintiff. Defendant appeared and filed pleas. Judgment for plaintiff. Error.

Ormond, J. 1. A bank can recover on a note made payable to A B, its cashier, by averring that it was made to the corporation by the name and description of A B, cashier. 2. When the defendant appears, the proceedings will be like those of an ordinary case, except it must appear that the court had jurisdiction, which the court had. Judgment affirmed.

Cited: 5 Ala. 638; 6 id. 110, 163; 10 id. 378; 11 id. 186, 225, 511, 929; 12 id. 465; 18 id. 760; 27 id. 418; 29 id. 374; 32 id. 517; 34 id. 117; 37 id. 483; 45 id. 580; 51 id. 561; 54 id. 298; 56 id. 519; 65 id. 453; 72 id. 121; 82 id. 157.

MOORE v PENN (1843) 5 Ala. 135.

On promissory note. Plaintiff, as assignee of a third party, brought the action for the benefit of the H Bank. It was contended that suit could not thus be instituted for the benefit of the bank. Defendant offered to prove that plaintiff had no interest in the note, but not showing any foundation for any proposed defense. Excluded. Judgment for plaintiff. Error.

Ormond, J. When the bank has only the equitable interest in a note, it must sue in the name of the person holding the legal title. The evidence as to the bank's interest was properly excluded. Judgment affirmed.

Cited: 10 Ala. 818; 15 id. 840; 25 id. 284; 65 id. 439.

BRANCH BANK AT MONTGOMERY v CROCHERON (1843) 5 Ala. 250.

On bill of exchange. The charter of a railroad corporation forbade it from circulating bills or notes. It entered into a contract with the plaintiff, whereby the latter was to receive from the company such notes as it should issue in payment of its debts and pay them out again in circulation. This arrangement being carried out, plaintiff loaned the bills so received on bills of exchange made by defendant, upon which the present suit is brought. Judgment for defendant. Error.

Goldthwaite, J. 1. The contract of the bank, in terms, only applies to such notes as the railroad company should lawfully issue and such as it was lawful for the bank to receive in payment of its debts. 2. But if this contract was a mere contrivance to enable the railroad company the better to evade the proviso by circulating its own bills as money, this concurrence of intention and aid in the unlawful act would render this contract void. Judgment reversed.

Cited: 8 Ala. 836; 9 id. 881; 28 id. 519; 37 id. 702; 41 id. 438, 456; 105 id. 193.

SNELGROVE v BRANCH BANK OF MOBILE (1843) 5 Ala. 295.

Summary proceedings on a promissory note. The note was not indorsed by the payee to the bank, and the judgment was not rendered in favor of the plaintiff by its corporate name, but in favor of the president of the bank, omitting the word "directors." The sheriff's return showed a service on "Snelgrove." Judgment was rendered by default. The record showed an indorsement to plaintiff. Judgment for plaintiff. Error.

Collier, C. J. 1. The indorsement could only be made duly and regularly by the payee; and the averment recited must be considered as equivalent to a special allegation that such is the fact. 2. The judgment was rendered in favor of the plaintiff by the name of the president of the bank, which was an irregularity; yet it must be regarded as a clerical misprision, not fatal to the judgment, but amendable under the Act of 1824 "to regulate pleadings at common law." Judgment affirmed.

Cited: 37 Ala. 483; 59 id. 117; 93 id. 548; 124 id. 449.

MURPHY v BRANCH BANK AT MOBILE (1843) 5 Ala. 421.

Summary proceedings on a promissory note. The defendant was the administrator of one of the makers of the note. The notice was a joint one against the other makers and the administrator. Judgment for plaintiff. Error.

Clay, J. 1. The statutory remedy is only expressly given against the makers and indorsers, and not extended in terms to the representatives of those who may die before payment. It cannot be properly used against those who are only liable in that capacity. 2. The administrator of one of several joint contracting parties, cannot be sued with the survivors. Judgment reversed.

Cited: 5 Ala. 465; 10 id. 378; 14 id. 259, 294; 20 id. 548; 23 id. 373; 30 id. 589; 31 id. 644; 54 id. 299; 79 id. 524.

HANCOCK v BRANCH BANK AT DECATUR (1843) 5 Ala. 440.

Summary proceeding on promissory note. Defendant contended that the note, not being payable and negotiable at the bank, did not come within the charter provision for a summary remedy. The note purported to be given for a debt, the payment of which was extended under the Act of June, 1837. Judgment for plaintiff. Error.

Collier, C. J. Although the note is not in proper form to authorize the summary remedy provided by the bank charter, it does come within sec. 27 of the Act of 1837, which provides that if any person becomes indebted to certain banks by bill, or note, and shall delay payment thereof, the banks may sue for and collect the same by summary remedy, as in other cases under the charter of said banks. Judgment affirmed.

Cited: 37 Ala. 483.

ALEXANDER v BRANCH BANK AT MONTGOMERY (1843) 5 Ala. 465.

Summary proceedings on promissory note. The defendants were administrators of the maker of the note. Defendants contended: 1, Being administrators, they were not liable to be proceeded against by the bank on motion; 2, that the testimony of a physician taken by deposition should have been read to the jury. Plaintiff objected because the testimony was taken by interrogatories. Judgment for plaintiff. Error.

Clay, J. 1. The summary remedy given by statute cannot be extended by construction to the representatives of the deceased maker of a note. 2. The deposition of a physician may be taken by way of interrogatory or otherwise. Judgment reversed.

Cited: 10 Ala. 378; 20 id. 548.

BRANCH BANK AT DECATUR v JONES (1843) 5 Ala. 487.

Summary proceedings on promissory note. The record showed that the 30 days, required by the charter provision, had not elapsed from the time of giving notice of the motion to the time when the judgment was rendered. The plaintiff relied on an earlier statutory provision requiring only 10 days' notice. Judgment for plaintiff. Error.

Ormond, J. In 1821 an act was passed giving the holders of bank notes a summary remedy if the note was not paid on presentment, and authorized a judgment by motion against the bank on 10 days' notice. When laws found on the statute books are repugnant to each other, we know of no other mode of ascertaining which must yield but by referring to the dates of their passage. The Act of 1821, being prior to the provision in the bank charter, must be considered to have been superseded by the latter. Judgment reversed.

Cited: 31 Ala. 622.

KEMPER BANKING CO. v SCHIEFFELIN (1843) 5 Ala. 493.

Assumpsit on promissory note. The note was issued by the defendants, an unchartered banking association, to A B, or bearer. The plaintiff sued and declared as holder of the note under sec. 1, Act of June 30, 1837. Demurrer, on ground that an action is not maintainable by plaintiff as holder of the note. Judgment for plaintiff. Error.

Clay, J. The action was properly brought under sec. 4 of the Act of February 2, 1839, which repealed the Act of 1837, and which provides that every person

who is a partner or stockholder in an unchartered banking association shall be liable to the holder of any note issued by said association for the amount of said note, which may be recovered by the holder thereof before any court of competent jurisdiction. Judgment affirmed.

Cited: 8 Ala. 41; 63 id. 554.

CRAWFORD v STATE BANK (1843) 5 Ala. 679.

Summary proceedings on promissory note. The notice required by the bank's charter was given under the seal of the president and directors. Defendant contended that the notice was not given by the president as required. Judgment for plaintiff. Error.

Ormond, J. The notice was given by the president, and the fact that others joined with him in giving it will not vitiate it. Judgment affirmed.

FORD v BRANCH BANK AT DECATUR (1844) 6 Ala. 286.

Summary proceedings on bill of exchange against indorsers. Defendants moved for judgment, and proved that the drawer of the bill proposed to the bank a transfer to it of a stock of goods to be applied pro rata on his liabilities, including the bill now sued on, the terms of the sale of the stock to be agreed upon; that the bank assented to this, sent an agent to take charge of the goods, and had them partly sold, without consultation with the drawer, who was, however, allowed their estimated value. The court charged that it would be no discharge except to the extent of the value of the goods. The court allowed to be read, a certificate signed by the president of the bank and of the same date as the day of the trial. Judgment for plaintiff. Error.

Goldthwaite, J. 1. The mere acceptance by the bank of the proposition of the drawer of this bill, and the taking of his goods under it, was not a discharge of these indorsers. They can require only that the proceeds of the goods, when sold, should be faithfully applied to the discharge pro rata of the debts indicated in the proposition. 2. The object of requiring a certificate, was to prevent suits in the bank's name in which it had no real interest. The certificate need not be in existence before the motion for judgment, but may be made at any time before judgment. 3. The bank had the right to accept additional security for debts. Such acceptance is for the benefit of all who are liable. Judgment affirmed.

CRAWFORD v PLANTERS AND MERCHANTS BANK (1844) 6 Ala. 289.

Summary proceedings on promissory note. The plaintiff, having produced a notice and certificates purporting to be executed by H & R, president and commissioner of plaintiff, that the note belonged to the bank, and the note and protest, moved for judgment. Plea: 1, That the bank could not maintain the action, because the state had obtained judgment declaring its charter forfeited for failure to pay its obligations on demand; 2, that the signatures of the officers were not proved genuine; 3, that the act incorporating the bank must be pleaded. Demurrer to first plea. Sustained. Judgment for plaintiff. Error.

Ormond, J. 1. The charter of this bank is a public law of which the court takes judicial notice and need not be pleaded. 2. The Act of 1843, continuing the bank for the purpose of suing and being sued, applies both to suits begun before and to those begun after the forfeiture. 3. The certificates produced as a basis of the motion for judgment were insufficient, because there was no proof of the official character of the persons who made them or of the genuineness of their signatures. Since these officers were merely agents of private individuals, the court cannot take judicial notice of their positions and signatures. Judgment reversed.

EX PARTE BANK OF ALABAMA (1844) 6 Ala. 498.

Mandamus. A judgment for costs against the bank having been rendered at a term of the county court commencing on the second Monday of December, 1843, a motion was made for a mandamus to the judge of the county court requiring him to issue a supersedeas. The grounds were that the term of the county court was not warranted by law, and that the fee of two dollars, taxed in the bill of costs as the judge's fee, was not allowed by law. The Act of February 13, 1843, gave the county judge a fee of two dollars in bank suits, though there was no jury.

This act provided for a term on the second Monday of December, 1843. An act approved a day later directs that the tax fee of two dollars on each judgment rendered in all cases of debt due the several banks in this state shall belong to the county treasurer where the defendant resides.

Goldthwaite, J. 1. The act contemplated a term to be held on the second Monday of December, 1843. 2. The act allows the judge of a county court two dollars for each judgment or decree. This later act does not deprive the judge of his fee under the preceding act. Motion denied.

BANK OF ALABAMA v GIBSON'S ADM'RS (1844) 6 Ala. 814.

Assumpsit on promissory note. Plea: That the cause of action declared on was not presented to defendants within eighteen months after letters of administration were granted to them, or after the same accrued. Demurrer to the plea on the ground that the state was the real party in interest, and that therefore the Statute of Limitations, as to claims against estates, could not be interposed. Overruled. Judgment for defendants. Error.

Collier, C. J. The bank of the state is the mere creation of the legislature, intended to provide a safe investment for public funds and to secure the benefits of an undepreciating currency. The legislature, being the mere machinery of government, could not confer upon a moneyed corporation, established by itself, any portion of the sovereign power which is inherent in the body politic. This bank, then, not being the depository of state sovereignty, cannot claim the privileges incident thereto. Judgment affirmed.

Cited: 7 Ala. 101; 73 id. 441.

GRIFFIN v BANK OF ALABAMA (1844) 6 Ala. 908.

On promissory note, by notice and motion. The notice set out the note as dated February 1, 1843, due twelve months thereafter and discounted by the bank three years prior thereto; it informed the parties that the president of the bank would move the county court for judgment; the notice was tested December 21, 1843. Demurrer to the notice being overruled, non-assumpsit was pleaded. The plaintiff offered in evidence a note dated February 1, 1843, and due June 1, 1843. The defendants objected to its admission because it varied from the description in the notice. Judgment for plaintiff. Error.

Collier, C. J. The notice is process, and subverts the purpose of both writ and declaration, though it need not be so formal as the latter. It may be demurred to. The fact that the notice here stated that the note was discounted three years before it was made was not sufficient to sustain the demurrer. Since the notice was not executed until after the debt became due, no objection can be made to this defect. The defendants, having appeared generally, could not object on demurrer that they were not properly before the court. The bank had the burden of proving that defendants had made a note substantially as described. The variation in the date of maturity alleged from that of the note produced, cannot be regarded as immaterial. For this discrepancy the note should have been rejected. Judgment reversed.

Cited: 8 Ala. 344; 12 id. 188; 17 id. 757; 23 id. 656; 24 id. 85; 37 id. 681.

BRANCH BANK AT MOBILE v COLLINS (1844) 7 Ala. 95.

Assumpsit. The defendant was a director of plaintiff bank for ten months, and received from it full compensation and also \$1,000 as compensation for special services on plaintiff's real estate committee. He also received money for services performed by him before he became a director, and for the services of laborers employed by him in the bank's interest. About the time the defendant ceased to be a director, the legislature passed an act declaring all allowances made by the said bank for a period preceding the act, illegal. Thereupon this action was brought to recover amounts allowed defendant as stated. Judgment for defendant. Error.

Goldthwaite, J. 1. The plaintiff had a right to bring this suit. All services beyond those provided for were either gratuitous or dependent for compensation upon future action of the legislature. No legal effect could be given a resolution of the board allowing the compensation, for the directors were not authorized to take such action. The defendant could not at the same time be both a servant of the directors and a director too; his legal compensation covered all services

required in the management of the bank, and he could not be employed by the board for other special services. 2. He was entitled to the compensation for his services before he became a director, under the laws then existing, and the act now sued under could not destroy that right. 3. There can be no recovery by the bank of the money paid out through him for the labor of others upon the bank's property under his supervision. Judgment reversed.

Cited: 7 Ala. 107; 8 id. 340; 11 id. 196; 13 id. 703.

BRANCH BANK AT MOBILE v SCOTT (1844) 7 Ala. 107.

Assumpsit. The defendant, while a director of the plaintiff bank, had received in addition to the salary fixed by law for such directors, an extra allowance of five hundred dollars for services performed by him as agent of the bank in other counties during the year he was director. In this action to recover the amount thus allowed him the services were proved to have been reasonably worth the amount allowed. Judgment for defendant. Error.

Goldthwaite, J. The compensation of these directors being fixed by law, no legal claim can arise for extra compensation for special services, and the board is without authority to allow such compensation. The defendant is entitled to the per diem allowance fixed by the law for the period covered by these special services, but for further compensation he must look to the legislature. Judgment reversed.

CRAWFORD v BRANCH BANK AT MOBILE (1844) 7 Ala. 205.

Summary procedure, by notice and motion, against the drawer of a bill of exchange. The defendant objected to the motion on the following grounds: 1, That there was no proof of the official character of the director who signed the certificates; 2, that the time for answering was indefinite, inasmuch as it was set down both for the "next term of the circuit court," and for another time; 3, that there was no proof of due notice of protest because there was no proof that the address was correct or that the postmark was genuine; 4, that the notary's name was printed on the protest, and, 5, that the notice was not sent directly to the defendant, but was delayed two days. Judgment for plaintiff. Exceptions.

Collier, C. J. 1. The authority and the official character of the director should have been proved. 2. The designation of the "next term of the court" was sufficient to fix the time; anything else was surplusage. A party cannot object to the original process after he has come into court and pleaded. 3. The address should have been proved correct, and the postmark genuine. 4. The notary's name may be written or printed. 5. Each party has one day after notice of protest in which to notify the prior party. 6. The notice is sufficient, if it identify the debt with reasonable certainty. A certificate by a president pro tem. is insufficient without proof of his appointment. Judgment reversed.

Cited: 12 Ala. 188; 20 id. 324; 21 id. 38; 23 id. 656; 42 id. 195; 57 id. 98.

GIBSON v GOLDTHWAITE (1845) 7 Ala. 281.

Bill of interpleader. The complainant had received from a foreign banking corporation numerous claims for collection. After he had collected some of them, G exhibited to him an assignment of a large part of the proceeds, executed under the corporate seal. The complainant was notified by M that G had drawn an order in his favor against the funds in complainant's hands, and later was notified by W of an assignment to him by the corporation for benefit of its creditors. G and W having brought suit against the complainant to recover the funds collected by him for the corporation, he brought this bill against them and M. W answered that the assignment to him was made under authority of a resolution adopted at a regular meeting of the directors. G answered that the assignment to him was duly authorized and made bona fide in payment of bills of the company held by M and himself. Decree in favor of W. Error.

Collier, C. J. 1. A bill of interpleader is maintainable, although the complainant was the agent of one of the defendants. 2. It is not the appropriate office of the president of the directory of a banking corporation to use its cash or credits for the purpose of settling the demands of its creditors. In the absence of an authority to transact such business, an assignment of the property of the corporation will not operate to divest the right of the corporation. The use of the corporate seal could not make the transaction valid. Decree affirmed.

Cited: 9 Ala. 749; 34 id. 577; 38 id. 112; 40 id. 209; 44 id. 682; 83 id. 581; 101 id. 93; 102 id. 423; 112 id. 610; 128 id. 196.

GINDRAT v MECHANICS BANK OF AUGUSTA (1845) 7 Ala. 324.

Assumpsit on bill of exchange against indorsers. The bill of exchange was payable at the Branch Bank at M. It had been deposited with the latter bank for collection, and protested for non-payment, the notice of protest being mailed to defendants who resided in M. It was contended that the notice was insufficient in that the law merchant required personal notice to parties when residents of the same place. These indorsers had received notices before through the mail. The court refused to charge that no custom could be established by this bank in opposition to the law merchant as declared by the statute, or that evidence of such a custom could not be given under an allegation of due notice. Judgment for plaintiff. Error.

Goldthwaite, J. 1. The strict rule of the law merchant, that when the parties reside in the same place the notice shall be personal or left at the residence, does not apply here; for since the holder of this bill resided elsewhere, it was competent for him to direct his agent, at the place fixed for payment, to give notice to the parties by mail, and it is immaterial where they reside, if the notice has the proper direction. Without such instructions the agent performs his duty by simply notifying his principal promptly. 2. The bank may establish a rule of practice as to the mode of notice which will be binding upon the parties to a bill payable at that particular bank. 3. An allegation of due notice is sustained by proof of notice in the mode established by such a custom. Judgment affirmed.

Cited: 20 Ala. 324; 42 id. 328, 409; 43 id. 459; 45 id. 608; 57 id. 98; 62 id. 535; 121 id. 166; 124 id. 534.

SMITH v BRANCH BANK AT MOBILE (1845) 7 Ala. 880.

Assumpsit for money paid. Plea: Statute of Limitations. The plaintiff offered in evidence a check drawn upon itself by the defendant, payable to "my note or bearer," and certified to be good by the proper officer of the bank. The defendant requested the court to charge that the check was presumptive proof that defendant had the amount of it on deposit, and that the three-year limitation on actions upon an "open account" therefore applied in his favor. Refused. Exceptions. Judgment for plaintiff. Error.

Ormond, J. 1. Payment of a check by the bank is prima facie an admission that the money drawn for was in the bank to the drawer's credit. The written statement of the bank officer on the check that it was good has the same effect. 2. The Statute of Limitations of six years applied unless this was an open account, and, so far as the record discloses, it was not. Judgment reversed.

BLACKMAN v BRANCH BANK AT MOBILE (1845) 8 Ala. 103.

Statutory proceedings by motion and notice. Assignee against maker of note. Pleas: 1, That person signing notice was not president of plaintiff; 2, setoff. Demurrer to first plea. Sustained. On issue joined on second plea. Judgment for plaintiff. Error.

Ormond, J. 1. Notice of intended motion for judgment may be by attorney. The notice given by H, acting president, and affirmed by the president, his successor, was sufficient. 2. The omission from the record of proof of title to the note is cured by statute. Judgment affirmed.

SPYKER v SPENCE (1845) 8 Ala. 333.

Trespass against a sheriff for seizure of plaintiff's goods. The defendant justified under a writ of fieri facias. Judgment had been obtained by the Branch Bank at M against plaintiff and another, and a writ of fieri facias placed in the sheriff's hands, the goods now in question being then in plaintiff's possession in M. This writ was indorsed "stayed by order of John Martin," but there was no evidence of his authority to control the execution except that he was president of the bank. The Act of 1807 provided that executions should not bind property, until delivered to the sheriff. The seizure complained of was made in Florida, and was under an alias fieri facias founded on the same judgment. Whether it was justified depended upon whether the lien acquired by the bank under the original writ was impaired

by the order of Martin that it be returned unsatisfied. Judgment for defendant. Error.

Collier, C. J. 1. The act of incorporation does not devolve upon the president the duty of expediting or delaying the collection of debts due the bank, and such a power is not deducible from any other source. The president's act was therefore unauthorized. 2. The lien of the original writ remained unimpaired, and attached to the writ subsequently issued, so as to avoid any transfer of the defendant's goods made in the interval. Thus the act of defendant was justified. Judgment affirmed.

Cited: 8 Ala. 888; 18 id. 298; 63 id. 537; 114 id. 444; 117 id. 574; 128 id. 196.

BALL v BANK OF ALABAMA (1845) 8 Ala. 590.

On bill of exchange against indorser. The plaintiff offered in evidence the bill of exchange with the protest for non-payment made in New Orleans. To show that defendant had due notice, it produced plaintiff's cashier and assistant cashier, who testified that the plaintiff received a large package of notices of protest, post-marked New Orleans, and forwarded them. The defendant showed an agreement between plaintiff and the drawer of the bill, under which 2 per cent exchange would be allowed to shippers on net amount of sales of cotton consigned to the bank at New Orleans. The court refused to charge that if the exchange was more than two per cent when the cotton was sold, defendant was entitled to the benefit of it. The drawer of the bill was not allowed to testify to the sale of the cotton for plaintiff, although his attorney offered to deposit security for costs with the clerk. The factor, to whom the cotton was by agreement sent for sale, was allowed to testify over the defendant's objection. Judgment for plaintiff. Error.

Collier, C. J. 1. The evidence of the cashier and assistant was admissible. 2. The provision in the agreement allowing two per cent exchange is controlling. The provision is not usurious, nor against public policy. 3. It was not sufficient to remove the disqualification of the drawer as a witness, that counsel offered to make a deposit with a clerk. An attorney cannot remit a liability which his client might enforce without the client's consent. 4. Since the cotton could be shipped under the agreement only to the bank's agents, they became also the shipper's agents. The account of the factors was admissible against the shipper as the admission of an agent. Judgment affirmed.

Cited: 14 Ala. 473; 30 id. 301.

McGEHEE v POWELL (1846) 8 Ala. 827.

Assumpsit. The W Company, an unchartered association, pretending to have formed a limited co-partnership, was formed for a trading and banking business, and issued notes intended to circulate as money. Some of the members were special partners. Defendant made a note payable to L, the president, in bills of the company, for an amount borrowed on these bills. After L's death, his administrator brought this action on the note. Demurrer. Overruled. Exception. Plea: That the note was made to L as president of the company, and in consideration alone of the notes of the company, to circulate as money; that the consideration had failed; that he had tendered the sum due in notes of the company. Demurrer to plea. Sustained. The circulation of bills of such companies, of three dollars or less, was restrained by law. Defendant urged that the jury might properly infer that the contract was in relation to such bills. He offered in evidence several hundred dollars in bills of the company, in denominations of from \$3 to \$50, in connection with other evidence, to show the insolvency of the company. Rejected. Exception. The Act of 1837, authorized limited partnerships, but not to transact a banking business. Judgment for plaintiff. Error.

Goldthwaite, J. 1. The exclusion of the notes of the company from evidence was proper. The insolvency of the company was immaterial. 2. The state constitution has not taken away the common law right to do banking. The statute forbidding the transaction of banking business by a limited partnership merely makes the members general partners, and does not prohibit the issuing of bills. 3. The jury was not constrained to infer that this contract related to bills of three dollars, circulation of which was restrained by law at that time. The mere contracting for a loan of bills with the company, to loan to a third person, does not connect defendant with the conspiracy. 4. Defendant cannot rely on his own wrongdoing as a defense to this action. Judgment affirmed.

Cited: 19 Ala. 82; 29 id. 204; 41 id. 439, 456; 42 id. 279.

BRANCH BANK AT MOBILE v HUNT (1846) 8 Ala. 876.

Bill to set aside foreclosure sale. The complainant was the grantee and exclusive owner of an equity of redemption in certain property when the mortgagee filed a bill to foreclose the mortgage. Soon after the mortgagee assigned his interest in the mortgage to the complainant, but a decree of foreclosure and sale was rendered in that proceeding notwithstanding. The sale was postponed with the approval of the president of the complainant bank. Later the property was offered and sold under the foreclosure decree to defendant for much less than its value. The sale was consummated through a misconception by the master of the complainant's wishes. Shortly after the postponement he had told the master that there could be no objection to what he had done. The complainant sought to set aside the sale, or to be permitted to redeem the property from defendant, upon paying him the amount he had expended for it, alleging that it had no notice of the sale, and that the defendant knew of its interest when he bought. Bill dismissed. Appeal.

Collier, C. J. The title of complainant to this property was complete by virtue of its acquisition of the interest of both mortgagor and mortgagee. Since the sale was without notice to complainant, the order of confirmation cannot prejudice its rights to have the sale set aside. It cannot be inferred that the president in this case knew when the property would again be offered, or that the master's communication was intended or regarded as notice. Decree reversed.

Cited: 14 Ala. 480; 32 id. 190; 49 id. 423; 72 id. 309.

BRANCH BANK AT MOBILE v THOMPSON (1846) 9 Ala. 295.

Motion, by the bank against the clerk of a county court for failure to issue an alias execution upon a judgment obtained by the bank. Twenty-five cents had been tendered the clerk as his fee, but he refused to perform unless a greater sum was paid. The Act of 1843, in regard to all suits commenced by motion by the bank, provides that the notices and copies shall be prepared by the attorney, and, in a later section, that it shall not be lawful for clerks in such cases to charge other than certain enumerated fees, one of which is twenty-five cents for issuing an alias execution. Judgment for defendant. Error.

Goldthwaite, J. This does not refer only to suits commenced after passage of the act, but to all suits commenced by the bank by motion, the object being to limit fees for acts performed after passage of the act. Judgment reversed.

BRANCH BANK AT DECATUR v DOUGLASS (1846) 9 Ala. 853.

Summary proceeding on promissory note, executed by B as principal, and defendant and another as sureties. Plea: That defendant, at the time of making the note, was a member of the General Assembly of Alabama, and therefore prevented by statute from becoming surety on a note. The act of 1840 makes it unlawful for a member of the general assembly to be security or indorser on any note discounted by the state bank or any of its branches, except on his own paper and for his own benefit. Demurrer. Overruled. Judgment for defendant. Error.

Goldthwaite, J. Indorser and surety are not equivalent terms, and the charter, when invoked to destroy a contract, must be construed strictly, and thus would not include this case. The plea did not aver that this note was discounted by the bank or that it was not for defendant's own benefit; therefore it did not show the note to be invalid under the statute, and the demurrer should have been sustained. Judgment reversed.

WHETSTONE v BANK AT MONTGOMERY (1846) 9 Ala. 875.

On bill of exchange against the indorser. The defendant contended that the consideration of the bill sued on consisted of notes of the M Railroad Company, issued to circulate as money in violation of the company's charter, and that the bank had received the notes with knowledge of the intention to thus circulate them. The defendant was not permitted to call one director to testify as to the knowledge of the board of directors concerning the transaction. Judgment for plaintiff. Error.

Ormond, J. 1. The contract would be unlawful only if made with the intention on the bank's part to aid the company in evading the prohibition in its charter.

The question of intention was for the jury. 2. If the bank took the illegal notes with knowledge, but from a bona fide holder, it could recover in this action. No court will sustain an illegal act. 3. The director could not properly testify as to the knowledge of the directors; such evidence would be a deduction from facts so far as he was concerned, and hearsay as to the others. Judgment affirmed.

Cited: 31 Ala. 722; 36 id. 124; 52 id. 551; 58 id. 610; 62 id. 188; 71 id. 305; 73 id. 532; 107 id. 153.

LEIGH v STATE BANK (1846) 10 Ala. 339.

Summary proceeding on bill of exchange. The defendant contended: 1, That at the time the bill was purchased, sec. 1 of the Act of 1843 was in force, providing that "it shall not be lawful for the bank to deal in bills of exchange during the suspension of specie payments, except for the purpose of effecting a remittance of funds for the payment of state bonds;" 2, that the record does not show that the dealing was for this purpose; 3, that the bank had suspended specie payment. Judgment for plaintiff. Error.

Ormond, J. Every fact must be shown to have been proved, which is necessary to establish the liability of the defendant to the judgment as rendered. The record should have shown that the bill was purchased to remit funds to pay for state bonds. Judgment reversed.

Cited: 11 Ala. 185; 26 id. 569.

ANDREWS, ADM'R, v BRANCH BANK AT MOBILE (1846) 10 Ala. 375.

Summary proceeding on promissory note against the administrator of a deceased indorser. Judgment for plaintiff. Error.

Collier, C. J. The summary remedy provided by statute in favor of banks will not lie against the representative of a deceased debtor of a bank. Judgment reversed.

Cited: 13 Ala. 673; 18 id. 760; 23 id. 850; 24 id. 704; 27 id. 676; 29 id. 374; 34 id. 78; 42 id. 347; 45 id. 580; 56 id. 504.

FAVER v BANK OF ALABAMA (1846) 10 Ala. 616.

Attachment founded on promissory note. The attachment was based upon sec. 2 of the Act of 1840, which provides that the state bank and its branches are authorized to take out attachments on the application of any indorser to the note, and on satisfactory showing of such indorser that either of the grounds specified in this act exists. The defendant contended that the affidavit was insufficient, because it was not made by an officer or agent of the bank. Judgment for plaintiff. Error.

Collier, C. J. Sec. 2 of the Act of 1840 makes the affidavit of the indorser sufficient without any reaffirmation by the bank which brings the attachment. Judgment affirmed.

RIGGS v BANK OF THE STATE (1847) 11 Ala. 183.

Summary proceedings on promissory note. The notice of motion was for the sum due and interest, and damages at 30 per cent. For one class of bills the law allows 30 per cent and for another class 5 per cent. It does not appear in what class was the note in question. Demurrer to notice. Overruled. The verdict by default was for more than the law allows. Judgment for plaintiff. Error.

Collier, C. J. 1. Where the damages are assessed by a jury and are excessive, the defendant's remedy is by motion for a new trial. 2. Plaintiff might have properly recovered judgment for less than his claim, and therefore the notice was sufficient. A judgment rendered on such a verdict will not be reversed on error. Judgment affirmed.

Cited: 29 Ala. 374.

GODBOLD v BRANCH BANK AT MOBILE (1847) 11 Ala. 191.

Case against bank director. The defendant was a member of the board of directors of the plaintiff, and voted with the majority in allowing compensation to a brother director for extra services as an agent of the bank. Defendant requested the charge that if the contract of employment was made in good faith, to benefit the bank, plaintiff could not recover. Refused. Judgment for plaintiff. Error.

Ormond, J. 1. An injury to the bank from an error of judgment is not a tort. 2. Bank directors are not responsible for injuries arising from mistakes in judgment, if they acted in good faith to promote the bank's interest. Although the act was not lawful and the director receiving such additional compensation may be compelled to refund it, it is not, if done in good faith, with the honest purpose to collect and preserve the assets of the bank, such an act which would expose the directors to a personal responsibility. Judgment reversed.

Cited: 29 Ala. 508.

COLGIN v STATE BANK (1847) 11 Ala. 222.

Summary proceedings on promissory note. The notice required by law to be given in summary proceedings, apprised the defendant that the plaintiff would move for judgment on a certain day in the proper court, on a note due from defendant to the plaintiff, discounted March 27, 1839, for \$1,800, payable to the plaintiff ninety days after date. Defendant pleaded to the merits and set up a variance between the note and notice. The note contained a memorandum on its face in red ink showing the amount due. Defendant offered in evidence the deposition of a surety who was released before it was taken. This was excluded on objection that deponent was a party to the record. Plaintiff introduced a certificate, purporting to be signed by bank commissioners appointed under the Act of 1846, that the note was the property of the bank. One of these officers was appointed by the governor to fill a vacancy occurring during a recess of the legislature. Judgment for plaintiff. Error.

Ormond, J. 1. The notice being merely designed to apprise the defendant of the intended motion, nothing more is necessary than that it should describe the debt upon which the motion was to be made with reasonable certainty. The only effect of the memorandum is an admission by the bank, showing the amount due. 2. After pleading to the merits, defendant could not set up the variance. 3. The deposition was not competent evidence. 4. These officers, whether appointed by the legislature or by the executive, belong to that class of which it is the duty of the courts to take judicial notice. Judgment affirmed.

CALDWELL v BRANCH BANK AT MOBILE (1847) 11 Ala. 549.

Assumpsit on promissory note. The writ was by the Branch Bank at Mobile. The declaration was in the name of the Branch of the Bank of the State of Alabama. Defense, variance, and that the plaintiff does not show legal title in itself, the note being payable to B T, cashier. Judgment for plaintiff. Error.

Collier, C. J. The Act of December, 1841, declares that a note payable to the cashier of a bank may be sued and collected in the name of the bank, in the same manner as if it had been made payable directly to the bank by which the paper has been discounted. The plaintiff's name is substantially the same in writ and declaration. Judgment affirmed.

Cited: 15 Ala. 677; 24 id. 335; 37 id. 483; 57 id. 3; 65 id. 453; 106 id. 309.

THE STATE BANK v DENT (1847) 12 Ala. 187.

Summary proceeding on bill of exchange. Defendant objected to the admissibility of the bill described in the notice, on the ground that the notice stated that the bill was purchased under the first section of the Act of February 14, 1843. The bill was dated January 6, 1840. Judgment for defendant. Error.

Collier, C. J. If matter foreign to the cause, in respect to which no allegation was necessary, be stated, it will be rejected as surplusage and need not be proved. Judgment reversed.

DAVIS v BRANCH BANK AT MOBILE (1847) 12 Ala. 463.

Assumpsit on promissory note. The note was payable to H, cashier. The court charged, under objection from defendant, that it was not necessary to show that H was cashier, or that the note was indorsed by him. The Act of 1841 provided that notes payable to the cashier might be sued on in the name of the bank. Judgment for plaintiff. Error.

Ormond, J. No proof was necessary on the part of the bank any more than was necessary where the note is made payable to the bank directly. This is the construction given to the Act of 1841, which provides that a note payable to the

cashier may be sued on and collected as a note payable to the bank. Judgment affirmed.

Cited: 37 Ala. 483.

TERRILL v BRANCH BANK AT MOBILE (1847) 12 Ala. 502.

Assumpsit on promissory note. Plaintiff executed a note in blank and handed it to S, a director of the defendant, to be filled up with a certain sum and used in the renewal of a note of L. S filled up the note for a much larger sum, and offered it to the bank to be discounted for his own use. The note was discounted, S sitting as one of the board of directors, but none of the other directors knew the facts. Judgment for plaintiff. Error.

Collier, C. J. Directors are not agents of the bank so as to charge the corporation with a knowledge of the facts they possess, in respect to a matter in which they are dealing as an individual with the bank. Judgment affirmed.

Cited: 14 Ala. 90; 51 id. 195; 64 id. 329; 70 id. 211; 82 id. 163; 83 id. 403; 88 id. 590; 125 id. 319.

BANK OF ALABAMA v COMEGYS (1848) 12 Ala. 772.

Debt, on a bond, against defendant as cashier of the plaintiff bank, for failure to protest a bill. Defendant proved that before the default a memorandum, assigning the duty of protesting bills to another person, was placed on the table of the board of directors, but it was not acted upon. No dissent to this assignment was expressed by the board nor by any director, and the officers discharged their duties pursuant to this memorandum, until after the default complained of. The court charged that if the board of directors did not object to the assignment of the duties, and the duties were afterward discharged, it was a ratification by the bank. Judgment for defendant. Error.

Dargan, J. Under these circumstances, it is to be inferred that the board assented to this arrangement of the duties of the bank officers. The board of directors had power to prescribe the duties of officers and this power could be exercised by an agent. Judgment affirmed.

Cited: 46 Ala. 629.

BANK OF MOBILE v WILLIAMS (1848) 13 Ala. 544.

Assumpsit for the recovery of lost notes issued by defendant. Indorsed on the writ was a statement that the action was to recover \$700 lost by the plaintiff in bills. Plaintiff proved ownership and destruction of the bills. Defendant objected that an action on lost notes or bills is given by statute, and that an affidavit of loss is required before any evidence as to this fact can be heard. Objection. Overruled. Judgment for plaintiff. Error.

Collier, C. J. 1. The statutory remedy is merely cumulative, and does not preclude plaintiff from proceeding as at common law. 2. The statutory requirement of a previous affidavit may therefore be dispensed with. The indorsement was sufficient to declare on any cause of action in which the bills might be recovered. Judgment affirmed.

Cited: 19 Ala. 66; 30 id. 475; 33 id. 626.

KITCHEN v BRANCH BANK AT MOBILE (1848) 14 Ala. 233.

On promissory note. The plaintiff discounted the note, and about the same time defendants agreed, without consideration, to pay the note by annual instalments, and did so for some time. By the general law, 8 per cent interest was allowed on accounts after maturity. By its charter, the bank was allowed to discount notes at 7 per cent. The court refused to charge that, if it was a discounted note, the plaintiff could not recover more than 7 per cent interest up to the time defendants made default in their contract. Judgment for plaintiff. Error.

Dargan, J. 1. In the absence of any statute specifying the interest that debts due the bank shall bear, they must be governed by the general interest laws of the state and bear 8 per cent per annum. 2. As the agreement did not attempt to regulate the interest, it could have no influence on the interest. Judgment affirmed.

Cited: 16 Ala. 545.

GOVERNOR v BAKER (1848) 14 Ala. 652.

Debt on a sheriff's bond for failure to make a return of a writ of attachment. Defense, that the property was not subject to attachment. Defendant proved, by a stockholder in a bank, that the defendant in attachment, stockholder in the bank, before the levy, mortgaged the property to C for a debt due to a bank, and later conveyed it to the bank in payment of the debt. The court refused to charge that the mortgage and sale to the bank were void, because the mortgagor, one of the defendants in attachment, was a stockholder in a bank. Upon the trial, defendant proved that an agent of the plaintiff had informed the witness that he had received certain property on the debt. Judgment for defendant. Error.

Collier, C. J. 1. It was competent for defendant to show that the property was not subject to seizure. 2. An admission or declaration of an agent binds his principal only when shown to have been made during the continuance of the agency in regard to a transaction then pending. 3. The mortgage was competent evidence as tending to show that defendants had disposed of their interest previous to the seizure by the sheriff. 4. A stockholder may borrow money from a bank in which he is interested, and may secure its payment by mortgage or other security. 5. The fact that a witness was a stockholder and president of the bank did not affect the mortgage or sale or render him incompetent. The sheriff was liable for his neglect. Judgment reversed.

Cited: 58 Ala. 64.

SALTMARSH v P & M BANK (1848) 14 Ala. 568.

Summary proceedings on a bill of exchange. Defenses: 1, Non-assumpsit; 2, that plaintiff, a bank, purchased the bill by discount after the forfeiture of its charter. Demurrer. Sustained. Defendant indorsed the bill for the accommodation of B, who sold it to W for \$100 less than its face value. After the forfeiture of plaintiff's charter, W indorsed the bill to plaintiff in consideration of the assignment of judgments held by it against H. The act declaring the forfeiture gave the plaintiff's trustees power to collect debts by any means provided in the original charter. By statute, only the principal could be recovered on a usurious contract. Judgment for plaintiff. Error.

Chilton, J. 1. After the forfeiture of its charter, the bank could not acquire the bill as alleged. 2. The forfeiture having terminated the power to discount bills, the averment in the plea was sufficient prima facie to show that the transaction was unauthorized. 3. The averment that plaintiff became the holder after the forfeiture of the charter is bad, for failing to show that the bank did not then have power to acquire it. 4. The trustees had power to make the transaction with W. 5. The transaction between B and W was usurious, and the usury affected plaintiff. 6. The acceptor, being the holder, was sufficient to charge W with knowledge that it was an accommodation bill. Judgment reversed.

Cited: 14 Ala. 567, 625; 16 id. 338, 405; 17 id. 766; 23 id. 190; 28 id. 610; 31 id. 266; 32 id. 459; 54 id. 474; 73 id. 560; 79 id. 562; 95 id. 523; 96 id. 244; 108 id. 410; 114 id. 389.

BRANCH BANK AT MOBILE v STROTHER (1848) 15 Ala. 51.

Bill to obtain credit on overcharge. The bill alleged that the complainant was indebted to the defendant either as principal or surety in the sum of \$30,000; that the debt was extended by the execution of six notes; and that, in casting the interest thereon, the banks discounted the notes at 8 per cent. The notes had a longer period to run than 12 months. Under the charter of the defendant, only 6 per cent discount was allowed on notes having a longer period to run than 12 months. The state bank is allowed to discount notes and bills at different rates according to the time they have to run before maturity. The general interest law of the state permits 8 per cent. On the day of the settlement, all the debts owing by complainant to the bank were due. The mode of computation adopted by the bank was to charge interest at 8 per cent by way of annual discount for every year the note had to run. Demurrer. Overruled. The answer alleged that if the new notes were for more than the bank was entitled to receive, it was the result of mutual mistake, and denied all intent to exact more than the legal interest. The chancellor decreed that the complainant be allowed a credit of \$4,000. Error.

Dargan, J. 1. The bank is not authorized to discount bills or notes at 8 per cent having a longer period to run than 12 months, nor can they extend a debt due them longer than 12 months, and charge interest by way of annual discounts in

advance. 2. The reservation of more than the legal rate of interest by mistake is not usury. 3. To the extent of the overcharge, the notes are void for want of consideration, and to this extent the plaintiff is entitled to relief. 4. As the bill is not to recover money paid, the Statute of Limitations does not apply. The amount that has been paid must be appropriated to the principal and lawful interest. Decree affirmed.

Cited: 15 Ala. 566; 35 id. 569, 588; 50 id. 590; 58 id. 525; 59 id. 430; 61 id. 514; 64 id. 532; 69 id. 77; 75 id. 331, 569; 92 id. 170; 101 id. 368.

MORGAN v RAMSEY (1849) 15 Ala. 190.

Ejectment. The agent of the state bank, appointed under the Act of 1843 levied an execution on the land of the defendant. The execution was returnable in March, but was levied on the land in October previous to the return term of the writ. After the return day, the agent of the bank, by virtue of this levy, sold the land to the lessors of the plaintiff, but no other process had issued to him to enable him to sell. Judgment for plaintiff. Error.

Dargan, J. The agents of the state bank, appointed under the statute, possess the same powers in executing process in favor of the bank conferred on sheriffs, and are bound to observe the same rules. A sheriff has no power to sell land and pass the title to the purchaser after the return term of the writ on which he made the levy, unless new process be issued to him for that purpose. Judgment reversed.

Cited: 49 Ala. 126; 90 id. 160; 94 id. 168.

BUSSEY v BRANCH BANK AT MONTGOMERY (1849) 15 Ala. 216.

Summary proceedings on promissory note. The action was against all the parties to the note, in accordance with the Statute of 1840, which provided that whenever suit is commenced by the Bank of Alabama, or its branches, on any promissory note, all the parties thereto shall be joined. The jury found in favor of one of the parties and against the other. Motion in arrest of judgment. Denied. Error.

Chilton, J. Under the Statute of 1840, with reference to suits by the state bank on promissory notes, judgment may be rendered against any defendant whom the jury finds liable, although other defendants may make a successful defense. Judgment affirmed.

Cited: 42 Ala. 632.

MARTIN v BRANCH BANK OF DECATUR (1849) 15 Ala. 587.

Trespass to try title. The plaintiff had bought in the land at a public sale on execution in its favor. One of the defendants died. The sale of the land of the other was had without revival as to the one deceased. The court charged that the plaintiff was capable of buying and holding the estate, sold under execution on a judgment in its own favor. Judgment for plaintiff. Error.

Dargan, J. Under the joint resolution of the general assembly of December 31, 1842, the Bank of Alabama and its branches have the power to purchase real estate sold under executions in their favor. Where one of two defendants dies, the lands of the other may be sold without revival as to the deceased defendant. Judgment affirmed.

Cited: 15 Ala. 355; 16 id. 557; 55 id. 385.

JEMISON v PLANTERS & MERCHANTS BANK OF MOBILE (1850) 17 Ala. 754.

Summary proceeding on promissory note. The statutory notice was served in the name of the plaintiff. Incorporated in the notice was an Act of February 13, 1843, forfeiting the bank's charter and vesting the power to sue in certain trustees. The act did not reserve to the bank the power to sue after forfeiture of the charter. Demurrer. Judgment for plaintiff. Error.

Chilton, J. As the record fails to show that this motion was made by any one in whose favor the court might rightfully render a summary judgment and award execution, it failed to show that the court had rightful jurisdiction. The demurrer to the notice raises the question, was proper, and should have been sustained. The bank should move and recover, if at all, by its trustees. Judgment reversed.

Cited: 23 Ala. 184; 27 id. 165; 29 id. 374; 37 id. 681.

SALTMARSH v P & M BANK (1850) 17 Ala. 761.

Summary proceedings on bill of exchange against indorsee. The plaintiff bank's charter was forfeited in 1842, and trustees were appointed to settle its affairs. The bill in suit was indorsed by defendant for the accommodation of B, who sold it to W; W, in 1845, in consideration of the assignment of two judgments, transferred the bill to the bank, at a deduction of 8 per cent interest for the time it had to run. The Act of 1834 voided the whole interest when a contract was usurious. Judgment for plaintiff. Error.

Dargan, C. J. 1. The trustees, in behalf of the bank, could lawfully enter into a contract with a third person, by which a doubtful debt is either paid or payment secured. 2. The transaction was a mere exchange, and not a discount or loan, and it could not be usurious though one demand was for a greater amount than the other. 3. The contract between B and W was held usurious, on the former trial, and the amount of recovery in this action can therefore not exceed the principal; it was, therefore, error to charge that plaintiff could recover interest. Judgment reversed. (S. c. ante, p. 23.)

Cited: 48 Ala. 259; 73 id. 561; 80 id. 263; 96 id. 245.

JEMISON v PLANTERS AND MERCHANTS BANK (1853) 23 Ala. 168.

Summary proceeding on promissory note. The defendant gave his note to the C Bank. After suspension of payment, the note was transferred to the plaintiff, to secure an antecedent debt. Plaintiff's charter was declared forfeited and trustees were appointed. The trustees commenced this action in the name of the bank, but were permitted to amend, so as to show that the suit was being instituted by the trustees. The judgment of forfeiture was reversed after this suit was begun. Before trial the trustees sold the note to R. Defendant contended that the amendment was improper as changing the parties to the action; that plaintiff did not acquire title from the C Bank, as, by the laws of Alabama, it was only permitted to make transactions of this nature to secure bad or doubtful debts; and that, as the trustees sold their claim to R before trial or judgment, the action should abate. Judgment for plaintiff. Error.

Phelan, J. 1. The amendment was properly allowed and did not amount to a change of the parties plaintiff. 2. If a note in suit be sold or assigned, the assignee buys with it the right to continue the suit in the name of the seller. The buyer or assignee takes the claim in suit with every right and under every liability which appertained to it in that condition in the hands of his assignors. 3. The trustees had the right to acquire these notes, since a balance due from a suspended bank cannot be considered otherwise than a bad or doubtful debt. The alteration in the judgment of forfeiture did not affect this case. Judgment affirmed.

Cited: 29 Ala. 627; 40 id. 482; 48 id. 244; 51 id. 491; 53 id. 56.

BANK OF ST. MARYS v ST. JOHN (1854) 25 Ala. 566.

Bill for injunction and attachment. Plaintiff was a creditor of defendant, holding a draft by G, defendant's cashier, given in exchange for bank notes issued by defendant. G was a stockholder and director, and had exclusive management of the defendant. He was also a member of the firm of J S W & Co., bankers. J S W & Co., composed of J S W and J G W, of Georgia, put in circulation \$500,000 of the defendant's bills in Alabama, and dealt in them for their own private use, without security to the bank and without knowledge of the board of directors. Plaintiff was the holder also of \$20,000 of defendant's bills, issued by G and J S W, in exchange for which the draft had been given to them. The bank was a Georgia corporation, located at Columbus, but its operations had been carried on by J S W & Co. in Montgomery, Alabama. The bank failed. Just before it failed, it extended the time of payment to J S W two or three years. Plaintiff asked for an attachment and injunction on its property in Alabama. The attachment was granted on a verified bill without an affidavit. Defendant appeared without objection and contended that there was no equity in the bill, and that the exchange of bills for the draft constituted payment. Defendant filed a plea in abatement. After a decree pro confesso was filed, defendant moved for leave to file a plea. Defendant claimed that two dormant partners of H should have been joined. Judgment for plaintiff. Appeal.

Ligon, J. 1. The directors and agents of a banking corporation are, in the management of its affairs, trustees for its creditors. If any one interferes with the trust fund, and, without authority, squander or misapply it, he will be held

to be a trustee, and under the jurisdiction of a court of equity. 2. When one security is substituted for another, without any new consideration passing between the parties, the substituted security does not extinguish the debt. 3. The bank had no funds when the draft was drawn or at maturity, so that the defendant is rightfully charged with fraud. 4. If the verified bill sets forth the facts clearly, it will support an attachment without a separate affidavit. The indebtedness of J G W is sufficiently pleaded. The provisions of the Act of 1846 cannot be traversed by a plea in abatement. J G W must be held to be a resident of Georgia. The appearance of defendant by a solicitor without objection was a waiver of all irregularities of service. A decree pro confesso cannot be set aside to file a plea. 5. The extension of time to J S W was a fraud on the bank's creditors. The joinder of dormant partners was unnecessary. 6. The stock of J G W was attachable. Consent can waive error and cure irregularities. 7. The Bank of St. Marys was not liable for damages. Judgment affirmed.

Cited: 32 Ala. 448; 35 id. 78; 45 id. 166; 59 id. 153; 95 id. 592; 96 id. 358; 99 id. 75; 103 id. 370; 111 id. 501.

SAVAGE v WALSHE (1855) 26 Ala. 619.

On promissory note. The declaration alleged that the note was issued by the defendant to the M Bank. The bank was placed in the hands of trustees to wind up its affairs. The trustees in September, 1851, sold the note to the plaintiff. An act of the legislature directed the trustees to sell "within thirty days after the first Monday in November," 1850, all the claims of the bank for the purpose of having a final settlement. Demurrer. Overruled. Pleas: 1, Non-forfeiture of charter; 2, that Stodder and Smith were not trustees; 3, that they did not own or transfer the note; 4, that the indorsement was void; 5, that the note was void. Demurrer to first, third and fifth pleas. Overruled. Exceptions. Judgment for plaintiff. Appeal.

Goldthwaite, J. 1. The declaration presented a substantial cause of action. The act which directed the trustees to sell all the claims of the bank conferred, by necessary implication, upon them the authority to transfer negotiable securities so as to pass the legal title to the purchaser by their assignment. 2. The time in which the trustees were directed to sell was not imperative, but directory merely. The power itself is not a limitation on the authority of the trustees. Judgment affirmed.

Cited: 28 Ala. 366; 32 id. 185; 207 id. 210; 34 id. 415; 35 id. 398; 36 id. 300; 37 id. 419, 446; 39 id. 319; 40 id. 294; 48 id. 448; 51 id. 413; 57 id. 456; 63 id. 198, 213, 392; 67 id. 490; 71 id. 588; 78 id. 110; 120 id. 409.

DE VENDELL v DOE (1855) 27 Ala. 156.

Ejectment. B was owner in fee of the land in controversy. He deeded the same to C, but the deed was not recorded within sixty days, nor until the M Bank had obtained a judgment against B. C conveyed to the defendant. The bank became insolvent and the judgment against B was sold by its trustees to H. H issued execution and the land was sold by the sheriff, from whose deed the plaintiff derived his title. By statute, unrecorded deeds to secure creditors, after sixty days, were void as against creditors and subsequent purchasers. Judgment for plaintiff. Appeal.

Chilton, C. J. 1. If a lien attaches in favor of a judgment creditor before notice of a deed not recorded, the purchaser is protected, although, at the time of the purchase, he may have had notice of such deed. 2. The deed to C, not being recorded within the time prescribed by the statute, was void as against the bank. Being so void, it was also void as to any one who purchased under the judgment when the land was sold to enforce the lien. 3. The lien of the bank was not lost by not issuing executions, the judgment itself not having become dormant. 4. Nor was the judgment rendered dormant by the acts putting the bank in liquidation. Judgment affirmed.

Cited: 32 Ala. 453; 38 id. 129, 659; 42 id. 79; 51 id. 468, 477, 501; 52 id. 602; 58 id. 92; 62 id. 493; 70 id. 166, 477; 71 id. 465; 75 id. 89; 76 id. 379; 87 id. 579; 102 id. 309.

BANK OF MOBILE v MEAGHER (1859) 33 Ala. 622.

To recover the value of bank bills of the defendant, destroyed by the burning of a steamboat. Plea: General issue, and Statute of Limitations. The Act of 1828,

provided a remedy on bills lost or destroyed. The subsequent Code of 1851 provided a similar remedy, not essentially different from the Act of 1828. Judgment for plaintiff. Error.

Walker, C. J. 1. After a total destruction of bank bills, an action at law may be maintained by the owner against the bank, without indemnifying the bank. 2. An incorrect description of the bills is no bar to recovery. The notes were payable on demand, as we must judicially know, because they were bank bills. 3. It was incumbent on plaintiff to prove that the bank bills once existed. The loss was also proved. But there was insufficient proof of the contents of the bills, which was, that the issue of the Bank of Mobile altogether amounted to \$1,400. It amounts to no proof whatever of their contents. 4. Any common-law remedy which would have been available to plaintiff, in the absence of statute, is unaffected by any state legislation. Judgment reversed.

Cited: 69 Ala. 450.

PEARCE v BANK OF MOBILE (1859) 33 Ala. 693.

Summary proceedings on promissory note against maker. Plaintiff was entitled to charge 7 per cent interest by its original charter. In 1852, the charter was extended by the legislature, and the rate of interest was changed to 6 per cent. The note was dated March 8, 1857, payable 90 days after date at the bank. Demurrer. Overruled. Exception. Pleas: 1, Discount in 1857 at 7 per cent; 2, extension of charter and discount of note at excessive interest. Demurrer to pleas. Sustained. Exception. Judgment for plaintiff. Error.

Rice, C. J. The question is whether the Act of 1852 deprived the bank of the right granted to it by its charter of 1834, to discount in 1857 such a note as is here sued on at the rate of 7 per cent per annum. The Act of 1834, as a legislative charter to a corporation, was a contract of inviolable obligation which could not constitutionally be impaired by the legislature without the assent of the corporation. The powers of the bank, which were extended by the Act of 1852, are extended "from the expiration" of the charter of 1834, leaving the charter wholly untouched in its duration. The restraint intended by the proviso as to 6 per cent interest was a restraint upon the extended powers of the bank at and before the passage of the Act of 1852. Judgment affirmed.

Cited: 39 Ala. 640; 42 id. 380; 58 id. 401; 73 id. 583; 75 id. 108; 82 id. 523; 98 id. 56; 104 id. 296.

WRAY v TUSKEGEE INS. CO. (1859) 34 Ala. 58.

On bill of exchange against drawer and indorser. Plaintiff had power under its charter to purchase, discount, and sell bills of exchange, but was prohibited from making and issuing bills to circulate as money. The F Bank of South Carolina deposited a large sum of money with the company, and this money was used by the bank in discounting notes and bills, among others, the one in suit. The code, sec. 939, prohibited a foreign banking corporation from exercising the privilege of banking by agent in this state, except by the use of gold and silver coin or bank bills issued by the authority of the state. The defendant claimed that the consideration of the bill of exchange was illegal. Plea of actio non. Demurrer to plea. Sustained. Judgment for plaintiff. Appeal.

Walker, C. J. The plea does not present a transaction violating the statute. It does not aver that plaintiff was the agent of the foreign corporation, nor does it allege such facts as, per se, authorize the legal inference of an agency. The deposit with the plaintiff by the foreign bank constituted the former the debtor of the latter. Such a deposit is a gratuitous loan. The specific bank bills became eo instanti the property of plaintiff. When they passed the bank and became the property of the plaintiff, they were issued or emitted, and the subsequent use of them by the plaintiff was a "circulation," not an "issue" of them. Judgment affirmed.

Cited: 41 Ala. 535; 54 id. 174; 62 id. 342.

EASTERN BANK v TAYLOR (1867) 41 Ala. 93.

On execution. W was the agent of the plaintiff to collect a judgment against the defendant. He had authority to collect or transfer it. W transmitted the amount due on the judgment to the plaintiff, and indorsed on the execution docket

a written transfer to himself. The judgment was entered on the books of the plaintiff as paid, although the amount was an advance by W personally. Afterward execution was issued by the plaintiff. Motion to quash the execution. Judgment for defendant. Appeal.

Walker, C. J. 1. If W purchased the judgment and transferred it to himself, no other person than the plaintiff could object. 2. In the absence of objection by the plaintiff it stands good, and no entry upon the books of the plaintiff that the judgment was paid would convert the sale into a payment. Judgment reversed. Cited: 41 Ala. 700.

BANK OF MOBILE v BROWL (1868) 42 Ala. 108.

Assumpsit on a check. A cashier's check of defendant, directed to the M Bank of New Orleans, was drawn in favor of T R. The latter indorsed it to the plaintiff. The check was for \$1,500, and was "payable in currency." Payment was refused by the M Bank and due notice given the defendant. There was no protest for non-payment. Judgment for plaintiff. Appeal.

Judge, J. The instrument sued on is not payable in money. Not being payable in money, it is not negotiable paper within the meaning of the law merchant. It results that a protest was not necessary to fix the liability of the drawer. Judgment affirmed.

Cited: 44 Ala. 578; 45 id. 54; 54 id. 462; 67 id. 89.

TALLADEGA INS. CO. v LANDERS (1869) 43 Ala. 115.

Assumpsit to recover deposit. The plaintiff deposited with the defendant \$313, and received a certificate therefor, payable on return of the certificate properly indorsed. Payment was refused. The original papers in the action were lost. Plaintiff offered to substitute amended copies. Sec. 648, rev. code, provided for the substitution, when papers were lost, of the best evidence that could be adduced. Defendant objected to the evidence of a witness and each divisible part thereof. The defendant claimed that the contract was void, because receiving money on deposit was an act of banking and prohibited by its charter. Plaintiff was not competent when suit was begun, but was so when offered as a witness. Judgment for plaintiff. Appeal.

Peck, C. J. 1. The powers granted to the defendant authorize it to receive money on deposit. 2. This power is not affected by the proviso that prohibits it from issuing bills, bonds, notes, or other securities to circulate in the community as money. 3. The objection to the evidence of witness was too general. It is enough that plaintiff was competent when offered. 4. The amended copies of the papers were properly substituted. 5. The certificate is evidence of money had and received. Judgment affirmed.

Cited: 43 Ala. 649; 44 id. 290; 46 id. 378; 54 id. 231; 67 id. 260; 87 id. 310; 96 id. 17.

FIRST NAT. BANK v COLBY (1871) 46 Ala. 435.

Attachment. On April 15, defendant refused to pay a draft of the United States. On the 16th it ceased to do business. On the 17th the president absconded, and the assets were found short \$200,000. On April 17, plaintiff issued an attachment against the defendant for \$4,800. Afterward a receiver was appointed by the United States District Court and a decree entered forfeiting the franchise of the defendant. Plaintiff proved by a certificate of deposit that defendant owed him the sum for which the attachment was issued. Motion to quash the attachment. Overruled. Judgment for plaintiff. Appeal.

Peters, J. 1. The bank may be sued by attachment. 2. The insolvency of a bank does not dissolve this liability. 3. When an attachment is once properly issued against a corporation, it will not be abated because the corporation had, before the issuance of the process, committed an act of insolvency, or had its assets placed in the custody of a receiver. 4. The state court has jurisdiction in cases of this character. Judgment affirmed.

CANNON v McNABB (1872) 48 Ala. 99.

Bill for discovery and account. Complainant was indebted to defendant for advances in confederate notes issued on cotton receipts. He executed a contract with McN, the president of the defendant, by which he sold to McN 500

bales of cotton for \$74,264.93, the amount of complainant's indebtedness. McN was to sell the cotton, and, if the proceeds overpaid the above price and expenses, the excess was to be paid to complainant. If the amount realized was insufficient, the complainant was to make the deficiency good. The charter of the bank forbade the issuance of any notes not payable on demand. The bill alleged that McN claimed a deficiency of \$31,000 and refused to account for what he did with the cotton. Demurrer. Sustained. Judgment for defendant. Appeal.

Saffold, J. 1. The contract between McN and complainant was not an absolute sale of the cotton, but was rather a mortgage of it with a power of sale, the mortgagee taking possession of the property for the purpose of sale. 2. The account has equitable trusts attached to it, and there is no doubt of the jurisdiction. 3. The circulation of these notes as money did not vitiate the contract between these parties. Judgment reversed.

McIVER v ROBINSON (1875) 53 Ala. 456.

Certiorari to prevent the sale of stock in a national bank for taxes. Petitioner, a stockholder, was not a resident of the place where the bank was located. Respondent, a tax-collector, was proceeding to sell the shares for taxes. An act of Congress made bank stock taxable in the place where the bank was located. A state statute of 1868, ch. 301, made all property, not exempt, taxable at a certain rate, and exempted stock of any company or corporation required to list its property for taxation. Demurrer. Sustained. Error.

Brickell, C. J. 1. The shares of stock in a national bank are subject to state taxation at the place where the bank is located, without regard to the residence of the stockholder. 2. The exemption under the state statute does not apply to national bank shares. Judgment affirmed.

Cited: 62 Ala. 296; 65 id. 636; 71 id. 421; 125 id. 421.

Overruled in part, 65 id. 628.

MARION SAV. BANK v DUNKIN (1875) 54 Ala. 471.

On a bill of exchange drawn by defendant, accepted by W, and payable to T, at plaintiff, a state savings bank, and subsequently discounted by plaintiff. Defense: That plaintiff was never incorporated. Defendant had no notice that the bill, when he drew it, was to be discounted by the plaintiff. Defendant contended that, by failing to deposit the bonds necessary to become a bank of issue, plaintiff was not duly incorporated. All other steps for forming a bank were taken. Plaintiff nonsuited. Appeal.

Stone, J. 1. The defendant, not being present or having notice of the arrangement for discounting the bill at plaintiff, is not estopped to set up the defense that the plaintiff had no authority to discount it. 2. Such incorporation, without more, authorized the bank to perform all banking powers, except the powers to issue and circulate its own notes as money. Judgment reversed.

Cited: 61 Ala. 242, 465; 65 id. 455; 67 id. 593; 76 id. 581; 79 id. 187, 314; 91 id. 521; 103 id. 129; 119 id. 171.

MOORE v MEYER (1876) 57 Ala. 20.

On a bill of exchange by the drawee against the acceptor. Plaintiffs sent the bill for collection to F, a private banker, with whom defendant made general deposits. The bill was presented and defendant made a deposit, with instructions to pay the bill. The deposit was credited to defendant and the bill was uncanceled when F failed. The court charged that the plaintiffs could not recover, if defendant gave F money with instructions to apply the same to the payment of the bill. Judgment for defendant. Appeal.

Brickell, C. J. The instruction to pay the bill from the deposit did not change the relation of debtor and creditor, existing between F and the defendant, until an actual application of the money was made. The charge was erroneous. Judgment reversed.

NATIONAL COMMERCIAL BANK v THE MAYOR (1878) 62 Ala. 284.

Bill to enjoin the collection of a tax assessed in gross by defendant, a city, on the shares of capital stock of complainant, a national bank. By the acts of Congress, states can tax such banks for their real estate, and can include the shares

in the valuation of shareholders' property. The assessment was against the bank. Defendant contended that the complainant's remedy was at law instead of in equity. Motion to dissolve the injunction. Granted. Decree for defendant. Appeal.

Manning, J. 1. National banks being subject to state taxation only so far as Congress permits, the assessment in gross was invalid. 2. The complainant's remedy is not in a court of equity. Decree affirmed.

Cited: 62 Ala. 467; 65 id. 631, 635; 68 id. 260; 71 id. 415; 91 id. 223; 102 id. 558.

SUMTER COUNTY v NATIONAL BANK OF GAINESVILLE (1878) 62 Ala. 464.

Action for taxes. Complainant assessed the capital stock of defendant, a national bank, in gross. A state statute provided for the collection of a tax at a certain rate on shares of capital stock of such a bank in lieu of all other state and local taxes, and provided that such banks should pay such tax for the shareholders. Congress permitted a state to tax the real estate of a national bank to the bank, and the shares of stock to the stockholders. Demurrer. Sustained. Judgment for defendant. Appeal.

Stone, J. 1. The statute so far as it relates to the taxation of the capital stock of a national bank is inoperative. 2. The rest of the statute, depending on a clause which is unconstitutional, is also inoperative. 3. The complainant had no cause of action. Judgment affirmed.

Cited: 65 Ala. 631, 636; 71 id. 414, 421; 83 id. 94; 91 id. 223.

Overruled in part, 65 id. 628

HENRY v NORTHERN BANK OF ALABAMA (1879) 63 Ala. 527.

To recover the value of drafts deposited for collection. Plaintiff sued the defendant for the value of certain notes and drafts on third persons, deposited by him with the bank for collection during the years of 1861 and 1862, and for which he made no demand until 1867. When the deposits were made, Southern banks would only make collections in confederate currency, and the plaintiff was so informed by the president of the bank. Plaintiff offered to prove that the president of defendant admitted its liability to plaintiff. When demand for payment was made this currency had no value. The court charged that there could be no recovery for more than the value of the confederate currency when demand was made. Verdict for plaintiff for \$500. Appeal.

Manning, J. When demand was made confederate currency had no pecuniary value whatever, and the plaintiff then obtained all he was entitled to recover from the defendant. Debts of the bank could not be created by the mere admissions of its president. Judgment affirmed.

Cited: 63 Ala. 609; 97 id. 687.

PLANTERS AND MERCHANTS MUTUAL INS. CO. v SELMA SAV. BANK (1879) 63 Ala. 585.

Bill to compel a transfer of stock in defendant, a bank. The stock owned by S was transferred to H, its successor, and by a member thereof assigned to complainant. The certificate was indorsed, giving defendant's cashier the power to transfer the stock to complainant. A year before the purchase, the defendant's cashier wrote that in his opinion the defendant had no lien. By-laws gave the bank a lien on the stock for any debts due from a stockholder, and required stock to be transferred on the books. Defendant contended that the lien extended to debts due from S and its successor, while the latter had an equitable title. Plaintiff contended that the defendant was estopped by its cashier's statement. Demurrer. Sustained. Decree for defendant. Appeal.

Brickell, C. J. 1. S's successor became the equitable owner of the stock and the bank's lien extended to any debt due from such successors. 2. Defendant was not estopped to assert its lien. Decree affirmed.

Cited: 72 Ala. 4; 78 id. 331; 80 id. 157; 82 id. 122; 94 id. 260; 97 id. 493; 99 id. 385; 105 id. 300; 113 id. 386; 116 id. 115; 128 id. 183.

POLLARD v THE STATE (1880) 65 Ala. 628.

Mandamus to compel the collection of a tax levied by plaintiff on stock in a national bank. Defendant, a tax collector, refused to collect the tax. The Code

of 1876 provided, by sec. 358, that the capital invested in bonds was exempt from taxation; by sec. 362, that the portion of stock of all state corporations invested in property taxed otherwise should be exempt, and by payment of a license obtain immunity from municipal taxes. Congress allowed a state to tax national banks at the same rate as other moneyed capital was taxed in the state. Defendant justified under the above sections of the code. Demurrer. Sustained. Writ granted. Error.

Somerville, J. The above sections apply a process of assessment and a rate of taxation unequal in their operation on moneyed capital in the hands of individual citizens, including state corporations, and on national banks, unfavorably discriminating against the latter to an extent violative of the act of Congress. Judgment reversed.

Cited: 71 Ala. 413, 421, 507; 73 id. 31, 70; 77 id. 604; 83 id. 112; 89 id. 485; 91 id. 223.

CITY NAT. BANK OF SELMA v BURNS (1880) 68 Ala. 267.

On check against bank. H, being indebted to plaintiff, gave him his check on the defendant for \$1,031. Plaintiff had an account with defendant and deposited the check there, where it was credited to him, and H was charged with it. Later in the day H failed. It was then discovered that the check was an overdraft, and the bank declined to honor it. The court refused to instruct that if the drawer, payee and holder of a check are customers of the bank on which the check is drawn, the presentment by the holder or noting in the bankbook is not a payment; and if within a reasonable time the bank found the check was an overdraft, and offered to return it, the bank is not liable; that presenting the check with knowledge that it was an overdraft was fraud. Judgment for plaintiff. Appeal.

Brickell, C. J. 1. Where a bank credits a depositor with the amount of a check drawn upon it by another customer, and there is no want of good faith on the part of the depositor, the act of crediting is equivalent to a payment in money. 2. Nor can the bank repudiate, because, on examination of the accounts of the drawer, it ascertains that there are no funds to meet the check, though the officer making payment thought there were funds sufficient. There was no evidence to support the request in regard to fraud. Judgment affirmed.

Cited: 77 Ala. 333.

MAGUIRE v BOARD OF COMMISSIONERS (1882) 71 Ala. 401.

Petition, to set aside assessment of bank shares. The assessor of M County assessed M on 40 shares of stock of the National Commercial Bank, owned by him for the years 1878, 1880, 1881. The Act of December 8, 1880, provided for taxation of national bank stock at the same rate as other moneyed capital. These shares were assessed at par without any deductions for any indebtedness which the shareholder owed. On complaint, the assessor corrected the assessment by substituting the true value for the par value. On certiorari the court sustained his action. M appealed.

Stone, J. 1. The right of a state to tax a national bank is derived from Congress. The decisions of the Supreme Court of the United States on this question are conclusive on state courts. 2. Taxpayers' debts must be deducted from the assessment on national bank stock. The assessment as corrected was proper. M is not liable for taxes prior to the passage of the Act of 1880. As to taxes assessed for the years 1878 and 1879, the judgment is reversed and these assessments are disallowed. In other respects it is affirmed.

Cited: 73 Ala. 31, 70; 89 id. 338; 91 id. 220, 223; 112 id. 553.

NATIONAL COMMERCIAL BANK v MILLER (1884) 77 Ala. 168.

On promissory note. The plaintiff bank sued A P on several promissory notes, and garnished the defendants, bankers, as the debtors of A P. Judgment was rendered for the plaintiff against A P. Defendants acknowledged that \$330.60 was standing on their books to the credit of A P, agent of N & Co. Also that A P had deposited with them, on the day of the garnishment, a check for \$8,000 drawn by H L in favor of A P, agent. The indorsement was "A P, agent, for deposit." Defendants presented the check to the bank on which it was drawn and had it certified. After certification and the service of garnishment, written notices were served on defendants, by H L and A P, agents, forbidding collection of the check. The plaintiff asked that N & Co. and H L be required to show their interests in

the \$330.60 and in the \$8,000 arising from the check. The court ordered notice to N & Co. as to the \$330.60, but refused to order notice as to the check. Judgment discharging garnishees. Appeal.

Clopton, J. 1. When the bank has certified the check, the power to revoke ceases and the drawer's authority over the funds on which it is drawn terminates pro tanto. 2. The notices by which H L forbade the collection of the check and A P revoked their authority to present it for payment were ineffectual to change the rights of the plaintiff or to displace any lien acquired by the legal process. 3. The lien of the garnishee could not be defeated by any act of the debtor. Judgment reversed.

Cited: 78 Ala. 525; 85 id. 495; 93 id. 432; 97 id. 709; 102 id. 539, 652; 125 id. 177; 127 id. 288.

WILLIAMS v JONES (1884) 77 Ala. 294.

Bill for an accounting. Complainant, as the assignee of an insolvent bank, filed a bill requiring all creditors to file their claims. W D & Co. filed a cross bill alleging that they should have a preference to some real estate conveyed to the bank by D Co., the makers of the drafts, forwarded by the bank and discounted by W D & Co., that the drafts were accepted by S & Son, and before maturity W D & Co. advanced their full amount to the bank; that W D & Co. repudiated the settlement made by the bank with D Co.; and that W D & Co. had instituted suit against the acceptors. Demurrer. Sustained. Decree for complainant. Appeal.

Stone, C. J. The averments that they repudiate the payment, and also seek redress on the drafts as evidences of debt, are incompatible with the relief sought by the cross bill, and W D & Co. are not entitled to a preference. Decree affirmed.

Cited: 79 Ala. 131.

EX PARTE JONES (1884) 77 Ala. 330.

Mandamus, to compel the assignee of a bank to recognize the petitioner as a depositor. The petitioner, a depositor, purchased New York exchange, with her funds on deposit in the bank. The bank failed before the drafts were presented, and the assignee notified the drawee to stop payment. The petitioners contended: 1, That issuing the drafts was an assignment of so much of the funds in New York; 2, that the bank, being insolvent and withholding such fact from its customers, when it issued the drafts, was guilty of fraud; and, 3, that the bank deprived itself of the power to fulfill the contract by making the assignment. There was no averment of fraud.

Stone, C. J. 1. Issuing the drafts was an assignment of so much of the funds in New York. 2. There being no allegation of fraud in the petition, there was no ground for rescinding the contract. 3. Though the bank's act gave the depositors the right to rescind, no recovery can be had because there was no allegation of fraud and the money had been paid. Writ denied.

Cited: 82 Ala. 115.

RENFRO BROS. v MERCHANTS & MECHANICS BANK (1887) 83 Ala. 425.

On certificate of deposit. The following certificate was issued by defendants: "Renfro Bros., Bankers, Opelika, Ala. R has deposited in this bank, * * *." The M & M Bank, assignee of the certificate, sued R. Bros. thereon. Sec. 2094, Code of 1876, provided that bills and notes "payable at a bank or private banking house, or other certain place therein designated, were governed by the commercial law." The court instructed the jury that the certificate of deposit came without that section, and was not subject to setoff or garnishment. Exception. Judgment for plaintiff. Appeal.

Clopton, J. The heading of the certificate is not a sufficient memorandum to bring it within the meaning of a note payable at either of the places prescribed by the statute. Judgment reversed.

Cited: 96 Ala. 192.

STATE BANK v BOARD OF REVENUE (1890) 91 Ala. 217.

Certiorari, to show cause why the assessment against a state bank should not be increased. Plaintiff claimed the right to deduct the stockholders' indebtedness for the value of the stock of the bank, and defendant contended that the stockholders and not the bank should have brought the action. The code, sec. 453,

provided that only the excess of the credits over the debits was taxable; that shares of any bank were taxable, and that from shares in a national bank the shareholders could deduct their indebtedness. Petition dismissed. Appeal.

Stone, C. J. 1. The bank was the proper party to maintain the suit. 2. Shareholders in state banks are entitled to have their indebtedness deducted from the value of the shares in their assessments for taxation. Judgment reversed.

ALSTON v THE STATE (1890) 92 Ala. 124.

On official bond. Defendant, a probate judge, made a general deposit of moneys, received by him for licenses, in a bank which subsequently became insolvent. A probate judge is prohibited by secs. 632, 3803, 3805 of the Code of 1886 from knowingly applying any money received by him in his official capacity to his own use, or permitting any other person to use it. Judgment for the State. Appeal.

Walker, J. 1. A general deposit of the fund in a bank was within the prohibition. 2. The effect of the statute is to make the probate judge a custodian of the money received by him for licenses and to prohibit him from permitting another to use it. Judgment affirmed.

SAYRE v WEIL (1891) 94 Ala. 466.

On promissory note against the maker. Plaintiffs were assignees in bankruptcy of an insolvent bank. At the time defendant made notes to secure his indebtedness to the bank, he had three separate deposits, one as trustee of his wife and one as trustee of each of his two grandchildren. The bank, at request of defendant, agreed to apply the trust funds to the payment of the notes made by him personally. D. Weil, defendant's wife, knew of the payments of her money to defendant and ratified them. The court made a special finding of facts. Judgment for defendant. Appeal.

Coleman, J. 1. Depositors may designate to whom deposit may be paid and when a bank pays to designated party its duty is ended. 2. A bank allows a trustee to apply trust funds to payment of his personal indebtedness, at its peril, as against the *cestui que trust*; but as between the parties such an agreement is binding. 3. The bank, being estopped to deny this agreement, its assignees can be in no better position. 4. Whenever, under sec. 2744 of code, there is a special finding by the court, in its discretion or at the request of counsel, it is the duty of the court on appeal to determine whether the facts are sufficient to support the judgment. Judgment affirmed.

Cited: 114 Ala. 432.

REEVES v THE STATE (1891) 95 Ala. 31.

Embezzlement. Defendant, the president of a state bank, was indicted for embezzling money "in the possession of said bank or deposited therein." The prosecution abandoned the first and relied on the above second count. Before the election to proceed only on the second count, the prosecution put in evidence checks showing that defendant had drawn certain money; and the entries of the transactions in the bank books. Some of the checks were payable to T for supplies for a plantation worked by defendant. Evidence was received of notes given by defendant to make up the deficit due on the plantation account; of the financial condition of the bank, and the relation of the stockholders and their transactions with it; that the officers had withdrawn more than the amount of their subscriptions; that the wives of the defendant and other officers were solvent; the value of the plantation; and that defendant's brother, without his knowledge, removed a private box, not in the vault, just before the assignment by the bank. The court refused to give defendant's charges in effect limiting the question of fraudulent intent to the time he received the money from the bank; that a good motive must be imputed to a person, and if there was a reasonable doubt that defendant intended to embezzle the money he received from the bank, he was not guilty; that defendant had no intention to embezzle the note or draft; and instructions ignoring defendant's intent in obtaining the loan, and his good faith in the transaction. One transaction marked "Given" by mistake was not read to the jury. Defendant contended that the indictment was insufficient in not specifying whether the deposit was general or special. Defendant guilty. Error.

Thorington, J. 1. The indictment was sufficient to cover any deposits in the bank, and it was unnecessary to aver it was a special deposit. 2. Defendant's criminal intent may be presumed from his misappropriation of the funds. 3. The

evidence was properly received to show the defendant's motives and intent. 4. The instruction marked "Given" being erroneous, defendant was not harmed by its failure to reach the jury. 5. The instructions were properly refused. 6. It was improper to receive evidence in regard to defendant's brother withdrawing the box, and the condition of the bank doors some days after the assignment. Judgment reversed.

YOUNGBLOOD v BIRMINGHAM TRUST & SAV. CO. (1891) 95 Ala. 521.

Action by payee of an accepted draft against an accommodation indorser. The plaintiff, a banking corporation, acquired the draft by discounting it at the rate of 12 per cent per annum. Sec. 4140 of the Code of 1886 declares that any banker who discounts any note or bill of exchange at a higher rate of interest than 8 per cent is guilty of a misdemeanor. Judgment for plaintiff. Appeal.

McClellan, J. 1. Sec. 4140 is not unconstitutional. The use of the words "Any banker" is not class legislation, as the legislature has a right to prescribe particular rules for the several occupations. The statute applied to corporations. 2. Where a note is acquired by criminal means not only is the act of acquisition itself a crime and invalid, but the paper itself is absolutely void. Judgment reversed.

Cited: 97 Ala. 100; 108 id. 410; 109 id. 160; 110 id. 566; 114 id. 389; 116 id. 154; 126 id. 403.

FIRST NAT. BANK OF DECATUR v JOHNSTON (1892-3) 97 Ala. 655.

Action against maker of promissory note. A delivered to a bank, for the purpose of renewing two other notes held by it, two promissory notes, one payable to his own order, and the other with the name of the payee in blank, both indorsed by A. At the time the second notes were given, the original notes had been discounted by X Bank. B Bank, being indebted to plaintiff, transferred to it as collateral the second notes in consideration of plaintiff's promise to defer collection of debt. Plaintiff had no notice of the equities between A and B Bank. Subsequent to the transfer B Bank became insolvent. Judgment for defendant. Appeal.

Thorington, J. 1. These notes having been given to B Bank for a specific purpose, which failed, never became part of its "assets" within the meaning of sec. 5242, U. S. R. S. 2. A promise to forbear the collection of a debt is sufficient consideration for the transfer of the notes. 3. The giving of notes containing blanks impliedly gives the holder the right to fill them in as he chooses. Judgment reversed.

Cited: 100 Ala. 441.

BIRMINGHAM TRUST & SAV. CO. v LOUISIANA NAT. BANK (1892) 99 Ala. 379.

Bill to compel transfer of stock. B made note to complainant, secured by defendant's capital stock. Defendant's cashier actively participated in the transaction. He died. Subsequently B became indebted to defendant. On the dishonor of the note, complainant demanded the transfer of the pledged stock on defendant's books. A statute gave defendant a lien on its stock for any debt or liability incurred to it by a shareholder. Decree for complainant. Appeal.

Stone, C. J. 1. Notice to the cashier was notice to the bank, and the effect of this notice was not nullified by secret instructions to, or by the subsequent death of, the cashier. 2. As defendant is not in position of a bona fide purchaser, complainant's claim is prior to that of defendant. Decree affirmed.

Cited: 112 Ala. 275; 122 id. 554.

FIRST NAT. BANK OF BIRMINGHAM v ALLEN (1893) 100 Ala. 476.

Assumpsit by a depositor to recover money paid on forged checks. At the end of each month the defendant, a bank, returned to plaintiff his checks and vouchers, which were examined by a dishonest clerk and returned to the bank as correct. The plaintiff's name had been forged by the same clerk. Judgment for plaintiff. Appeal.

Coleman, J. 1. It is the duty of the depositor, by himself or an authorized agent, to examine his account and vouchers and checks. 2. If agent who makes examination is culpably negligent, the depositor is liable and not the bank. 3. A bank is bound to know the signature of a depositor. 4. It is not asking a non-

expert for an opinion to request a witness to identify his own signature. Judgment reversed.

BIRMINGHAM NAT. BANK v BRADLEY (1893) 103 Ala. 109.

Assumpsit to recover money paid on a forged check. February 23, 1892, the G Bank of Georgia drew a check on the N Bank of New York. X raised the amount, changed the payee to defendant, took it to Alabama and induced defendant to take it. Defendant indorsed it to plaintiff, who cashed it and sent it to the drawee "for collection." The drawee, receiving it on the 27th, telegraphed plaintiff it was paid. Plaintiff told defendant, who sent a telegram to drawee to examine it closely. Drawee telegraphed the drawer that the check had been fraudulently altered. On the 1st of the following month, drawee telegraphed plaintiff of alteration, adding, "We charge it back to you and return it to-day." Judgment for defendant. Appeal.

Coleman, J. 1. The plaintiff owed defendant no duty to discover the fraud, and both plaintiff and the drawee acted with due diligence. 2. Not having remitted, but simply having credited the money, the drawee had a right to charge it back. 3. The payee of a forged check, who indorses it and receives the money, acquires no title against the owner of the money. Judgment reversed.

Cited: 108 Ala. 206; 116 id. 17.

INDUSTRIAL TRUST AND SAV. CO. v WEAKLEY (1893) 103 Ala. 458.

Action on a check. June 16, 1891, defendant took up M's note with a check for \$229 given to N, who held note as plaintiff's agent. The check, payable to N or order, was drawn on the F Bank, just across the street, and at the time defendant told N to cross the street and cash the check. On the same day N sent the check to plaintiff. Plaintiff failed to present it for payment before the F Bank, on the 22d, closed its doors. On the 16th, there was \$154.64 to defendant's credit on the F Bank's books. The bank then owed him \$75 for legal services and \$60 by check drawn in his favor by a depositor on the 10th. He had the consent of the cashier to overdraw his book credit because of these facts. He had proved these facts against the bank's receiver and held a receiver's certificate for \$60.54 after deducting this check and \$25 paid him. Judgment for defendant. Appeal.

Haralson, J. 1. The plaintiff must suffer the consequences of a disobedience of defendant's request to present the check. 2. The defendant had a right to draw for the \$229 and he must be regarded, as we cannot divide the amount, as having paid all or none. Judgment affirmed.

Cited: 106 Ala. 387; 122 id. 587, 592.

CARR v THE STATE (1893) 104 Ala. 4.

Indictment for receiving deposit when bank was insolvent. Defendant was president of the T Bank. On May 5, while defendant was away, A made a deposit with H, the cashier. Defendant knew that the bank was insolvent. The statute provided that any officer who should receive a deposit, knowing the bank to be in an insolvent condition, should be guilty of a misdemeanor. One of the jurors, N, had been a witness in a prior similar case where defendant was convicted, and had testified against defendant before the grand jury. Defendant was brought into the state on requisition papers charging another offense. Judgment for the State. Appeal.

McClellan, J. 1. The act of H, the cashier, in accepting the deposit was the defendant's act as fully as if he had performed it. 2. The requests for charges that defendant could not be convicted because the business was conducted under the name of the banking company, or as a firm, is untenable. 3. Defendant had no immunity from indictment and trial for any other offense than that designated in the requisition papers. 4. The court erred in retaining juror N. 5. How the bank became insolvent is immaterial. Judgment reversed.

Cited: 104 Ala. 53; 106 id. 17; 109 id. 47; 117 id. 65.

BANK OF FLORENCE v U. S. SAV. AND LOAN CO. (1893) 104 Ala. 297.

Bill for a receiver. The bill alleged that defendant, a bank, was indebted to complainant for money collected; that defendant, becoming insolvent, proceeded to

terminate its affairs itself, with the consent of its creditors; that it was making preferences; that S, to whom the defendant had given possession of its assets, was disposing of them recklessly; that complainant should have a lien prior to all general liens. A receiver was appointed without notice to the defendant and without affidavit of other evidence. Appeal.

Brickell, C. J. 1. The facts alleged were insufficient for the appointment of a receiver. 2. The allegation of S's reckless dispositions of the assets was not sufficient alone for the appointment of a receiver without notice to the defendant. 3. The complainant is a mere simple contract creditor of the defendant, not entitled to a preference. Decree reversed.

Cited: 105 Ala. 523.

FIRST NAT. BANK v NELSON (1894) 105 Ala. 180.

Money had and received. Plaintiff's husband, without her knowledge, loaned the A Co. a check payable to plaintiff, "or bearer." The A Co. passed it without indorsement to defendant, a bank. Defendant cashed it and credited the A Co. Plaintiff's husband was insolvent, as was the A Co. Sec. 1761 of the code provided that "all bonds, bills, or notes payable to an existing person or bearer must be construed as if payable to such person or order." Defendant's offer to prove the custom in the case of checks like this was rejected. Judgment for plaintiff. Appeal.

Haralson, J. 1. Checks are embraced within sec. 1761 of the code. Custom will not repeal the statute. 2. The check gave the defendant notice that it was the plaintiff's property. 3. The plaintiff cannot be held to have ratified an act of which she was ignorant. 4. She was not bound to prove that her husband was in default to her without the means of making indemnity. Judgment affirmed.

Cited: 122 Ala. 592.

CARR v THE STATE (1894) 106 Ala. 35.

Indictment of banker for receiving a deposit, knowing his bank was insolvent. Defendant was indicted under an Act of December 12, 1892, which provided that an officer of a bank who received a deposit, knowing the bank to be insolvent, should be deemed guilty of a misdemeanor, and on conviction fined a sum of money not less than double the deposit, one half of which should go to the depositor; that payment to the depositor at any time before conviction should be a defense to any prosecution under this act. Art. 1, sec. 21, of the state constitution provided "that no person shall be imprisoned for debt." Demurrer. Overruled. Judgment for State. Appeal.

McClellan, J. This enactment, being punitive, is violative of the spirit of the constitutional provision and therefore void. Judgment reversed.

Cited: 119 Ala. 105.

FLORENCE R. R. & IMP. CO. v CHASE NAT. BANK (1894) 106 Ala. 364.

Assumpsit on a note. Plaintiff, a national bank, was the bona fide holder for value, before maturity, of a note made by defendant, a corporation. Defendant was not empowered to execute accommodation paper. Plaintiff discounted the note at higher than the legal rate of interest. By sec. 4140 of the criminal code "any banker who discounts any note, bill of exchange or draft at a higher rate of interest than 8 per cent is guilty of a misdemeanor." Defendant contended that the note was an accommodation note and therefore ultra vires; that it was void under the above section. Judgment for plaintiff. Error.

Coleman, J. 1. Defendant is estopped from setting up the defense of ultra vires. 2. The penalty prescribed by the national banking statute for the usurious discounting of paper by national banks is exclusive. Judgment affirmed.

MORRIS v EUFAULA NAT. BANK (1894) 106 Ala. 383.

On check, by maker against payee, for failure to present. Defendant, as the M Co.'s agent, having received plaintiff's acceptance, presented it for payment. Plaintiff gave his check, payable to defendant, on the J Bank. Both plaintiff and defendant resided in the town where the J Bank was. The check was received March 30, 1893, about ten o'clock a. m. and presented on the 31st. The J Bank honored all checks on the 30th and suspended at the close of business hours that day. Defendant had held plaintiff's acceptance to await payment of the check. On the 31st, plaintiff paid the M Co. and took up the check. Demurrer. Judgment for defendant. Appeal.

Haralson, J. 1. The plaintiff was bound to pay the M Co. 2. The defendant, in taking the check, assumed a relation and duty to its drawer, and as to him, should have presented the check the very day it was drawn. Failing to do so, it owes the plaintiff the amount of the check with interest. Judgment reversed.

Cited: 122 Ala. 593.

PEOPLES BANK v JEFFERSON CO. SAV. BANK (1894) 106 Ala. 524.

Money had and received. Plaintiff sent the C Bank a check indorsed "pay C Bank or order for account of" plaintiff. The C Bank sent the check indorsed "for collection only" to its correspondent, the defendant. March 25, 1893, the check was paid defendant, who mailed notice of credit and collection within banking hours to the C Bank. That day the C Bank failed, being indebted to defendant in excess of the check. Plaintiff had an arrangement with the C Bank not to draw before the collection was reported. Judgment for defendant. Appeal.

Coleman, J. 1. Whoever undertook to collect this paper thus indorsed, whether acting as the agent of the owner, or the agent of the agent, must be presumed to have known that the money when collected, *ex aequo et bono*, would belong to the owner of the paper. 2. The agreement between the plaintiff and the C Bank did not authorize the latter to use the plaintiff's money at any time. Judgment reversed.

PLANTERS AND MERCHANTS BANK v GOETTER (1895) 108 Ala. 408.

Garnishment. Defendant, a bank, loaned P a sum of money on notes. It gave P the face of the notes, on an agreement that P was to repay the face value, with 10 per cent interest. When the notes were past due, P executed a bill of sale to defendant and four other creditors. The property was sold before this garnishment was issued and defendant received in payment of the note a proportional share less than the amount of the notes. Sec. 4140 of the code provides that any banker who discounts a note at more than 8 per cent is guilty of a misdemeanor. The court found the defendant's debt had no existence, being in violation of the statute. Judgment for plaintiff. Appeal.

McClellan, J. 1. The transaction, though usurious, was not a discount, and was not within the penal statute. 2. The defendant acquired a good title to the property transferred to it. Judgment reversed.

SLAUGHTER v FIRST NAT. BANK OF MONTGOMERY (1895) 109 Ala. 157.

On a note, against maker. Plaintiff, a national bank, obtained defendant's note by discounting it at the legal rate of interest. By an error in computation, plaintiff retained five cents more than it was entitled to. Sec. 4140 of the code prohibited banks from exacting usurious interest. National banks were forbidden to take usury by the federal law. Plaintiff did not allege how it obtained title to the note. Verdict directed. Judgment for plaintiff. Appeal.

Head, J. 1. It was necessary that the plaintiff should show how it obtained title to the note. 2. Plaintiff, being a national bank, is not amenable to the state laws against usury. 3. To incur the penalties of usury, the taking of an unlawful interest must be intentional. 4. The maxim "*de minimis non curat lex*" applied. Judgment reversed.

LOWENSTEIN v BRESLER (1895) 109 Ala. 326.

Goods sold and delivered. The plaintiffs' account for goods sold and delivered to defendant, was due on June 3. On that day defendant sent plaintiffs his check on the T Bank, payable to their order. They received it on the 5th and deposited it in the Bank of C for collection. On the same day, the bank sent it to the drawee, indorsed "for collection and return to the Bank of C. J. A. O., Cashier." The drawee received it on the 6th, but could not pay it for defendant's lack of funds. Judgment for defendant. Appeal.

Brickell, C. J. 1. The taking of a bill, note or check, without more, is not payment or satisfaction. 2. Plaintiffs were under the duty to present the check, and, if not paid, to give due notice of its dishonor. 3. Defendant, not having been injured by the drawee's being selected as agent for collection, cannot complain thereof. Judgment reversed.

Cited: 118 Ala. 581.

JEFFERSON COUNTY SAV. BANK v HEWITT (1896) 112 Ala. 546.

To recover taxes paid under duress. The State Statute of 1895 provided that every share of bank stock should be assessed at its actual market value to the person in whose name such share stood; that a bank officer should make the return at the actual market value and the bank should pay for the shareholder the tax assessed; that nothing in this act should be so construed as to exempt from taxation any property now subject to taxation under the state laws. Plaintiff, in its returns, included certain real property in computing the actual market value of the stock, and paid the tax. The tax assessor, defendant herein, then assessed the real property against the bank, and levied on the property. Judgment for defendant. Appeal.

Coleman, J. 1. The tax assessor construed the statute according to its terms and the evident intent of the legislature. 2. The property of the corporation, which is taxable, is subject to taxation without regard to that of the shareholder. 3. The Act of 1895 is constitutional. Judgment affirmed.

WATT v GANS (1896) 114 Ala. 264.

On a check. Defendant, indebted to the plaintiffs, gave them his check on an out-of-town bank. Plaintiffs, on the following day, gave it to their agent for collection. The drawee was solvent at a time when the check, if sent by the ordinary mail route, would have reached the drawee for payment. Plaintiffs' agent, however, sent it by a devious and unusual route. The drawee failed before it was presented. Plaintiffs sued on the debt to pay which the check was intended. Defendant pleaded payment. Judgment for plaintiffs. Appeal.

Head, J. 1. The holder of the bank check was negligent because he did not present it for payment within a reasonable time. 2. Plaintiffs' agents were negligent in sending the check by an unnecessarily devious route. 3. Where the drawer establishes negligence in the presentation of his check and the failure of the drawee bank, after the expiration of the period within which, with due diligence, the check could have been presented, the presumption of injury arises, casting on the holders the burden of proving the drawer has suffered no damage by the negligence. 4. The defense of negligence is available under the plea of payment. Judgment reversed.

Cited: 122 Ala. 587, 591.

FIRST NAT. BANK v DENSON (1896) 115 Ala. 650.

To recover usurious interest. Plaintiff gave his note to the defendant for borrowed money, defendant charging 12 per cent interest. The note was renewed several times at the same rate. The defendant sued to recover on the note, made more than two years before this action was brought, and plaintiff set up the plea of usury and obtained judgment against defendant less than two years before this action. Plaintiff then brought this action for double the usurious interest under sec. 5198 of the U. S. R. S., which provided that charging more than the legal rate of interest was usurious, and that twice the amount of interest thus paid might be recovered within two years from the time the usurious transaction occurred. Defendant contended that the former action was a bar, and that the Statute of Limitations applied. Judgment for plaintiff. Appeal.

McClellan, J. 1. The plea goes to one thing, the action to another. To sustain both, is not to inflict a double penalty, but only to impose the penalty given by the statute. 2. Such a plea does not defeat, by estoppel or otherwise, the action for usurious payments. 3. Plaintiff's action is not barred under the statute. Judgment affirmed.

ALABAMA NAT. BANK v RIVERS (1896) 116 Ala. 1.

On bill of exchange against indorser. The G Bank issued its draft on the N Bank for the sum of two dollars payable to H. The draft was raised to \$2,000, and the payee's name was changed. The defendant, a customer of plaintiff, introduced G to plaintiff, who produced the draft. The cashier agreed to purchase it. He told defendant to indorse it. Defendant did so. G was paid the amount of the draft, and, being indebted to defendant on two notes at the time, G paid defendant. The draft was sent by plaintiff to the N City Bank for collection, and paid. Defendant pleaded payment. Demurrer, on the ground that plaintiff had repaid it to drawee. Sustained. Plaintiff declared for money had and received in

one count. Defendant objected to interrogatories and cross-interrogatories after they had been read to the jury. He alleged that his signature merely identified G. Judgment for defendant. Appeal.

Brickell, C. J. 1. The specific import of defendant's indorsement was that he would pay, if payment were refused by the drawee on presentment, and if he were duly notified of the dishonor. 2. This import cannot be destroyed and the contract varied, even in a suit between the immediate parties, by proof that the indorsement was only for identification. 3. Repayment to drawee was not proper matter for a demurrer. There was sufficient evidence of presentment, non-payment and protest. 4. The indorser is not liable as for money had and received. Objections to interrogatories come too late after the interrogatories have been read to the jury. Judgment reversed.

ANNISTON NAT. BANK v HOWELL (1896) 116 Ala. 375.

To recover deposits. Plaintiff's husband deposited with the defendant two sums of money. The deposits were in her name. The account was a usual account, except that it had written on the face of it, "special deposit." After plaintiff's husband died, this action was brought for recovery of the deposits. It was proved that after his death, plaintiff kept the passbook; and that prior to his death, plaintiff's husband had drawn most of the funds except a small sum. Defendant offered to prove that in his lifetime, and at the time of the deposits, plaintiff's husband had instructed defendant to honor plaintiff's or his checks on the fund. Objection. Sustained. Judgment for plaintiff. Appeal.

Head, J. If the deposits were made by plaintiff's husband of his own funds, and if he had instructed the defendant to honor either his or plaintiff's checks, there was not such a complete transfer of the money to the plaintiff as would prevent the defendant from carrying out the instructions. The evidence should have been admitted. Judgment reversed.

FIRST NAT. BANK v FIRST NAT. BANK (1897) 116 Ala. 520.

Damages for negligence. The plaintiff held the note of C for an indebtedness secured by twenty transfers of Texas land certificates, each entitling the holder to a section of land in Texas to be selected and located according to the laws of that state. Plaintiff's cashier sent these certificates to the defendant with these instructions: "Enclosed find collection transfers for twenty sections Texas lands, which are to be delivered to C upon payment" of a certain sum. While in defendant's possession the transfer certificates were lost. This action was brought, after demand, for damages for failure to return them. Demurrer to complaint. Overruled. Pleas: 5. Failure to record transfers. 7. That defendant was not in the business of handling land transfers, and that its agent had no authority to receive such transfers. Demurrer to pleas. Demurrer to 5th plea sustained. Demurrer to 7th plea overruled. Replication, that defendant's cashier was authorized to receive papers for collection, and did receive these transfers for collection. Demurrer to replication. Overruled. Plaintiff contended that defendant was guilty of negligence in not using due diligence to safely keep the certificates. Judgment for plaintiff. Appeal.

Brickell, C. J. 1. The transaction was a bailment undertaken for a reward. 2. The duty of the defendant was to exercise ordinary care in the keeping and preservation of the transfers until redeemed by C. 3. The receipt by a bank for collection of papers transferable by indorsement, not of themselves evidence of indebtedness, but showing by the indorsement that the person sending them must hold them as collateral, is within the custom and usage of such institution. 4. The burden of proof to rebut the presumption of negligence was on the bank. 5. The receipt of such papers by the cashier is within the scope of his authority and is the act of the bank. 6. The failure to record the transfers was no defense. 7. The proximate damage resulting to plaintiff was the expense of procuring substitution of such transfers not exceeding their value as security. Judgment reversed.

OLDACRE, ADM'R. v BUTLER (1897) 116 Ala. 652.

Motion to vacate levy on national bank stock. The defendants recovered a judgment against Y and issued execution to the sheriff, who levied on ten shares of a national bank. The plaintiff, as administrator of Y, moved to have the levy vacated, contending that stock in a national bank cannot be levied on and sold under

execution. The petition alleged no fact tending to show that the sale of the stock and its transfer to another owner by the process of execution under the state statute would at all interfere with the operation of the bank as a governmental agency. Motion overruled. Appeal.

Head, J. National banks organized under the acts of Congress are subject to state legislation, except where such legislation is in conflict with some act of Congress or where it tends to impair the utility of such banks as agents of the United States. The petition alleges no fact offending the laws of the United States concerning national banks. Judgment affirmed.

EUFULA GROCERY CO. v MISSOURI NAT. BANK (1897) 118 Ala. 408.

Assumpsit to recover draft. B & Co. of Kansas City sold to the plaintiff a carload of hay. B & Co. shipped the hay and drew on the plaintiff for the price, the draft being payable to C, cashier of the defendant. C indorsed it for collection for account of the defendant, and sent it to the E Bank for collection. The plaintiff paid for the draft. Before the E Bank had parted with the funds, plaintiff discovered that the hay was moulded. He garnisheed the funds in the hands of the E Bank, as the property of the defendant, and brought this suit against the latter. The court overruled objections to testimony tending to show the defendant did not own the draft, but had it only for collection. Judgment for defendant. Appeal.

Head, J. 1. The defendant will not be heard to say that it was not the owner of the draft, that the collection was not made for its use, when, by reason of some equity, the plaintiff becomes entitled to retain the money. 2. There was error in the admission of the evidence. Judgment reversed.

MORRIS v EUFAULA NAT. BANK (1898) 122 Ala. 580.

On a check. The M C D Co. drew on plaintiff for \$470.20, and gave the draft to the defendant, a bank, for collection. It was due March 30, 1891, and presented to plaintiff for payment on that day at 10 a.m. Plaintiff gave his check on the McN Bank, with which he had on deposit \$2,000. The McN Bank failed the next day and plaintiff's check was not paid. He took up the check and paid the draft in cash on the 31st, and sued the defendant for negligence in not presenting his check on the 30th. Defendant demurred to the first count of plaintiff's complaint on the ground that it was not its duty to present the check until the day after it was received. Overruled. The plaintiff's complaint was thereafter amended, setting up a new count in assumpsit. Demurrer on the ground of misjoinder of counts. Sustained. Judgment for defendant. Appeal.

Per curiam. 1. The only obligation of defendant was to use due diligence to make presentment and demand of payment of the check, within a reasonable time, and to give due notice to the drawer. 2. Reasonable time, where the bank on which it is drawn and the holder are in the same place, is till the close of banking hours on the next secular day. If, in the meantime, the bank fails, the loss falls on the drawer. 3. The acceptance of the check by the defendant was only a payment sub modo, and could become operative as a payment only when the check was paid. 4. The defendant was not liable to the plaintiff, and the demurrer to the first count should have been sustained. 5. A count in case cannot be joined with a count in assumpsit. Judgment affirmed.

TOBIAS v JOSIAH MORRIS & CO. (1899) 126 Ala. 535.

To recover deposit. There was deposited in the plaintiff's name with the defendants, bankers, \$1,478.83, which this suit was brought to recover. The defendant pleaded payment, alleging that the plaintiff, her husband, and J went to the bank together at the time the account was opened, and that it was then arranged by her husband and J, with her consent, that the checks should be signed "B. Tobias by M. Tobias." B. Tobias was plaintiff. Checks were so signed by M. Tobias, the husband, without the plaintiff's knowledge, and the funds exhausted. No demand was proven. The court charged that if the jury believe all the evidence, its verdict must be for defendant. Judgment for defendants. Appeal.

Tyson, J. 1. If plaintiff was present, and by her conduct she led defendant to believe that she had authorized J and her husband to make the contract of deposit, and to direct how the account was to be kept, and how drawn out, and it acted

on this belief, plaintiff must suffer for her neglect rather than the bank. This is a question for the jury. 2. Until demand is made, no action lies for the recovery of a general deposit. 3. It was error to give the general charge for defendant. Judgment reversed.

ARKANSAS

GAMBLIN v WALKER (1838) 1 Ark. 220.

Debt. Plea: That before commencing suit plaintiff had assigned the writing. Demurrer. Sustained. The writing was not payable to order. A statute made all bonds and notes assignable, and gave the assignee the right to sue in his own name. The plaintiff sued for the use of the assignee. Judgment for plaintiff. Appeal.

Dickinson, J. 1. The assignor of a bond, negotiable by the statute, is not competent to sue in his own name, to the use of the assignee. 2. The statutory provision is not a declaration of the law as it was, but introduces a new rule. Judgment reversed.

Cited: 5 Ark. 100, 467, 650; 13 id. 527.

THE STATE v ASHLEY (1839) 1 Ark. 279.

Information. Motion in supreme court for rule to show cause why an information in the nature of a quo warranto should not issue against defendants for usurping the office of directors of a bank. The constitution did not expressly give the court the right to issue an information.

Ringo, C. J. 1. The proceedings by writ of quo warranto and by information in the nature of a quo warranto are entirely different. 2. The original jurisdiction of the supreme court is expressly limited by the constitution to matters of a civil nature. 3. The proceedings by information in the nature of a quo warranto, being properly a criminal proceeding, cannot be entertained. Motion denied.

Cited: 1 Ark. 535; 2 id. 96, 501; 4 id. 436; 5 id. 364; 6 id. 232; 9 id. 281; 12 id. 90, 114; 26 id. 289; 27 id. 13; 31 id. 31, 517.

THE STATE v ASHLEY (1839) 1 Ark. 513.

Quo warranto. Pleas: 1. That the office of director of a bank, chartered by the state, is a private right. 2. Justifying his title to the office of director and showing the warrant by which he was elected. The constitution gave the right to incorporate a state bank, with branches, and one other banking institution. Demurrer.

Lacy, J. 1. The office of director of a state bank is a public franchise, and the supreme court has jurisdiction to issue a writ of quo warranto, in behalf of the state for its usurpation. 2. The legislature had power to incorporate a state bank, with branches, and one banking institution, with any number of agencies. 3. The pleas are defective in not averring or showing defendant was eligible to the office, and that his election was according to the provisions of the charter. Demurrer sustained.

Cited: 4 Ark. 355; 5 id. 304; 7 id. 187; 8 id. 443; 15 id. 679; 27 id. 352, 629.

BANK OF ARKANSAS v CLARK (1839) 2 Ark. 375.

Debt on a bond. The declaration alleged that defendants promised to pay plaintiff, the state bank, according to the terms of the contract, and made a special averment of interest due. The bond did not provide for interest. A rate of interest is prescribed by law. A statute required the court to amend every formal defect in pleading unless expressly demurred to. General demurrer. Sustained. Judgment for defendant. Appeal.

Ringo, C. J. 1. The declaration set out a cause of action in the bank. 2. The court is expressly required to amend every defect in form of pleadings, unless expressly demurred to. 3. The court takes judicial notice of the legal interest and a special averment thereof is surplusage. Judgment reversed.

Cited: 5 Ark. 197; 13 id. 586.

THE STATE v HARRIS (1841) 3 Ark. 570.

Quo warranto to require the defendant to show his authority for acting as president of the Real Estate Bank. Defendant pleaded, setting forth his authority. By the charter, any citizen of the state owning real estate situate therein, could be a stockholder. Directors had to be stockholders. The right to become directors of the central bank was limited to members of the board of directors of the branch bank. The right to become president was limited to directors of the principal bank and of the central board. Stock could only be issued by submitting real estate security to, and getting the approval of, the board of managers. Defendant averred he was a citizen of the state. Defendant did not plead facts showing compliance with all these requirements. Demurrer.

Ringo, C. J. 1. As regards citizenship the averment that defendant is a citizen of the state is sufficient. 2. Defendant must show every fact upon which his right to exercise the franchise in question depends, and all records and written documents without which he could not acquire the legal right to hold the franchise. Demurrer sustained.

McFARLAND v STATE BANK (1841) 4 Ark. 44.

Debt on a bond. The bond was given as security for a loan of bank notes made by plaintiff bank. Defendants contended that these bank notes were "bills of credit" as specified in United States Constitution. Defendants also pleaded usury, omitting the allegation of a corrupt agreement; and a third defense, "non est factum," not sworn to. The constitution has a clause which declares "no state shall emit bills of credit." The United States Supreme Court has held that notes issued by a state bank are not bills of credit within the meaning of the United States Constitution. Judgment for plaintiff. Error.

Lacy, J. 1. The decisions and opinions of the Supreme Court of the United States are final, and must be imperative on all state courts. 2. The law incorporating plaintiff bank with power to issue such notes is constitutional. 3. Defendant's unverified plea, "non est factum," is a nullity. 4. A corrupt agreement must be alleged and proved to sustain usury. Judgment affirmed.

Cited: 5 Ark. 195; 7 id. 58; 26 id. 359.

EX PARTE CONWAY (1842) 4 Ark. 302.

Application for mandamus compelling the circuit judge to issue an injunction. By direction of the central board of the Real Estate Bank, the president assigned all the property of the bank, for the benefit of creditors, to trustees, who were also members of the board and indebted to the bank. The deed was not signed by all the trustees but they showed their assent in other ways. The deed extended the debtors' time of payment, and gave them the right to pay by instalment. The local directors refused to give the trustees possession, and the judge of the circuit court refused to grant an injunction restraining them from intermeddling.

Lacy, J. 1. The supreme court has the power to issue a peremptory writ of mandamus to compel a circuit judge to perform a ministerial act, such as issuing an injunction. 2. The property being a trust estate, gave equity jurisdiction, and the judge of the circuit court should have granted the injunction. 3. The Real Estate Bank of the State of Arkansas, by its central board, can make a bona fide assignment of any or all its assets for the benefit of creditors, though it is in failing circumstances at the time. The deed was made by proper parties. The validity of a deed is not altered by reducing the number of trustees according to its provisions. 4. The bank had the right to prefer its creditors. 5. The deed is not invalid because only a part of the trustees signed it. The appointment of debtors of the bank its trustees does not extinguish the debts or invalidate the trust. 6. The extension of payment, and allowing the debtors to pay in annual instalments does not constitute fraud. 7. The creditors and stockholders are presumed to have assented to the assignment. Application granted.

Cited: 11 Ark. 106, 368, 599; 12 id. 358; 13 id. 570; 15 id. 318, 400; 18 id. 131, 565; 25 id. 615, 28 id. 84; 32 id. 405; 39 id. 84, 90, 96; 42 id. 443; 50 id. 149; 54 id. 129; 59 id. 574.

McFARLAND v STATE BANK (1842) 4 Ark. 410.

Debt on a bond. Plea: Usury. Demurrer. Sustained. The charter and subsequent acts gave the bank the right to charge 8 per cent interest. Then the general laws were passed fixing interest at 6 per cent. Judgment for plaintiff. Error.

Lacy, J. The general laws of interest do not repeal, either by express words or by necessary implication, the acts giving the State Bank the right to charge certain interest. Judgment affirmed.

Cited: 4 Ark. 423, 436, 438, 523; 5 id. 60, 195, 300; 6 id. 14; 7 id. 58; 13 id. 587; 23 id. 308; 25 id. 195; 40 id. 452; 50 id. 138; 60 id. 130; 63 id. 403.

WEBSTER v BANK OF THE STATE (1842) 4 Ark. 423.

Debt. Suit was brought in the name of the Bank of the State of Arkansas. Judgment was rendered in the name of the State Bank. Judgment for plaintiff. Error.

Lacy, J. Judgment in the name of the State Bank, in a suit brought in the name of the Bank of the State of Arkansas, is a clerical error and not a variance. Judgment affirmed.

Cited: 5 Ark. 197; 7 id. 58.

CUMMINS v WOOLBRIDGE (1842) 4 Ark. 616.

Assumpsit. Plaintiffs were the assignees of the United States Bank. Defendants, as plaintiffs' attorneys, collected the amount of a judgment in favor of the United States Bank. The bank's charter had expired, but the corporate name and capacity were continued in force, by act of Congress, for the settlement of its affairs. The court refused to charge the jury to find for defendants; 1, if it believe the legal right to the money to be in the bank; or 2, unless it believe the plaintiffs to be the legal assignees of the bank. Verdict for plaintiffs. Motion for new trial. Overruled. Error.

Lacy, J. 1. Owing to the above act the bank was not divested of all legal interest in the claim. The refusal of the court to give the first instruction took from the jury the question of fact as to the right of action, and was error. 2. The second instruction was incorrectly refused. Plaintiffs were not entitled to recover without showing in themselves the legal interest in the suit. Judgment reversed.

MAHONY v STATE BANK (1842) 4 Ark. 620.

Debt against payee and sureties. Plaintiff discounted note at a usurious rate of interest. Defendant pleaded usury, and nul tiel corporation. There were no express words incorporating any particular persons. The management was given to a directory who were elected by the legislature. This board had all the power conferred on a banking corporation. Judgment for plaintiff. Error.

Lacy, J. 1. No particular form is necessary to create a corporation. The powers conferred here must necessarily imply incorporation. 2. A corporation may be established by implication as well as by express grant. Judgment affirmed.

Cited: 5 Ark. 195, 251; 6 id. 138; 13 id. 51; 20 id. 206, 208; 25 id. 190.

REED v BANK OF THE STATE (1843) 5 Ark. 193.

Debt on a bond. Pleas: 1. Nul tiel corporation. 2. Usury, in that the bank took 7 per cent instead of 6 per cent interest in advance. 3. That the bond was discounted contrary to the bank's charter. Demurrers. Sustained. A plea of payment was made and issue joined thereon. The act of incorporation authorized the bank to deal in certain enumerated securities which did not include in terms such a bond as that sued on. An act was passed in 1838 authorizing defendant to charge interest on bonds at certain rates. Judgment for plaintiff against one defendant by default and the other by nil dicit. Error.

Sébastien, J. 1. The bank is a corporation by the necessary implication of the act of incorporation. 2. The facts in the second plea do not constitute usury. 3. The Act of 1838 gave the bank the right to charge interest on bonds. 4. A judgment by default and by nil dicit, without disposing of the issue of fact raised by plea of payment is not good. Judgment reversed.

Cited: 9 Ark. 67; 17 id. 456; 18 id. 248; 23 id. 19; 25 id. 195; 42 id. 270.

BOWER v BANK OF THE STATE (1843) 5 Ark. 234.

Debt. The note was to the "Branch of the Bank of the State of Arkansas at Arkansas." The suit was by the "Bank of the State of Arkansas," its corporate name. Judgment for plaintiff. Error.

Ringo, C. J. Acts done by or to a corporation by a name substantially its true name, though different therefrom in words and syllables, are valid. If the name in the instrument does not import of itself the true name of the corporation, it may be shown, by express averment, that it was made by or to the corporation by the name contained in the instrument. Judgment affirmed.

Cited: 6 Ark. 69, 70; 7 id. 64, 389; 18 id. 245.

HAY v BANK OF THE STATE (1843) 5 Ark. 250.

Debt on a bond. Process issued against two, who severed in their pleadings. On demurrer to the plea of one, he was ordered to pay all costs to date. Judgment for plaintiff. Error, by defendants jointly.

Ringo, C. J. It is improper, upon a demurrer by one of two defendants severed in their pleadings, to order him to pay all costs in the suit then expended. But such irregularity cannot be taken advantage of upon a writ of error prosecuted by both defendants jointly. Judgment affirmed.

Cited: 13 Ark. 51.

DAWSON v REAL ESTATE BANK (1843) 5 Ark. 283.

Debt on a note. Pleas: 1. That the principal was a stockholder of the bank and that the note was part of the credit allowed a stockholder by the charter. 2. That the note was executed by defendants as principal and sureties for this stock credit. 3. That the bank owed the principal certain money. 4. That the note was to be evidence only that the sum was received as a stockholder, and was a stock credit or accommodation. The sureties pleaded that the bank extended the time of payment for nine months after the note became due; that the bank held deposits of the principal and loaned him more money. Demurrers. Sustained. Judgment for plaintiff. Error.

Ringo, C. J. 1. The Real Estate Bank can maintain an action at law on the notes or obligations of a stockholder, given on account of money obtained by him from the bank. 2. The bank may loan or discount to a stockholder a sum equal to half the amount of his shares in the capital, but he must give notes or obligations as security. 3. A plea of setoff is bad on demurrer if it fails to show a mutuality of indebtedness. 4. A bank cannot appropriate the deposits of a debtor in payment of his note held by it. 5. Failure to sue for a period of nine months after the right of action accrued is not a bar to the suit. 6. The adjudication of a plea as if demurred to, when no demurrer was filed, is not sufficient irregularity for reversing a judgment otherwise right, nor is it sufficient to allow an amendment of the pleadings. Judgment affirmed.

Cited: 13 Ark. 577; 14 id. 519; 46 id. 540.

BYRD v CONWAY (1843) 5 Ark. 436.

Mandamus, to compel state auditor to pay plaintiff his salary. Plaintiff was a bank visitor, to which office he was duly elected and qualified. He had fulfilled all the duties required of the office. The legislature, by special act, appropriated moneys "to pay officers appointed by the legislature to wind up the State Bank."

Ringo, C. J. 1. Plaintiff was entitled to his salary in like manner as other public officers. The legislature unquestionably has the right to create such an office and fix a salary. 2. The special act of appropriation included and provided for plaintiff, even though he was not specifically mentioned. Mandamus granted.

Cited: 14 Ark. 700.

STATE v REAL ESTATE BANK (1844) 5 Ark. 595.

Quo warranto. Plea: Due incorporation. Replication setting up: 1, Suspension of payment in specie; 2, insolvency; 3, voluntary assignment of property; 4, hypothecation of state bonds and failure to pay interest thereon; 5, surrender of franchise. An act of the legislature provided a remedy in damages for a failure to pay in specie to a party entitled to demand it. The State continued to recognize the bank after the suspension of specie payment.

Lacy, J. 1. Quo warranto is the proper remedy. 2. Another remedy being provided, suspension of payment in specie does not work a forfeiture. 3. The State is estopped to insist on suspension as a cause of forfeiture. 4. The failure to pay interest on the bonds lays no ground of forfeiture in this case. 5. An allegation of surrender of franchises, not showing the acts wherein it consists, is insuffi-

cient. 6. The assignment operates as a forfeiture of the charter, and the State, by writ of quo warranto has the right to have that fact ascertained, and to seize the franchises into its own hands. Demurrer to the third replication was bad. No replication filed. Judgment of seizure pronounced.

Cited: 13 Ark. 570; 15 id. 318; 48 id. 324.

UNDERHILL v STATE BANK (1845) 6 Ark. 135.

Debt. Defendant was a public bank of which the state was sole incorporator. An act was passed January 31, 1843, providing for its liquidation and placing it in the hands of receivers. The act provided "that nothing in this act shall be so construed as to impair or destroy the corporate existence of the bank." Pleas: 1. That the bank was not a corporation at the beginning of the suit. 2. That the foregoing act destroyed its corporate existence. Demurrer. Sustained. Judgment for plaintiff. Error.

Oldham, J. 1. The Act of 1843 did not destroy the corporate existence of the bank. 2. Under the act all the powers originally possessed by the different boards of directors, subject to the terms of the act, vested in the receivers. Judgment affirmed.

BANK v CREASE (1845) 6 Ark. 292.

Debt on cashier's bond, for paying in specie out of bank funds his own and the salaries of other officers. An act of the legislature made these salaries payable in dollars. It is contended that they were payable in Arkansas bank paper. An act was passed in 1843 to liquidate the affairs of the bank, which left the directors and officers in full possession of the powers, privileges and rights conferred by the charter. The payment of these salaries was made in accordance with a resolution of the board of directors authorizing it. Under an Act of 1840 the directors had power to fix the salaries. Judgment for defendant. Error.

Maclin, C. J. 1. Under Act of 1840, the officers were entitled to payment of their salaries in specie. 2. The Act of 1843 did not affect or impair the private rights of any of the officers of the bank. 3. The directors did not exceed their authority in fixing the salaries, and the payment under their resolution was lawful. Judgment affirmed.

MURPHY v STATE BANK (1846) 7 Ark. 57.

Action on promissory note payable to the state bank. Pleas: 1, Nul tiel corporation; 2, that the notes were bills of credit, and unconstitutional; 3, that the note was payable and negotiable at the branch of plaintiff, and that the plaintiff had no interest in the note, as there was want of consideration moving between the parties. No delivery was made to the plaintiff. Demurrer. Sustained. Judgment for plaintiff. Error.

Johnson, C. J. 1. The branch bank had the power of discounting notes. There is nothing unconstitutional in the power thus conferred. 2. A delivery to the Branch Bank of the State of Arkansas, at Fayetteville, was tantamount to a delivery to the principal institution itself. Judgment affirmed.

Cited: 13 Ark. 51; 20 id. 206.

WALLACE v STATE BANK (1846) 7 Ark. 61.

Assumpsit on certificate of deposit, issued by a branch bank of the defendant, stating that the plaintiff had deposited therein certain notes issued by the defendant, and that the same were subject to his order on the return of this certificate. Plaintiff demanded payment in specie. Demurrer on the grounds: 1, That the defendant was not liable for the acts of its branch; 2, that the deposit was special. Sustained. Judgment for defendant. Error.

Johnson, C. J. 1. The act of the branch, in issuing certificates, was the act of the defendant. A bank and its branches constitute but one corporation. 2. The depositing of the bank's bills was a general deposit, and established the relationship of debtor and creditor. Plaintiff was therefore entitled to specie in the amount of his deposit. Judgment reversed.

Cited: 7 Ark. 390.

DUNCAN v BISCOE (1846) 7 Ark. 175.

Bill, to foreclose a mortgage. Defendants, in part payment for stock, subscribed for and issued, and as security to the state for money borrowed on said stock,

delivered mortgages. The stock was issued to Real Estate Bank. The bank made a general assignment to trustees, plaintiffs here. Demurrer for want of capacity to sue. Overruled. Decree for plaintiffs. Appeal.

Oldham, J. The plaintiffs have no interest in said mortgages. The bank held these mortgages merely as trustee for the state and bondholders. Decree reversed.

Cited: 11 Ark. 54, 114; 13 id. 578; 14 id. 518; 20 id. 91.

ADAMS v ROANE (1847) 7 Ark. 360.

Debt. The plaintiffs were trustees of the Real Estate Bank, and the note sued upon was given by Harris as principal and the other defendants as sureties. A state statute provided that any one liable as sureties on any bond or bill may, after action has accrued, by giving notice to the one having the right to commence suit, be exonerated from liability, if suit is not commenced within thirty days. Notice was given by one of the sureties to a clerk of the trustees who in turn notified one of the trustees. Suit was not commenced until thirty days thereafter. Judgment for plaintiffs. Appeal.

Johnson, C. J. It certainly cannot be contended that a service upon the clerk could operate as a notice to the trustees. The clerk cannot be said to have the right of action. There has been no service upon the trustees. Judgment affirmed.

Cited: 15 Ark. 135.

THE STATE BANK v JENKINS (1847) 7 Ark. 389.

Action on a promissory note. The note was payable to the "Branch of the Bank of the State of Arkansas at Fayetteville." The plaintiff alleged that it had been made payable to the Bank of the State of Arkansas by that description. The note itself was the only evidence advanced. Judgment for defendant. Error.

Oldham, J. 1. Promises and obligations purporting to be made by, or to, "the Branch of the Bank of Arkansas," may well be considered as having been made, by or to, the Bank of the State of Arkansas. 2. The note itself is evidence that it was made to the bank, and there is no necessity of showing that fact by other proof. The note read in evidence was sufficient to establish the issue on the part of the plaintiff. Judgment reversed.

McJUNKIN v THE STATE BANK (1847) 8 Ark. 61.

Injunction. M recovered judgment against the State Bank. The general assembly made an appropriation "to pay judgments that are or may be obtained against the State Bank, provided that all said judgments shall be paid through the state treasury, and not otherwise." There was no money in the state treasury, to meet the appropriation. Execution issued. To prevent a levy this bill was filed. Injunction ordered. Appeal.

Oldham, J. We cannot agree that the legislature designed depriving creditors of the bank of their legal rights of enforcing payment of their demands by execution, or to exempt the bank from the liability that it had incurred. Decree reversed.

WOODRUFF v ATTORNEY-GENERAL (1847) 8 Ark. 236.

Petition for mandamus to compel the attorney-general to receive the notes of the Bank of the State of Arkansas in satisfaction of a judgment due from the plaintiff to the state, under the provision of sec. 28 of the act incorporating the bank, which provided that the bills of the bank should be taken in satisfaction of debts due the state. This provision was repealed by the revenue law of 1845, which provided that nothing but funds should be accepted in payment of debts due the state. The plaintiff contended that this law impaired the obligation of a contract and was unconstitutional.

Johnson, C. J. The act by which the bank was created was nothing more than a grant of power for certain purposes specified, which was exclusively under the control of the legislature and subject to repeal at any time. The act relied upon was a mere gratuity, and liable to be revoked or withdrawn at any time. Judgment for defendant.

FERGUSON v STATE BANK (1848) 8 Ark. 416.

Debt. Defendant executed to plaintiff a note upon which R was surety. Subsequently a receiver was appointed for plaintiff. Defendant pleaded nul tiel corpo-

ration, to which a demurrer was sustained. A verified plea of nil debet was then interposed. Sec. 104 of ch. 116, Rev. Code provides that the plea of nil debet shall not put in issue the execution of a written instrument upon which the debt is founded, unless it be verified by affidavit. No proof was given that R signed the note, except that the signature resembled his. Defendant R pleaded that after the note became due plaintiff promised to give an extension of time upon defendant's giving additional security. The evidence did not show the acceptance of this security. The court charged the jury to find for plaintiff if it believed R signed the note. The court refused to instruct for defendant that the burden of establishing the execution of the notes by the parties was on the plaintiff; and that the delay in payment on the part of the bank released the securities. Judgment for plaintiff. Error.

Johnson, C. J. 1. The corporate existence of the State Bank was not destroyed by the appointment of a receiver. 2. The intention of sec. 104 was to throw the onus of proving a signature to be genuine upon the plaintiff. 3. The proof of R's signature was totally insufficient. 4. The defense of a surety that his principal has accepted other security and granted an extension of time without his consent is one of which a court of law may take cognizance. 5. The acceptance of the additional security is the essence of R's defense and must be clearly proved. Judgment reversed.

Cited: 20 Ark. 207.

BIZZELL v THE BANK OF THE STATE (1848) 8 Ark. 459.

Assumpsit. Plea: Non-assumpsit. Plaintiff sued defendant on a bill of exchange for \$1,100, drawn by S T in favor of E C, and accepted by defendant, payable to the U Bank. The declaration averred that E C indorsed the bill to A M, who then indorsed the same to the plaintiff. The plaintiff offered in evidence a bill or exchange, similar to that described in the declaration, with the additional indorsement of "J. H. Crease, Cash." It was proved that the plaintiff obtained title to the bill through a transfer from the cashier under a blank indorsement. Defendant set up, 1, variance, and 2, failure of plaintiff to fill up the indorsement. Judgment for plaintiff. Error.

Oldham, J. 1. If Crease was the cashier of the bank, his indorsement did not divest her legal interest in the bill of exchange, unless the indorsement was consummated by delivery to the indorsee. 2. When all the indorsements are in blank, the holder may make himself at his pleasure, the immediate indorsee of any one of them. Judgment affirmed.

BIZZELL v BREWER (1848) 9 Ark. 58.

Covenant. The defendant issued a bond, obligating himself to pay to plaintiff, on January 1, 1843, \$150 in current notes of the Bank of the State of Arkansas. The defendant showed that notes of the branches of the State Bank of Arkansas were current on January 1, 1843, but the court would not permit him to show what was the value of such notes until it was proved that the notes passed as money in the ordinary transactions of the country. Judgment for plaintiff. Error.

Johnson, C. J. 1. The bond was a promise to pay the sum specified in notes of the bank at their nominal value. 2. It was not necessary for defendant to show that the notes were passing at par or considered as cash in the ordinary transactions of the country. 3. It unquestionably devolved upon the plaintiff to show what such notes were actually worth in money, and, until he had made out his case by competent proof, he was not entitled to a judgment for any sum whatever. Judgment reversed.

Cited: 65 Ark. 75.

PAUP v DREW (1848) 9 Ark. 205.

Debt, on a bond given by defendant to the governor of the State of Arkansas for the purchase price of property. At the time the bond was executed, the charter of the State Bank made bills emitted by it legal tender for debts due the state. Thereafter, by the Act of 1845, that provision was repealed. The defendant pleaded tender in state bank notes. Demurrer. Sustained. Judgment for plaintiff. Error.

Johnson, C. J. The Act of 1845 was not unconstitutional as impairing the obligation of the contract in this case. The plea was bad. Judgment affirmed.

EX PARTE CARROLL (1849) 10 Ark. 38.

Where, under the Act of 1846, money was appropriated for the payment of officers of the State Bank, but the money thus appropriated and held by the State Bank was, by the Act of 1849, transferred to the treasury without making any appropriation for such claims, held, that the latter act repealed the former, and that under neither act would mandamus lie to compel the auditor to issue a warrant for the payment of a claim for salary as a State Bank officer.

CONWAY v ROANE (1849) 10 Ark. 242.

Action on a promissory note. The action was brought by the surviving original trustees of the Real Estate Bank. Three of the original trustees were dead. The note had been executed in favor of the bank and assigned by it to the trustees. Judgment by default for plaintiffs. Error, alleging defect of parties plaintiff.

Scott, J. In this case the record shows a suit by the plaintiffs as survivors of three others, then deceased. They derive their title to sue as such survivors from an assignment in writing, indorsed upon the bond, which is the foundation of the action, and make profert of this bond and of the indorsed assignment. Judgment affirmed.

CLARKE v BANK OF MISSISSIPPI (1850) 10 Ark. 516.

On a promissory note. Statute of Limitations pleaded. The plaintiff bank was a foreign corporation, and commenced suit shortly after three years from the maturity of the note. The statute provided that an action on a note be commenced within three years from its maturity, and also provided that if any person entitled to bring an action be under any disability, the statute shall not run until the disability be removed; and persons residing beyond the limits of the state at the passage of the act were given two years additional to commence the action. Only one cause of action set forth was barred when the act was passed. The plaintiff pleaded non-residence, and offered in evidence a book of the laws of Mississippi, not fully authenticated. Judgment for plaintiff. Error.

Scott, J. 1. A corporation created by and transacting business within a state is to be deemed an inhabitant of such state, and cannot migrate to another sovereignty. 2. Corporations are not embraced within the saving clauses of our Statute of Limitations relative to non-residents, and consequently the statute began to run from the date of maturity. 3. The plaintiff was a person beyond the limits of this state. The enactment in favor of persons residing beyond the limits of the state was not intended to revive causes of action that were at that time barred. Laws of other states purporting to be issued by authority are admissible. Judgment reversed.

Cited: 11 Ark. 377; 12 id. 602, 679; 17 id. 168.

WILSON v BISCOE (1850) 11 Ark. 44.

Action to foreclose a mortgage. The defendant subscribed for stock in the R Bank, and, to secure the stock and the payment of money borrowed, executed a mortgage to the bank, under the provision of the bank charter. Sec. 13 of the charter provided that all subscriptions of stock should be guaranteed by mortgages executed to the R Bank, and conditioned for the payment of all moneys received from the bank, and for the final payment of the bonds of the state. Sec. 14 provided that, for the guaranteeing of the bonds to be emitted by the state, all the mortgages executed for stock are hereby transferred to the state and to the holders of the bonds issued by the state in virtue of this act. Sec. 17 provided that every stockholder should be entitled to a credit equal to one-half of the total amount of his shares. The bank became insolvent, and the plaintiffs were appointed trustees. The state bonds had not yet matured. The state and its bondholders were not made parties. Decree for plaintiffs. Appeal.

Wallace, J. 1. The charter must be construed without reference to the present condition of the bank. 2. The two conditions in the bond are separate and distinct, and secure a subsequent equity and security to the bank for loans as fully as if two distinct instruments had been executed. 3. Prior incumbrancers need not be made parties to the suit. 4. All incidental securities follow the debt and pass with it by assignment. Decree affirmed.

Cited: 11 Ark. 115, 145; 13 id. 578; 14 id. 518; 18 id. 440; 20 id. 92; 23 id. 308; 24 id. 321; 27 id. 671; 37 id. 495; 39 id. 277; 55 id. 278; 65 id. 199.

BISCOE v SNEED (1850) 11 Ark. 104.

Action on assignment of a note. Defendant gave the R Bank the promissory note in suit. Subsequently the R Bank made a general deed of assignment to plaintiffs as trustees, and the note passed without any indorsement into the plaintiffs' hands. Later the bank's charter was taken away by a judgment of this court. The note is past due and unpaid. Demurrer. Sustained. Bill dismissed. Appeal.

Johnson, C. J. 1. The deed of assignment did not, per se, convey the legal interest in the note, and the complainants cannot sue at law in their own names. 2. They cannot sue in the name of the bank, as it has experienced a civil death. 3. Since they are thus remediless at law, chancery has jurisdiction. Decree reversed.

Cited: 12 Ark. 76; 15 id. 318; 18 id. 565; 25 id. 44; 57 id. 443.

BISCOE v TUCKER (1850) 11 Ark. 145.

Bill to foreclose mortgage. Defendant subscribed for shares in the R Bank, and, as required by the bank charter, executed the mortgage to secure his subscription and any loans. His title to the land was not perfected, and therefore the directors allowed him to borrow on personal security. Long afterward he perfected his title. The directors then authorized a calculation of how much he owed and should pay before he could avail himself of a substitution. Though this calculation was made, defendant never paid the amount nor gave a new note. He, however, voted on his stock, though no certificate of stock was awarded him. Plaintiffs are trustees of the defunct R Bank. Bill dismissed. Appeal.

Walker, J. The loan to defendant was made as well on the security furnished by the mortgage to the bank as on the personal security. Decree reversed.

Cited: 14 Ark. 518.

FERGUSON v STATE BANK (1851) 11 Ark. 512.

Action, on a note held by the bank. R pleaded non est factum. Defendant F appeared but did not plead. The other defendants did not appear. Judgment for R with his costs, and against the other defendants. Error.

Walker, J. 1. The plea non est factum goes alone to the personal discharge of the defendant making it, and does not inure to the benefit of co-defendants, who have defaulted or made an unsuccessful plea. 2. The party successfully interposing a personal defense should have a judgment of discharge and his costs. Judgment should be in favor of the successful defendant and for the costs expended by him, and against the other defendants, and the costs expended by plaintiff. Judgment affirmed.

Cited: 13 Ark. 218; 14 id. 31; 15 id. 517; 16 id. 306, 334; 17 id. 655; 36 id. 479, 494.

BISCOE v MOORE, ADM'R (1851) 12 Ark. 77.

Debt on a note made by defendant in favor of I, plaintiff's intestate. It was stipulated between the parties to the note that I should purchase Arkansas money with the note, and apply it to the payment of a judgment owned by the intestate; or that defendant should have privilege of paying it in Arkansas money at its value. Defendant failed to prove tender of payment. Judgment for plaintiff. Appeal.

Walker, J. 1. The payment of the note was a condition precedent to the application of the funds. 2. To avail himself of the stipulation, he should have averred a tender of Arkansas bank paper equal in value and made in apt time. 3. An administrator may take a note for a debt due his intestate either in his individual or representative capacity. Judgment affirmed.

THE STATE v CURRAN (1851) 12 Ark. 321.

Bill in equity. The State Bank being insolvent, was authorized by the legislature to liquidate its affairs, and the state was made a preferred creditor. Complainant sought to have transfers, made after this act, set aside. Demurrer. Overruled. Decree for complainant. Appeal.

Scott, J. 1. The state may be sued either in law or chancery, as well for
Vol. I—4

property as for money demands. 2. An act to liquidate the affairs of a state bank is constitutional. 3. The state may make itself a preferred creditor of a state bank, and may provide all necessary provisions for terminating the affairs of such a bank. Decree reversed.

Cited: 13 Ark. 267; 14 id. 406; 15 id. 18; 58 id. 445. s. c. 15 id. 21.

BANK OF TENNESSEE v ARMSTRONG (1852) 12 Ark. 602.

Action on a foreign judgment. The bank, a foreign corporation, obtained judgment in a foreign state in 1840. In 1847 it sued on that judgment in Arkansas, where, by Act of 1844, the period of limitations was extended two years for persons out of the state. The bank failed to plead this statute. Defendant pleaded the five year Statute of Limitations. Plaintiff filed a replication alleging it was no bar. Judgment for defendant. Error.

Johnson, C. J. 1. Foreign banking corporations are embraced in the Act of 1844. 2. To take advantage of the Statute of Limitations the bank should set it up, in reply to defendant's plea of the Statute of Limitations. 3. A replication must present an issue of fact, and not one of law. Judgment affirmed.

WOODRUFF v TRAPNELL (1852) 12 Ark. 640.

Attachment, for contempt. Mandamus issued to compel plaintiff to accept payment of a judgment in state bank notes, which had just been declared valid. Defendant offered to pay interest to the day of original tender, and plaintiff claimed interest to date, and defendant asked that attachment issue for plaintiff's contempt in failing to obey the writ of mandamus.

Walker, J. The tender was valid. Interest and costs ceased at the time of the original tender. An alias writ issued.

Cited: 33 Ark. 453; 34 id. 178.

WOODRUFF v TRAPNELL (1852) 12 Ark. 811.

Petition for alternative writ of mandamus, to compel plaintiff to receive payment of the judgment in notes of the state bank. Defense: That the section of the charter making such notes legal tender had been repealed. Demurrer: That the repealing law was unconstitutional. Demurrer overruled. Error.

McLean, J. 1. The obligation of the state to accept the notes of the bank as legal tender was a contract between the state, and the holders of the notes. 2. The repeal of that clause was contrary to the Constitution of the United States. Judgment reversed.

Cited: 19 Ark. 285; af'd 10 How. U. S. 190.

CONWAY v STATE BANK (1852) 13 Ark. 48.

Debt. A writ issued against one defendant in one county and against the others in another county. Motion to quash the writs on the ground that the declaration did not show that defendants resided out of the county where the suit was commenced, and were issued contrary to law. Motion overruled. Plaintiff, without producing the bank's book, proved that defendant admitted the correctness of an entry, when it was shown him. Judgment for plaintiff. Error.

Walker, J. 1. An entry made of a payment in part discharge of a note executed to the bank may be proved by parol evidence, without accounting for the non-production of the record. 2. The motion to quash the writs was properly overruled. Judgment affirmed.

Cited: 14 Ark. 114, 165, 177, 203.

RINGO v BISCOE (1853) 13 Ark. 563.

Bill in equity. Complainant sought to pay a debt due the State Bank, by giving the trustees, under an assignment by the bank, certain bank notes he had, if they would allow him 10 per cent damages from the date of the note, or from the time of the suspension of payment by the bank. The charter gave 10 per cent damages if the bank suspended. Decree for complainant for 10 per cent from time of demand. Appeal.

Watkins, J. 1. A bank, unless restricted by its charter or the insolvent laws, may make a bona fide assignment of its property for the payment of its debts. 2. The holder of notes is entitled to 6 per cent interest thereon from the time of demand upon the trustees, and not from the time of general suspension of payment by the bank or from the date of the note; and the holder is entitled to 10 per cent of the amount of the notes additional damages. 3. Any holder of notes of the bank can follow the assets of the bank into the hands of the trustees. 4. The charter provision was in the nature of a security. Decree affirmed.

Cited: 13 Ark. 592; 21 id. 89; 22 id. 444; 28 id. 84; 59 id. 574.

STATE BANK v BOZEMAN (1853) 13 Ark. 631.

Bill to enjoin collection of a judgment. Complainant and R were sureties on a note. R alone was surety on another note held by the bank. The bank released R and applied the money paid by him to the note on which complainant was not surety. The bank recovered at law on the note on which both were sureties. Complainant sought to make use of R's release. Certain of the sureties were not made parties to the action. Decreed that complainant pay half the note, on which he and R were sureties. Appeal.

Watkins, J. 1. The release of R released one half of each note, and complainant was liable for the other half. 2. Relief cannot be given in this case, because all the interested parties were not parties to the bill. Decree affirmed.

PIKE v STATE BANK (1854) 14 Ark. 403.

Bill to enjoin a judgment at law rendered against plaintiffs in favor of the bank. C made a note to the bank with the plaintiffs as sureties. C died insolvent. At the time of his death he was a member of the state senate, and there was due him a sum of money as such. The plaintiffs notified the state auditor to retain a sufficient sum to pay the note, as the debt, being due the State Bank, it was also due the state. The general assembly, by an act, authorized G to receive the money due C, and, after paying his expenses at the legislature, to pay the residue to his administrator. Decree for defendants. Appeal.

Watkins, C. J. The debt was not due the state. The state could not appropriate so much of C's assets as would pay his note and that of his sureties. If the plaintiffs were creditors of C's estate by having paid this debt, they would have the right, in common with other creditors, and according to the classifications fixed by law, to a distributive share of his assets, including the money drawn by G. Decree affirmed.

DANLEY v PIKE (1854) 15 Ark. 141.

Mandamus. Defendant refused to accept bank notes of the State Bank of Arkansas in payment of taxes. Demurrer. Overruled. Judgment for relator. Appeal.

Scott, J. The bank notes of the Bank of the State of Arkansas are receivable for taxes due the State of Arkansas. Judgment affirmed.

Cited: 15 Ark. 183; 20 id. 286.

CREASE v DANLEY (1854) 15 Ark. 183.

The facts in this case are similar to the case of Woodruff v Trapnell (12 Ark. 811, affirmed in 10 How., U. S. 190.)

Hempstead, J. Bank notes of the Bank of the State of Arkansas are receivable for taxes due the State of Arkansas. Judgment affirmed.

STATE BANK v CRISWELL (1854) 15 Ark. 230.

On promissory note, against maker. The note was in due course indorsed to plaintiff. The defendant set up that the plaintiff had no authority to deal in such instruments unless they were received by the plaintiff as collateral security to secure some pre-existing debt due the plaintiff. Demurrer. Overruled. Plaintiff refused to answer. The bank charter authorized the bank to "deal in bullion, gold and silver coin, promissory notes, mortgages, or any collateral security." Judgment for defendant. Appeal.

Scott, J. The bank charter expressly authorized the bank to deal in promissory notes. Indeed, such a transaction would have been within general banking powers without the aid of such an explicit provision. Judgment reversed.

EX PARTE THE STATE AND THE STATE BANK (1854) 15 Ark. 263.

Mandamus, to compel the circuit judge to issue an injunction. The State bought the land on an execution against the State Bank, but did not pay for it, though willing to do so. A deed was given to the State. The sheriff re-sold the property. The bank made the State complainant in a suit against the sheriff, but refused to verify the bill or give security for costs.

Walker, J. 1. Two complainants with distinct and several interests cannot sue together as such, or where one has no interest whatever. 2. The Bank of the State of Arkansas is required to verify the allegations of its bill for an injunction, and to give bond, like other suitors, and can derive no aid by making the State a party complainant. Application denied.

MAGRUDER v THE STATE BANK (1856) 18 Ark. 9.

Bill to foreclose mortgage. P, being indebted to the defendant on renewal notes, arranged with the plaintiffs, receivers of the bank, to accept a new note for the amount of the old notes plus the interest, secured by a mortgage of the defendant. On this agreement the receivers gave up other securities of possibly more value and extended the note for ten years. The statute permitted the receivers, where the security was doubtful, to obtain additional security, to extend the time of payment not over two years, and to take mortgages, and generally, in case of doubtful or insolvent debtors, to pursue such course as their judgment might dictate. The defendant contended that the charge of interest on the renewal notes was usurious. Decree for plaintiffs. Appeal.

English, C. J. 1. To charge interest upon the face of a renewal note, taken for an old note plus interest, is not usurious. 2. The agreement to extend the time of payment for P was a valid consideration to the defendant. 3. The provisions of the statute as to time, are directory, and a departure from them does not make the contract null and void. Decree affirmed.

STATE v BANK OF WASHINGTON (1857) 18 Ark. 554.

Covenant on state bonds. Defendant pleaded: 1. Nul tiel corporation. 2. That no demand of interest had been made. The charter of the plaintiff had expired before the bringing of this suit, but had been extended and certain trustees authorized to collect the assets of the bank. The court instructed the jury that if it appeared that there was such a corporation as the plaintiff still in existence for the purposes of this suit, they must find for the plaintiff on the plea of nul tiel corporation, and that it was sufficient evidence of that fact that the trustees were authorized to sue in the name of the bank, notwithstanding that its charter had expired; that in case the jury found the breaches and issues for the plaintiff, to allow interest on the interest found due on the bonds, semi-annually from the times that each instalment of interest should have been paid to the date of trial. The court refused to instruct the jury that a demand of the interest on the bonds was necessary to be made at the place where payment of the interest was to be made. Judgment for plaintiff. Error.

Hanley, J. 1. The bank was so far a corporation as to make it competent on the part of the trustees to sue in the corporate name, notwithstanding the expiration of the charter. 2. No obligation is imposed on the State by the terms of the bonds to pay interest on interest, and the State is not liable for interest in any case unless by express agreement. 3. No demand of either principal or interest was necessary to fix the liability of the State on the bonds. 4. If there are several pleas setting up the same defense, the court may require defendant to elect on which he will rely. The court has power to strike out the other pleas only after allowing an election. 5. The general deed of assignment did not invest the trustees with the legal title to bonds so as to authorize suits in their own names. Judgment reversed.

FAGAN v STILLWELL (1857) 19 Ark. 282.

Mandamus. The Bank of the State, having recovered a judgment against plaintiff, he tendered the receiver of the bank the full amount of the judgment

in overdue coupons of the bonds of the state, issued to raise the capital of the bank, and of the Real Estate Bank. The receiver refused to accept them. To an alternative writ of mandamus, the receiver responded that the judgment was recovered on a written obligation for \$400, which was assigned to the bank as an obligation payable in specie. Demurrer to response. Sustained. Peremptory mandamus against receiver. Appeal.

English, C. J. Debts due to the Bank of the State may be discharged in the bonds of the state, or in the interest due thereon, as evidenced by coupons. The bank is obliged by law to receive her own notes and bonds of the state in payment of debts due to her. Judgment affirmed.

Cited: 21 Ark. 92.

THURSTON v PEAY (1860) 21 Ark. 85.

Debt. Agreed case. The plaintiff, as receiver in chancery of the Real Estate Bank, brought an action for debt against the defendant and others on their bond in the sum of \$400. The payees in the bond were the sole surviving trustees of the bank under a deed of assignment, and as such were owners of a tract of land in C County, which they sold to the defendant, who paid the whole price except the amount sued for in this action. The plaintiff was the receiver of the bank and the successor of the said trustees, and the bond was assigned to him. While the plaintiff as receiver held the obligation, the defendant tendered, in over-due coupons, detached in his presence from bonds issued by the State of Arkansas to the Real Estate Bank, the entire amount of principal and interest due on the obligation sued on. The plaintiff refused to accept the tender, or to allow payment otherwise than in gold and silver. Judgment for plaintiff. Appeal.

English, C. J. The bank being bound to pay the interest on the bonds, it was competent for the legislature, under its power, to regulate the law of setoff, and to make the interest due on the bonds as evidenced by the coupons attached receivable in payment of debts due the bank. The parties are presumed to have contracted with reference to existing laws. Judgment reversed.

Cited: 21 Ark. 103; 25 id. 265; 34 id. 274.

PEAY, RECEIVER v RAMSEY (1860) 21 Ark. 91.

Debt on a bond which constituted a part of the assets of the Real Estate Bank. The defendants pleaded tender before the suit in "bonds of the State of Arkansas, issued by the state for the benefit of the Bank of the State." Plaintiff demurred to the plea. Overruled. Judgment for defendant. Appeal.

English, J. 1. Debts due the Real Estate Bank do not belong to the state. 2. The bank was in no way bound for the payment of the bonds issued by the state for the benefit of the Bank of the State. Judgment reversed.

SESSIONS v PEAY (1860) 21 Ark. 100.

Mandamus to enforce the acceptance of state bonds as legal tender for debt. The relator and S executed to the residuary trustees of the Real Estate Bank two notes for \$10,000 each for a debt previously contracted. The assets of the bank were afterward placed in the hands of the defendant as receiver, who afterward recovered judgment on the notes. The sheriff was about to make a levy, when the relator tendered to him in payment of the judgment thirteen bonds of the state issued to the Real Estate Bank, with coupons attached, amounting to \$20,000, together with sufficient specie to cover the remainder of the judgment. This the sheriff refused to receive in payment, and responded that the notes were given as part consideration for a tract of land under an express agreement that said tract of land should be paid for at specie rates and prices. Demurrer to response. Overruled. Appeal.

English, C. J. 1. The land was sold at a specie valuation, and upon an express contract that the purchase money was to be paid in gold and silver, and not in bonds, coupons, or any other medium of payment. 2. If by law S had the privileges of paying a debt to the trustees in bonds or coupons, he had the right by contract to waive the privilege. Judgment affirmed.

Cited: 23 Ark. 41; 50 id. 395.

WHITNEY v PEAY (1862) 24 Ark. 22.

Debt. The State of Arkansas issued to the Real Estate Bank 500 bonds for \$1,000 each, to be sold at par. The agents of the bank hypothecated them to

the North American Trust and Banking Company for less than their par value, and the money advanced was appropriated by the bank. The trust company transferred them to H for an advance upon the amount for which they were pledged. Afterward, in a proceeding against the trust company for insolvency, the debt due from the bank to this company was sold to the complainant. The prayer of the bill was that a decree issue against the defendant as receiver, for the amount of the debt, and that the administrators of H, the holders of the bonds, be required to litigate their claim to the bonds. Bill dismissed. Appeal.

English, C. J. 1. The bank having appropriated the money advanced, is bound in equity to repay it upon a re-delivery of the bonds. 2. When the trust company transferred the bonds to H for a larger sum than it advanced to the bank, the debt due to the company from the bank, resting upon the pledge, passed to H. After this transfer the trust company could not have compelled the bank to pay to it the money advanced, because the company had parted with the bonds. The complainant is in no better condition than the trust company. Decree affirmed.

Cited: 34 Ark. 274.

CHAPMAN, ADM'R'X v STATE OF ARKANSAS (1882) 39 Ark. 274.

Foreclosure of stock mortgage, and to charge mortgaged lands with payment of a deficiency. S's intestate bought stock in Real Estate Bank, and gave as security, for part of price of stock unpaid, a mortgage on certain land. He gave another mortgage on this stock for moneys advanced by the Real Estate Bank. There had been a foreclosure of the mortgage given for moneys advanced. The property was purchased by defendant's intestate. There were two conditions in each of the mortgages—one as to payment of the bond, the other as to payment of the moneys advanced on the shares of stock. The state had a lien on the mortgage securities. Decree for plaintiff. Appeal.

Howard, S. J. The mortgage conditions are the same as separate instruments; the former, being prior in time and equity, could not therefore be extinguished by a sale under a decree for the satisfaction of the second. Judgment affirmed.

GERMAN BANK v HIMSTEDT (1883) 42 Ark. 62.

Attachment. Plaintiff brought an action before a justice of the peace against F M and E M, his wife, and caused the bank to be summoned as garnishee. The bank answered that it held no money belonging to F M, but had a certain sum deposited by E M. Plaintiff discontinued the action as to her, and the bank paid her the amount standing to her credit. The attachment was then dissolved. On appeal to the circuit court, the attachment was sustained and judgment rendered against F M. The plaintiff then took issue to the answer of the garnishee. The court found that as the money in the bank had not been scheduled as the separate property of E M, it was liable for the husband's debts. The bank was then ordered to pay the amount of the plaintiff's debt and costs into court. Appeal.

Smith, J. 1. There is no legal presumption with regard to money and securities transferable by delivery, in possession of the wife, that they belong to the husband. 2. A bank on receiving the money of a depositor is bound to pay it to him or his order, and cannot refuse payment on the ground that it is the property of another. Judgment reversed.

Cited: 46 Ark. 538.

HIMSTEDT v GERMAN BANK (1885) 46 Ark. 537.

Attachment. H had sued M and E, his wife, for a debt due by the husband; and had taken out an attachment and summoned the bank as garnishee. The bank denied any indebtedness to M, but disclosed that it held \$75, which had been deposited by E in her own name. The plaintiff discontinued his action against the wife, and the bank paid her the amount standing to her credit. Judgment was rendered against the defendant, the attachment sustained, and the garnishee ordered to pay the amount of the plaintiff's debt and costs into court. On appeal this order was reversed. On second trial the evidence showed that M, being indebted to H, had sold his real estate, and that the purchase price had been paid to his wife and deposited in the bank. Judgment for defendant. Appeal.

Smith, J. The issue was whether the bank owed anything to M. A general deposit is not a contract of bailment in which the title to the thing deposited remains with the owner. But the title to the money deposited passes to the bank and the bank becomes the debtor of the depositor. The debt which the bank owed was to M's wife, not to M himself. The question whether the gift to the

wife was fraudulent cannot be tried in a garnishment proceeding. It did not concern the bank that M chose to sell his property and turn the proceeds over to his wife. Judgment affirmed.

Cited: 48 Ark. 273.

OLIPHANT v BANK OF COMMERCE (1895) 60 Ark. 198.

Mandamus to compel the Bank of Commerce to transfer to the plaintiff two hundred shares of its stock. R and S each owned one hundred shares of the stock; a judgment had been recovered against them, execution levied on the stock, and the stock sold to the plaintiff under the execution. The bank then refused to transfer the stock to the plaintiffs, claiming a lien on it by reason of the indebtedness of R and S, which existed before the execution was issued. Sec. 971 of Mansfield's Digest required that a certificate of the transfer of any stock should be filed with the county clerk. Judgment for defendant. Appeal.

Hughes, J. The bank's lien existed before the execution lien under which the plaintiff bought. The only right they acquired by the purchase of the stock was subsequent and subject to the right of the bank to satisfy its lien upon the stock. The bank was not required to give notice of its lien in its certificate as to its condition. Judgment affirmed.

Cited: 68 Ark. 238.

BANK OF NEWPORT v COOK (1895) 60 Ark. 288.

Foreclosure of mortgage secured by note. Plea: Usury. A promissory note, payable in twelve months from its date, was discounted and the highest legal rate of interest was taken out in advance. Judgment for defendant. Appeal.

Hughes, J. The taking or reserving of the highest legal rate of interest in advance on negotiable paper having twelve months to run is not usurious. Judgment reversed.

Cited: 64 Ark. 296.

CITY ELEC. ST. RY. CO. v FIRST NAT. EXCH. BANK (1896) 62 Ark. 33.

On promissory note. Note was made by the defendant, payable to B, and indorsed by him before maturity for value, and delivered to A Bank and by it indorsed and delivered to the plaintiff. Answer, that the note was excuted by the president and secretary of the defendant without authority from its board of directors, and that the charter and by-laws of the corporation gave no such authority. Demurrer to answer. Sustained. Judgment for plaintiff. Appeal.

Wood, J. The president and secretary were not empowered to bind the bank by their signature to commercial paper unless the authority was expressly conferred by the charter or given by the board of directors. They had no inherent power to execute negotiable notes in the name of the corporation. Such authority is not presumed as matter of law. Judgment reversed.

Cited: 67 Ark. 551.

COCKRILL v JOYCE (1896) 62 Ark. 216.

Petition in Chancery. J placed sixteen promissory notes in the First National Bank either for collection or as collateral for indebtedness due by him to the bank. He afterward made an assignment of all its notes and accounts to W in trust for creditors. On the application of the bank, which was a preferred creditor in the assignment, W was appointed receiver of the property conveyed by the assignment. Subsequently the receiver sought bids for the property, and the plaintiff made a bid for the stock of goods, real estate and notes of J, which bid was accepted; but the receiver refused to turn over the notes in question. He denied that the notes were ever in his hands or that he was ordered to sell the same, and alleged that the notes were placed with the bank as collateral security to secure an indebtedness due the bank from J. The chancellor found that the notes were deposited for collection, and that the bank, having been preferred in the assignment, and having elected to take under the assignment, and having consented to the confirmation of the sale to J, was estopped to claim the notes, and directed the receiver to deliver the notes to J. Appeal.

Riddick, J. 1. We think that the bank had a lien upon the notes for the payment of the balance due from J without regard to whether there was an express agreement for a lien or not. 2. The notes were in the custody of the bank at the time of the assignment, and it in no way affected the right of the bank to hold

the notes. 3. The assignment conveyed nothing more than the right to redeem the notes; and the bank, by consenting to the confirmation of the sale, is not estopped from asserting its claim to property not in the possession of the receiver and not embraced in his sale. Judgment reversed.

GROW v COCKRILL (1897) 63 Ark. 418.

Action to charge a national bank as principal, on the ground that its officers conspired to defraud plaintiff. The plaintiff had an account with the National Bank, and the president and cashier agreed with the plaintiff to loan her money to B, the loan to be secured by stock of the bank. The cashier brought a note to B and stated that the plaintiff had some money to loan and asked B to make the note. B made the note and afterward failed. The bank also failed, and defendant was sued as receiver. The defendant contended that the president and cashier had no power to bind the bank, and that a national bank had no power to act as broker. Judgment for defendant. Appeal.

Bunn, C. J. 1. The services that the cashier rendered for the plaintiff were gratuitous. 2. By its charter, the bank had no authority to transact such business. The business of a broker is not a business in which a national bank can lawfully engage. Judgment affirmed.

Cited: 65 Ark. 546.

BANK OF COMMERCE v WRIGHT (1897) 63 Ark. 604.

On promissory note. The plaintiff held the note of R & S, who transferred to the plaintiff before maturity, as collateral security, two notes of the defendant. These notes were transferred to the plaintiff, in lieu of notes of J E B, which the plaintiff held as collateral to the debt of R & S. R & S obtained these notes of J E B from the plaintiff before the time when defendant's notes were deposited with it, for the purpose of collecting them and paying the proceeds to the plaintiff. They neglected to pay over the proceeds. The notes of the defendant were accommodation notes, and he received no consideration. The court refused to instruct the jury that if plaintiff had no notice and defendant was an accommodation maker, then judgment should be for plaintiff; and it was no defense that the notes were diverted. Judgment for defendant. Appeal.

Hughes, J. 1. There was a sufficient consideration moving from the bank to R & S to fix the liability of the defendant to the bank and to constitute the bank a bona fide holder for value. 2. A pre-existing debt is not a valuable consideration of an accommodation note. 3. It was error to refuse to instruct as requested. Judgment reversed.

LANIER v UNION MORTGAGE & TRUST CO. (1897) 64 Ark. 39.

Promissory note. Defendant executed five notes to the Real Estate Mortgage Co. The consideration of these notes was used to pay certain other debts of defendant. He also executed seven other notes to F W for money and supplies advanced to him by the Corbin Banking Company. It was contended that the five notes to the Real Estate Mortgage Co. were usurious, in that they were given to take up other notes that were usurious; and that the seven notes to F W were void for usury, first, because they bore interest at the highest lawful rate from their dates, while the money for which they were given was not paid to the borrower until long afterward; and secondly, because, instead of paying to the borrower the amount of his loans in money, the bank furnished him with supplies upon which it realized more than 10 per cent per annum for the use of the money. The notes were transferred to the plaintiff by the Real Estate Mortgage Co. before maturity and for value. Judgment for plaintiff. Appeal.

Battle, J. As to the five notes to the Real Estate Mortgage Company, these notes cannot be affected by usury by reason of the fact that part of their consideration was used to pay a usurious debt. The two transactions are distinct; the considerations are different, and the one is not affected by the usury of the other. As to the notes executed to F W, there was no agreement to pay more than 10 per cent. If there was any failure to furnish the money or supplies it was a partial failure of consideration and no usury. Charging the plaintiff with profits on supplies furnished in addition to 10 per cent per annum on the amount paid for the same did not stamp the taint of usury on the notes. Judgment affirmed.

SCANLAND v PORTER (1897) 64 Ark. 470.

Certificate of deposit. The certificate was issued by the Arkansas County Bank and indorsed in blank by the defendants before delivery to the plaintiff, who seeks to hold the defendants as makers. Judgment for defendants. Appeal.

Hughes, J. This certificate is the equivalent of a promissory note. When a promissory note, made payable to a particular person or order, is first indorsed by a third person, without any words to express the nature of his undertaking, he is considered as a joint promisor with the other signers. Judgment reversed.

CITY ELECTRIC STREET RY. CO. v FIRST NAT. BANK (1898) 65 Ark. 543.

On promissory note. K, as trustee, sued defendant on an account which A had against the company, which account A had assigned to K, as collateral security for his indebtedness to the First Nat. Bank. A was president of the bank and payee of the notes. Another suit was brought against the same defendant by the receiver of the bank for an account claimed to be due on several overdrafts and promissory notes. These suits were consolidated. Defendant answered denying its liability on these claims, and averred that the receiver of the bank was not the holder or owner of the notes embraced in his suit, and asked for judgment on a counter claim against the receiver for the proceeds of certain notes alleged to have been negotiated by the bank for the railway company. Judgment for plaintiff. Appeal.

McCain, Sp. J. The action of A in negotiating the notes was not the action of the bank. A cannot bind the bank by the negotiation in its name of notes in which he is payee, as his interest conflicts with that of the bank. Judgment affirmed.

MARTIN v ADAMS (1898) 66 Ark. 10.

Petition to charge lender with usury. The American Mortgage Co. was a foreign corporation organized to lend money on mortgage on farms in the United States, and had an agent, S, in New York City. The Corbin Banking Co. did a general banking business and were loan bankers. Plaintiff applied to C for a loan of \$4,500, agreeing to pay him \$900 for his services in securing the loan. C applied to the Banking Co., which applied to S, and he approved the loan. The Banking Co. then prepared a note for the amount, at 8 per cent interest, payable to the mortgage company, and a deed of trust in favor of S to secure the same. They also prepared five other notes aggregating \$900, payable to C, and a deed of trust in favor of D, cashier of the Banking Co., to secure these notes. The borrower executed the notes and the deeds. The Banking Co. forwarded the note for \$4,500 and the deed of trust to secure the loan to the Mortgage Co. in Scotland, which approved the loan and forwarded the money to the Banking Co. C transferred the five notes and mortgage to the Banking Co. which honored C's drafts for \$4,500 and which paid him \$90 for his services. The Mortgage Co. had no notice or knowledge of the five notes or deed of trust to secure them. The borrower fell into arrears, and S prepared to foreclose the mortgage in his favor on her lands. Plaintiff brought this action to restrain S and to cancel the note for \$4,500 and the mortgage, alleging that the transaction with C was a device to evade the usury laws, so that the total interest amounted to 12 per cent per annum. The court below held the loan to be usurious and canceled the notes and the mortgages. Appeal.

Battle, J. Two contracts were made by Mrs. Adams, one with Calhoun to pay him \$900 to secure a loan, the other with the Mortgage Co. for the loan. The Mortgage Co. could not ratify the former contract because it was not made in its name or for its benefit. It was a separate and distinct contract, based upon a different consideration. Calhoun, or the Banking Co., in making it, did not assume to act for the Mortgage Co. Hence the Mortgage Co., in ratifying the latter, did not ratify the former and make it a part of the latter. Decree reversed.

MCLILROY BANKING CO. v DICKSON (1899) 66 Ark. 327.

Bill in equity against the widow, heir and executrix of a deceased cashier of the plaintiff bank and against his bondsman, to subject his property to the satisfaction of a decree sought in this suit. The deceased owed the bank in his lifetime over \$18,000, shortage in his account. The decree was partly for plaintiff, partly for defendants, and both parties appealed.

Bunn, C. J. 1. Claims against the estate of a deceased person, should be authenticated by an affidavit that the claims are just and have not been paid. The affidavit is necessary to authenticate the claim for a defalcation like the one in suit. 2. There was no necessity to authenticate the claim in order to subject the stock of the bank owned by the deceased to the payment of the debt pro tanto. 3. Some of the money went to build a house on homestead property. The homestead cannot be reached and made subject to an overdraft on the bank. 4. The office of cashier was an annual one. At the end of the first year, the directors selected the cashier to succeed himself, but failed to exact the usual bond for the future term. The old bond of the previous year did not cover the cashier's official conduct during the new term. The election for the new term ended the first term. Decree affirmed.

EUCLID AVE. NAT. BANK v JUDKINS (1899) 66 Ark. 486.

Bill to set aside a conveyance of land as fraudulent against creditors. The plaintiff bank, on June 16, 1890, obtained a judgment against the defendant and others for \$1,719.54. On March 4, 1891, defendant executed the conveyance in question, without consideration, to defendant Townsend. He had no other property subject to execution. A demurrer to the complaint was sustained. Judgment for defendant. Appeal.

Wood, J. 1. Under the Act of March 31, 1887, providing that in suits to set aside fraudulent conveyance it shall not be necessary for the plaintiff to obtain judgment at law in order to prove insolvency, but insolvency may be proved by any competent testimony, the design was not to do away with the necessity of showing insolvency, but to broaden the methods of proving it. 2. Sec. 3,034 (Sand. & H. Dig.) provides that "on a judgment or decree against several, the execution must be joint." In this case the plaintiff's judgment was against other persons as well as against defendant. They appear as joint principals. The complaint does not allege the insolvency of these joint judgment debtors with defendant. Herein it fails to show an occasion for the interposition of a court of equity. Judgment affirmed.

DANIEL v ST. LOUIS NAT. BANK (1899) 67 Ark. 223.

On promissory note. The bank sued Daniel on a promissory note made by him to the order of the Bank of Mammoth Springs. The plaintiff was an indorsee, and forwarded the note to the Bank of Mammoth Springs for collection. Plea of payment. Judgment for plaintiff. Appeal.

Hughes, J. Until the note was sent to the Bank of Mammoth Springs for collection it was not the agent to receive payment for the St. Louis Bank, but it was its agent for collection after the receipt of the note; and, if after its receipt for collection, the Bank of Mammoth Springs had \$600 of Daniel's money, which he had directed to be paid on this note, and charged up to Daniel the amount and credited the St. Louis Bank with the amount in the usual way of business between the two banks as correspondents, we are of opinion that this constituted payment by Daniel to the St. Louis Bank. Judgment reversed.

AUTEN v MANISTEE NAT. BANK (1899) 67 Ark. 243.

Action on two promissory notes, one made by X, payable to the First National Bank of Little Rock, at its office there, and by that bank indorsed to the plaintiff bank. This note was duly presented for payment and protested. The second note was made by A, payable to B, for \$4,000 at the First National Bank of Little Rock, and indorsed to that bank, which indorsed it to plaintiff. In due time it was sent to the First National Bank for collection. The latter bank thus became the agent of plaintiff to collect the note, although liable thereon as the immediate indorser to plaintiff. The First National Bank, defendant below and appellant here, after a delay of twelve or fifteen days, returned the note to plaintiff with notice of its non-payment. Judgment for plaintiff. Appeal.

Bunn, C. J. 1. The question here (on the second note) is one between the owner of a note and an immediate indorser. The agency of the latter is only incidentally involved. This indorser claims to be discharged because of the non-protest of the note, claiming that it was not responsible for the failure to make demand and protest. It is not sued for such failure, but as an indorser. It would seem to be a useless procedure to notify one who ought to have made the demand. The delinquent agent ought not to be heard to plead his own failure to do his as-

sumed duty as agent. 2. The next question is, whether or not the Little Rock Bank is bound for the acts of its cashier in negotiating the notes. To parties dealing in good faith, the cashier of a national bank is the duly authorized agent of the bank to make such an indorsement for the bank, and the defendant bank would not be relieved from liability by reason of an improper or fraudulent indorsement made by the cashier, unless the plaintiff bank had notice of such bad conduct or dishonest dealing of the cashier with his own bank. 3. The federal examiner was in possession of the insolvent (defendant) bank. There was no other person upon whom to make the demand at the place appointed in the note. Judgment affirmed.

FARMERS & MECHANICS SAV. CO. v BAZORE (1899) 67 Ark. 252.

Bill in equity to cancel a deed of trust securing a promissory note made by Wilson and Bazore to the defendant, a banking company, on the ground of usury. It was a building and loan contract. The plaintiff, Wilson, took fifty shares of the company, which was organized under the laws of Missouri, borrowed \$2,500 at 6 per cent interest, and agreed to pay sixty months dues of \$50 each month and a premium of \$25 every month for sixty months, when the stock was to mature. The transaction was valid under the law of Missouri, and the main contention was whether the contract was a Missouri or an Arkansas contract. The note was dated at Springfield, Missouri, and payment was to be made there. The deed of trust was upon lands in Boone County, Arkansas. The court below decreed the note and mortgage to be usurious, and canceled them. Appeal.

Hughes, J. 1. The application was made to the company in Missouri, and was there accepted. The contention that the company's manager for the county (in Arkansas) wrote to the plaintiff, Wilson, the terms on which the company would make the loan, and plaintiff wrote him from the county that he accepted the proposition, does not make the contract an Arkansas one. 2. The mortgage security was only an incident to the debt. In a quit-claim deed for his interest in the property in suit, made by Bazore to Wilson, there was a provision that Wilson would pay the debts of the firm in which they were partners. Wilson cannot be heard to plead usury as to Bazore's half interest. Decree reversed.

BANK OF MALVERN v BURTIN (1900) 67 Ark. 426.

On promissory note, dated May 12, 1896, made by defendants to the plaintiff bank for \$349.50. The defense was usury. The note sued on was given for another which was for the same amount, and which was then in the bank. It was a renewal note, payable in ninety days, and \$16 interest was paid thereon in advance, which was in excess of legal interest. The note first executed was not usurious. The court, sitting as a jury, found for the defendants. Appeal.

Battle, J. The court, in its findings of fact, found "that the note sued on was the last of a series of notes given from time to time to secure a debt originally free from usury." This being true, and the renewals being void for usury, the plaintiff was entitled to sue and recover upon the first note. The complaint could have been amended by conforming it to the facts proved. Judgment reversed.

BOONE COUNTY BANK v BYRUM (1900) 68 Ark. 71.

Claim by sureties to subrogation. The sheriff of each county was ex-officio collector of taxes. In this case he collected taxes and deposited them in the Boone County Bank. The bank, knowing the title of the state to the money, appropriated a portion of it to pay an individual debt of the collector. The sureties satisfied the demand of the state, and claimed to be subrogated to its rights as against the bank. Judgment in their favor and the bank appealed.

Battle, J. The sureties, upon payment of the amount due the state on account of the default of their principal, became entitled to be subrogated to the right the state had to the sum in controversy. Those of the sureties who failed to appear and ask for relief are not entitled to it. Judgment affirmed.

Cited: 69 Ark. 48.

SPRINGFIELD WAGON CO. v BANK OF BATESVILLE (1900) 68 Ark. 234.

Mandamus to compel transfer of stock. H owned shares of stock in the Bank of Batesville. He pledged them to X, and also became indebted to the bank. The plaintiff, the Wagon Co., obtained a judgment against H, levied on the stock, by

giving notice to the officers of the bank, sold the shares, and purchased them at the sale. The bank refused to transfer the stock on the books of the bank until the claim of X was satisfied, and also claimed a lien on the shares because of the debt of H to the bank. This action was then brought for a mandamus to compel the officers of the bank to transfer the stock on its books. The petition was dismissed. Appeal.

Riddick, J. The ruling of the circuit court was correct. The bank had a lien on the stock for its debt. The Wagon Co. had notice of the bank's claim and lien before it purchased the stock, and its purchase was subject to that lien. The liens of both parties (that of the bank and that of the pledgee) were prior in point of time, and were superior to that of the Wagon Co. Judgment affirmed.

O'LEARY BROS. v ABELES (1900) 68 Ark. 259.

Action on an account. Plea of payment. Defendant mailed to plaintiff his check, for the amount of the claim on the First National Bank of Little Rock. Plaintiff deposited it with the Iron City National Bank, of Pittsburgh, Pa., for collection. The latter bank sent the check to the drawee bank by mail for collection. The Pittsburgh bank received from the drawee in payment a draft on the Southern National Bank of the same city. The draft was returned to the Pittsburgh bank protested and unpaid, the drawee bank having failed. Defendant was a director in the First National Bank of Little Rock. Judgment for defendant. Appeal.

Wood, J. 1. When the holder of a check delivers it to a bank for collection and the bank sends the check by mail to the drawee, who lives at a distance, and the drawee, upon receipt of the check, having money on deposit to the credit of the drawer, indorses the check "paid," and delivers it to the drawer, the check, as between the payee or holder and the drawer, is paid. 2. Defendant was not liable because of his being a director in the drawee bank. Judgment affirmed.

BINGHAMPTON TRUST CO. v AUTEN (1900) 68 Ark. 294.

On promissory note, indorsed by the First National Bank of Little Rock to plaintiff, a New York corporation. The note had been discounted by the Little Rock bank, and forwarded to the plaintiff for purchase or discount. The note was so purchased or discounted, a discount of 7 per cent being deducted from the face of the note. The complaint alleged that the makers and other indorsers were insolvent. The defense set up by the receiver of the Little Rock bank was that by the laws of New York, the plaintiff was forbidden to discount notes, and the note was therefore void. Judgment for defendant. Appeal.

Riddick, J. By the laws of New York, 1892, ch. 689, the plaintiff had authority to receive deposits and "to loan money on real or personal securities;" to "purchase, invest in and sell stocks, bills of exchange, bonds and mortgages and other securities." And, again, the statute authorizes it to "invest the moneys received by it in trust in the stocks and bonds of any state of the United States or in such real or personal securities as it may deem proper." We are of opinion that those provisions of the statute gave it the power to discount or purchase the note sued on. Judgment reversed.

Cited: 68 Ark. 306.

BINGHAMPTON TRUST CO. v AUTEN (1900) 68 Ark. 299.

Action for deceit. The McCarthy-Joyce Co., being indebted to the First National Bank of Little Rock, made two notes of \$5,000 each to the order of J, payable at the bank, and J indorsed and delivered them to the president of the bank to be negotiated, the proceeds to be applied on the debt due the bank. The president transmitted them to the Binghampton Trust Co., of New York, in a letter stating that the McCarthy-Joyce Co. had on hand cotton worth \$70,000, and that the bank held insurance and warehouse receipts on the cotton. The statements were false and the McCarthy-Joyce Co. was insolvent. The Trust Co., misled by the statements, accepted the notes and paid for them. The judgment below was for defendant, receiver of the bank. Appeal.

Riddick, J. 1. The plaintiff asked for damages for deceit and fraud practiced upon it by which it was induced to pay out a large sum of money for the worthless notes of an insolvent company. The plaintiff was not required to return or offer to return the notes. 2. It is a matter of no moment that the directors of the bank did not know or authorize the false representations of the president of the

bank. We must "distinguish between authority to commit a fraudulent act, and authority to transact other business in the course of which the fraudulent act was committed." The bank did not authorize the president to commit a fraud, but it intrusted him with the conduct of the business, and he conducted it unfairly and committed the fraud in the course of his employment. 3. The contract was valid under the laws of New York, and, if valid in the state where made, it is valid everywhere. Judgment reversed.

NORTH AMERICAN TRUST CO. v BURROW (1900) 68 Ark. 584.

Action to recover land and rental value thereof. The defendant executed a mortgage on lands owned by him to secure a debt. The mortgage was foreclosed, and the lands purchased by plaintiff on November 6, 1897. Defendant remained in possession until September 27, 1898, when the action was commenced against him for the land and the rental value. No demand had been made for possession of the land or for rents. The suit was the first intimation defendant had that plaintiff laid claim to the land. He surrendered possession, but demurred to so much of the complaint as sought to recover rent. Demurrer sustained. Appeal.

Wood, J. A mortgagee is not entitled to rents and profits of the mortgaged premises until he takes actual possession. The purchaser at foreclosure sale, when a stranger to the mortgage, could certainly have no greater rights than the mortgagee. The mortgagee, having purchased, is entitled to rents and profits after notice to quit and a demand for rents and profits has been made. But even the mortgagee is not entitled to more than this, much less a purchaser not a mortgagee, during the period of redemption, without demand, notice, or suit for possession. Judgment affirmed.

LANIGAN v NORTH (1900) 69 Ark. 62.

Action against stockholder. Defendant's testator held stock in a California bank, which failed after his death. By a California statute, a stockholder was individually liable for a proportionate share of the bank's debts. Plaintiff obtained, by assignment, a number of claims against the bank for collection and presented them for allowance. Plaintiff offered to prove the California statute by an unofficial copy of laws. Some claims were not authenticated, as required by the statute. Judgment for plaintiff. Appeal.

Riddick, J. 1. The liability imposed on the stockholder by the statute of California is a debt which may be enforced in law in this state. 2. The stockholder's estate is liable, though the debt did not arise until after his death. 3. An assignment, valid where made, cannot be questioned. 4. A foreign statute must be proved by the statute itself, or an authenticated copy thereof, or by a book published by official authority. 5. Claims against an estate, which are not properly authenticated, must be rejected. Judgment reversed.

CARROLL CO. BANK v RHODES (1900) 69 Ark. 43.

Bill in equity. To pay a note given the bank for a loan to make up back taxes, the tax collector gave his check, and the bank paid it out of money deposited in his individual name, but known by the bank to be public money. Plaintiffs, the sureties on the collector's official bond, made good the loss to the state and claimed to be subrogated to its rights. Decree for plaintiffs. Appeal.

Battle, J. 1. The bank is liable for knowingly misappropriating the money. 2. Plaintiffs are subrogated to the rights of the state. Decree affirmed.

KLEIN v GERMAN NAT. BANK (1900) 69 Ark. 140.

Action on a note made by a hotel company, with the other defendants as sureties for accommodation. The payee gave the note to plaintiff to secure a loan for the company, which it did not authorize. Plaintiff, acting in good faith, gave the payee credit instead of cash. Defendants claimed the note had been altered after execution, and some of them asked for a change of venue. Judgment for plaintiff. Appeal.

Riddick, J. 1. A change of venue cannot be granted when one defendant refused to join in the application. 2. Plaintiff must prove that defendant executed the note as sued on. The bank, taking the note in good faith, can hold the sureties. 3. The bank cannot be responsible for the misappropriation, unless it had notice. Giving the payee credit instead of paying him the cash does not make the bank liable. Judgment affirmed.

LAWRENCE CO. BANK v ARNDT (1901) 69 Ark. 406.

Action on a note. Answer: That defendant did not make it individually, but as an officer of the corporation, though the name of the corporation did not appear. Defendant proved that plaintiff wrote the note and that he knew it was intended for corporate debt. The cause was transferred to equity for reformation of the note. Decree for defendant. Appeal. Decree reversed. Rehearing.

Battle, J. 1. Equity will correct the mistake and make the note conform to the intention of the parties. 2. Such intention may be shown by parol evidence. Decree for defendant affirmed.

CALIFORNIA

HEADLEY v REED (1852) 2 Cal. 322.

Goods sold and delivered and for money loaned. A claim for money loaned, allowed by the referee, was proved only by a check drawn by plaintiff in favor of R or bearer. The case was tried before a referee who made his report, and thereafter filed an amended report. No objection was made to the rendition of the judgment. It was insisted that this was a waiver of the exceptions, and that they could not be heard on appeal. Judgment for plaintiff. Appeal.

Heydenfeldt, J. 1. The legal presumption from the delivery of the check was that it was drawn in payment of a sum of money due from plaintiff to defendant. It was error to admit the check as evidence of a loan. 2. The referee had no power to file an amended report, and the case must be heard on the report as originally made. 3. The exceptions can be heard in this court. Judgment reversed.

Cited: 9 Cal. 225; 24 id. 327; 30 id. 287.

MINTURN v FISHER (1854) 4 Cal. 35.

On check. The check sued on was drawn by defendant in favor of plaintiff on a banking firm, and was payable six days after date. The check, being then presented and dishonored, was protested. Judgment for defendant. Appeal.

Murray, C. J. 1. A check is a negotiable instrument by the law merchant. 2. This check, being payable at a future day, was in the nature of an inland bill of exchange, and was entitled to days of grace and notice. 3. Presentation and commencement of action were premature. Judgment affirmed.

WELTON v ADAMS (1854) 4 Cal. 37.

On certificate of deposit. Defendant issued to plaintiffs a certificate of deposit in the usual form. This was destroyed by fire and notice thereof at once given to the defendant. Payment was demanded and refused, unless an indemnity was given the bankers, which was refused. Judgment for plaintiffs. Appeal.

Heydenfeldt, J. 1. A certificate of deposit is a negotiable instrument. 2. The rule is to demand indemnity in all cases where such a bill is lost or destroyed. Judgment reversed.

Cited: 5 Cal. 484; 9 id. 418; 22 id. 248; 28 id. 564; 29 id. 505; 35 id. 120; 114 id. 262.

RITCHIE v BRADSHAW (1855) 5 Cal. 228.

On check. Defendants drew their check on C & Co. on September 14, 1854, in favor of plaintiff, who left it with P B & Co. for collection. It was presented by them on the day following at the usual time. It was not paid, as C & Co. had failed. The referee found that plaintiff had adopted the customary method and used due diligence. Judgment for plaintiff. Appeal.

Bryan, J. The referee, having found on conflicting evidence that plaintiff had used due diligence, we are bound by the finding. Presentation on the day after the check is made, is sufficient. Judgment affirmed.

COUNTY OF YUBA v ADAMS (1857) 7 Cal. 36.

To recover taxes. Defendants, bankers, at the time of their failure had on deposit with B & Co., bankers, \$75,000. The certificate of deposit was in the name

of C, receiver in a suit in which defendants were plaintiffs. On this money the tax in dispute was levied. Creditors of defendants had attached this money and it had been paid into court. The county intervened, claiming a prior lien, the tax having been levied before the attachments. Petition for intervention dismissed. Appeal.

Terry, J. 1. The money was taxable. 2. The levy created a lien from the time it was made. 3. The fund, being in the hands of a receiver of the court, was in the custody of the law and could not be attached by the creditors of defendants. Judgment reversed.

MINTURN v FISHER (1857) 7 Cal. 573.

On check. On June 9, 1853, defendant drew his check on the banking house of P B & Co. in favor of plaintiff, payable on June 15, 1853. It was then presented for payment to defendant, teller of the bank upon which it was drawn, who said it would not be paid. The bank failed on May 2, 1855, and the check was never paid. It was not presented on the 18th, on the expiration of the days of grace, nor was it protested. Judgment for plaintiff. Appeal.

Terry, J. The statement by the drawer of the check, before it was due, that it would not be paid, was a waiver of demand and notice of non-payment. Judgment affirmed.

NAGLEE v LYMAN (1859) 14 Cal. 450.

On bill of exchange against the drawee. The defendant gave C a letter of credit on B & Co., plaintiff's assignor. B & Co. refused to give long credit on the faith of the letter; but later, when defendant became insolvent, B & Co. took the bill in suit from C, drawn on defendant, in payment of a debt then due from defendant, and in lieu of collection by attachment. The defendant contended: 1, That there was no consideration for the bill; 2, that it was never accepted; and, 3, that the receiver of B & Co. could not sue. Judgment for plaintiff. Appeal.

Field, C. J. 1. An antecedent debt is sufficient consideration for the bill, and forbearance to attach would also be. 2. The letter of credit was sufficient acceptance of the bill drawn thereafter. 3. The receiver may sue. Judgment affirmed.

Cited: 14 Cal. 98; 44 id. 342; 52 id. 616; 54 id. 109; 134 id. 194.

COYE v PALMER (1860) 16 Cal. 158.

On certificate of deposit, issued by defendants P & Co. to defendant V, by whom it was sold and indorsed for \$400 to L. Demand was made and, being unpaid, the note was protested and notice given. It was then transferred to plaintiff. Judgment for plaintiff. Appeal.

Cope, J. The plaintiff took the certificate after it became due and holds it subject to all the equities existing between the indorser and L. He can only recover from the indorser the amount which L paid therefor. Judgment reversed.

Cited: 22 Cal. 249; 35 id. 120; 85 id. 96.

BRUMMAGIM v TALLANT (1866) 29 Cal. 503.

To recover bonds. Defendants received from K a deposit of money on December 8, 1860, and issued to him a certificate of deposit therefor payable on demand. This was stolen from K, and the money paid on depositing the bonds in suit as indemnity, to be returned when the certificate was found and delivered up, or when it was barred by the Statute of Limitations. Plaintiff was K's administrator. This action was commenced to recover the collateral on July 19, 1865. Actions on such certificates were barred in three years. Demurrer to complaint. Overruled. Judgment for plaintiff. Appeal.

Sanderson, J. 1. The certificate possessed all the essential elements of a promissory note. 2. No demand was necessary, and the statute commenced to run from the date thereof. The action was barred. Judgment affirmed.

Cited: 35 Cal. 120; 81 id. 633; 82 id. 34; 114 id. 262.

POORMAN v MILLS (1868) 35 Cal. 118.

On certificate of deposit. Defendant issued to R a certificate of deposit payable to R or order, on return of the certificate properly indorsed. It was indorsed in blank to plaintiff, who sued thereon. The answer simply denied that

plaintiff was the legal owner or holder thereof. Plaintiff proved the certificate with its indorsement. Judgment of non-suit. Appeal.

Rhodes, J. 1. The certificate of deposit was in effect a negotiable promissory note. 2. The holder of such a paper is presumed to be an owner for value. The averments in the answer raised no issue, as they were mere conclusions of law. 3. The note was admissible to support the allegation of indorsement. 4. Indorsement of an agent transfers title as to all parties except his principal. Judgment reversed.

Cited: 36 Cal. 302; 39 id. 345; 43 id. 324; 55 id. 129; 69 id. 571; 72 id. 570; 93 id. 117; 98 id. 497; 99 id. 606; 101 id. 262, 436; 106 id. 211; 114 id. 262; 123 id. 586.

WITTE v VINCENOT (1872) 43 Cal. 325.

Assumpsit. An attachment was levied on a savings bank in which defendant was a depositor. The by-laws provided that depositors' passbooks were transferable to order. The bank made a return to the attachment, that \$600 was standing to the credit of the defendant, and that the bank did not know if the passbook had been assigned. An order was made requiring the bank to turn over the money to the sheriff. The bank appealed.

Wallace, C. J. The by-laws did not have the effect to make the passbook negotiable according to the law merchant, and, even if it had that effect as between the bank and the depositor, it was not binding on third parties. Order affirmed.

SIMPSON v PACIFIC MUTUAL LIFE INS. CO. (1872) 44 Cal. 139.

On check against drawer. Defendant drew its check in favor of plaintiff and delivered it to him about 9 a. m. The agent of the defendant went with plaintiff to the bank at once and identified him. Payment was tendered, there being sufficient funds of defendant on deposit. Plaintiff, desiring to remain in the city for a few hours, declined at that time to receive it. At two o'clock on that day he called at the bank to receive payment, but the bank had suspended and he was refused. Judgment for plaintiff. New trial granted. Appeal.

Crockett, J. 1. If the holder of a check declines payment when it is tendered him on a proper demand, the liability of the drawer ceases. 2. This court will not disturb the ruling of the court below in granting or refusing a new trial, except on abuse of discretion. Order affirmed.

REDINGTON v WOODS (1873) 45 Cal. 406.

On check. The signature to the check was genuine, but the amount, date and name of the payee had been altered. It was made by plaintiffs, payable to C, for \$30. When presented to defendants by a stranger, it was payable to defendants for a much larger sum. They took it as payment in the usual course of business. It was at once presented to the bank and paid, after having been indorsed by defendants. No formal demand for repayment was made until some days later. The check was never returned or offered to be returned to defendants. The body of the check was in a different handwriting from the signature. Judgment for plaintiffs. Appeal.

Crocketts, J. 1. If the drawee in good faith, without negligence, pays a check fraudulently altered in amount after it left the hands of the drawer, he will be entitled, ordinarily, to recover back the amount so paid. Such a check is technically a forgery. 2. The fact that the handwriting in the body of the check is different from the signature raises no presumption of negligence or notice of any defect in the check. The bank, if not guilty of laches, is entitled to recover. 3. A demand by the bank for repayment was not necessary. 4. A failure to return or offer to return the check to the payers was a good defense to the action. Judgment reversed.

Cited: 92 Cal. 128.

SAVINGS AND LOAN SOCIETY v AUSTIN (1873) 46 Cal. 415.

Injunction to restrain collection of tax. The constitution provided that all taxes should be equal and uniform. The tax in question was levied by the state board of equalization against the plaintiff upon solvent debts, which consisted of the money of depositors loaned on notes and mortgages. The land upon which the mortgages were given had been assessed at its full value for the same year, but the tax had not been paid. Judgment for plaintiff. Appeal.

Crockett, J. 1. The act creating the state board of equalization is constitutional. 2. Solvent debts are property within the meaning of that term as used in the constitution. 3. If the land on which the mortgages were given, as well as the mortgages, were assessed, that is double taxation. The plaintiff is not entitled to the remedy of injunction. Judgment reversed.

Cited: 46 Cal. 522, 527; 47 id. 651, 666; 48 id. 70; 51 id. 254, 412; 56 id. 204; 70 id. 506; 72 id. 435; 76 id. 276; 91 id. 13; 102 id. 474.

PEOPLE v ASHBURY (1873) 46 Cal. 523.

Application for mandate to compel defendant, city auditor, to enter upon the assessment books unpaid taxes, levied against a number of savings banks on solvent debts. Sec. 3,802 of the political code required the auditor to so enter such taxes on the assessment list for the year following the delinquency. Sec. 3,801 of the political code gave the board power to cancel any tax included in the list furnished by the auditor and supported by his affidavit that he had been unable to find any property from which he could collect the tax. The board had passed a resolution as claimed, but the statement and affidavit had not been furnished.

Rhodes, J. Solvent debts are liable to taxation. Without the affidavit of the auditor, required by the political code, the board of supervisors had no authority to cancel the assessments. It is the duty of the auditor to proceed forthwith to enter the taxes on the assessment book. Peremptory mandate ordered.

Cited: 50 Cal. 284.

SIMPSON v PACIFIC MUTUAL LIFE INS. CO. (1874) 47 Cal. 585.

On check. The check was given by defendant to plaintiff, who, with the secretary of defendant, went to the bank on the same day, to be identified. He did not then draw the money. About two o'clock the same day he again went to the bank and found it in the hands of the sheriff. Demand for payment refused. Plaintiff contended that his failure to demand the money at first was due to a suggestion made by the defendant's secretary. An instruction was asked by plaintiff and refused, which ignored this circumstance. Judgment for defendant. Motion for new trial. Denied. Appeal.

Per curiam. As there was a substantial conflict in the testimony as to the purpose of plaintiff in first presenting the check, the verdict cannot be disturbed. Any instruction asked by plaintiff without taking this circumstance into consideration, as to a subsequent presentation and demand for payment, would not have been proper. Judgment and order affirmed.

NATIONAL GOLD BANK v McDONALD (1875) 51 Cal. 64.

To recover overdraft. The accounts of defendant and B at the plaintiff were overdrawn. Defendant presented a check, drawn on the bank by B, for deposit. This check was entered to his credit in his passbook, but not in the books of the plaintiff. Thereafter the plaintiff returned the check to defendant, notifying him that B had no funds on deposit. Defendant refused to receive the check, on the ground that the bank had accepted it as cash. Judgment for defendant. Appeal.

Crockett, J. A check on the same bank presented by a depositor with his passbook to the receiving teller, nothing being said, does not raise a presumption that the check was received as cash. Judgment reversed.

Cited: 94 Cal. 366.

PEOPLE v HIBERNIA SAV. AND LOAN SOCIETY (1876) 51 Cal. 243.

To recover taxes. Defendant was engaged in a savings bank business, and the tax in question was levied on solvent debts secured by mortgage on real estate in California, which real estate had been assessed at its full value and taxes paid thereon. Judgment for plaintiff. Appeal.

McKinstry, J. Credits are not property subject to taxation within the meaning of sec. 13 of art. 9 of the Constitution of California, and the solvent debts were not taxable. Judgment reversed.

Cited: 51 Cal. 370, 472; 64 id. 507; 113 id. 399; 128 id. 593.

BANK OF MENDOCINO v CHALFANT (1876) 51 Cal. 369.

To recover taxes. The tax in question was levied upon solvent debts, promissory notes and mortgages, and was included with other items upon which the bank was willing to pay taxes. The entire tax was paid under protest. Defendant was the tax collector. Demurrer. Sustained. Judgment for defendant. Appeal.

Niles, J. Solvent debts, notes and mortgages are not the subject of taxation, and the assessment was pro tanto illegal and void. Plaintiff was entitled to recover back such illegal taxes. Judgment reversed.

Cited: 113 Cal. 402; 128 id. 593.

THE BANK OF CALIFORNIA v NORTHAM (1876) 51 Cal. 387.

Action by assignee for the value of machinery sold by plaintiff's assignor to defendant's testator. The Act of 1869 and '70 provides that when there is no express contract in writing fixing a different rate, interest shall be allowed at the rate of 10 per cent per annum for money due on the settlement of accounts, from the day on which the balance is ascertained. No settlement had been made of the account on which this action is brought. Judgment for plaintiff, including interest. Appeal.

Per curiam. The court erred in rendering a judgment for interest on the account sued upon. Judgment modified.

Cited: 76 Cal. 70; 89 id. 635.

BANK OF WOODLAND v WEBBER (1877) 52 Cal. 73.

To recover taxes. The taxes which were claimed to be illegal were paid by the bank under protest before any threats had been made to sell the property to enforce collection thereof. On this proof there was a finding of duress. Judgment for plaintiff. Motion for new trial. Denied. Appeal.

Per curiam. The general finding of duress was not supported by the evidence. Judgment and order reversed.

Cited: 52 Cal. 171; 53 id. 380; 80 id. 89; 124 id. 343.

BANK OF SANTA ROSA v CHALFANT (1877) 52 Cal. 170.

To recover taxes paid under protest. Plaintiff alleged that defendant, who was a tax collector, demanded payment of the tax, which was claimed to be illegal, and threatened to sell plaintiff's property unless it was paid. There was no allegation that the tax was delinquent or that defendant, when demand was made, was armed with authority, real or apparent, to carry out this threat. Demurrer to complaint. Overruled. Judgment for plaintiff. Appeal.

Per curiam. As there was no legal duress, the payment must be deemed to have been voluntary and cannot be recovered. Judgment reversed.

Cited: 71 Cal. 469; 124 id. 343.

BANK OF CALIFORNIA v WESTERN UNION TEL. CO. (1877) 52 Cal. 280.

To recover money obtained by fraud. W was the operator of defendant at C. He engaged X to assist him. He had no authority to appoint a sub-agent. X sent a fictitious telegram to plaintiff directing it to pay C. H. Crowley a sum of money, and signed the name of the cashier of a bank at C. X got a person of good repute to identify him at plaintiff bank as the person to whom the money should be paid. Plaintiff paid the money and X signed Crowley's name to a receipt. Judgment for defendant. Appeal.

McKinstry, J. 1. Public policy requires that masters should be held liable for the consequences in such cases. 2. The bank was not guilty of negligence in paying the money. Judgment reversed.

Cited: 82 Cal. 81.

THE PEOPLE v ABBOTT (1878) 53 Cal. 284.

Indictment. Defendant was broker for the A bank. He stated to the bank's cashier that he could purchase a certain amount of silver. To provide funds defendant drew a check on A Bank, payable to "cash or bearer," which the bank certified. Defendant cashed the check at the N Bank for his own use. Verdict against defendant. New trial granted. Appeal.

Wallace, C. J. 1. The check was in no sense the property of the defendant. 2. In such a case, if the employee took the custody of the accepted check *animo furandi*, the taking would amount to a larceny of the property of the bank within the intent of the statute. Order granting new trial reversed.

FARMERS AND MERCHANTS BANK v DOWNEY (1878) 53 Cal. 466.

To charge defendant, as trustee, for profits. Defendant, president and director of the plaintiff, negotiated a loan with interest to M and L on condition that he should share in the profits of the transaction in which it was to be used. Plaintiff demanded the profits secured by defendant, who refused to turn them over. Judgment for plaintiff. Appeal.

Wallace, C. J. The officers and directors of a corporate body are trustees of the stockholders, and cannot, without being guilty of fraud, secure to themselves advantages not common to the latter. Judgment affirmed.

Cited: 60 Cal. 140; 93 id. 29, 631.

HIBERNIA SAV. AND LOAN SOCIETY v HERBERT (1879) 53 Cal. 375.

To foreclose mortgage. Mortgagor conveyed all his interest in the premises to his wife. He died before the commencement of this action. His wife married the defendant. The last seven notes of the series for which mortgage was given are unpaid. The first five of these had been due more than four years before the defendant's wife died, and the last two less than that period. Sec. 353 of the code of civil procedure provides that if a person died before the expiration of the time limited, an action may be commenced against the representatives after the expiration of that time and within one year after the issuing of letters. This action was begun within one year after letters had been granted on defendant's wife's estate. Judgment for plaintiff. Appeal.

Crockett, J. 1. The mortgagor, having no interest in the estate, his personal representative was not a necessary party. 2. The first five notes were barred by the statute, while the last two are within the terms of sec. 353 of the code, and, as to them, the action was commenced in time. Judgment reversed with an order to the court below to modify its judgment in accordance with this opinion.

Cited: 98 Cal. 328; 116 id. 358.

WELLS, FARGO & CO. v COLEMAN (1879) 53 Cal. 416.

Injunction. Plaintiff, a commercial bank, refused to permit defendants, bank commissioners, appointed under the Act of March 30, 1878, to examine the affairs of the bank. The language of the act was "savings banks and banking companies." The contention was that this did not include plaintiff. It was alleged that defendants threatened to commence divers actions and proceedings in the courts against plaintiff on account of the refusal. Injunction denied. Judgment for defendants. Appeal.

Wallace, C. J. 1. The allegations of the bill would not support an injunction. 2. The act includes commercial banks. Judgment affirmed.

Cited: 100 Cal. 120.

LA SOCIETE FRANCAIS D'EPARGNES v THE DISTRICT COURT (1879)
53 Cal. 495.

Certiorari. Defendant granted the *ex parte* petition of G for orders dissolving plaintiff and appointing a receiver. Sec. 564 of the code of civil procedure enumerates the cases in which a receiver may be appointed by the court in which an action is pending. Subdiv. 5 provides for such appointment in cases where a corporation has been dissolved or is insolvent or in immediate danger of insolvency. Sec. 956 of the code provides that upon an appeal from a judgment, no interlocutory judgment may be reviewed from which an appeal might have been taken. The writ of certiorari may be had only where there is no appeal.

Wallace, C. J. 1. Such an order is not subject to be reviewed on an appeal from the judgment under sec. 956 of the code of civil procedure. 2. Irrespective of statute, there is no jurisdiction vested in courts of equity to appoint a receiver of the property of a corporation prosecuted by a private party. 3. Sec. 564 of the code of civil procedure does not confer upon a private person the right to procure the appointment of a receiver. Orders annulled.

Cited: 54 Cal. 288; 64 id. 622; 97 id. 350; 101 id. 146; 103 id. 34; 110 id. 140; 129 id. 632; 130 id. 599.

PEOPLE v PERRIN (1880) 56 Cal. 345.

Quo warranto to test legality of organization of bank. The Act of April 14, 1853, as to formation of corporations, did not authorize the formation of a mutual savings bank. The Act of 1870, amending the former act, declared that all corporations theretofore formed under the provisions of the former act, for the purpose of receiving deposits and investing them, may receive deposits of money from minors and married women. The Act of 1864 cured all defects in the formation or organization of corporations theretofore formed. The defendants were officers of the bank, which was organized under the Act of 1853. Demurrer to complaint. Sustained. Judgment for defendants. Appeal.

Sharpstein, J. The Act of 1870 was a recognition of the right of the bank to conduct the ordinary business of a savings bank. As the corporation had a legal existence, the court cannot grant the relief prayed for. Judgment affirmed.

MILLER v HEILBRON (1881) 58 Cal. 133.

Submission to test validity of taxes. Agreed case. The tax was upon shares in a national bank owned by plaintiff. U. S. R. S. sec. 5219, p. 1019, permitted the shares to be taxed, but not at a greater rate than is assessed on other moneyed capital. The political code (sec. 3640) permitted a deduction, in assessing credits, of all debts due by the party assessed to bona fide residents of the state; but no deduction was made in favor of the owner of stock in a national bank. Judgment for plaintiff. Appeal.

McKinstry, J. There is a discrimination against the holders of this class of property not justified under the law of Congress, and the tax is void. A tax imposed upon a corporation is not equivalent to a tax imposed upon its shareholders. Judgment affirmed.

Cited: 116 Cal. 27.

OAKLAND BANK v WILCOX (1882) 60 Cal. 126.

To recover overdrafts. Defendant was president of plaintiff, and was owner, with C, of a hotel operated by the latter, C paying the rent. C had no money and, at the suggestion of defendant, he drew a check on the bank and it was paid by direction of defendant. Thereupon, at defendant's suggestion, C opened an account at the bank and received a passbook. Thereafter C made deposits and drew checks, which were paid and some of which were overdrafts and paid by express direction of defendant. On July 10, defendant left the bank on account of ill-health and did not return until July 30, between which dates the overdraft was created. The court instructed the jury that if the course of dealing with C was established by defendant, it was his duty on going away to instruct the bank to discontinue payment of overdrafts, and if he failed to do so he would be liable therefor, and that permitting the first overdraft was a violation of his duty as president of the bank. Judgment for plaintiff. Appeal.

Myrick, J. Neither the president nor the cashier had any authority to permit an account to be overdrawn. To make an overdraft on the savings bank was a fraud in law on the part of the drawer; to pay or authorize the payment was a fraud in law on the part of the officer paying or authorizing the payment. The instruction given was correct. Judgment affirmed.

HINDS v MARMOLEJO (1882) 60 Cal. 229.

On promissory note made by defendants in favor of a national bank, and by it indorsed to plaintiff, the rate of interest being 10 per cent. Defense: Usury. The legal rate of interest in California was 8 per cent when there was no contract, but by contract any rate could be charged. Sec. 30 of the National Banking Act gave national banks the right to charge interest at the rate allowed by the laws of the place where the bank was located; and when no rate was fixed by law, the bank could charge 7 per cent. Judgment for plaintiff. Appeal.

Ross, J. The word "fixed," used in the last clause, has the same meaning as the word "allowed" as used in the first clause, and the word "laws" means

statute laws, and therefore, in this state, any rate of interest agreed upon is lawful. Judgment affirmed.

Cited: 60 Cal. 393; 108 id. 151.

FARMERS NATIONAL GOLD BANK v STOVER (1882) 60 Cal. 387.

On promissory note. The note sued on was made by defendants, payable to plaintiff, and bore interest at the rate of $1\frac{1}{4}$ per cent per month. The defenses were: 1, That the note was void because it exacted a greater rate of interest than a national bank was allowed to charge; and 2, payment. Under the latter defense, evidence was offered tending to show that the bank took from S, in payment for the note, a mortgage and note. This being objected to, defendants asked leave to amend the answer setting up these facts. Motion denied. Judgment for plaintiff. Appeal.

McKee, J. 1. The answer should have stated that the bank consented to deal with defendants as sureties. In this state national banks may charge any rate of interest agreed upon. An illegal charge of interest is no defense to an action on a note given to it. 2. The proposed amendment to the answer constituted a good defense to this action. Judgment reversed.

Cited: 77 Cal. 105; 85 id. 521; 95 id. 633; 98 id. 276; 108 id. 151.

ANGLO-CALIFORNIA BANK v GRANGERS BANK (1883) 63 Cal. 359.

Damages for refusal to transfer stock. The plaintiff bought the stock in good faith, for value, without notice of a by-law of defendant to the effect that defendant had a lien on its stock for any indebtedness due from the owner of the stock. There was no copy of such by-law printed on the certificate. The vendor of plaintiff was in fact indebted to defendant when the stock was bought by plaintiff. Until the debt was paid, defendant refused to transfer the stock. Judgment for defendant. Motion for new trial. Denied. Appeal.

Sharpstein, J. The defendant might make by-laws regulating the transfer of its stock, but it could not, under such power, create a secret lien upon it, which would adhere to it in the hands of a bona fide purchaser, for value and without notice. The plaintiff's having a similar by-law on its stock, did not operate as notice of the defendant's by-law. Judgment and order reversed.

Cited: 79 Cal. 331; 82 id. 603.

MITCHELL v BECKMAN (1883) 64 Cal. 117.

To recover from stockholders. The deposit sued for was originally made in the O S Bank, which was taken over, and its liabilities assumed by a commercial bank in which defendants were stockholders, some of whom had not paid their subscriptions. The bank stopped payment. It was claimed that the transfer to the new bank was void. The assets received were sufficient to pay all claims. Judgment for plaintiff. Motion for new trial. Denied. Appeal.

Thornton, J. 1. The liability of the stockholder in a commercial corporation is primary, and commences with the liability of the corporation. It was immaterial that some of the defendants had not paid their subscriptions. 2. The stoppage of payment by the bank gave the depositor a right of action at once. 3. The new corporation or its stockholders cannot be heard to say that the taking over of the assets and assuming the liabilities of the old bank was illegal. Judgment and orders affirmed.

Cited: 65 Cal. 72; 82 id. 603, 653; 86 id. 579; 94 id. 127; 101 id. 79, 500; 107 id. 452; 109 id. 404; 111 id. 67; 125 id. 459.

GREEN v ODD FELLOWS SAV. AND COMMERCIAL BANK (1884) 65 Cal. 71.

To recover deposit. Defense: Statute of Limitations. Plaintiff was a depositor in a savings bank, which was afterward taken over and its liabilities assumed by defendant. This arrangement was ratified by plaintiff. Defendant paid plaintiff a dividend on the deposit. Judgment for plaintiff. Appeal.

Ross, J. Defendant assumed toward plaintiff the precise relation that its assignor did. There is no limitation in this state to an action to recover money deposited with a bank. Judgment affirmed.

Cited: 109 Cal. 405.

SAN JOAQUIN VALLEY BANK v DOURS (1884) 65 Cal. 247.

To recover losses through negligence of cashier, and to recover for an overdraft of salary. Defendant was cashier of the plaintiff, and made all loans with or without security, according to his judgment. It was the duty of the directors to inspect loans, but they failed to do so. For four years prior to April 1, 1870, defendant drew a salary of \$200 per month. After that date, he drew a salary of \$300, this being charged against him, and appearing in the monthly balances submitted to the directors. His salary was never fixed by the board. Judgment for plaintiff. Motion for new trial. Denied. Appeal.

Ross, J. 1. The defendant is liable for his negligence in making the loan complained of. The negligence of the directors is no defense to this action. 2. The directors must be deemed to have acquiesced in the salary of \$300 per month, and defendant was entitled thereto. Judgment and order reversed.

Same case. 73 Cal. 201.

BANK OF HEALDSBURY v BAILHACHE (1884) 65 Cal. 327.

To quiet title. The land in controversy was the property of the cashier's wife. Her husband had overdrawn his account, and for the purpose of making it good, a deed was prepared, signed and acknowledged by the husband, and delivered to the president of the bank. The deed was then taken by the president and director to the wife who signed and acknowledged it and passed it to the notary, who took it away and affixed his seal and signature; while returning to the wife with the deed he met one of the directors and handed it to him with the request that it be not delivered to the bank until the arrangement with the wife was completed. He finally delivered it to the wife, who had since kept it. Judgment for defendant. Appeal.

McKee, J. The deed of a married woman has no validity until acknowledged. The delivery to the president of the bank before that took place had no force. Nor was the delivery to the director by the notary such as to make the deed operative. Power to do such acts must be conferred by the board of directors. Judgment affirmed.

Cited: 68 Cal. 140.

LAFARGUE v HARRISON (1886) 70 Cal. 380.

Money had and received. The defendant, in consideration that plaintiff would advance money to a third person, gave to plaintiff a letter of credit on its London bank. Subsequently plaintiff drew a draft on the London bank under the terms of the letter of credit. This draft was dishonored. Judgment for plaintiff. Appeal.

Foote, C. The plaintiff, from the letter of credit, had a legal right to expect that his draft would be honored, and, on failure, that defendant would make good the loss incurred. Judgment affirmed.

Cited: 125 Cal. 482.

PEOPLE v HIBERNIA SAV. AND LOAN SOCIETY (1887) 72 Cal. 21.

Mandamus. Proceeding instituted by the attorney-general to compel the bank to permit him to examine its books at his option and without judicial action, for the purpose of discovering property escheated to the state. It was brought under sec. 474 of the political code. Judgment for plaintiff. Motion for new trial denied. Appeal.

McKinstry, J. We find nothing in the statute which requires the attorney-general to demand that the books and papers of a corporation should be submitted to him before commencing the proceedings. The attorney-general cannot examine the books of a corporation at his own option. Judgment and order reversed.

Cited: 72 Cal. 29.

PEOPLE v GERMAN SAV. AND LOAN SOCIETY (1887) 72 Cal. 28.

Mandamus. The application was to allow the attorney-general or his counsel to examine the books and papers of the bank, without judicial action, under sec. 474 of the political code, for the purpose of discovering escheated property. Judgment for plaintiff. Appeal.

The Court. The section does not authorize the attorney-general, or coun-

sel appointed by him, to examine the books and papers of a corporation, except under the order and supervision of the court. Judgment reversed.

PACIFIC TRUST COMPANY v DORSEY (1887) 72 Cal. 55.

On promissory note. The defendant gave his note in payment for his bank stock subscription. The constitution prohibited the issue of bank stock except "for money paid, labor done, or property actually received." Sec. 560 of the penal code made it a misdemeanor for directors to receive a note as payment for stock, with intent to provide the means of payment, etc. Judgment for plaintiff. Appeal.

Belcher, C. C. 1. The word property includes things in action and evidences of debt, and the defendant's note was an evidence of debt. 2. The statute does not make the note void and its receipt did not violate public policy, good morals, nor positive law. Affirmed.

PEOPLE v SAN FRANCISCO SAV. UNION (1887) 72 Cal. 199.

Injunction. Defendant was a savings bank organized under the Act of April 11, 1862, and was authorized to pay dividends out of its surplus profits. The question was whether the interest on loans or investments, matured or accrued, but not paid, were included in that term. Judgment for defendant. Appeal.

Searls, C. Money earned as interest, but not paid, however well secured, or certain to be eventually paid, does not constitute surplus profits, within the meaning of the statute. Judgment reversed.

HONIG v PACIFIC BANK (1887) 73 Cal. 464.

On certificates of deposit. P, plaintiff's agent, made three unauthorized deposits of plaintiff's money, disclosing the name of his principal and taking certificates in his principal's name. He also wrote in bank's register for signatures plaintiff's name, as owner; his, as agent. The bank paid proceeds of certificates to P on his unauthorized indorsements. Defendant contended, on the theory that P may have withdrawn the first deposit and redeposited the money, that plaintiff should have shown money actually deposited; that the name given as owner should be treated as a fictitious one; and that the plaintiff should have produced the certificates in court. Judgment for plaintiff. Appeal.

Temple, J. 1. Certificates of stock are negotiable paper. 2. Where an indorsement is required, its character is indicated on the face of the paper. 3. A bank must get correct signature of depositors. 4. It could only assume at its peril that the name of principal was fictitious. 5. No act of bank could authorize P to act as agent of plaintiff. 6. The burden of proving that an amount less than the face value was paid for certificates was on defendant. 7. Plaintiff could ratify the unauthorized deposits of P, without ratifying his unauthorized indorsements. 8. Defendants, having unlawfully come into possession of certificates, held them for plaintiff, and its production of them in court inures to plaintiff's benefit. Affirmed.

Cited: 75 Cal. 354.

DALLEMAND v ODD FELLOWS SAV. BANK (1888) 74 Cal. 598.

To cancel subscription. The bank was organized as a membership savings bank, but was reorganized in 1878 as a stock company. Plaintiff subscribed for 40 shares of the stock, his subscription being unconditional. Only a part of the capital stock was subscribed. It was contended that there was an implied condition that this subscription was binding only in event all the stock was taken. The bank had gone into liquidation. Judgment for defendants. Motion for new trial. Denied. Appeal.

Sharpstein, J. The subscription of the entire capital stock was not an implied condition precedent to the consummation of the contract of membership with plaintiff. Judgment and order affirmed.

LOW v WARDEN (1888) 77 Cal. 94.

On promissory note. The note was left with a bank for collection, with instructions not to let it outlaw. Two days before it would have outlawed defendant called at the bank with the money, and was told by the president that he could give a new note instead of paying. He left the money; but whether to pay the note or on his own account, the testimony was conflicting. The next day

this action was commenced. Plea: Payment. Testimony was offered to show that he afterward withdrew the money on his own check. Objection. Overruled. No new note was given. Judgment for plaintiff. Motion for new trial. Denied. Appeal.

Belcher, C. C. 1. The president of the bank had no authority to extend the time of payment so as to prevent the owner of the note suing thereon. 2. The evidence of withdrawal of the money was properly admitted. Judgment and order affirmed.

COMPTOIR D'ESCOMPTE v DRESBACH (1888) 78 Cal. 15.

For money loaned. Defendants were shippers of goods by water and H & H were their brokers. Plaintiff made advances to H & H on a shipment by defendants, and sold for H & H a bill of exchange for £4,000. H & H then drew a check on the P Bank for the advances and the £4,000, and gave it to plaintiff, which sent it to the P Bank for certification, which was refused. Plaintiff then deposited the check to its credit in the Bank of C. H & H then notified plaintiff that the check would not be paid, and requested plaintiff to take up the check. Plaintiff then paid to P Bank sufficient money to pay the check of H & H, took up their check, and returned it to H & H. No part of the check or advance were ever paid. Plaintiff asked the court to charge that when a check is given in payment of a debt, if dishonored, the creditor may resort to his original claim. Refused. Judgment for defendants. Motion for new trial. Denied. Appeal.

Thornton, J. 1. The instruction asked for in regard to the check stated the law correctly and should have been given. 2. In the absence of an agreement to that effect, a check is only a conditional payment. 3. When one accepts a check in absolute payment, he takes the risk of payment. Judgment and order reversed.

Cited: 94 Cal. 366; 106 id. 530; 112 id. 306; 120 id. 447; 122 id. 33, 372; 124 id. 92; 128 id. 515.

JENNINGS v BANK OF CALIFORNIA (1889) 79 Cal. 323.

Damages for refusal to transfer stock. The stock in controversy was owned by B, who assigned it to plaintiff. A condition was printed on the certificate reserving a lien in favor of the bank for money due from the person in whose name the stock stood. This provision was inserted by the officer making the loan to B, without a resolution of the directors. When the stock was transferred to plaintiff and when demand for transfer was made, B was indebted to the bank. Judgment for plaintiff. Motion for new trial. Denied. Appeal.

Hayne, C. 1. The condition attached to the stock, created an equitable lien in favor of the bank and against B, and was binding upon his assignee. 2. The officer of the bank making the loan to B had a right to arrange for its security, without any authority from the board of directors. 3. The acquirement of the lien in the manner specified was not ultra vires. Judgment and order reversed.

Cited: 82 Cal. 603; 99 id. 322; 112 id. 214.

BANK OF BRITISH NORTH AMERICA v CAHN (1889) 79 Cal. 463.

To recover against stockholder. Plaintiff loaned money to P Co. in which defendant was a stockholder. This action was brought to recover the loan. The defense was that plaintiff had failed to comply with the provisions of the Act of April, 1876, requiring it to publish and file a statement as required by the act, and that sec. 3 of said act was repealed by Stats. 1877-'78, p. 740. Judgment for defendant. Appeal.

Foote, C. The failure to file the statement was a good defense to this action. Said act is not repealed by the Act of March 30, 1878, creating a board of bank commissioners. Judgment affirmed.

Cited: 97 Cal. 36.

HUMBOLDT SAV. AND LOAN SOCIETY v WENNERHOLD (1889)
81 Cal. 528.

On bond of surety. H was appointed secretary of the plaintiff. Under the by-laws, the duties of the secretary were to collect all moneys due to the society and keep the same in the mode prescribed by the directors, and that he should not dispose of any funds of the society. No term of office was fixed by the board of directors. H

held the secretaryship until 1883, when he was dismissed for defalcations. In 1890, H gave a bond for \$5,000 with defendants as sureties. Civil code, sec. 2837, provides that, in interpreting a contract of suretyship, the same rules are to be observed as in the case of other contracts. It was the custom of the society, when a loan was granted and one or more payments made, to place the balance in a bag and put it in the safe with a tag showing the borrower's name. From that time he paid interest on the loan, and money thereafter withdrawn was noted on the tag. It was these sums of money which were taken. Judgment for plaintiff. Appeal.

Thornton, J. 1. In interpreting this contract, the by-laws must be taken as a part thereof. 2. The defendants were not responsible for any money converted which was not the funds of the plaintiff; and court erred in holding that the defendants were liable for the sums misappropriated, which belonged to others and were left in the bank. The terms of the bond made defendants responsible for defaults of H so long as he was secretary. Judgment reversed.

Cited: 121 Cal. 79.

FRESNO NAT. BANK v SUPERIOR COURT (1890) 83 Cal. 491.

Writ of prohibition. Petitioner had its principal place of business in F County. The action was brought in S J County. The contract was made and was to be performed in F County, but no place of payment was named. The constitution (sec. 16, art. 12), provided that a corporation "may be sued" in the county where the contract is made, subject to the right to change the place of trial. The court had jurisdiction of the subject matter. Motion to dismiss for want of jurisdiction. Denied.

Van Clief, C. 1. The words "may be sued" in the constitution, sec. 16, art. 12, are permissive, not mandatory, and not in conflict with sec. 5, art. 6. The remedy of a party sued in the wrong county is to move for a change of venue. 2. It does not follow that because petitioner is a national bank a state court has no jurisdiction outside of the county or city in which the bank is located. 3. The distinction between local and transitory actions depends upon statutory law. Writ denied.

Cited: 97 Cal. 140; 98 id. 167; 102 id. 49; 107 id. 381.

MENDOCINO COUNTY v THE BANK OF MENDOCINO (1890) 86 Cal. 255.

Assumpsit, to collect a license tax. In 1887 the board of supervisors of Mendocino County passed an ordinance (Stats. 1883, p. 299) providing for the payment of licenses by personal firms and corporations carrying on "every kind of business" in that county, and, among others, the business of banking. The defendant refused to pay the license on the ground that it was illegal and void. Judgment for plaintiff. Appeal.

Belcher, C. C. 1. This action was properly brought in the name of the county. 2. Assumpsit will lie. 3. This statute fully covers the case, and there is and can be no pretense that it is unconstitutional. Judgment affirmed.

Cited: 97 Cal. 285; 113 id. 168.

McLENNAN v BANK OF CALIFORNIA (1891) 87 Cal. 569.

Money had and received. The complaint alleged the collection by defendant of a note belonging to plaintiff. Defendant claimed that the note was collected by the cashier of defendant in his private capacity, and the money was used by him. A counter claim was also pleaded. R having died, the only witnesses to the transaction were plaintiff and T, his agent. They made contradictory statements. The counter-claim was barred when this action was commenced. The court allowed defendant to introduce the original entries in the books of the bank, showing the items making up the claim. The court did not file its findings within thirty days after the submission. Judgment for defendant. Motion for new trial. Denied. Appeal.

Foote, C. 1. It was for the court which tried the case to say whether the testimony of plaintiff and his agent was to be believed, and we cannot disturb its finding on that point. 2. It was not improper to admit in evidence the original entries in the books of the bank in regard to the counter-claim, even though it was barred by the statute. 3. The code provision requiring a decision to be made

and filed within thirty days of the submission of the case is merely directory. Judgment and order affirmed.

Cited: 107 Cal. 24.

YARNELL v CITY OF LOS ANGELES (1891) 87 Cal. 603.

To enjoin execution of a contract. Defendant had a "freeholder's charter" under the provisions of sec. 8, art. 11, of the state constitution. Under sec. 44 a contract was made between the city and the defendant bank for the deposit for a year of the city money in the bank. The constitution prohibited a delegation by the legislature of the power to interfere with any money held in trust or otherwise; and making profit out of public money or using the same for any purpose not authorized was declared to be a felony. Plaintiff was a taxpayer. Demurrer to complaint. Sustained. Judgment for defendant. Appeal.

McFarland, J. The provisions of sec. 44 of the charter of the city authorizing the contract in question are inconsistent with the constitution and with the law under which the charter was framed. The contract is void as against public policy. The complaint stated a cause of action. A taxpayer can bring such an action as the one at bar. Judgment reversed.

Cited: 99 Cal. 561; 100 id. 19; 103 id. 493; 112 id. 329; 117 id. 243.

JANIN v LONDON AND SAN FRANCISCO BANK (1891) 92 Cal. 14.

To recover deposit. A forged check on defendant was paid in May, 1878, and charged to plaintiff's account. In September, 1878, plaintiff's passbook was balanced and this check returned to him. Plaintiff did not at once examine his book, but did so about December 28, 1878, and intimated to defendant a doubt as to the genuineness of the check. On February 1, 1879, he first claimed it to be a forgery. The main defense was estoppel by negligence and delay. Judgment for plaintiff. Motion for new trial. Denied. Appeal.

DeHaven, J. Payments on forged checks are made at the peril of the bank. The balancing of the passbook constituted a statement of account which required plaintiff to specify any objections thereto within a reasonable time; and defendant had the burden of proof to show that it was in some way injured by the delay. Judgment and order affirmed.

Cited: 97 Cal. 213; 112 id. 306; 115 id. 366, 371; 117 id. 243; 123 id. 627; 127 id. 320; 132 id. 194; 134 id. 241.

WICKERSHAM v CRITTENDEN (1892) 93 Cal. 17.

Suit to restrain defendants from acting as directors. The complaint alleged in substance that the plaintiff was a stockholder in the O Bank, of which defendants assumed to be and were acting as directors, president and secretary, and that they had unlawfully diverted and misappropriated large sums of money belonging to the bank by diverting \$45,000 of the bank's funds from the proper course, and by appropriating to himself by the president of \$400 per month as salary as trustee, under a resolution of the board of directors at which the president acted as a member of the board and voted in favor of the resolution. No demand on the corporation to sue was alleged, but it was shown to be fruitless. Demurrer. Sustained. Judgment for defendants. Appeal.

Harrison, J. 1. A peculiar function of a court of equity is to protect a cestui que trust against any violation by his trustee. 2. The directors of a corporation hold a fiduciary relation to the stockholders. 3. A trustee cannot deal in trust property. 4. The president and cashier had no authority to dispose of bank funds. 5. A director is not entitled to compensation for his services as such. 6. A resolution increasing president's salary is void if it appears he takes part in the proceeding. 7. The bank was a necessary party to the action. 8. No demand on the corporation was necessary. Judgment reversed.

Cited: 104 Cal. 8; 106 id. 328; 109 id. 143; 110 id. 333; 112 id. 650; 121 id. 208; 124 id. 182; 126 id. 73, 76, 342; 127 id. 637; 130 id. 348, 433; 131 id. 659; 132 id. 653.

WICKERSHAM v MURPHY (1892) 93 Cal. 41.

To determine right to office of director. M, a director in the bank, resigned, and plaintiff was chosen in his place by a unanimous vote of the board. M still claimed to be director, and he and the other directors refused to acknowledge

plaintiff's rights as such. Sec. 315 of the civil code gave a summary remedy to try the right of one "elected" as a bank director. Defendant demurred to the complaint. Sustained. Judgment for defendant. Appeal.

Harrison, J. Sec. 315 of the civil code does not apply to this case. For such a wrong plaintiff must seek a remedy in a different proceeding. Judgment affirmed.

WICKERSHAM v BRITTAN (1892) 93 Cal. 34.

To determine right to office of director. Defendant was named to fill a vacancy in the board of directors in the O Bank, caused by the resignation of one director. Sec. 315 of the civil code, under which the present proceeding was brought, gave a summary remedy to try the right of any one claiming to have been "elected" a director in such a corporation to the office. Defendant demurred to the complaint. Sustained. Judgment for defendant. Appeal.

Harrison, J. 1. The appointment of the defendant to fill the vacancy was not an election within the meaning of the code. The superior courts are successors of the former district courts, and exercise all the jurisdiction formerly vested in such courts. Judgment affirmed.

Cited: 93 Cal. 42; 97 id. 381.

STEINHART v NAT. BANK OF D. O. MILLS (1892) 94 Cal. 362.

Money had and received. P made his note to plaintiffs, who placed it for collection in a San Francisco bank, by which it was sent to defendant. P, a customer of defendant, was then insolvent, though in good credit and supposed to be solvent. He had overdrawn his account in excess of a note given to secure such overdrafts. When the note to plaintiffs was presented for payment, at his direction, it was charged to his account, the note marked "canceled," and defendant's check, with a letter of advice for the amount of the note, was inclosed in an envelope and mailed to the San Francisco bank. P assigned that afternoon, and, as soon as defendant heard of it, the letter with the check was taken out of the post-office, the check canceled and a letter of explanation sent with the note to the San Francisco bank. Judgment for defendant. New trial denied. Appeal.

Belcher, C. 1. The bank had a right to rescind the credit on the ground that it was obtained by mistake. 2. As an action could have been maintained by the plaintiff against the makers, it was not paid, even though the customary canceling mark of the bank was placed thereon. The act of the defendant did not constitute a payment of the note. Judgment affirmed.

Cited: 124 Cal. 92.

STOCKTON SAV. AND LOAN SOCIETY v GIDDINGS (1892) 96 Cal. 84.

On note. Two of the defendants purchased from a company, in which the president of the bank was interested, a harvesting machine. The note in suit, signed by them as principals, and the other defendants as sureties, was given for the price. It was made payable and delivered directly to the bank, and was received by it as collateral for money due from the company. It was non-negotiable. Defenses: Non-delivery, breach of warranty, failure of consideration, and rescission of sale. Judgment for plaintiff. Appeal.

Temple, C. 1. The note being payable to the bank made it agent to collect, and was evidence to the makers of the bank's interest; it also put the bank in the position of a payee as to defenses. 2. The makers and sureties, while they could not recoup damages for breach of warranty, could show rescission of the sale and failure of consideration as to the note. The transaction did not amount to a novation. Judgment reversed.

MCCORD v THE CALIFORNIA NAT. BANK (1892) 96 Cal. 197.

On check. Plaintiff made a wager for \$1,000, and drew a check for that sum payable to McR and placed it in the hands of H as stakeholder. The next day H presented the check for payment, which was refused. H and McR called, and payment was again refused in order to give the plaintiff an opportunity to stop payment. H asked that the check be certified, and defendant, not having heard from the plaintiff, certified the check and the check was paid. Thereafter plaintiff drew his check for the amount and presented it for payment, which was refused on account of no funds. Judgment for defendant. Appeal.

Temple, C. Payment not having been stopped, the defendant was authorized to pay the check. The check was an order to pay, and a banker cannot excuse disobedience of his customer's orders by setting up that such orders were in promotion of an unlawful purpose. Judgment affirmed.

BANK OF BRITISH NORTH AMERICA v ALASKA IMP. CO. (1892)
97 Cal. 28.

On bills of exchange. The Act of April 1, 1876, required that a bank, doing business in California, should furnish sworn statements in January and July of each year, showing the condition of the bank for the six months immediately preceding the publication and recording thereof. A failure to comply with any of the provisions of the act would prevent the corporation from maintaining any action or proceeding in any of the courts of the state. To the statement made, which failed to show the capital paid in, the value of assets, or where the same were situated, was annexed an affidavit of the agent of the bank at San Francisco, simply stating that the statements were furnished by the head office at London, and were made up on June 30 and December 31, of each year; but it was not stated anywhere, that the statements were true or correct. It was contended that the statements were not a compliance with the statute, and that plaintiff could not maintain the action. Judgment for plaintiff. Motion for new trial. Denied. Appeal.

Haynes, C. 1. The statement was not a compliance with the statute. It failed to show capital actually paid in, or the value of the assets, or where situated. 2. Nor were the statements sworn to as required. 3. As the bank, though a foreign corporation, was doing a banking business in this state, it was obliged to conform to its laws. Judgment reversed.

Cited: 99 Cal. 127.

HATTON v HOLMES (1893) 97 Cal. 208.

On a bond. The action was against defendant, a notary, and the sureties on his bond, to recover damages for negligently certifying an acknowledgment to a forged mortgage. Plaintiff had given his check for the amount of the loan, payable to the order of the mortgagor. Her indorsement was forged. The money was paid by the bank and charged to plaintiff. The note and mortgage were both forged. It was shown that the notary was negligent. The court granted a nonsuit on the ground that the remedy was against the bank and not against the notary. Judgment for defendant. Appeal.

Belcher, C. 1. The payment by the bank was not authorized, and it had no right to charge the amount against plaintiff's account. That being so, plaintiff has sustained no loss and cannot recover against defendant. 2. The liability of a surety does not extend to a case where the negligence of the losing party is the proximate cause of the loss. Judgment affirmed.

SECURITY SAV. BANK AND TRUST CO. v HINTON (1893) 97 Cal. 214.

To recover taxes. Defendant was city assessor of the City of Los Angeles. The charter of the city was adopted under a constitutional provision allowing certain cities to frame their own organic laws. The tax in question was levied under a provision of the charter. Another constitutional provision prohibited the legislature from imposing taxes upon cities, except by general laws. The tax was upon solvent credits of the savings bank, and the assessor refused to allow a deduction for sums due depositors. Demurrer. Sustained. Judgment for defendant. Appeal.

Haynes, C. 1. The constitutional provision prohibiting the legislature from levying a tax upon municipalities, except by general law, does not conflict with the right of a city to provide by its own charter for the levy of a tax for municipal purposes. 2. The deposits cannot be treated as liabilities of a savings bank for the purpose of reducing the amount of its solvent credits liable to taxation. Sec. 3617 of the political code comprehends both ordinary deposits in savings banks and time deposits. Judgment affirmed.

Cited: 97 Cal. 321; 109 id. 402.

FARMERS AND MERCHANTS BANK OF LOS ANGELES v BOARD OF EQUALIZATION OF LOS ANGELES (1893) 97 Cal. 318.

To review assessment. The bank was doing a general banking business in Los Angeles. The statement of its property returned to the assessor for taxation by

the city for municipal purposes gave the sum of \$2,774 as the value of its unsecured solvent credits. A notice was sent to plaintiff by defendant to show cause why this item should not be increased to \$275,000. Representatives of the bank appeared, a hearing was had, testimony taken and the board made an order finding that the bank had made a false statement; that it should be assessed for \$270,774, for such property, which was done. This action was brought to review the assessment. Judgment for plaintiff. Appeal.

Temple, C. 1. The board of equalization has power to add to the value of property on the assessment roll. This power is not in contravention of the constitution. 2. A defect in notice is waived by appearance. 3. The court had jurisdiction as to subject matter and person. 4. Whether or not petitioner had property that had escaped assessment, is not jurisdictional. Judgment reversed.

Cited: 104 Cal. 394; 110 id. 65; 117 id. 389; 121 id. 525; 131 id. 230; 133 id. 342.

BANK OF BRITISH NORTH AMERICA v MADISON (1893) 99 Cal. 125.

To recover against stockholder. Plaintiff, a foreign banking corporation, sought to recover from defendants, as stockholders in the A corporation, debts due from it to the bank. The statute required the bank to file and record two sworn statements in July and December of each year—one showing the capital stock paid in, the other, the value of the assets and where situated and the liabilities; and “until” such statement was so filed and recorded, no action could be maintained by the bank. The statement filed did not state the value of the assets in each separate place. It was verified by the agent according to the “best of his knowledge and belief;” both statements were embraced in one paper. Judgment for plaintiff. Motion for new trial. Denied. Appeal.

Harrison, J. 1. The requirement of the statute as to the time for filing the statements was directory, and filing before action was sufficient. 2. Including both statements in one paper and recording it in both records was a substantial compliance with the statute. 3. The oath was sufficient. 4. The statement as to the value of the assets was insufficient. Judgment reversed.

DORAN v DORAN (1893) 99 Cal. 311.

To enforce trust in land and money. J, the brother of defendant and son of plaintiff, while in his last sickness, deeded the land in question, and assigned his bank book, to the defendant, declaring his intention to transfer the property in trust for his mother and to make defendant his trustee, asserting that he had confidence that he would do what was right. Aware of the approach of death, he told defendant to hurry down to the bank, draw the money, and bring it to him; but when defendant returned with the money, J was dead. The mother brought this action to enforce a trust in the land and money. Judgment for defendant. Motion for new trial. Denied. Appeal.

Belcher, C. As a trust in regard to real property can only be created by writing, under the code, the judgment was correct as to that. The evidence is sufficient to show a valid trust as to the bank deposit. Judgment and order affirmed as to the land and reversed as to the money.

Cited: 122 Cal. 427.

BANK OF SAN LUIS OBISPO v WICKERSHAM (1893) 99 Cal. 655.

Deceit. Defendants were charged with having fraudulently brought about the sale to the bank of 400 shares of its own stock, owned by defendant W, and paid for with the money of the bank. No rescission was asked nor offer made to return the stock. One of the defendants, only, was a director at the time of the transaction in 1876. The fraud was not discovered until 1891. General demurrer. Special demurrer, that the “cause of action is barred by the Statute of Limitations.” Sustained. Judgment for defendants. Appeal.

DeHaven, J. 1. The Statute of Limitations was not sufficiently pleaded. 2. Without a rescission of the sale and a return or offer to return the stock, plaintiff cannot maintain this action. 3. As the sale to the bank was ultra vires, it could have issued a new certificate for the stock in order to make the tender. The shares of stock were not extinguished by the sale. Judgment affirmed.

Cited: 112 Cal. 214.

FIELD v SHORB (1893) 99 Cal. 661.

To compel accounting. H gave the defendant a check for \$500, which she at once cashed. Thereafter he gave her another check for \$1,288.25, and indorsed to her a certificate of deposit for \$25,000. None of these sums were ever afterward reclaimed by H. At this time H was in his last illness, and the husband of the defendant was his physician. They were both near friends of H, who had no near relatives. Undue influence and mental unsoundness were alleged. The testimony failed to show such a state of mind as to render H incompetent to do business or to comprehend the effect of his acts. The testimony was positive as to the gift. There was evidence of disinterested persons that long prior to his death H had said that he intended to give the defendant the \$25,000. The court found that there was a valid gift of the \$500 check, but not of the other money nor of the certificate. The administrator sued to recover the money. Judgment for plaintiff, except as to \$500. Motion for new trial. Denied. Appeal.

McFarland, J. 1. The evidence was insufficient to support the finding of unsoundness of mind. 2. The indorsement and delivery of the certificate of deposit to defendant transferred to her the entire right to collect the certificate or to dispose of it as she thought fit. 2. No undue influence was practised. Judgment and order reversed.

Cited: 102 Cal. 261; 106 id. 532; 116 id. 653.

CITY OF LOS ANGELES v CITY BANK (1893) 100 Cal. 18.

Money had and received. Plaintiff, pursuant to a provision of its charter, contracted with defendant for the payment of interest upon deposits of municipal funds. Subsequently, this charter provision was held to be unconstitutional and void. Plaintiff withdrew its deposits except the accrued interest, which was afterward demanded and refused. Defendant conducts a general banking business and pays no interest upon deposits, unless a specific contract has been made therefor. The law of the state allows interest "on money received to the use of another and detained by him." Judgment for plaintiff. Appeal.

Searles, C. 1. Interest not specially contracted for is but an incident of the contract upon which it depends, and cannot be recovered in a separate action after payment of the principal. 2. An agreement to pay interest will not be implied where the parties could not by special agreement have provided therefor. 3. The law will only award interest from the time the principal falls due, which, in case of deposits, is not until a demand has been made. Judgment reversed.

Cited: 133 Cal. 194.

PEOPLE v SUPERIOR COURT (1893) 100 Cal. 105.

Writ of prohibition. The Act of the Legislature of California, approved March 30, 1878, provided a complete method of procedure in regard to insolvent banks and their liquidation. The P Bank failed on June 23, 1893, and was proceeded against in insolvency on petition of certain of its creditors under the state insolvency law. The attorney-general applied to the supreme court for a writ of prohibition against the court's taking jurisdiction of the insolvency proceedings.

Paterson, J. The Act of March 30, 1878, known as the Bank Commissioners' Act, is constitutional and superseded the state insolvency law in regard to matters therein referred to. The court had no jurisdiction to proceed in insolvency against the P Bank. Writ granted.

Cited: 102 Cal. 457; 106 id. 69; 133 id. 143, 144.

LONG v SUPERIOR COURT (1894) 102 Cal. 449.

Writ of prohibition. The attorney-general had commenced an action against the P Bank and its directors under the Bank Commissioners' Act, alleging insolvency and that it was unsafe for it to continue business. A judgment had been rendered therein in accordance with the allegations, and in addition it was adjudged that the affairs of the bank be wound up by the commissioners, under the direction and control of the court. This application was to prevent the enforcement of this part of the judgment.

Garoutte, J. The jurisdiction prescribed by the act is limited and special. The superior court has power to enjoin the bank from transacting further business;

but that part of the judgment which directs the bank's liquidation, under the control of the court, is void, the court having no jurisdiction to make it. Writ granted.

Cited: 103 Cal. 33; 106 id. 70; 121 id. 203; 124 id. 94; 133 id. 143.

PEOPLES HOME SAV. BANK v SUPERIOR COURT (1894) 103 Cal. 27.

Petition for prohibition. Petitioner is a savings bank. The attorney-general filed a complaint in the superior court against the petitioner, and obtained an ex parte order appointing a receiver and enjoining the further transaction of business.

Beatly, C. J. 1. The statute relied on (Statutes 1886-7-90) authorizes the attorney-general to commence such an action to enjoin "the further transaction of business," and the court to issue an injunction "after hearing;" but it does not authorize the appointment of a receiver. The ex parte orders were unauthorized and void. Petition granted.

Cited: 106 Cal. 72; 110 id. 140; 129 id. 633; 133 id. 144.

HIGH v BANK OF COMMERCE (1894) 103 Cal. 525.

Statutory action to collect a debt. The plaintiff had obtained a judgment against C, and execution had been returned unsatisfied. He then brought this action upon a judge's order, under sec. 720 of the civil code, against the defendant as debtor of C. The evidence of the defendant's debt to C was very meager; but it showed that at some time there had been a small balance held by the defendant in favor of C. Judgment for defendant. Appeal.

McFarland, J. 1. We would not be warranted in holding that the court should have found some indebtedness, for the evidence was too meager, and the presumption that "a thing once proven to exist continues as long as is usual with things of that nature" is not applicable to a balance in one's favor in a bank. 2. The order of the judge allowing proceedings supplementary to execution was not an adjudication of the rights of parties; his only power was to make an order authorizing the judgment creditor to institute an action in the proper court, and, if he chose, to forbid a transfer pending the action. Judgment affirmed.

SAVINGS BANK v BURNS (1894) 104 Cal. 473.

Action to foreclose mortgage. The complaint referred to the note and mortgage and stated that "said mortgage is hereto annexed and marked Exhibit 'B,'" and it was so annexed. General demurrer to complaint. Overruled. Defendant contended: 1, That plaintiff had not filed the statement required by the Act of April 1, 1876; and 2, that the loan was made by the bank, at the request of its president to take up a mortgage by defendant to him; and that such a loan was in fact to the president, and prohibited by sec. 578 of the civil code prohibiting a loan to directors or officers of savings banks. Demurrer to answer. Sustained. The Act of March 9, 1893, purporting to be "an act to repeal an act concerning corporations and persons engaged in the business of banking" approved April 1, 1876, enacted that "said act is hereby repealed." Judgment for plaintiff. Appeal.

Belcher, C. 1. The exhibit was a part of the complaint. 2. The Act of March 9, 1893, repealed the Act of April 1, 1876. The title of an act is not a part thereof but may be resorted to for the purpose of ascertaining the legislative intent. 3. The mortgage was enforceable, for where parties are not in pari delicto an exception may be made to the rule that no recovery can be had on a contract founded on an illegal consideration. Judgment affirmed.

Cited: 112 Cal. 79; 124 id. 291.

HOLT v THOMAS (1894) 105 Cal. 273.

To recover back assessment. When the C National Bank failed plaintiff was a director, and sixty shares of its stock appeared in his name on the books. An assessment was levied by the comptroller to pay debts of the bank. When called upon to pay, plaintiff claimed to have sold fifty of his shares to a third party. He was told by the receiver that unless he paid his assessment, suit would be brought. He then paid the money, and later sued to recover his assessment on the ground of mistake. Judgment for plaintiff. New trial denied. Appeal.

Van Fleet, J. The question of ownership of the stock was immaterial. Defendant paid with full knowledge of the facts and cannot recover. Payment to avoid suit has sufficient consideration to support it. Threat of suit will not constitute duress. Judgment reversed.

BANK OF MARTINEZ v HEMME ORCHARD & LAND CO. (1895) 105 Cal. 376.

Foreclosure of mortgage given to the plaintiff to secure a loan. Plaintiff was incorporated under a code provision authorizing banks of deposit and discount, but prohibiting the issuance of paper to circulate as money. The constitution contained a like provision. Ultra vires and illegality were urged as defenses. Decree for plaintiff. Appeal.

Per curiam. 1. Banks of deposit are almost universally banks of loan and discount, and there is no prohibition against taking real estate security. 2. Loan and discount associations, or companies, are not banks within the meaning of the constitution. Decree affirmed.

CRANE v PACIFIC BANK (1895) 106 Cal. 64.

Attachment. After the defendant had suspended, this action was brought by attachment against it to recover a deposit. Thereafter a judgment was entered in an action brought by the attorney-general of the state against the bank, under the Bank Commissioners' Act, declaring the bank insolvent and ordering its liquidation. A motion to dissolve the attachment was allowed. Appeal.

Haynes, C. The bank being in fact insolvent when the attachment was levied, the judgment of insolvency and liquidation thereafter entered dissolved the attachment. Order affirmed.

Cited: 119 Cal. 338; 133 id. 144; 135 id. 598.

THE PEOPLE v LEONARD (1895) 106 Cal. 302.

Indictment. The defendant was charged with embezzlement as "an officer, manager and servant of the Bank of Santa Clara, a corporation duly organized and existing under the laws of California." The prosecution offered in evidence articles of incorporation of "the Bank of Santa Clara County" and entries in the bank's cash book. The defendant had taken funds and had given the bank his unsecured promissory note. Verdict guilty. Motion for new trial. Denied. Appeal.

Searles, J. 1. The articles were insufficient to constitute a corporation de jure; but though defective, they could be introduced in the proof of the existence of a corporation de facto as tending to show that the bank acted and did business as a corporation, and that the defendant acted as a director, manager, and agent thereof. 2. Any officer or director who has acted as such is subject to the liabilities and penalties of like officers of a de jure corporation. 3. The cash book was admissible in evidence, as it showed the cash receipts and disbursements, kept under the direction of the defendant, and was prima facie evidence of the balances of cash on hand at the specified dates. 4. Where an officer in charge of the bank's funds takes therefrom such funds and deposits and gives therefor his worthless promissory notes, and appropriates to his own use the funds so taken, he is guilty of embezzlement. Judgment affirmed.

Cited: 114 Cal. 573; 116 id. 509; 134 id. 438.

WICKERSHAM v CRITTENDEN (1895) 106 Cal. 327.

Action to compel accounting. The action was brought by a stockholder of a bank against defendant to compel him to repay an increase in salary voted to him as president at a meeting of the trustees at which defendant was present and cast the deciding vote. Judgment for plaintiff. New trial denied. Appeal.

Per curiam. The increase in salary being accomplished by his own vote, defendant cannot retain it. The resolution was invalid. Order affirmed.

Cited: 106 Cal. 329; 124 id. 182.

WICKERSHAM v CRITTENDEN (1895) 106 Cal. 329.

To compel accounting. The action was brought by a stockholder in a bank, of which defendant was president, to recover attorney's fees paid by the bank,

on his order, for services in a suit between rival stockholders of the bank in which the bank had no interest and which was solely for defendant's individual benefit. No request to the directors to sue was alleged, but it was stated that such request was useless and would have been denied, because the directors were under control of the president. Judgment for plaintiff. Appeal.

Per curiam. 1. The defendant should account to the bank for the money paid out. 2. The allegation that demand to bring suit would have been useless was sufficient to excuse the failure to so request the directors. Judgment affirmed.

Cited: 126 Cal. 73.

HENDERSON v O'CONNOR (1895) 106 Cal. 385.

To recover amount of draft. On June 7, 1893, plaintiff deposited a draft on New York, to recover the amount of which this action was brought, with the C National Bank at San Diego. The draft was received for collection, and at once forwarded to the correspondent of the bank in New York. It was collected on June 14, 1893, and the notice thereof received June 20, 1893, when the bank credited the amount to the plaintiff. On June 21, 1893, the bank failed and defendant was appointed its receiver. Judgment for plaintiff. Appeal.

Vancief, C. The bank was the agent for the owner of the draft in making the collection, and the proceeds belonged to plaintiff. Judgment affirmed.

Cited: 112 Cal. 602.

PAULY v PAULY (1895) 107 Cal. 8.

On promissory notes, against stockholders for attorneys' fees and money paid. The plaintiff was receiver of the C Bank. Defendant was assignee of the C Co. The notes were executed by the C Co. without authority, in favor of the C Bank. At a special meeting, not called for that purpose, the directors attempted to ratify the making thereof. The court excluded the notes. Counter-claims were interposed and the jury found against both plaintiff and defendant. The cashier of the bank and two of its directors were directors in the C Co. The C Co. had an account at the bank, but no passbook, and loans as well as deposits were credited to it. Bills of the C Co. were paid, after being approved by C Co., as though they were checks. Weekly statements of the account and the vouchers were delivered by the bank to the C Co. These statements, but not the vouchers, were allowed in evidence. The ledger of the C Co. was also allowed in evidence. The court excluded the book of the bank. Judgment for defendant. Motion for new trial. Denied. Appeal.

Haynes, C. 1. The rejection of the notes was not conclusive on the right of the plaintiff to recover. 2. The weekly statement furnished the C Co. by the bank and the vouchers accompanying the same had the effect of a passbook. The vouchers should have been admitted as prima facie proof of payment. 3. The books of the bank were also competent evidence. 4. The cashier and directors, were not the bank, but in an action by the bank against the C Co. their acts are admissible in relation to matters under their charge. Judgment and order reversed.

Cited: 112 Cal. 59; 125 id. 410; 129 id. 55; 130 id. 348; 132 id. 74.

CALIFORNIA NAT. BANK v GINTY (1895) 108 Cal. 148.

On promissory notes. One of the notes was made by L & Co. and the other by them and defendants G and L to plaintiff, and bore interest at 10 per cent per annum. The court found that, as to the bank, G and L were principals, but sureties as to L & Co., which the bank knew. The legal rate of interest, when no agreement was made, was 7 per cent in California, and by agreement any rate could be charged when the notes were made. Originally L & Co. had pledged certain logs with the bank as security for a larger loan made by them and by defendants. Thereafter this note was surrendered, and the notes in suit given. It was held that the rate of interest charged in the notes was legal, and that the proceeds of the logs should be applied first to the payment of the note signed by L & Co. and defendants, and then to that signed only by L & Co. Judgment for plaintiff. Cross appeals.

Van Fleet, J. 1. Where one signs as principal, he will be held as such, notwithstanding the creditor knew that, as between the one thus signing and the principal debtor, he was a surety, and that a release of the principal would not release the surety. 2. The act of Congress intended that in states where no

rate of interest was provided by statute, national banks could charge 7 per cent; and when the statute did fix the rate, such banks could charge the same rates as other banks or individuals. 3. The bank was entitled to have the proceeds of the pledged property first applied to the payment of the note signed by L & Co. alone. Judgment modified.

CITY OF LOS ANGELES v STATE LOAN & TRUST CO. (1895) 109 Cal. 396.

Action to recover taxes. Defendant was organized to do a safe deposit business, that of a trust company, and that of general banking, and had a savings department in which savings deposits were received, upon which interest was paid. The account of these was kept in a separate ledger headed "Savings Deposits" and "Term Savings Deposits." It was upon these accounts that the tax in question was levied. Subdiv. 6 of sec. 3617, political code, provided that credits, claims, debts and demands due, owing or accruing for or on account of money deposited with savings and loan corporations, should, for the purposes of taxation, be deemed an interest in the property of the corporation, and not taxable against the owner or creditor thereof. The court held that the defendant was not a de facto savings and loan association, and that the tax was invalid. Judgment for plaintiff. Appeal.

Haynes, C. 1. The political code includes a savings institution such as defendant. 2. It is not necessary that the name should express the fact that it is a savings bank. 3. If an association presumes to act as a savings and loan association, it is estopped from claiming that it is not such. The defendant was de facto a savings corporation and the tax was valid. Judgment reversed.

Cited: 117 Cal. 160; 119 id. 341.

McGOWAN v McDONALD (1896) 111 Cal. 57.

To recover against stockholders. Plaintiff was assignee of depositors in the P Bank, which failed in 1893. Statutes made the stockholders personally liable for their proportion of the debts of all corporations. The act under which the bank was incorporated undertook to exempt stockholders from this liability. The bank did not elect to continue under the code provisions. Certain of the assignors of the plaintiff were permitted, over objections of the defendants, to refresh their memories by reference to their bank passbooks; and these books, though objected to, were allowed in evidence. Interest was allowed from the time the bank failed. W, one of the plaintiff's assignors, was a stockholder. Motion for new trial. Denied. Appeal.

Belcher, C. 1. If the provision of the act under which the bank was formed was intended to exempt stockholders from liability, it was unconstitutional and void. The whole act was not necessarily void, but only that part thereof. 2. The bank, not having elected to continue under the code provisions, remained subject to the law under which it was incorporated. 3. The court did not err in allowing the witnesses to refresh their memories from their passbooks. The books were competent to prove the amount of deposits, and might be used in a suit against stockholders as well as against the bank. 4. Interest from the suspension of the bank was properly allowed. 5. Both the legislature and the people have the power to change the liability of stockholders without violating the constitutional provision against impairment of contracts. Judgment affirmed.

Cited: 119 Cal. 338, 340; 121 id. 85.

KILBURN v LAW (1896) 111 Cal. 237.

Writ of prohibition. S brought a civil action against plaintiffs, state bank commissioners, alleging neglect of duty in failing to ascertain the insolvent condition of a certain bank. The action was brought under sec. 772 of the penal code and was begun in the superior court. The plaintiffs made application for this writ to the supreme court, alleging that the section in question related only to criminal proceedings, and also that its provisions applied solely to district, county, or township officers, and asked that the defendant, the judge of the court below, be commanded to desist from further proceeding with the action.

Temple, J. The legislature intended sec. 772 to apply to criminal proceedings only. The provisions of the above section apply only to the class of officials mentioned therein. Prosecution of a bank commissioner under that section cannot be sustained. Decree for plaintiffs.

O'CONNOR v WITHERBY (1896) 111 Cal. 523.

To recover assessment. The plaintiff sued as receiver of an insolvent national bank to recover from defendant, a stockholder, an assessment levied by the comptroller of the currency to pay the debts of the bank. He alleged demand and refusal to pay the assessment. The comptroller decided that such amount was necessary, and he ordered it levied and collected. General demurrer to the complaint. Overruled. Defense: That an assessment had been levied without full knowledge, and was too large by one half. There was no conflict in the evidence. The stock had been transferred on the books of the bank to defendant, vice-president, by the wife of the president. Defendant had indorsed the certificate therefor, though he contended that the transfer was made without his knowledge and in fraud of creditors. Verdict directed. Judgment for plaintiff. Motion for new trial. Denied. Appeal.

McFarland, J. 1. The complaint was good as against a general demurrer. 2. The decision of the comptroller of the currency was conclusive. 3. Defendant, having indorsed the certificate, must have known of the transfer, and it was immaterial what was the intent in making it. 4. Indorsement by a bank officer on certificates is conclusive evidence of his knowledge of their issuance. Judgment affirmed.

RALSTON v BANK OF CALIFORNIA (1896) 112 Cal. 208.

For conversion of bank stock. In 1881 B, the owner of stock in defendant bank, transferred his certificate to P. P demanded a transfer, which was refused on the ground that B owed the bank, a lien being reserved on the certificate. The bank thereafter sold its claim against B to G. P, having died, plaintiff, his executor, on July 3, 1888, demanded a transfer of the stock, which was refused. When the last demand was made, the stock was worth \$200 per share. When the case was tried it was worth \$281 per share, and dividends had been declared and paid. Judgment for defendant. Appeal.

Per curiam. 1. While the refusal to comply with the first demand was correct, the subsequent sale of the claim by the bank against B released the lien, and the refusal of the second demand was a conversion. 2. A bank can be guilty of converting its own stock. 3. The measure of damages is the value of the stock when the second demand was made, with interest. 4. Dividends cannot be recovered by way of damages except on special demand. Judgment reversed

Cited: 130 Cal. 521.

ANDERSON v PACIFIC BANK (1896) 112 Cal. 598.

To recover special deposit. The bank agreed to furnish bail for two persons charged with a crime; and, to indemnify it, plaintiff gave to the president, as a special deposit, to be returned when liability on the bond ceased, the gold coin in controversy, and obtained a certificate of deposit therefor, "payable only on release of bonds." The bank having failed, this action was brought to recover the coin. The money, without the knowledge or consent of plaintiff, went into the bank vaults through the usual channels. The bonds were given, and thereafter released without loss. The court allowed plaintiff legal interest from the time one of the parties arrested was surrendered by his sureties, though demand for the money was made later. Judgment for plaintiff. Appeal.

Henshaw, J. 1. This was a special deposit; the depositor did not become a general creditor. 2. The fact that the bank afterward wrongfully mingled the money with its own funds would not defeat the right to recover. 3. Interest should have been allowed only from demand. Judgment modified.

Cited: 133 Cal. 144.

BANK OF CALIFORNIA v J. L. MOTT IRON WORKS (1896) 113 Cal. 409.

Bill of interpleader. The plaintiff received from A, for collection, a note made by B in favor of the P Co. and indorsed to A. After the note was collected, the money was attached in the hands of the bank by the Iron Works in an action against the P Co. A had assigned his claim to M, who was a defendant and claimed the money. There was no proof of the attachment, nor any evidence tending to impeach the title of A to the note. Judgment for the Iron Works. Appeal by M.

McFarland, J. 1. In the absence of any evidence of the attachment, there was

no basis for a judgment in favor of the Iron Works. 2. The possession of the note by A was prima facie evidence of his title thereto. Judgment reversed.

CHETWOOD v CALIFORNIA NAT. BANK (1896) 113 Cal. 414.

To recover money lost through negligence. Plaintiff was a stockholder in a bank, which had failed, and for which a receiver had been appointed. The complaint was in form a bill in equity for an accounting. Defendants were the executive committee thereof, and had authorized the act complained of, which had resulted in a large loss to the bank. The court failed to find that the defendants were jointly negligent. The action was compromised as to two of the defendants and dismissed as to them. Judgment was entered against defendant T, as president, without finding any dereliction of duty by the other two. Judgment for plaintiff. Appeal.

Henshaw, J. 1. The gravamen of the charge is the injury to the property of the bank by reason of the wrongful acts of the defendants, and is an action of tort. 2. The relief prayed for, being based on the joint negligence of the defendants, there should have been a finding on that point. 3. The release of two of the defendants operated to release the other. Judgment reversed.

Cited: 113 Cal. 653; 114 id. 519; 133 id. 113.

CHRISTIE v SHERWOOD (1896) 113 Cal. 526.

Action to foreclose mortgage. The mortgage by S to the plaintiff, was made December 3, 1887, and recorded December 20, 1890, and that to the defendant bank was made May 4, and recorded May 5, 1890. The money loaned by plaintiff was part of a deposit made by him in the bank, and the loan was made through the bank cashier. The mortgage was acknowledged before the cashier and recorded at his request, and the interest thereon was paid through the bank. The controversy was as to the priority of these mortgages. Judgment for plaintiff. Appeal.

Haynes, C. The cashier must have had knowledge of the first loan in making the second, and, with this knowledge, the bank is chargeable. Under the circumstances, the bank should not be permitted to say that it did not make the loan of plaintiff's money. Judgment affirmed.

CHETWOOD v CALIFORNIA NAT. BANK (1896) 113 Cal. 649.

To recover money lost through negligence. The bank had become insolvent, and was in the hands of a receiver when this action was commenced to recover damages for money lost by the bank by reason of mismanagement of its executive committee. The receiver was discharged, and the defendant S was appointed under a provision of the act of Congress to wind up its affairs, and all the assets of the bank were turned over to him. Thereafter a compromise was made with two of the defendants whereby they paid \$27,000 and were released and the action dismissed as to them. A motion by S to compel the plaintiff to turn over the money to him was denied. Appeal.

Henshaw, J. The money having been paid for the benefit of the stockholders of the bank should have been turned over to S, the agent, after making a reasonable allowance to plaintiff for his costs, disbursements and attorney's fees. Order reversed.

IN THE MATTER OF HOWELL (1896) 114 Cal. 250.

Habeas corpus. The petitioner was cashier of the M Bank which, at the time of these occurrences, was in liquidation. He was charged with having falsely sworn as to the value of certain securities. For the purpose of learning whether the bank was solvent the petitioner was put under oath by the commissioners. In a statement of the assets and liabilities there appeared loans and overdrafts of \$176,000. The cashier had expressed an opinion that these items were good and valid assets, but had not sworn that the value of the loans and overdrafts was \$176,000.

Henshaw, J. In the absence of a showing that there was a willful failure, and refusal to exercise an honest judgment, a charge of perjury cannot be successfully maintained. Prisoner discharged.

CARPY v DOWDELL (1897) 115 Cal. 677.

To foreclose chattel mortgage. Two mortgages were given by defendant to a bank on a lot of wine. A sale of the wine and payment of the price to the bank was negotiated by the cashier with the knowledge and approval of the bank. The owners were delivering the wine in accordance with the contract, when plaintiff, to whom the bank had assigned the notes and mortgages after maturity, with full notice of the sale, commenced to foreclose and stopped the delivery by injunction. Judgment for plaintiff. New trial denied. Appeal.

McFarland, J. 1. When a corporation, by a long course of acquiescence, holds out an officer, as agent, as having authority to do certain things, it cannot, after he has acted, repudiate his acts. 2. The bank having consented to and encouraged the sale, both it and its assignee are estopped to deny its validity. 3. The principle of equitable estoppel does not rest on a consideration moving to the party estopped. Judgment reversed.

Cited: 117 Cal. 346; 130 id. 539.

McHENRY v DOWNER (1897) 116 Cal. 20.

Action to enjoin collection of taxes. Plaintiffs were stockholders in a national bank, the stock of which had been assessed at an arbitrary valuation of \$100 per share, the other property of the bank, having also been assessed, and all taxes paid thereon. The constitution of the state provided that all the property should be taxed in proportion to its value, and the political code exempted shares in corporations, including banks, from assessment, and shares in state banks were not assessed. The act of Congress, permitting the assessment of national bank stock, provided that the tax should not be at a greater rate than is assessed upon other moneyed capital. Judgment for defendant. Appeal.

Searls, C. The provision of the state constitution is not self-executing. As the legislature has provided no means for carrying it into effect, it cannot be claimed that the assessment complained of violates that provision. The fact that the code exempts shares in state banks from taxation operates as an unlawful discrimination against shares in national banks and renders the assessment complained of void. Judgment reversed.

Cited: 128 Cal. 595.

HERMAN v HECHT (1897) 116 Cal. 553.

To recover from stockholders. The P Co., a corporation, owed the M Bank on a note. It sold out to a partnership which assumed the debt, took up the old note, and substituted its own therefor; thereafter the J Co. repurchased the property sold, assuming the debts of the partnership, and took up the note thereof, substituting its own note, indorsed by some of its stockholders. The corporation became insolvent. The note was taken up by the indorsers, who assigned the debt to plaintiff. This action was to recover the amount from the stockholders of the J Co. The defense was, in part, that the last transaction between the bank and the J Co. was not a loan, and that plaintiff was not the real party in interest. The court admitted evidence that plaintiff's assignors were stockholders in the J Co. Plaintiff had commenced an action against the corporation alone, which was still pending. Judgment for defendants. Motion for new trial. Denied. Appeal.

Haynes, C. 1. The giving of the new note by the J Co. was a new loan to that corporation by the bank. 2. Plaintiff was the real party in interest. 3. The court erred in admitting evidence that plaintiff's assignors were stockholders in the corporation. 4. The action against the corporation was no defense to the present action against the stockholders. Order reversed.

Cited: 132 Cal. 630; 133 id. 583.

WELLS v BLACK (1897) 117 Cal. 157.

To recover against bank stockholders. Plaintiff sued as a depositor to enforce the statutory liability of defendants. The depositors received such interests as the directors voted them, and the surplus earnings went to the stockholders. A by-law or form of agreement entered among the by-laws of the corporation and printed in each deposit book, waived the statutory liability of the stockholders. The signature book of the bank contained printed matter, under the head of "agreement," which recited a similar waiver; but its contents were not known to its depositors,

and they never assented thereto. The three years Statute of Limitations was pleaded. Judgment for plaintiff. Appeal.

Henshaw, J. 1. The relation between the bank and its depositors is that of debtor and creditor. 2. The depositor is not bound by the so-called by-law or agreement of waiver. If a by-law, it is void because in conflict with the constitution and laws of the state. 3. An action on the deposit against the stockholders is barred after three years after the deposit was made. Judgment modified.

Cited: 125 Cal. 488; 127 id. 168.

PEOPLE v WILSON (1897) 117 Cal. 242.

To recover money. Defendant was insurance commissioner from April 1, 1890, to April 1, 1894, and was in the habit of paying the receipts of his office into the state treasury at the end of every month; and for the intermediate period, he made a general deposit of such receipts in the P Bank, which failed in the latter part of June, 1893, when the amount now sought to be recovered by the state from the commissioner was on deposit there. The statute required defendant to pay "monthly into the state treasury whatever amounts may be received and collected by him." Sec. 424 of the penal code prohibits any officer holding public moneys from loaning them or unlawfully depositing them with any bank or banker. Judgment for plaintiff. Appeal.

Britt, C. In our opinion defendant was not permitted by law to make an ordinary deposit of the funds in bank at all. The legislature did not intend to allow loans by way of general deposits in banks while forbidding all others. Judgment affirmed.

McKEAN v GERMAN AMERICAN SAV. BANK (1897) 118 Cal. 334.

To recover deposit. S, who owed defendant money, which was secured by note and mortgage, made the deposit sued for and assigned it to plaintiff. Defendant sought to offset the mortgage debt. Sec. 726 of the code of civil procedure provided that there should be but one action for the recovery of a debt secured by mortgage, and that was foreclosure. Judgment for plaintiff. Appeal.

Chipman, C. The mortgage was not the proper subject of an offset to a claim for the deposit. A mortgagee must first look to the mortgage as constituting the primary fund out of which a debt secured by mortgage must be paid. Judgment affirmed.

Cited: 120 Cal. 484; 127 id. 577.

DAVIS v FIRST NAT. BANK OF FRESNO (1897) 118 Cal. 600.

Negligence. In May, 1893, plaintiff requested defendant to cash a draft in his favor, drawn by a bank in Wyoming on a bank in New York. This was refused without identification. The draft was indorsed by plaintiff, left for collection, and at once forwarded by defendant to the bank in Wyoming for identification, then to be forwarded to New York for collection. By legal proceedings against the plaintiff, it was intercepted and not collected. The court refused to permit defendant to prove that it had followed the usual custom in the matter. The court instructed the jury that if, through the negligence of defendant, it has never returned to plaintiff the proceeds of the draft, the plaintiff had made out a prima facie case of negligence against the defendant. The court refused to permit defendant to show that the failure to collect the draft was due to legal proceedings which defendant could not prevent. And, as a third instruction, the court said that there was no need to forward the draft to any place to have the signature identified. Judgment for plaintiff. Appeal.

Harrison, J. It was incumbent on plaintiff to establish negligence. If defendant followed the usual, reasonable custom, it would have been exonerated from liability. The court should have instructed the jury whether, if any of the facts claimed thereby were established, they would constitute negligence. If the failure to collect or return the draft was by virtue of a *jus tertii*, defendant was not liable. The second instruction noticed was correct, but its effect was neutralized by the third, which was erroneous. Judgment reversed.

WHEAT v BANK OF CALIFORNIA (1897) 119 Cal. 4.

To recover deposit. J brought an action for accounting against R, claiming that they were partners in the business of selling cables. S intervened, claiming

also to be a partner. Plaintiff was appointed receiver to collect the money on account of the partnership. In that action the judgment was that S was a partner of J. The money, to recover which this action is brought, was collected by the bank for J pending the litigation. S and his attorney called on the bank and notified it not to pay out the money to J, as he and S had an interest therein. Judgment for defendant. New trial denied. Appeal.

Garoutte, J. If the notice by Seale and his attorney to the bank had any effect, it was a right personal to Seale and which the receiver could not assert. The receiver had no authority to maintain the action. Judgment affirmed.

FRIEDLANDER v BANK OF CALIFORNIA (1897) 119 Cal. 93.

To recover an accounting. Prior to his death, F, whose administrator is plaintiff, owed defendant \$500,000 on his own account on a note upon which C was indorser, and \$200,000 on a note of C, on which F was indorser. To secure his debt, F conveyed to defendant land and collateral in trust, to sell and apply the proceeds to the payment of the debt. C did the same. Without consulting C, F and defendant made an agreement whereby the collateral, except the land, was surrendered to F. In the settlement of F's estate this land was not treated as an asset. Thereafter C made an agreement with defendant, without the knowledge of F, whereby C conveyed his land absolutely to the bank, and the notes of F and himself were surrendered and canceled and he was fully released. Defendant has sold the land conveyed by F. Plaintiff claims the proceeds on the ground that the agreement of C with defendant was a satisfaction of the indebtedness of both debtors. Judgment for defendant. New trial denied. Appeal.

Garoutte, J. The settlement with Chapman did not release Friedlander, the other debtor. Judgment affirmed.

MURPHY v PACIFIC BANK (1897) 119 Cal. 334.

To recover dividends. Plaintiff sued, as assignee of M, on a demand against defendant for money loaned by M. Defendant became insolvent and six dividends were declared. Defense: That the money due was a deposit, and that M was a stockholder; that the bank had been incorporated under the Act of April 11, 1862, which provided that the capital stock and assets of the corporation should be a security to depositors who were not stockholders; that M was the owner of 1738 shares of the stock of defendant, and that the assignment to the plaintiff was made long after the insolvency. The corporation had, by legislative permission, changed its name from "Pacific Accumulation and Loan Company" to its present name. Judgment for plaintiff. Appeal.

Haynes, C. 1. The change in the name or in the business done by the bank did not change the liability of stockholders who were depositors. 2. The Act of 1862 is not unconstitutional. And while it was undoubtedly repealed by sec. 288 of the civil code, the repeal related only to the corporation thereafter to be formed. 3. Plaintiff's assignor, McDonald, being a stockholder, was not entitled to participation in the dividends. Judgment reversed.

Cited: 130 Cal. 549, 550; 133 id. 144.

SAVINGS & LOAN SOCIETY v McKOON (1898) 120 Cal. 177.

To foreclose mortgage. The plaintiff was organized for doing a savings bank business, and its principal place of business was in San Francisco. The mortgage in this suit was on land in San Diego County. It was objected that no certified copy of the articles of incorporation of plaintiff had been filed in that county. Sec. 299 of the civil code provided that, unless such copy was filed, the corporation could not maintain any action or proceeding in relation to its property. Judgment for plaintiff. Appeal.

Belcher, C. Sec. 299 of the civil code does not apply to an action for the foreclosure of a mortgage. The failure to file the articles of incorporation should have been specially pleaded in abatement. Judgment affirmed.

CHEMICAL NAT. BANK v HAVERMALE (1898) 120 Cal. 601.

To recover against stockholders. On September 15, 1891, the C Bank executed to J a certificate of deposit, which before maturity, was transferred to the plaintiff for value. The C Bank failed on November 12, 1891. This action was

brought to recover from defendant H and the C National Bank, as stockholders in the C Bank, the amount of the certificate. Ownership was denied by the bank, and on the trial it offered to show that a subscription made by its cashier was never authorized by it. Rejected. It was not stated that the stock was taken as collateral. The court found that the bank was a stockholder. Judgment for plaintiff. New trial. Denied. Appeal.

Haynes, C. 1. A national bank had no power to purchase or subscribe for the stock of another corporation, although it might take such stock in the usual course of business as security for a loan. It follows that the finding was contrary to law. The evidence should have been admitted. 2. The transaction was ultra vires, and the bank acquired no title to the stock. The defendants therefore are not liable to the creditors of the C Bank. Judgment and order reversed.

CITIZENS BANK OF LOS ANGELES v JONES (1898) 121 Cal. 30.

On certificate of deposit. A bank issued to defendant the certificate of deposit, payable to his order twelve or six months after date, if desired. The certificate was indorsed to plaintiff, by whom it was duly presented to the maker for payment. On default it was protested and notice given. The answer set up that the indorsement, made after issue, was with the understanding that the certificate should be presented for payment at the end of six months from its date, at which time the maker was solvent. Judgment for plaintiff. Appeal.

Van Fleet, J. 1. If the agreement was made before the indorsement, all negotiations were merged in the writing; if after, it was void for want of consideration. The stipulation in the certificate was an option solely for the benefit of the payee, and passed to the indorsee. 2. The terms of a negotiable instrument cannot be varied by parol evidence. Judgment affirmed.

PACIFIC BANK v STONE (1898) 121 Cal. 202.

On promissory note. The defense was that the defendant was specially employed by the acting president of the bank as an attorney, and for services rendered under said employment the note in suit was to be canceled. The employment was without authority of the board of directors and while the bank was insolvent. It was shown that the directors knew that the services were rendered, and this was relied on as a ratification. Under the code, the corporate business was controlled by the directors. Judgment for plaintiff. Appeal.

Chipman, C. 1. The acting president had no authority to employ special counsel for the bank. 2. The knowledge of the directors that the services had been rendered did not amount to a ratification. Judgment affirmed.

Cited: 133 Cal. 144.

HART v KETCHUM (1898) 121 Cal. 426.

To recover money. P, since deceased, whose administrator was plaintiff, gave defendant two savings bank books, with written orders to withdraw the funds, saying at the time, "after my death, I want you to draw this money and pay it out as I wish to have it done." The money was drawn by defendant on these orders. Defense: Gift mortis causa. Judgment for plaintiff. Appeal.

Harrison, J. To constitute a valid gift mortis causa the delivery must be a gift in presenti, and not for the purpose of making a future disposal of it under the direction of the donor. If by the terms of the gift it is not to take effect until after the death of the donor, the disposal is testamentary and not a gift. A gift may be revoked by the donor's recovery. Judgment affirmed.

Cited: 121 Cal. 679, 682; 126 id. 535; 133 id. 503.

BOOTH v OAKLAND BANK OF SAVINGS (1898) 122 Cal. 19.

To establish a trust. B, who had an account with defendant bank, agreed with the bank that the account should be so fixed that either C B or A J could draw it after her death. She signed a paper at the time, as follows: "To Oakland Bank of Savings, May 17, 1892; in re savings deposit 7041, in my name. Pay to the individual order of either Cornelia E. Booth or Amelia L. James or myself. (sgd.) Frances A. Bell." The signatures of the sisters were furnished by her to the bank. B died still owning a part of this deposit, a part having been drawn by B. B retained the bank book with the knowledge of the bank. C B

and the administrator of A J were plaintiffs. The executors of B were also defendants. The complaint alleged that B made the deposit, and that plaintiffs were its owners. Demurrer. Overruled. Judgment for defendant. Motion for a new trial. Denied. Appeal.

Haynes, C. The transaction falls short of a gift, but was a trust in favor of the sisters. It was unnecessary to show an acceptance. This suit was sufficient acceptance. Even though revoked as to part of the deposit by subsequent withdrawal, the trust remained as to the balance. The complaint was sufficient. The retention of the bank book by decedent is immaterial, as the bank had knowledge of the transaction. The bank was a trustee of the fund. Judgment and order reversed.

CAMP v LAND (1898) 122 Cal. 167.

To redeem a homestead from foreclosure sale. Plaintiff executed a mortgage on the land to defendant. Thereafter he executed a deed of trust thereon to a national bank. The mortgage was foreclosed, plaintiff, his wife, and bank, which set up its trust deed, being defendants. The wife answered denying the incorporation of the bank and alleging want of authority to take the trust deed. Under judgment in favor of the plaintiff in that action, the property was sold, and bought by defendant, who obtained a deed. Defendant pleaded the decree and sale, and asked that his title be quieted. Without objection, the president orally proved that for many years it had done business as a bank. The trust deed was introduced over the objection of plaintiff. Judgment for defendant. Motion for new trial. Denied. Appeal.

Henshaw, J. 1. Plaintiff having dealt with the bank as a corporation, cannot deny its existence as such. The admission of the evidence of the bank's president, without objection, is sufficient to prove a de facto corporation. 2. The United States only could raise the question of ultra vires. 3. The trust deed was in proper form. It is not void as being a restraint upon alienation. 4. The deed was not merged in the foreclosure. Judgment and order affirmed.

PEOPLE v NATIONAL BANK OF D. O. MILLS (1898) 123 Cal. 53.

To recover taxes. The assessor of the state levied a tax on the safes, fixtures, money on deposit and shares of stock of the defendant. On objection being made to the taxation of fixtures, he struck that item from the list; but he subsequently added it again without notice to defendant. Judgment for defendant. Motion for new trial. Denied. Appeal.

Temple, J. 1. The assessor had power to include in the list as property subject to taxation, that which had not been included therein by the owner. 2. Under the United States statutes, the shares of stock were not subject to taxation. Judgment affirmed.

Cited: 129 Cal. 97; 131 id. 359, 614.

DINGLEY v McDONALD (1899) 124 Cal. 90.

Against stockholders. The assignor of plaintiff had on deposit in the P Bank, of which defendants were stockholders, \$4,891.01. He obtained two drafts on a bank in Chicago in favor of C, giving checks therefor, which were charged to his account on December 14, 1893, leaving a balance in his favor. The bank in Chicago failed on June 25, 1893. The drafts were protested and returned to the P Bank. A claim for the original deposit was allowed on August 5, 1895. The claim was substituted for the bank book and received in evidence to prove the indebtedness. Another claim sued on was assigned to plaintiff by P acting for F, the owner, the authority of P being verbal. The liability on this claim arose on March 10, 1893. This action was brought on March 10, 1896, the limitation being three years. It was contended that the action was barred. Judgment for plaintiff. Appeal.

Pringle, C. 1. The drafts were not payment of the checks. The claim was competent evidence to show the state of the account. 2. The authority of P to assign the claim of F was not required to be in writing. 3. Under sec. 12 of the code of civil procedure, the first day is excluded in computing time. The claim was not barred. Judgment affirmed.

Cited: 125 Cal. 615; 128 id. 515.

BRASLON v SUPERIOR COURT (1899) 124 Cal. 123.

Petition for writ of certiorari. The attorney-general commenced an action in the superior court against M Bank and its directors, under sec. 11 of the Act of 1895, p. 175, to enjoin them from transacting business and to compel a liquidation. After appearance, some of the directors resigned, and the petitioner claimed to have been elected in place of one of them. He was not substituted as a defendant. He entered no appearance. Thereafter the attorney-general, served on defendants a supplemental complaint alleging that all of the directors had resigned and praying for the appointment of a new board. To this an answer was filed, alleging that the petitioner had, prior to filing the supplemental complaint, been elected a director, but it did not state that he was still a director. No notice of this supplemental complaint or the answer thereto was given to petitioner. The court appointed a full board of seven directors.

Beatty, C. J. The court obtained jurisdiction by the filing of the original complaint and the appearance thereunder. Notice was not necessary. The court did not err in declaring a vacancy and proceeding to fill it. Writ denied.

SACRAMENTO BANK v PACIFIC BANK (1899) 124 Cal. 147.

Action for dividend. The defendant became insolvent, owing plaintiff \$20,-272.70, of which it had collected five dividends of 5 per cent each and \$5,100 from stockholders, leaving the balance of about \$10,000 still due. A sixth dividend of 5 per cent was declared. The question was how it should be computed—whether on the original amount, or on the balance. McD intervened as a stockholder who had paid to plaintiff his proportion of the claim, and contended that he should be subrogated to plaintiff's right in this dividend. Judgment for plaintiff. Appeal.

Gray, C. 1. The plaintiff's right to share in the dividends is measured by the amount of its claim. 2. A stockholder is liable to the full amount of his subscription and for such proportion of his claim as the amount of his stock bears to the capital. 3. The intervenor has no rights to subrogation, as the funds of an insolvent corporation are to be dispensed solely for the benefit of its creditors. Judgment affirmed.

Cited: 133 Cal. 144.

GOSLINER v GRANGERS BANK OF CALIFORNIA (1899) 124 Cal. 225.

Goods sold and delivered. The goods in question were sold by plaintiff to T and J. Defendant, a banking corporation, had taken mortgages on the crops on the farms of T and J to secure it for money due. The crops had been disposed of and the proceeds credited on the accounts of the borrowers, leaving a large balance still unpaid. The goods were sold and charged to T and J. Plaintiff knew the relations existing between the bank and the borrowers when he sold the goods. Sec. 2300 of the civil code provided that an agency is ostensible when the principal intentionally or by want of ordinary care causes a third person to believe another to be his agent. Judgment for defendant. Appeal.

Bray, C. The fact that plaintiff, knowing the relations that existed between T and J and the bank, charged the goods to T and J and not to the bank, is strong evidence tending to show that the plaintiff did not believe that T and J were purchasing the goods as the agents of the bank. Judgment affirmed.

BRITTAN v OAKLAND BANK OF SAVINGS (1899) 124 Cal. 282.

Conversion of stock. Plaintiff, the owner of the stock in question, about January 1, 1882, assigned it in blank to W, a director of defendant, for the purpose of enabling the latter to borrow money for plaintiff. W pledged the stock with defendant as security for money thereafter loaned him personally. In 1884, W failed, being indebted to defendant above the value of the securities held by it. On October 15, 1884, defendant surrendered the certificate and obtained a new one. Prior to this action, defendant sold the stock at private sale in good faith, for full value, but for less than the amount due. The civil code, sec. 578, declared that no director of any savings corporation should, directly or indirectly, borrow from the corporation. Judgment for defendant. Affirmed in 112 Cal. 1. Motion for new trial. Denied. Appeal.

Van Dyke, J. 1. The case here is one of pledge. As such, the pledgee had the right to sell the stock to a bona fide purchaser. 2. The fact that B, the pledgor, was a director in the bank, is of no advantage to plaintiff. Order affirmed.

DINGLEY v McDONALD (1899) 124 Cal. 682.

Action against stockholders of an insolvent bank. The claim was in favor of a bank in S, which made an assignment to plaintiff, by an attorney, whose only authority consisted of a telegram from the cashier of the bank, stating "I have instructed bank to turn Pacific papers over to you. Will you investigate them, and act as you deem best, without consulting us further." This was followed by a letter of confirmation stating "any action by you will be satisfactory to us." After this action was brought the bank passed a resolution ratifying what C had done. Judgment for plaintiff. Motion for new trial. Denied. Appeal.

Chipman, C. The general power given to the attorney was based on the special trust and confidence reposed in his personal ability and integrity and could not be delegated. Under it he had no authority to assign the claim. The ratification after action brought was not sufficient. Judgment reversed.

BANK OF WOODLAND v OBERHAUS (1899) 125 Cal. 320.

To foreclose mortgages. The mortgages in suit were signed by the husband and wife, to secure a debt of the husband. The acknowledgments were taken by a notary, who was also cashier of plaintiff. The mortgages covered land which had been occupied by defendants as a homestead since 1867, although the declaration of homestead was not filed until after the lis pendens in this suit was filed and the mortgages recorded. Sec. 1241 of the civil code provided that the homestead was subject to forced sale for debts secured by mortgage on the premises, executed and recorded before the declaration of homestead was filed for record. Sec. 1237 declared that the homestead consists of the dwelling house in which the claimant resides and the land on which it is situated. Judgment for plaintiff. Motion for new trial. Denied. Appeal.

Van Dyke, J. 1. A notary public does not exercise judicial functions, but acts ministerially. The acknowledgment by the cashier of the bank was valid. 2. The land did not become a homestead until after the declaration was filed for record, and it was subject to sale under the foreclosure. Judgment affirmed.

Cited: 133 Cal. 414.

SANTA ROSA NAT. BANK v BARNETT (1899) 125 Cal. 407.

Action to enforce individual liability of stockholders. Defendants were stockholders in a corporation of which P was treasurer. The corporation had an account in the plaintiff. All the funds of the company went to its credit in the bank-book. Checks thereon were signed by the treasurer, although warrants drawn by the president and secretary on him were also paid as checks. Under sec. 359 of the code of civil procedure a cause of action of this nature was barred after three years. On December 4, 1892, a balance was struck and the overdraft found to be \$9,607.51. On December 7, 1892, the note of the company to the plaintiff for \$10,000 was given, and plaintiff gave the company credit for \$325.89. This note was renewed on June 7, 1894. The complaint in this action was filed December 5, 1895. Defense: Statute of Limitations. Judgment for plaintiff for \$392.49. Motion for new trial. Denied. Appeal.

Chipman, C. The account was not an open, mutual and current account within the meaning of sec. 344 of the code of civil procedure. The statute did not start to run as of December 7, 1892. General deposits such as these do not make the account mutual. Sec. 359 of the code is not in conflict with the constitutional provision making stockholders liable for their proportion of the debts, and only limits the time within which the action may be brought. That section is not in conflict with sec. 348 of the code, or with sec. 309 of the civil code. Judgment affirmed.

LANZ v FRESNO LOAN AND SAVINGS BANK (1899) 125 Cal. 456.

To recover deposit. The indebtedness was not disputed. But it was contended that the bank, having failed and being in liquidation, could not be sued. The bank had refused to obey the orders of the bank commissioners, and had retained exclusive charge and control of its affairs and of the property of the bank, ignoring the plaintiff. No proceedings had been brought against it by the commissioners or the attorney-general to enforce its liquidation. Judgment for plaintiff. Appeal.

Garoutte, P. J. From the standpoint of the law, in the absence of an express provision to that effect, it is incredible to believe that a bank, of its own motion,

may close its doors and proceed to a liquidation which prevents its creditors from seeking the aid of courts to enforce their rights. Judgment affirmed.

Cited: 127 Cal. 135; 133 id. 143.

LONDON & SAN FRANCISCO BANK v PARROTT (1899) 125 Cal. 472.

On guaranty and to charge stockholders. The paper sued on requested unlimited credit for a sum named to a corporation of which the signers, defendants, were stockholders. On September 6, 1893, the overdrafts amounted to nearly \$73,000; and a note was given by the corporation to the bank for that amount, until August 30, 1894, when the note with interest was still unpaid. No direction as to application of payment was made. After September 6, 1893, no credit was given, checks from that date being paid from deposits thereafter made. No notice of acceptance of the guaranty by the bank to defendants was shown. Interest on overdraft was computed and charged monthly, and was paid by the bank with its own memorandum check placed to the credit of the corporation. The court held that the deposits of the corporation should be applied first to interest due, then to payment of checks earliest in date; application to be made at the date of the deposits irrespective of the lapse of time between the earliest items and the commencement of the action. Judgment for plaintiff. Appeal.

Harrison, J. 1. The instrument is both a letter of credit and a guaranty. Acceptance was not necessary. 2. Taking the note did not discharge the guarantors. Nor did this liability cease when credit ceased on September 6, 1893. 3. Deposits not having been directed to be applied in the notes, the bank was not required to so apply them. The court made a correct application of these deposits, under sec. 1479 of the civil code. 4. Defendants' liability as stockholders was not affected by the guaranty. Action against them as such was not barred. Their liability as such is not limited to items accruing after August 16, 1892. 5. There is no presumption that a check is to be paid out of a deposit thereafter to be made. The payment of the interest by the bank by its own memorandum check was merely a loan to that extent to the corporation. Judgment affirmed.

PLACER COUNTY BANK v FREEMAN (1899) 126 Cal. 90.

On bill of exchange. G, in Chicago, owing defendants, drew his check for the amount on D & Co. in favor of plaintiff. At G's request D & Co. telegraphed plaintiff that they held the money "subject to your draft," on receipt of which advice plaintiff paid defendants the amount, taking a receipt. Shortly afterwards plaintiff stated to one of defendants that the receipt was not sufficient, and requested them to sign another paper, which they did, supposing that it was an additional receipt. It turned out to be the draft in suit on D & Co. for the amount paid. This draft was presented and dishonored, the drawers having failed. The court found that plaintiff was acting as agent for D & Co. and not for defendants. There was no question of fraud or undue influence. Defendant F, who signed the draft for himself, and the other defendant had ample opportunity to read it, and had authority to sign as he did. The court held that the draft was given without consideration. Judgment for defendants. Motion for new trial. Denied. Appeal.

Chipman, C. 1. The finding that the money was on deposit with D & Co., subject to the order of plaintiff, is not sustained by the evidence. 2. There was no lack of consideration for the draft. 3. Defendants had ample means of knowledge as to what they were doing in signing the draft. Judgment reversed.

SAVINGS BANK OF SAN DIEGO COUNTY v BARRETT (1899) 126 Cal. 413.

Bill to foreclose a mortgage. Defendant, in 1888, executed a previous mortgage on the land to secure his note to H, who assigned them to the plaintiff. Before the maturity of the note the defendant executed the note and mortgage in question to the plaintiff, the latter surrendered to the defendant the note and mortgage executed to H. Sec. 571 of the civil code provides that corporations of this character "may loan and invest their funds." Subdiv. 5, sec. 354, prohibits the purchase of personal property "except mortgages on real property." Defendant denied the consideration and that a code provision extended time of redemption. Judgment for plaintiff. Appeal.

Harrison, J. 1. The plaintiff had authority, under the code, to take and en-

force the first note and mortgage. Money is "invested" by the purchase of income-producing property. 2. If the plaintiff could have recovered on the first note and mortgage, then the surrender of the same to the defendant would be a good consideration for the contract in suit. 3. Sec. 702 of the code has no application to mortgages executed prior to its enactment. Judgment affirmed.

Cited: 133 Cal. 404, 518; 134 id. 345.

CALKINS v EQUITABLE BUILDING & LOAN ASS'N (1899) 126 Cal. 531.

Mandamus to compel transfer of stock. Plaintiff was a nephew of D C, the former owner of the stock in question, consisting of certain shares of the stock of the defendant. D C assigned the stock to plaintiff, reserving to himself for life the dividends. He took the certificates away with him, but on the same day returned them to plaintiff in a sealed envelope, with a signed indorsement thereon, to the effect that it was not to be opened until thirty days after D C's death, and that one-third was to go to a son of the nephew, the other two-thirds to the nephew and his wife in equal parts. This stock so remained in the nephew's possession until after the death of D C. The administrator of D C intervened, claiming the stock as belonging to the estate. Judgment for plaintiff. Motion for new trial. Denied. Appeal.

Gray, C. 1. The transaction constituted a valid gift of the stock. Whether there was an actual gift depends on the intention of the donor. 2. The fact that the donor reserved to himself the dividends during his life does not affect the validity of the gift. Judgment and order affirmed.

COUNTY BANK OF SAN LUIS OBISPO v GREENBERG (1899) 127 Cal. 26.

On promissory note. The amended complaint alleged the execution of the note by defendants, G Bros., and S, as security for an overdraft of G Bros. It was for \$5,000 and interest at a rate therein stipulated. It was alleged that the overdraft exceeded the amount of the note and interest, and on the trial it was shown that the note and interest amounted to \$7,210.07 and the overdraft to \$7,358.53. The answer of S was not verified. The court refused the request of S to instruct the jury as to the rate of interest when the agreement did not name the rate; also in regard to certain "several obligations" of G Bros. having no relation to the matter in controversy. Defendants contended that a prior suit by plaintiff against one of the firm of G Bros. to foreclose a mortgage given by him to secure this overdraft was a bar. Demurrer. Overruled. The verdict was for the amount of the overdraft. Judgment for plaintiff. Motion for new trial. Denied. Appeal.

Gray, C. 1. The amended complaint stated a cause of action against the surety. 2. The failure to verify the answer admitted the due execution of the note. 3. The instructions asked in regard to the rate of interest and other obligations of G Bros. were not relevant to any issue and were properly refused. 4. The suit to foreclose was no bar. 5. The surety was not liable beyond the amount of the note and interest. Judgment and order reversed, unless the plaintiff consents to reduce the judgment to \$7,210.07.

MERCED BANK v IVETT (1899) 127 Cal. 134.

To recover collateral securities. The plaintiff was indebted to C Bank which was secured by collateral, and also to defendant. The C Bank was threatening to realize upon its collateral, when it was agreed between plaintiff and defendant that the latter should pay off the C Bank, receive the collateral held by it and retain the same for the advance made, as well as for the debt to defendant. This was done. At this time, plaintiff was insolvent, and its board of directors had passed a resolution to go into liquidation. After this it was thrown into liquidation under the banking act. Thereafter it paid defendant the amount advanced by her to the C Bank, and sued to recover the collateral on the ground that, being insolvent at the time, it could not prefer one creditor over another. Sec. 3432 of the civil code provides that a debtor may prefer his creditors. Judgment for plaintiff. Motion for new trial. Denied. Appeal.

Garoutte, J. 1. The word "debtor" as used in sec. 3432 of the civil code, allowing preference, includes corporations. 2. The voluntary act of liquidation, in no way changed the bank's status toward creditors. Order reversed.

DENIGAN v HIBERNIA SAV. & LOAN SOCIETY (1899) 127 Cal. 137.

Action to recover deposit. The money was the separate property of the wife. It was deposited by her in the names of herself or husband, so as to be drawn by either, she retaining the passbook until her death. After her death her husband transferred a part of the deposit to a new account in favor of himself and a nephew. Thereafter he gave an order to C to draw a part of the new account, which was done. No consideration for the transfer of the money to the husband, or by him to the nephew was shown. The husband died and the nephew claimed the deposit as well as the amount paid C. The administrator of the husband and also of the wife likewise claimed the amount. Judgment for the administrator of the wife. Motion for new trial. Denied. Appeal.

Harrison, J. 1. As it was not shown that the bank book was ever delivered by the wife to her husband, one of the essential elements of gift is wanting. 2. The retention by the wife of the right to withdraw the whole deposit is inconsistent to the idea of a gift. 3. The authority given to the husband to draw the money is consistent with her title. 4. When a claim of gift is not asserted till after the death of the donor, it should be sustained by clear and satisfactory evidence. 5. Possession of the bank book is not a determination of ownership and not equivalent to delivery. 6. The nephew had no right to raise the question as to the authority of the husband to give the order for the payment made to C. 7. There is no presumption in favor of a gift. Judgment and order affirmed.

Cited: 127 Cal. 145, 146.

DENIGAN v SAN FRANCISCO SAV. UNION (1899) 127 Cal. 142.

To recover deposit. The deposit, the separate property of the wife, was made in the names of Frances and Ella Denigan, and was made payable to the order of herself or her husband, the plaintiff. The only evidence of the wife's intention was the form in which the deposit was made. After her death the husband brought this action to recover the deposit. Judgment for defendant, administrator of the wife. Motion for a new trial. Granted. Appeal.

Harrison, J. 1. The money remained the wife's separate property at the time of her death, notwithstanding its deposit in this form. The burden was on plaintiff to show that it had ceased to be her separate property, and in the absence of any evidence tending thereto his claim must be denied. Neither was the husband entitled to the deposit by virtue of his survivorship. 2. Nor is he entitled under sec. 1431 of the civil code, which provides that a right created in favor of several persons is presumed to be joint and not several, because the husband had no right in the money. Order reversed.

NELLIS v PACIFIC BANK (1899) 127 Cal. 166.

To recover against stockholders. The complaint was filed June 18, 1895, and was amended on May 19, 1897. The original complaint, which was to recover from the stockholders of the bank deposits due plaintiff on a number of claims assigned to him, alleged that one of the deposits was made on June 22, 1893, by A P R for \$1,143.09, and that another deposit of like sum was made on the same date by L D. The fact was that the deposits were made on said day for said sums by R & Co., by them assigned to R & D, by the latter to A P R and by her to plaintiff. The complaint further alleged that another of the deposits was made on June 22, 1893, by W, the fact being that the deposit had been made by B, who assigned to W, who assigned to plaintiff. The court allowed the complaint to be amended to correctly state the names of the assignors. Under subdiv. 1 of sec. 338 and sec. 339, code of civil procedure, a claim against a stockholder was barred in three years. The bank failed June 22, 1893. The assignments were all made before filing the original complaint. If the amendment introduced a new cause of action, the claims were barred. Judgment for defendants. Appeal.

Chipman, C. 1. The amendment did not state a new cause of action and was properly allowed. 2. The claims were not barred by the statute. 3. There can be no recovery on the claim, the assignment of which was not proved. 4. An amendment of a mistake correcting the description of a person through whom plaintiff acquired title did not introduce a new cause of action. Judgment reversed in part, affirmed in part.

DENNIS v FIRST NAT. BANK OF SEATTLE (1899) 127 Cal. 453.

Attachment. Sec. 57 of the National Bank Act, as amended on March 3, 1873, (U. S. R. S., sec. 5242), provided that no attachment before final judgment could issue against a national bank. The attachment in this case was issued from a state court before judgment. Motion to dissolve. Allowed. Appeal.

Cooper, C. 1. The attachment was properly dissolved. 2. Congress had power to create the law. Order affirmed.

LONDON & SAN FRANCISCO BANK v MOORE (1900) 128 Cal. 650.

On bill of exchange. H & Co. of Melbourne, in March, 1895, obtained from the M Bank there a letter of credit for £500, authorizing defendant to draw bills on the M Bank in London in payment for merchandise to be purchased by defendant for account of H & Co. The letter authorized defendant to draw at any time prior to September 14, 1895, the bank agreeing to accept and pay them on maturity, provided they are accompanied by a certificate of the bank's agent at S F that bills of lading and invoices of sufficient goods should be forwarded to the managers of the bank at M. Purchasers were to note the amount of bills separately on the back thereof, and to see that they are described as drawn under the credit, and naming the plaintiff as the bank's agent at S F. The certificates required were issued and were forwarded with the draft. Defendant, in May, 1895, drew a bill of exchange on the M Bank at London in favor of plaintiff at S F and received value therefor. The draft was accepted, but at maturity was dishonored and protested. The defense was that plaintiff represented that it was the agent for said M Bank. Judgment for plaintiff. Motion for new trial. Denied. Appeal.

Chipman, C. 1. Plaintiff became the agent for the M Bank for the purpose only of issuing the certificates referred to in the letter of credit. 2. When it purchased the draft, it had the same rights in regard thereto as if the purchase had been made by any other bank. Judgment affirmed.

FIRST NAT. BANK OF SAN FRANCISCO v CITY AND COUNTY OF SAN FRANCISCO (1900) 129 Cal. 96.

To recover taxes paid under protest. The tax in question was levied and collected upon certain personal property of the bank consisting of fixtures and money on hand, and was paid under protest. Judgment for defendant. Appeal.

Harrison, J. 1. Under sec. 5219 of the U. S. R. S., the only property of a national bank which can be taxed is its real estate and its shares of stock, which may be assessed to the owners. Judgment reversed.

EPHRAIM v PACIFIC BANK (1900) 129 Cal. 589.

To recover receiver's fees. The plaintiff was appointed receiver of lands and premises in a suit by the defendants against the M Company, in February, 1894. A savings bank had previously commenced a suit for foreclosure upon the same property, and obtained a judgment of foreclosure and sale. The property was conveyed to the savings bank by the receiver. In the discharge of his duties, the plaintiff expended certain money which the court allowed. After the foreclosure sale the defendants herein dismissed the suit in which the plaintiff was appointed receiver. The defendant bank was insolvent. The defendants herein, other than the bank, are the directors of the bank and have control of its assets. The plaintiff notified said defendants, directors, of his claim, and at the time they had sufficient funds in their hands to pay this claim. In October, 1897, the court made an order settling plaintiff's account. On appeal from the order, it was affirmed in May, 1899, at which time the statute had not run. Demurrer. Sustained. Judgment for defendants. Appeal.

Harrison, J. 1. If the property of which the receiver takes possession is taken from his possession by paramount authority, he must look for his compensation to the parties at whose instance he was appointed. 2. The trustees were properly made defendants in the action that they might protect the funds of the bank. 3. The Statute of Limitations would not begin until the plaintiff's account was settled and allowed. During the appeal the statute would be suspended. Judgment reversed.

FAULKNER v FIRST NAT. BANK OF SANTA BARBARA (1900) 130 Cal. 258.

Conversion to recover promissory notes. B gave his note to defendant, and at the same time plaintiff deposited the notes in question with defendant as collateral security for the note of B. Plaintiff contended that B had the right at any time to substitute other collateral in place of the note. The prayer of the complaint was for the return of the notes or their value. The judgment was for the value of the notes. It was contended that the judgment was improper, as defendant was not in possession of the property. Judgment for plaintiff. Appeal.

McFarland, J. 1. If defendant was a pledgee of the notes, it was controlled by sec. 2996 of the code of civil procedure. 2. The bank had no right, without the consent of the original pledgee, to deliver the notes to the pledgor. 3. An action of conversion for the possession or value of the notes could be maintained notwithstanding the surrender of the notes to the pledgor. The common-law action of conversion is specially appropriate, and in a case where possession cannot be had, an alternative judgment for possession or the value is not necessary. Judgment affirmed.

NICHOLSON v RANDALL BANKING CO. (1900) 130 Cal. 533.

Action for recovery of money deposited and on an account stated. R was a private banker in E. M was his cashier, and G R his teller. Defendant commenced to do a banking business in the premises occupied by R. M became its cashier, G R its teller, and R its president. The entire management of the business of the bank was left to R and M, it being publicly announced that defendant had succeeded to the business of R. N, whose administratrix is plaintiff, had \$4,000 on deposit with R when defendant was organized. A new passbook upon it, in N's favor, was issued by the cashier for such balance. N supposed that his account had been transferred on the books to the new bank. He continued to make deposits with and draw checks on defendant. On February 11, 1897, M credited on his passbook a year's interest on the \$4,000. R went out of the banking business as soon as the new bank was formed. The new bank failed. Testimony of a brother of N as to the passbook was objected to as being incompetent, but was admitted. The testimony of the attorney for N was to the effect that N had shown him the passbook with the entries therein. R testified both for plaintiff and defendant, his testimony being the same, to the effect that the defendant took over his business and all the accounts. M, the cashier, a witness for defendant, refused to make answer on the ground that to do so would tend to incriminate him. Defendant claimed surprise. Judgment for plaintiff. Motion for new trial. Denied. Appeal.

Van Dyke, J. 1. It was not error to receive the testimony of the brother of the deceased nor that of his attorney in regard to the passbook. As the testimony of Randall was substantially given by him when examined as a witness for defendant, it was not error to receive it for plaintiff. Even if the witness Murray, the former cashier, had answered the questions put to him, it would not change the result. 2. Whether the deposit was made or not, or the transfer of the account actually made, is not material so long as Nicholson was led by defendant to believe that such transfer had been made. 3. Defendant is now estopped from disputing its liability. Judgment affirmed.

MURPHY v PACIFIC BANK (1900) 130 Cal. 542.

Action to recover dividends. On July 25, 1890, J M assignor of plaintiff, had on deposit with the defendant, in which he was a stockholder, the sum of \$155,000, and on that day he loaned the bank \$150,000 for one year at 6 per cent interest, receiving a certificate of deposit therefor, payable in one year. In February, 1893, this was surrendered and canceled, \$25,000 was paid, and a new certificate issued to him for \$125,000, no time of payment being specified. This was surrendered and canceled in March, 1893, and \$50,000 paid. A new certificate for \$75,000 was issued to him, payable on demand. All the surrendered certificates were marked "paid" at the time. Defendant failed in June, 1893, was declared insolvent in November, 1893. Six dividends of 5 per cent each have been paid; but in these the claim of J M, which had been assigned to plaintiff, did not share. If the transaction was a loan, this claim would be entitled to share in the dividends, otherwise not. Under the law the capital stock of such a bank was a security to depositors who are not stockholders. It was contended that the statute of 1862 was unconstitutional. Under the Act of March 12, 1864, the

Pacific Bank was authorized to continue business as a savings bank. The original by-laws provided that the capital stock and assets of the bank were a security to all depositors, whether stockholders or not. Thereafter a new set of by-laws was passed omitting such provisions. Judgment was that plaintiff recover the amount from the bank only after all the depositors who are not stockholders were paid in full. Appeal.

Van Dyke, J. 1. A certificate of deposit, though negotiable, is not, under the civil code, a promissory note. 2. The term "depositor," as used in the Act of 1862, was intended to include holders of such certificates as well as persons having open accounts. Such certificates do not imply a loan in the ordinary sense. That plaintiff did not know, when he took the certificate, that the person to whom it was issued was a stockholder in the bank, is immaterial. The Pacific Bank was a savings bank. 3. The new by-laws were complete and full, and the provisions in the former by-laws were not continued in force. 4. The Act of 1862 is not unconstitutional. The form of the judgment was entirely proper. Judgment affirmed.

McGORRAY v STOCKTON SAV. AND LOAN SOCIETY (1901) 131 Cal. 321.

To recover deposit. Plaintiff deposited with defendant \$12,778 and received a certificate of deposit, which he indorsed payable to the order of C, sheriff, and left it with the bank to be delivered to C whenever he should deliver to the bank, for plaintiff, a certificate of redemption. This was not furnished. Thereafter plaintiff demanded payment of the money, which bank refused, except on the indorsement of C. After this action was brought, C was made a defendant, but no new allegations were made as to him. He demurred. Sustained. The case was dismissed as to him. The notice of appeal from the judgment and from the order denying a new trial was made separately. The former was not filed within six months of the entry of judgment, as required by sec. 939, code of civil procedure. Judgment for defendant. Motion for new trial. Denied. Appeal.

Chipman, C. 1. The sheriff makes no claim to the money and plaintiff is clearly entitled to it. 2. The objection, that the notice of appeal from the judgment was not filed in time, is well taken. 3. The bank was the agent of the plaintiff to do a particular act. Upon revocation of agency, the burden was on defendant to show another claim to the deposit. Order reversed.

SAVINGS AND LOAN SOCIETY v SAN FRANCISCO (1901) 131 Cal. 356.

To recover taxes paid under protest. Plaintiff returned a verified statement containing a complete list of all its taxable property for 1896. Without notice or hearing, the assessor made an assessment on the property described, and on "loans on stocks and bonds and state and mining bonds and school district bonds." It was contended that the assessment on "loans on stocks and bonds" was void for uncertainty, and that these securities were not taxable under sec. 4 of art. 13 of the constitution of the state, which exempted from taxation "the contract or other obligation by which the credit is secured." The money and solvent credits were claimed to be illegally assessed because raised above their full value by the state board of equalization. Interest was claimed from the time of protest on the tax ordered refunded. The action was to recover back the entire tax, except that levied in accordance with the statement furnished by plaintiff. Judgment for plaintiff for the tax assessed on state and mining bonds and the amount of the 20 per cent increase on the county and school bonds. Appeal by plaintiff.

Chipman, C. 1. The action of the assessor in changing the list without hearing or notice was not illegal. Such act is not an arbitrary assessment, but one within the general powers of the assessor to make. 2. The assessment on loans on stock and bonds was not void for uncertainty. These items were not exempt under the clause of the constitution referred to. 3. The 20 per cent increase did not apply to the money and solvent credits. Secs. 1915 and 1917, civil code, do not apply to claims against the state. 4. Interest was not allowable. Judgment affirmed.

Cited: 131 Cal. 614; 132 id. 600; 133 id. 16; 134 id. 480.

SECURITY SAV. BANK v SAN FRANCISCO (1901) 132 Cal. 599.

To recover taxes paid under protest. The tax in question was on outstanding solvent loans secured by pledge of stocks and bonds, and on a loan evidenced

only by the promissory note of the borrower. It was claimed that this property was exempt from taxation. Judgment for defendant. Appeal.

Van Dyke, J. The property was taxable. Judgment affirmed.

PEOPLE v BANK OF MENDOCINO COUNTY (1901) 133 Cal. 107.

Injunction. The judgment was rendered under sec. 11 of the Bank Commissioners' Act of March 26, 1895, and contained an injunction as a part thereof. It decided that the bank was insolvent, that it was unsafe for it to continue business, and that the property thereof be delivered to the corporation for the purposes of liquidation under the direction of the commissioners. This was the only judgment provided for in the act. A motion was made to dissolve the injunction on the ground that the judgment was interlocutory and that the injunction was not warranted by the facts and the law. Motion denied. Appeal.

Smith, C. The judgment was undoubtedly final in the sense used in subdiv. 1, sec. 939, code of civil procedure, and the injunction was to remain in force as long as the judgment was operative. Order affirmed.

ARGUES v UNION SAV. BANK OF SAN JOSE (1901) 133 Cal. 139.

To recover deposits. Plaintiff brought this action upon a large number of depositors' claims assigned to him. The bank was in process of liquidation under a judgment of the court in an action under the Bank Commissioners' Act, as amended in 1895, which created a trust fund for creditors, and enjoined the transaction of any other business. That judgment was rendered before this action was commenced. The claims sued on had not been presented to, or disallowed by, the directors of the insolvent bank. Judgment for plaintiff. Appeal.

Smith, C. While a bank is in process of liquidation, under the Bank Commissioners' Act, an action cannot be maintained against the bank unless a claim has been presented and disallowed by the directors having charge of the liquidation. Judgment reversed.

Cited: 133 Cal. 187; 135 id. 629, 630, 632.

BANK OF NATIONAL CITY v JOHNSON (1901) 133 Cal. 185.

To recover assessment. After an action had been commenced by the bank commissioners against the plaintiff to compel its liquidation under the Bank Commissioners' Act, and an injunction had been issued, but before judgment, the directors of the bank levied the assessment to recover which this action was brought. Judgment for defendant. Motion for a new trial. Denied. Appeal.

Temple, J. After the commencement of the action by the commissioners to compel liquidation, and the issuance of the injunction provided for by the act, the powers of the bank and its officers, except for liquidation, were suspended and the assessment could not be levied. Judgment and order affirmed.

Cited: 135 Cal. 630, 632.

VALENTINE v DONOHUE-KELLY BANKING CO. (1901) 133 Cal. 191.

To recover deposit. V, the testator of plaintiff, deposited a note and mortgage with defendant to secure the payment of a certain indebtedness then existing and all future advances to be made by defendant to the B Company. During the lifetime of V, it was the custom to charge the interest on these notes to the B Company. At V's death, there was a balance to the credit of the B Company. After V's death, a claim on the notes was presented by the defendant to the executrix of V's estate for the amount of the notes without interest. The executors sold the note and mortgage pledged with the bank, and the proceeds were deposited with the bank in place of the note and mortgage and a new account opened with the estate of V. Defendant's account of the amount due from the estate on the notes was paid by check and the notes delivered up and canceled. When this action was commenced there was a balance in favor of the estate in this account, which sum defendant retained as interest accruing on said note before and after the death of V; and this is the sum in controversy. There was an overdraft by the company, after V's death, which the bank wished his estate to pay. Judgment for plaintiff. Motion for new trial. Denied. Appeal.

Per curiam. 1. The notes have been fully paid; and under sec. 3290 of the civil

code, such payment operates as a waiver of interest. 2. The guaranty ceased on the death of V, and he was not liable for any overdraft thereafter. Judgment and order affirmed.

CUSSEN v SOUTHERN CALIFORNIA SAV. BANK (1901) 133 Cal. 534.

To recover deposit. Defendant conducted a safe deposit business. But one of the two keys, which unlocked the box, was delivered to plaintiff. Plaintiff rented a safe in his vaults, where he deposited a sum of money. He subsequently discovered that \$560 thereof had been abstracted. The contract provided that the lessor should use diligence that no unauthorized person should be admitted to any safe rented from it. It was proved that the money was taken out of the vault while on deposit. Plaintiff did not inform the defendant of the value of the deposit, and it was contended that there could be no recovery under sec. 1840 of the civil code, which declares that the liability of a depositary for negligence cannot exceed the amount which he is informed by the depositor or has reason to suppose the thing deposited is worth. Judgment for plaintiff. Motion for new trial. Denied. Appeal.

Garoutte, J. 1. It devolved on defendant to use that degree of care in the safeguarding of the plaintiff's property, which is demanded of a bailee for hire in the keeping of valuable property. 2. Proof of the deposit and loss made out a prima facie case for plaintiff, and threw the burden of proof on the defendant. 3. It cannot be said that defendant used the degree of care required. Sec. 1840 has no application to this case. Judgment affirmed.

PEOPLE v STOCKTON SAV. AND LOAN SOCIETY (1901) 133 Cal. 611.

To escheat land. The constitution of California provided that no corporation should hold land for more than five years, except such as was necessary for carrying on its business. Sec. 574 of the civil code provided that "savings and loan corporations may purchase, hold and convey real and personal property" under certain conditions. There was no penalty prescribed for a failure to sell. The complaint alleged that defendant acquired the land at trustee's sale, under a deed of trust and that more than five years have elapsed since then, and that the lands were not sold. Demurrer. Sustained. Judgment for defendant. Appeal.

Garoutte, J. The provision of the constitution is not self-executing, and the land did not escheat under it, or under the section of the code referred to. Judgment affirmed.

COPSEY v SACRAMENTO BANK (1901) 133 Cal. 659.

To set aside sale. Plaintiff owned the land in question, and executed a deed of trust in favor of the bank for money loaned to her. Plaintiff defaulted in payment. The trustees were known by her to be stockholders and directors in the bank. They sold the property to the bank and gave a deed therefor. Plaintiff did not offer to pay the money loaned. A demurrer to the complaint. Sustained. Judgment for defendant. Appeal.

Garoutte, J. 1. The mortgage to the trustees, who were also stockholders of the bank, was not void. 2. The sale by them to the bank was valid and was not a sale to themselves, as they and the bank were distinct entities. Judgment affirmed.

Cited: 133 Cal. 665.

GARTHWAITE v BANK OF TULARE (1901) 134 Cal. 237.

On check. The check was drawn by defendant on the P bank, payable to the order of S. L, owing S, bought the check and sent it to S at Oakland, to apply on the debt. It miscarried, was obtained by a third party, who forged S's name and drew the money. On discovering this, S notified the P Bank and demanded the check, which was refused. L assigned all his interest in the check to S, of which both banks were notified. S died in 1893. His executors are plaintiffs. On January 25, 1894, the P Bank delivered the check to the plaintiffs. They sued the drawer for the amount. No demand for a return of the check by the defendant on the P Bank was made. Demand for payment was made on January 30, 1894, and refused. Sec. 3177 of the civil code makes the rights and obligations of the drawer of the check the same as those of an indorser, which was, that if it were dishonored, it would, upon notice or without notice, if excused, pay the same with interest. Judgment for plaintiff. Motion for new trial. Denied. Appeal.

Harrison, J. 1. The instrument was none the less a check because drawn by one bank upon another. 2. The payment upon a forged indorsement gave the Pacific Bank no rights as against defendant. 3. The possession of the check by the drawee obviated any necessity for its presentation by Smith. 4. It was the duty of the drawer, on receiving notice of the forgery, to demand the check or the money paid thereon. 5. The drawer was liable for interest. 6. The production of the check was evidence of non-payment. 7. The letters testamentary were proof of the death of Smith. Judgment affirmed.

CITY SAV. BANK v ENOS, ADM'R (1901) 135 Cal. 167.

Action for relief on the ground of fraud. In 1889, P had on deposit in plaintiff over \$1,000. In 1890, he had over \$150 on deposit. The bank first paid to S, the defendant's intestate, \$1,000 and later \$150. The payments were made to the intestate on his representations that he had authority from P to collect the money. These representations were false. P recovered judgment from the bank for the amounts paid. Plaintiff did not discover the fraud until after the death of the intestate, at which time the statute had not run. The book of account of the bank with P was introduced in evidence. Objection. Overruled. Judgment for plaintiff. Appeal.

Chipman, C. 1. The book of account of the bank, the preliminary proof having been made, was admissible. The cashier and assistant cashier were competent witnesses to make the preliminary proof. The law disqualifies only parties or assignors of parties. 2. The cause of action in such a case has not accrued until the discovery of the facts constituting the fraud. Judgment affirmed.

COLORADO

UNION MINING CO. v ROCKY MOUNTAIN NAT. BANK (1873) 2 Colo. 248.

Assumpsit. S contracted with defendant to operate its mine on his own account. He occupied the offices of the defendant and opened an account with the plaintiff. S overdrew this account. B, the president of the defendant, had knowledge that S was assuming to act for the corporation. B was informed by plaintiff of the overdraft, but payment was refused. The defendant set up want of power to borrow and incapacity of the bank to make the loan without security. The court charged that the defendant must repudiate the debt within a reasonable time after notice thereof. Judgment for plaintiff. Appeal.

Hallett, C. J. 1. Where an arrangement is made by which a depositor is allowed to overdraw his account, the transaction is simply a loan. A failure to take security is no defense to the borrower. 2. A corporation may borrow money to carry out the purpose for which it was created. 3. Where a contract is executed the corporation is estopped from denying its capacity. 4. If an officer of a corporation is held out as having authority, the corporation is bound by his acts. Approval of the principal may be inferred from his silence when informed of the agent's acts. 5. The charge of the court was erroneous. Judgment reversed.

Cited: 2 Colo. 566; 4 id. 506, 507; 6 id. 240; 13 id. 177; 16 id. 127; 17 id. 105; 24 Colo. 231, 232; 25 id. 110, 111; 3 Colo. App. 136; 4 id. 226; 7 id. 391; 10 Colo. App. 139.

WOODWARD v ELLSWORTH (1879) 4 Colo. 580.

The property of an insolvent national bank having been levied upon to pay a tax assessed subsequent to its becoming insolvent, it cannot be subjected to a sale for the payment of any demands as against a claim for the property by a receiver subsequently appointed; and if the assessments were illegal, that ground alone would not warrant the issuance of an injunction to restrain the sale to satisfy the taxes.

WYMAN v COLORADO NAT. BANK (1879) 5 Colo. 30.

Assumpsit to recover amount of a draft. Plaintiff drew his sight draft on D, of England, payable to C, in Colorado, and delivered it to C to collect and place to his credit. C transmitted it to defendants, indorsed for his account. C was indebted to defendant. Defendants were advised from New York agents that the

draft had been paid. A few days later the defendants were informed by the New York agent that he had been notified the draft belonged to plaintiff who had given it to C for collection, and that as C had failed, plaintiff claimed the proceeds. This notice came before the proceeds had come into the hands of the defendants, but after the draft had been paid in London. C's bank and the defendants were mutual collection agents, correspondents, and depositaries, according to the usual course of banking business. Judgment for defendants with costs. Appeal.

Stone, J. 1. One who acquires negotiable paper in good faith for value, from one capable of transferring, becomes a bona fide holder, unaffected by prior equities. 2. The indorsement of C, as payee, was sufficient to transfer the legal title and vest complete ownership. 3. The possession of the paper by the defendants imported prima facie a bona fide holder. Judgment affirmed.

Cited: 14 Colo. 206; 1 Colo. App. 514; 8 id. 330.

COLORADO NAT. BANK v BOETTCHER (1879) 5 Colo. 185.

Action to recover amount of deposit. The complaint alleged that the defendant, a banking corporation, was possessed of \$1,000 of S and B, to be paid on demand. S died and B, as surviving partner, assigned the money to the plaintiff. Although the defendant had notice of the assignment, payment was refused when demanded by the presentation of a check drawn to the order of the plaintiff. Plaintiff contended that the conduct of the officers of the defendant amounted to an implied acceptance. The answer denied that the money was held by defendant subject to B's order, and averred that S and B owed the defendant \$1,200, as evidenced by a note, which matured prior to the assignment. Judgment for plaintiff. Appeal.

Beck, J. 1. The holder of an unaccepted check cannot maintain an action in his own name against the drawer. 2. To warrant the inference of acceptance, the intention must be clear. Mere detention does not constitute an acceptance. Judgment reversed.

Cited: 11 Colo. 451; 15 id. 18, 23.

PEOPLE v CITY BANK (1883) 7 Colo. 226.

Where a banking corporation fails to pay up its entire capital stock in cash within one year, pursuant to statute, its franchise should be forfeited and the corporation dissolved.

FIRST NAT. BANK OF LEADVILLE v LEPPEL (1886) 9, Colo. 594.

On promissory note. The plaintiff deposited with the defendant, for collection, a promissory note executed by C to H, and by H indorsed to the plaintiff. After maturity, demand was made and payment refused. The answer alleges that the note is not the property of the plaintiff, but belongs to H, and was given to defraud H's creditors, of which plaintiff had knowledge before assignment; that the defendant had been garnished and commanded to hold the note to satisfy judgment in a case in which H is a defendant. Judgment for plaintiff. Error.

Elbert, J. 1. The facts alleged in the answer do not concern the defendant, unless it was a creditor of H. 2. In the absence of a special notice, the defendant was not charged with liability in the garnishment proceedings. Judgment affirmed.

RAY v HILLER (1888) 11 Colo. 445.

Where an assignment is made for the benefit of creditors, and the list of property assigned, attached thereto, does not include a deposit in a bank against which there are outstanding drafts, the fact that the assets were not definitely enumerated will not vitiate the deed; and the making of the drafts could in no way divest the fund of its trust character, nor could it operate as an assignment of the amount therein until presentation was made.

Cited: 7 Colo. App. 262.

LARSEN v BREENE (1889) 12 Colo. 480.

Action for the cancellation of a note and trust deed, given by the plaintiff to the defendant for an interest in mining property; in the course of an adjustment of the complications growing out of the business, the plaintiff tendered the defendant a certified check, being the amount found to be due defendant, which was de-

posited with the judge of the court where an action was in process of adjustment. The defendant, learning that the bank on which the check was drawn was in failing condition, withdrew the check and presented it. Payment was refused; whereupon the defendant brought suit upon the check. The bank being insolvent, the plaintiff claimed that the loss of the check should fall upon the defendant. Judgment for defendant, with decree that the note and deed be canceled upon condition that the plaintiff pay to the defendant \$7,000, the amount of the check. Error.

Hayt, J. 1. The defendant was not held to any greater accountability by reason of the certification of the check tendered; it was a mere evidence of debt due from the drawer and a conditional payment. 2. The defendant did not accept it as a full payment. 3. The act of the defendant in trying to preserve the amount did not constitute a waiver of his claim for payment on the note. 4. The court committed no error in not decreeing a cancellation of the deed. 5. The party seeking the benefit of a tender must pay the debt, and no redemption of the incumbered property will be decreed unless such payment is made. Decree affirmed.

Cited: 7 Colo. App. 489.

GERMAN NAT. BANK v BURNS (1889) 12 Colo. 539.

Where the defendant bank received for collection a certificate of deposit drawn by another bank in favor of the plaintiff, and transmitted the certificate by mail to such bank for collection, the court held, that the receiving bank was bound to use all reasonable diligence to protect the plaintiff; that, sending the certificate direct to the bank primarily liable thereon, was negligence per se; and that, proof of depositing a letter in the post office properly addressed, was prima facie evidence that the letter was duly received.

FIRST NAT. BANK v HUMMEL (1890) 14 Colo. 259

To recover money. R gave his note, secured by a trust deed, to H for a loan; the money to be paid by R drawing on E, H meeting the draft. R gave plaintiff the draft to collect. Plaintiff directed E, when H paid the money, to send it to G for plaintiff's credit. H paid the draft. E died before sending the money, and defendant took possession of his property. Plaintiff also made R, who refused to sue, a defendant. Demurrer, on the grounds: 1, No cause of action; 2, misjoinder of parties defendant; 3, causes of action improperly united. Sustained. Judgment for defendant. Error.

Pattison, C. 1. E received the money in a fiduciary capacity and a trust arose in favor of the plaintiff, which continued in the hands of the defendant. 2. The fund never being E's, the statute on administration of estates cannot apply. 3. R, refusing to unite with the plaintiff, was properly made a defendant. 4. No cause of action is attempted to be stated against R, and the causes are not improperly united. Judgment reversed.

Cited: 19 Colo. 125; 5 id. 73, 464; 7 id. 258; s. c. 2 Colo. App. 572.

BOETTCHER v COLORADO NAT. BANK (1890) 15 Colo. 16.

On Checks. The case is the same as ante p. 101 (5 Colo. 185). After remanding, the complainant amended his complaint by attempting to allege facts showing an equitable case by alleging that the deposit was, by an agreement between S & B and the complainant, appropriated to the payment of these checks. This amendment was stricken out. Judgment directed for defendant. Appeal.

Reed, J. 1. The facts do not show a cause of action. Defendant could only be made liable in equity as trustee by an agreement to which it was a party. 2. A deposit is not special so as to create a trust, unless made by agreement, or by circumstances indicative of an intent to make it such, or unless made in a particular capacity indicative thereof. Judgment affirmed.

Cited: 27 Colo. 149.

BUENZ v COOK (1890) 15 Colo. 38.

Action to enforce liability of stockholders. Defendant B and others were shareholders in the B Bank. S recovered judgment against defendant B alone, by default, for the full amount, and assigned to plaintiff. Sec. 43, ch. 19, G. S. of 1833, provided: "Stockholders of every banking corporation shall be individually liable for all debts contracted, during the term of their being stockholders,

ratably to the extent of their respective shares." Judgment for plaintiff. Appeal by defendant B.

Richmond, C. The liability of the defendant is increased beyond the terms of the statute. He is not liable for more than his proportion of the debt. Judgment reversed.

Cited: 25 Colo. 560.

FIRST NAT. BANK v DEVENISH (1890) 15 Colo. 229.

Money paid on a check. The plaintiff received checks of C upon the defendant, which were forwarded for collection and paid by draft upon G Bank. The next day the defendant returned the checks, which it had paid and canceled, and asked a return of the draft, claiming that they had been paid by mistake, and stopped the payment of the draft by telegram. The plaintiff did not return the draft, but brought suit upon it. The defendant showed that C had no funds in the bank when the payment was made. Judgment for defendant. Appeal.

Reed, C. Banks are required, for their own safety, to know at all times the balance to the credit of each customer, and they accept and pay checks at their own risk. If by mistake a check is paid when the drawer has no funds, the bank must look to the customer for rectification, not to the party to whom the check is paid. In the absence of proof of agency a demand for the return of the draft would not constitute a defense. Judgment reversed.

Cited: 8 Colo. App. 547.

LAHAY v CITY NAT. BANK (1890) 15 Colo. 339.

Action to recover money paid through fraud. The complaint alleged that a certificate of deposit drawn on the plaintiff and payable to J came into the possession of D, who applied to the plaintiff for payment, representing that he was J. D and J were unknown to the plaintiff, and payment was refused for lack of identification. The defendant, in whom the plaintiff reposed special confidence, thereupon identified D, falsely representing him to be J, and the money was paid to D by the plaintiff. J, the party for whom the certificate was in fact intended, sued the plaintiff and recovered judgment for the full amount. Judgment for plaintiff. Appeal.

Hoyt, J. The intention of one party to deceive another is sufficiently made out by showing that a false affirmation had in fact been made by a party concerning a matter about which he had no actual knowledge. The representations were in fact false and damages were sustained thereby. Judgment affirmed.

Cited: 8 Colo. App. 231.

LARSEN v JAMES (1892) 1 Colo. App. 313.

Action on a statute. The plaintiff drew his check in favor of B on a bank of which the defendants were directors. The bank having failed to pay the check, B recovered a judgment against the plaintiff, who thereafter discharged it and brought this action against the defendants, alleging the insolvency of the bank and its failure to make a semi-annual report for the month of January, 1882. The cause of action accrued upon plaintiff's demand for payment of the check on January 30, 1884. The defendants set up that they were only secondarily liable, and the remedy of the plaintiff against the bank should have been exhausted; and that the one year Statute of Limitations applied. Plaintiff contended that the six years' statute governed. A statute provided that the directors should be personally liable for the debts of the corporation if it failed to make such statement. Demurrer to answer. Sustained. Judgment for plaintiff. Error.

Reed, J. 1. The liability attaches upon the failure to make the statutory statement, and so remains until compliance with the law. 2. The statute is in its nature penal, and the one-year Statute of Limitations applies and commences to run at the time the cause of action accrued. Judgment affirmed.

Cited: 6 Colo. App. 514; 25 Colo. 528.

HUMMEL, ADM'R, v FIRST NAT. BANK (1892) 2 Colo. App. 571.

Money had and received. R, under an arrangement with H, drew a draft on him and indorsed it to the plaintiff, a bank, who transmitted it to E for collection. H paid the draft by placing with E certain certificates of deposit, and drew a check on E's bank which was marked "paid." A deed of trust, executed by R, was then turned over to H as security for the loan. E died pending the transaction, hope-

lessly insolvent. It was proved that certain county officials had deposited with E funds in excess of his daily balance. The defendant, as administrator of E's estate, contended that the plaintiff could not recover because H had no funds deposited with E, as the funds belonged to the county officials. Judgment for plaintiff. Appeal.

Bissell, J. 1. The money deposited by H was a trust fund which did not belong to the banker. 2. The knowledge of the collecting agent E was not knowledge to the plaintiff. 3. A national bank is not a foreign corporation within the principle which requires proof of corporate existence under a general denial. Judgment affirmed.

Cited: 5 Colo. App. 73.

TOOTLE v COOK (1893) 4 Colo. App. 111.

Action to recover balance due for goods sold. The defendant and D were co-partners. The co-partnership having been dissolved, D assumed the firm indebtedness, of which fact the plaintiffs had notice. Subsequently a firm draft was sent to the A Bank for collection and accepted by D, whose acceptance was received by the plaintiffs. The bank retained the draft and partial payments were made on it by D, which were forwarded to the plaintiffs by the bank without stating by whom made. The bank had knowledge of the dissolution. The plaintiffs extended the time of payment without the consent of the defendant. A default for non-appearance was entered in the action against D, who is also a defendant. Judgment for both defendants. Appeal.

Thomson, J. 1. Entering judgment in favor of D, who did not appear, was erroneous. 2. The knowledge which the bank had of the dissolution, or its act in taking the acceptance of one drawer and not of another, cannot affect the prior relations between the defendant partnership and the plaintiffs. The record discloses nothing on the part of the plaintiffs that would tend to impair any claim which they had against the defendants jointly. Judgment reversed.

Cited: 5 Colo. 527.

ROCKWELL v NATIONAL BANK OF LONGMONT (1894) 4 Colo. App. 562.

On promissory note. The note was for \$500 and bore interest at 1 per cent per month. The defendant contended: 1, That the plaintiff had charged a greater rate of interest than was allowed by law; 2, that he is entitled to a credit of \$105, being the interest at 1 per cent originally paid and \$31 interest due on the note in suit. Demurrer to answer. Sustained. Judgment for plaintiff. Appeal.

Bissell, P. J. 1. On no event could the sums paid by way of interest, even though illegal, be applied to the reduction of the principal sum due on the note. 2. National banks may charge as high a rate of interest as is allowed individuals. Judgment affirmed.

FIRST NAT. BANK OF DENVER v SCHMIDT (1895) 6 Colo. App. 216.

Action to recover goods stopped in transit. B & Co., depositors in the plaintiff, were indebted to it. Being desirous of borrowing more money, they deposited as collateral security a bill of lading and warehouse receipts for goods consigned to them by the defendant. B & Co. failed and defendant stopped the goods in transit. The plaintiff subsequently attached the assets of B & Co., and by this action seeks to recover the goods which were stopped in transit. Judgment for defendant. Appeal.

Bissell, J. 1. The equities of the bank, which sprung from the advancement to B & Co., on the faith of the indorsement of the bill of lading, must prevail over the legal right which accrues to a vendor to stop goods in transit when he is informed of the insolvency of the vendee. 2. An antecedent debt is sufficient consideration for an acceptance of security. 3. The bank was a holder for value. Judgment reversed.

MELDRUM v HENDERSON (1896) 7 Colo. App. 256.

Action to recover unpaid balance on draft. The draft, drawn by S on K, was deposited by plaintiff with S, a broker, and collected by him. Thereafter he made an assignment for the benefit of creditors to defendant. The evidence did not show that the draft was delivered to S and by him collected for the

plaintiff, thus constituting S the agent of the plaintiff. Judgment for defendant. Appeal.

Thomson, J. 1. It must clearly appear that S was the agent of the plaintiff, and that the money was collected by him and passed into the hands of his assignee, before the estate is chargeable with the fund. 2. The making of a draft does not, ipso facto, act as an assignment. 3. The proceeds did not constitute a trust fund that could be followed into the hands of defendant. Judgment affirmed.

WESTON v ESTEY (1896) 22 Colo. 334.

Action to remove a cloud from the title to real estate and to foreclose a deed of trust. The plaintiff was the vendee of the property under a sale by the receiver of the Bank of L. W alone defending claimed an estate adverse to plaintiff. W averred that three of the defendants negotiated a loan from the cashier of the Bank of L, securing the same with a deed of trust upon the property in question; that the property was sold on an attachment by W against the bank and purchased by W. This averment showed only a junior title to the claim of the plaintiff. Decree for plaintiff. Appeal.

Hayt, C. J. It is evident that W's pleadings contain no defense to the plaintiff's bill. He claims title to the property as the result of his attachment proceedings against the Bank of L; but the bank never held title, but at best merely security thereon. Banking institutions are not permitted to enter into the hazardous business of mining. Decree affirmed.

COLORADO SAV. BANK v EVANS (1898) 12 Colo. App. 334.

Action against directors, to compel them to replace money lost in the conduct of the business. G. S., secs. 279, 287 and 291, provided "that the board of directors may invest one-half of the deposits on personal security or on unincumbered real estate worth at least double the amount of the loan." The complaint alleged: 1. The directors were without authority under the statute to loan money on personal security. 2. The real estate upon which certain loans were made sold under foreclosure for less than the amount of the loan. There was no allegation that the real estate was not worth double the amount of the loan at the time the loan was made. Demurrer. Sustained. Judgment for defendant. Appeal.

Bissell, J. 1. The plaintiffs have chosen to rest their case upon the naked plea that loans on personal security were contrary to the statute, which we deny. 2. Suit cannot be brought against the directors without a direct charge that at the time the loan was made the property was not worth double the amount of the loan. Judgment affirmed.

AMERICAN NAT. BANK v HAMMOND (1898) 25 Colo. 367.

Action to recover the balance due upon a stock of goods. C and G negotiated with the plaintiff for a stock of goods, and referred him to the defendant bank for their standing, and for the value of mining stock then held by the bank, which they were to give as collateral for credit given them on the stock. It was understood between C and G and the defendant that, if the trade was consummated, their indebtedness to the bank was to be secured by the property purchased. An officer of the bank informed the plaintiff that C and G were solvent, and the mining stock was ample security for the proposed purchase. C and G were insolvent and the mining stock of no value. The defendant was not allowed to show that stock of goods was not worth what the plaintiff sold it for. The jury was instructed that the measure of damages would be the amount for which he gave C and G credit with interest. Judgment for plaintiff. Appeal.

Gabbert, J. 1. A corporation must act through its agents, who can bind only within the scope of the powers for which it was created; but where, through its agents, it reaps and obtains the fruits of an authorized transaction, it cannot set up the defense of ultra vires. 2. It was no part of the business of the defendant to make representations regarding the financial responsibility of C and G. 3. The plaintiff had a right to rely on the bank officers' statements. 4. An expression of opinion, affirmed as a fact, may be a fraudulent representation. 5. It was error to submit statements of plaintiff as to C's solvency to the jury. 6. The bank is liable for the value of the property at the time of the transfer, less any payment by C, and the value of the stock. Judgment reversed.

ZANG v WYANT (1898) 25 Colo. 551.

Action in equity, to enforce statutory liability of stockholders. The Session Laws of 1885, p. 264, sec. 1, provided "that shareholders in banks shall be held individually responsible for debts of said associations in double the amount of the par value of the stock owned by them respectively." The plaintiffs, being the creditors of a bank, the assets of which had been turned over to an assignee, brought this action against its shareholders under the above statute. The plaintiffs failed to introduce in evidence negotiable instruments which represented certain of the claims, relying for their proof upon the verified claims presented to the assignee. The defendants contended: 1. The assignee alone was entitled to maintain this action. 2. The action was prematurely brought, as the assets of the bank should have been first exhausted. 3. The judgment was excessive in that the plaintiffs were allowed interest on their claims. Judgment for plaintiffs. Appeal.

Goddard, J. 1. The statute is security for the benefit of the creditors. An assignee, whose trust relates only to the corporate assets, acquired no right to enforce this statute. 2. By reason of the dissolution of the bank, the action against it would be unavailing. 3. If, from the nature of the debt, interest was allowable against the bank, it would constitute part of its indebtedness, for which the stockholders would be liable. It was error to allow recovery upon the notes without requiring their production at the trial. Judgment modified.

MURPHY, REC'R, v GUMAER (1899) 12 Colo. App. 472.

• **On promissory note.** The plaintiff brought this action against the defendant the maker of five promissory notes which came into the N Bank's possession for value before maturity and prior to appointment of the plaintiff as receiver of the N Bank. The notes were payable to the order of the N Bank and others. The plaintiff requested the court to charge the jury "that if the defendant failed to establish to their satisfaction that there was no consideration passing from the bank at the time it acquired title, the plaintiff was entitled to a verdict." The court refused and charged as follows: If the notes were taken as collateral security for a pre-existing debt, the bank was not a bona fide holder; or if B, in the management of the operations of the bank, made the agreement with defendant that he should not be held liable on the notes, but would only be considered an accommodation maker, it would be binding only upon B. There was no evidence that B had authority to bind the bank. Judgment for defendant. Appeal.

Bissell, J. 1. As against holders of commercial paper who acquire title before maturity and for a valuable consideration, no equity however strong that may exist between the original parties can defeat its collection. 2. It was error to give the above instruction, and plaintiff's request should have been granted. 3. A banking corporation can only transact business through its board of directors. Judgment reversed.

PATTEN v AMERICAN NAT. BANK (1900) 15 Colo. App. 479.

Action to recover interest on bank deposit. The comptroller of the currency suspended the business of the defendant and appointed a temporary receiver. The defendant subsequently resumed its general banking business. At the time of suspension, the plaintiff had a general deposit in the bank. No demand therefor was made until the defendant resumed business, when plaintiff demanded payment of the principal with 8 per cent interest from the time of the suspension. The principal was paid but the interest refused. Judgment for defendant. Appeal.

Wilson, J. 1. In cases of general deposits, unless there be some agreement to the contrary, the undertaking of the bank is only to pay on demand. The bank is not in default until such demand and refusal. 2. The plaintiff was not entitled to receive interest, unless the circumstances were such as to legally excuse him from making a demand prior to the time when he did make it. Judgment affirmed.

McCLURE v THE PEOPLE (1900) 27 Colo. 358.

Indictment for larceny. Defendant, the president of a bank, was indicted under a statute making it larceny for any officer of a bank to receive or assent to a deposit, knowing the bank was insolvent. The statute provided that a failure of a bank, within thirty days after a deposit, was prima facie evidence of knowledge by the officers of its insolvency. The bank failed three days after the

deposit. The court refused to allow the defendant to prove that he did not live where the bank was located; that he was an illiterate man, gave little attention to the bank, took no part in the actual management, and that the officers in charge were guilty of the fraud. Defendant contended that the charge of receiving a deposit and assenting thereto constituted distinct offenses and could not be joined in the same count. Judgment for plaintiff. Error.

Campbell, C. J. 1. The receiving of a deposit and the assenting thereto, being charged as done by the same person and relating to the same transaction, may be combined in one count and together constitute but one offense. 2. Receiving the deposit within thirty days of the failure of the bank made a prima facie case of knowledge of the insolvency. 3. The defendant should have been allowed to introduce the evidence offered. Judgment reversed.

MORGAN, ADM'R, v KING (1900) 27 Colo. 539.

Bill to set aside sale. Plaintiff, a stockholder, brought the bill against a national bank, its directors and others. The bill alleged that the bank was a creditor of A Co., which failed. H, on behalf of all creditors, bought its assets. W Co. was organized and issued stock in payment of A Co.'s debts. The directors fraudulently bought the bank's right to its stock which had been issued to H in trust for the bank. Title remained in H, though the sale was to N for the directors, who paid for the stock by notes. The notes were not on the records of the bank. The directors refused to institute suit at the request of the plaintiff. The suit was commenced within five years from the date of the sale. Plaintiff's motion to substitute the administrator of one of the directors who had died during the progress of the suit was granted. Motion to file an amended answer, after a motion for judgment on the pleadings was denied. Sec. 2912, of the statutes provided that in cases of trusts and other cases not covered by the Statute of Limitations, the action should be brought within five years after the cause arose. Demurrer. Overruled. Judgment for plaintiff. Appeal.

Gabbert, J. 1. The plaintiff was not guilty of laches. 2. Plaintiff was entitled to bring the action after the directors had refused to do so at his request. 3. Plaintiff was entitled to equitable relief. 4. The directors of a bank cannot purchase from the bank. 5. The Statute of Limitations had not run. 6. A defendant cannot amend his answer as of course after the court has announced a judgment adverse to him on a motion for judgment on the pleadings. 7. The action against the intestate did not abate on his death. 8. The administrator was a proper party. Judgment affirmed.

GREGG v BIMETALLIC BANK (1900) 59 Pac. (Colo.) 852.

Action to recover proceeds of check. The plaintiff was interested in the proceeds of a sale of real estate; and, pending its consummation, there was deposited with the defendant an abstract of title and a check from B, the proceeds of which were to go to the plaintiff when the sale was completed. The M Bank, upon which the check was drawn, sent its draft for the amount to the defendant. Before it had been paid to the plaintiff, the defendant received a letter from B demanding that the draft be returned to the M Bank, as he was not satisfied with the abstract of title. The plaintiff had no notice of any of the transactions relating to the check. The defendant contended that the money was not payable until it was collected by the defendant, and that, before the receipt of the draft by defendant, it was notified to return the same, which was not a collection. Judgment for defendant. Appeal.

Thomson, J. 1. The direction to the defendant was not a stoppage in transitu. No condition existed to authorize a stoppage. 2. The draft was the property of the defendant, subject to the trust. 3. The defendant is estopped from saying that it did not receive the money. When it relinquished the security which represented the money its liability to the plaintiff was complete. Judgment reversed.

GRAHAM, ASSIGNEE, v PLATT, REC'R. (1901) 28 Colo. 421.

Claim to enforce statutory liability of stockholder. The plaintiff, as receiver of the G National Bank, brought this action against the defendant as assignee for the benefit of the creditors of a stockholder of the bank under U. S. R. S., sec. 5151, which provides, "that the stockholders shall be individually responsible ratably for the amount of their stock at its par value in addition to the amount invested in

such shares." The assignee contended that the liability of this stockholder was not a provable debt against the assigned estate. Judgment for plaintiff. Error.

Steele, J. The stockholder, on the insolvency of the bank, became its debtor to the extent of the par value of his stock. It was the duty of the receiver to file his claim against the assigned estate. Judgment affirmed.

KASSLER v KYLE (1901) 28 Colo. 374.

Action on certificate of deposit against assignee of bank. The defendant was the assignee of the M Bank, which was capitalized at \$100,000. A resolution was passed, reducing the capital stock one-half, and it was left to the option of the president and cashier whether certificates of deposit should be issued in lieu of the stock surrendered, or whether notes held by the bank should be delivered to the stockholders in lieu thereof. M, the president of the bank, was personally indebted to the plaintiff, and had given as collateral certain shares of the bank stock. M notified the plaintiff that the bank was reducing its stock, and requested him to turn in the collateral, in return for which one-half in new stock and one-half in certificates of deposit would be issued. The plaintiff did as requested. The plaintiff based his claim upon the certificate of deposit given to him by M. Judgment for defendant. Error.

Gabbert, J. 1. The plaintiff should have shown that the assets, distributed in pursuance of the resolution, which are represented in part by the certificates of deposit upon which he bases his action, were of such character as to be legally distributable. 2. The resolution was in effect a sale of one-half of the capital stock of the bank to itself, and its agreement, therefore, to pay the sum represented, by the certificates of deposit was in violation of its charter powers. Plaintiff is not a bona fide holder for value. Judgment affirmed.

CONNECTICUT

SHEPARD v HALL (1815) 1 Conn. 329.

Assumpsit on a promissory note. Defenses: No notice of non-payment, and fraud. Defendant was the indorser of the note payable at the bank and held by plaintiff. The last day of grace was Sunday. On the preceding Saturday, after banking hours, the plaintiff sent notice of non-payment by mail to the defendant and on the following Monday gave him personal notice. The defendant offered testimony tending to prove fraud in the transactions in which the note was transferred. The court charged that a total fraud in the consideration of the note or in the manner of obtaining it would render the note void, and left the facts to the jury. Verdict for plaintiff. Motion for new trial.

Swift, C. J. 1. The charge was proper. 2. Notes payable at a bank are entitled to three days of grace. 3. Putting a letter in the mail is legal notice if the parties do not live in the same city; either this or the personal notice on Monday was due notice. Motion denied.

HARTFORD FIRE INS. CO. v TOWN OF HARTFORD (1819) 3 Conn. 15.

Indebitatus assumpsit to recover money collected for taxes. Plaintiff was a Connecticut corporation authorized by its charter to hold bank stock. A statute required all inhabitants to list their property for taxation. Defendants were the taxing body of the town. Plaintiff was required to maintain an office in the city in which it was located, but could do business elsewhere. The plaintiff failed to include the bank stock in its tax list. Defendants included it at its fourfold rate and collected the tax. Case reserved for the opinion of the court.

Hosmer, C. J. The plaintiff is not an inhabitant of the town of Hartford in such a sense as to come within the taxation law, and therefore the bank stock held by plaintiff was not taxable by the defendants. Judgment for plaintiff.

Cited: 13 Conn. 209, 210; 20 id. 115; 31 id. 112; 68 id. 590.

HARTFORD BANK v STEDMAN (1821) 3 Conn. 489.

Assumpsit against defendants as indorsers of a note payable at M Bank. The plaintiff discounted the note and sent it to M Bank for collection. Payment was refused. On the same day a notary inclosed the notice of dishonor, blank as to

the defendants' address, and sent it to the cashier of the plaintiff, with the request that he fill in the address and forward it. The officers of the M Bank and the notary did not know the residence of the defendants. Defendants claimed that they were well known in M, and contended that the cashier should have delivered the notice personally. Plaintiff proved that the notice was the customary one given between H and M. The court charged that a notice of protest by mail must be posted so as to go out on the first post after refusal of payment; that a notice not sent by mail must be given personally or left at the indorser's residence; that the notary was bound to make inquiry as to the defendants' residence, and that the notary's negligence was no defense. Verdict for defendants. Motion for new trial.

Hosmer, C. J. 1. The charge was erroneous. 2. The cashier was not required to deliver the notice personally. 3. There is no particular form or method of giving notice. Ordinary diligence must be used; where the party resides in another town, notice sent by mail is sufficient. Motion granted.

Cited: 12 Conn. 312; 31 id. 301.

MAGILL v PARSONS (1822) 4 Conn. 317.

Assault, battery and false imprisonment. Plea of justification under an attachment against the plaintiff, at the suit of the Bank of the United States, in an action of assumpsit in the circuit court of the United States for the District of Connecticut. An act of Congress provided that the bank might sue and be sued in any circuit court of the United States. Demurrer. Case reserved.

Peters, J. The act to incorporate the Bank of the United States is a law made in pursuance of the constitution, and the case was one arising under that law and that constitution. Demurrer. Overruled.

BANK OF THE UNITED STATES v ROBERTS (1822) 4 Conn. 323.

On a bill of exchange, drawn by the defendant and discounted by the plaintiff, the Bank of the United States. The bill, drawn and discounted in Kentucky, was dishonored by the acceptor, a resident of Louisiana. The suit was in the plaintiff's corporate name, and not by an attorney. The act of incorporation gave the bank power to sue in its corporate name in any circuit court of the United States. The declaration contained no allegations in regard to the citizenship of the parties. Demurrer: That the circuit court of the United States did not have jurisdiction.

Per curiam. The circuit court of the United States has jurisdiction of an action commenced by the Bank of the United States in its corporate name. Demurrer overruled.

BANK OF THE UNITED STATES v NORTHUMBERLAND BANK (1822)
4 Conn. 333.

Case stated. The plaintiff was the Bank of the United States, suing in its corporate name in the circuit court of the United States to recover a sum of money from defendant, a corporation organized under the laws of Pennsylvania. By an act of Congress, the bank could sue in its corporate name in any circuit court in the United States. The suit was commenced in the proper circuit. If the court was of opinion that it had jurisdiction, the judgment was to be for plaintiff for an agreed sum, otherwise it was to be for defendant.

Washington, J. The circuit court of the United States has jurisdiction of a civil suit commenced by the Bank of the United States in its corporate name. Judgment for plaintiff.

BANK OF UNITED STATES v SILL (1823) 5 Conn. 106.

Assumpsit. The plaintiff desiring to safely send by mail a bank bill issued by the defendant, the Bank of United States, cut it in half and mailed each under separate cover. Only one part was received. The plaintiff presented one-half for payment, giving notice and offer of proof of the facts. The defendant, having previously advertised that it would no longer pay mutilated notes, because of the danger of a claim from the holder of the other half, refused payment. Plaintiff had no knowledge of such notice. Profert was not made of the bill. Judgment for plaintiff. Error.

Peters, J. 1. In declaring upon simple contracts profert is not necessary. 2. The bona fide holder of a part of a bank bill, mutilated with the intent to preserve it, can enforce payment. 3. The plaintiff was not bound by the notice. Judgment affirmed.

NEW YORK FIREMEN INS. CO. v ELY (1825) 5 Conn. 560.

On a promissory note. The plaintiff was a New York insurance company without banking powers. The note was discounted by plaintiff in part payment of a note received by way of discount as security for a loan. The defendant claimed the charter and the laws of New York prohibited the plaintiff from loaning money and receiving the note. The court charged against this claim. Verdict for plaintiff. Motion for a new trial.

Hosmer, C. J. 1. The note is void for deficiency of right in the plaintiff to loan money on the discount of notes. 2. The discount of money on a note is peculiarly a banking power. Motion granted.

Cited: 5 Conn. 578; 6 id. 241; 7 id. 556; 9 id. 180; 13 id. 260, 267; 14 id. 443, 444; 34 id. 541; 46 id. 152; 65 id. 347.

CATLIN v EAGLE BANK (1826) 6 Conn. 233.

Bill to set aside conveyances and to distribute all the funds of defendant, an insolvent bank, ratably among its creditors. The bank, by the act of incorporation, had authority to purchase, hold and convey property, with the usual banking powers. The directors, authorized to manage its affairs after it had become actually insolvent, made payments and gave security in the form of mortgages to one of its creditors, and left plaintiff and other creditors unpaid and without security. Case reserved.

Hosmer, C. J. 1. The directors of an insolvent bank can prefer the bank's creditors. 2. The plaintiff was not entitled to relief. Bill dismissed.

Cited: 8 Conn. 512; 16 id. 601; 25 id. 101; 52 id. 108.

LAWRENCE v STONINGTON BANK (1827) 6 Conn. 521.

Assumpsit. The plaintiff drew a bill of exchange on D to his own order, indorsed it in blank and deposited it for collection in a New York Bank, which forwarded it to E Bank. E Bank indorsed it and forwarded it to defendant, a bank, for collection. Defendant credited the amount to E Bank, which, unknown to the defendant, had failed. The plaintiff's order from E Bank and demand for the money was refused by the defendant, who claimed to offset it against an indebtedness of E Bank. A custom existed among banks of transmitting bills for collection and, when paid, of passing them to the credit of the transmitting bank and to the debt of the receiving bank. Verdict for plaintiff. Motion for a new trial.

Hosmer, C. J. 1. The defendant was in no sense the factor or banker of the E Bank. 2. The defendant had no lien on the proceeds which they might set off against E's account. 3. The custom of transmitting bills for collection from one bank to another and crediting in account the avails received, cannot affect the claims of a third person. 4. The crediting of the money to E does not alter the case. New trial refused.

Cited: 11 Conn. 438; 12 id. 237, 314, 422; 38 id. 18; 72 id. 508.

UNITED SOCIETY v EAGLE BANK (1829) 7 Conn. 456.

Assumpsit. 1. Money had and received. 2. For the amount of stock demanded of the defendant after six months' notice of withdrawal. The defendant was an incorporated bank, whose charter provided that its stock should be open to subscription from any ecclesiastical society within the state, provided that the shares might be withdrawn on six months' notice to directors. The plaintiff, an incorporated ecclesiastical society in Connecticut, subscribed for shares of its stock. When the bank became insolvent, the plaintiff notified the directors of the intention to withdraw, and at the end of six months demanded payment, which was refused. Case reserved.

Hosmer, C. J. By their subscription, the plaintiffs became stockholders in the Eagle Bank and operated with the responsibilities of such. They are not creditors. Judgment for defendant.

Cited: 7 Conn. 477; 26 id. 272; 34 id. 235; 38 id. 580, 581.

BISHOPS FUND v EAGLE BANK (1829) 7 Conn. 476.

Assumpsit to recover the amount of stock subscribed by the plaintiff. The defendant was an incorporated bank whose charter provided that the bank should

be open to subscription from the funds of any charitable organization within the state; that the shares so subscribed might be withdrawn on six months' notice. The plaintiff, a Connecticut organization, incorporated for the purpose of receiving donations for the support of the Episcopal bishop, having subscribed for stock, after the bank became insolvent, notified the directors of its intention to withdraw the amount. Case reserved for the consideration of this court.

Hosmer, C. J. 1. The plaintiff is a charitable society within the intendment of the charter provision of the bank. 2. As the plaintiff by its subscription became a stockholder and part of the corporation, plaintiff's part of its capital, pledged to the creditors of the bank, could not be withdrawn on the insolvency of the bank. Judgment for defendant.

Cited: 38 Conn. 580, 581; 66 id. 103.

CATLIN v SAVINGS BANK (1829) 7 Conn. 487.

Bill to establish a preference. The plaintiff, the holder of bills and notes of E Bank, demanded payment, which was refused. The amount due in specie was subsequently tendered to the plaintiff in New York and refused, plaintiff demanding two days' interest. Plaintiff's demand, for payment or a return of the notes which had been left at the bank, was refused upon the ground of payment to the plaintiff in New York. The bank then transferred the account to their books under sundry accounts. The bank made a preferential assignment for: 1, The defendant bank; 2, special or ordinary depositors; 3, general creditors, and thereafter failed. The plaintiff claimed to stand in the second class. Case reserved.

Bissell, J. 1. The plaintiff was not a creditor of the bank by reason of any ordinary deposit. 2. The entry by the bank on its books did not have the effect of changing the plaintiff's demand. Bill dismissed.

SAVINGS BANK v DAVIS (1830) 8 Conn. 191.

Bill to foreclose a mortgage. The cashier of the E Bank notified each director in person to attend a meeting, the purpose thereof not being specified. The meeting was held on a regular meeting day and a quorum was present. The president being absent, M was elected president pro tem and a resolution was passed authorizing him to execute a mortgage deed of all the real estate of the bank to complainant to cover an indebtedness, and a record was made of this proceeding. The board had general power to dispose of the property of the bank and to delegate this authority. The deed was executed and acknowledged by M, but the corporate seal was not affixed. It was signed "William McCracken (L.S.)," and acknowledged by him as "president pro tem" of the "Eagle Bank aforesaid." Decree for complainant. Appeal.

Hosmer, C. J. 1. The notice was, for ordinary transaction, a legal notice. 2. The board had a right to do by agent what they could themselves do. 3. A commercial corporation does not alone speak by its corporate seal. 4. The deed was not duly executed. Decree reversed.

Cited: 14 Conn. 603; 27 id. 555; 58 id. 461; 72 id. 480.

SAVINGS BANK v BATES (1831) 8 Conn. 505.

On a promissory note. Defenses: 1, Usury; 2, fraud in transfer; and 3, release by tender. Defendant was the maker of a note to the order of E Bank, payable sixty days after date. On the same day, E Bank discounted the note according to the Rowlett tables, estimating 360 days to a year. On the first day of grace, the defendant's offer to pay the note in bills issued by E Bank was refused. On the second day of grace, E Bank, being then insolvent, transferred the note to secure a bona fide claim of plaintiff. Plaintiff acted in good faith. On the third day of grace E Bank again refused defendant's offer to pay in its bills. The Act of 1827 provided that all contracts made prior thereto, wherein interest was calculated according to the Rowlett Tables, were valid. Verdict for plaintiff. Motion for a new trial.

Bissell, J. 1. The Act of 1827 made all contracts entered into before its passage valid. 2. Before the expiration of the days of grace a note is not due and may be negotiated. 3. An insolvent bank may prefer its creditors. 4. Defendant could not pay the note before payment was due or set off the bills of E Bank. Motion denied.

Cited: 22 Conn. 642; 29 id. 102; 30 id. 159; 31 id. 266.

WATSON v OSBORNE (1831) 8 Conn. 363.

Case. The declaration alleged that the defendant transferred to the plaintiff, bills of a certain bank, knowing that the bank was then insolvent. Plaintiff did not know of the failure of the bank. The plaintiff did not prove the bills specifically set out in the declaration. The plaintiff proved by a witness, that, in the absence of the defendant, the plaintiff had shown him the bills, and gave the particulars of a conversation to show his recollection and reason for recollecting the incident. The court charged that the plaintiff must prove that the defendant passed the bills mentioned in the declaration, but that their denomination was not material. Judgment for plaintiff. Error.

Peters, J. 1. The testimony was improperly received. 2. Having alleged the specific bills, it was for the plaintiff to prove them. Judgment reversed.

MIDDLETOWN SAV. BANK v BATES (1836) 11 Conn. 519.

Ejectment. Plaintiff, a savings bank, claimed under two mortgages made by defendant to it. Two persons, offered as witnesses, for plaintiff, had been trustees of the bank when the mortgages were made, but were not depositors or stockholders. The court charged the jury that plaintiff was bound to prove title in themselves and ouster; that if defendant was in possession by his tenants, who entered under him, by lease given subsequent to the mortgages, they must find for plaintiff. Verdict for plaintiff. Motion for new trial.

Bissell, J. 1. The trustees of the bank were not incompetent witnesses by reason of their interest. 2. The possession of the tenant was the possession of the landlord. Ejectment was maintainable. Motion denied.

EAST HADDAM BANK v SCOVIL (1837) 12 Conn. 303.

Money had and received. A bill of exchange, drawn by B in London on C in New York, in favor of defendant, and accepted by C, who was insolvent, was indorsed by defendant and sent to plaintiff, a bank, for collection. It was transmitted by plaintiff in the usual way to N Bank in New York "for collection," without other indorsement. Subsequently plaintiff, supposing that the bill had been paid, credited defendant with the amount. On discovering that such was not the case, it sued defendant to recover the amount. The bill was duly protested and notice given to the drawee, but no notice was given to plaintiff or defendant. Plaintiff did not inform its correspondents of the residence of the indorsers. Defendant contended that N Bank was plaintiff's agent and that plaintiff was negligent in not sooner obtaining information of the bill's dishonor. Verdict for plaintiff. Motion for a new trial.

Huntington, J. 1. The law does not impose the duty of indorsing a bill on a bank receiving and transmitting it for collection, nor of communicating the residence of the indorsers. 2. The New York bank was not the agent of plaintiff. 3. Plaintiff was not guilty of negligence in not sooner obtaining information in regard to the bill. Motion denied.

Cited: 44 Conn. 569; 66 id. 474.

PHILADELPHIA LOAN CO. v TOWNER (1839) 13 Conn. 249.

On promissory note, and money had and received. Plaintiff was a Pennsylvania corporation, authorized to loan money, but not authorized to discount notes. Plaintiff loaned money to defendant and took goods as security. When the loan became due, plaintiff took defendant's note in renewal. Defendant claimed the right to setoff the value of the goods as goods sold and delivered, against the loans. The note was made in Pennsylvania, the interest for the loan being deducted at the time the note was made. The note was usurious. It was contended that the transaction was in contravention of the charter of plaintiff. Under the law of Pennsylvania, principal and legal interest could be recovered on a usurious note. Verdict for defendant. Motion for new trial.

Williams, C. J. 1. The amount of principal and interest can be recovered under the law of Pennsylvania on a usurious contract. 2. Discounting the note was a violation of the charter of plaintiff, and for that reason the transaction is void, and there could be no recovery on the note. The original loans made before the note was discounted could be recovered. 3. Defendant was not entitled to setoff. Motion denied.

Cited: 14 Conn. 444; 18 id. 159; 24 id. 157; 64 id. 247.

DUTTON v CONNECTICUT BANK (1840) 13 Conn. 493.

Bill to cover proceeds of stock. W, an insolvent, on March 31, assigned to plaintiff stock in H Bank for the benefit of his creditors. W was then indebted to defendant, a bank, which on April 1, attached the stock without actual knowledge of the assignment. Subsequently defendant recovered judgment, sold the stock, and applied the proceeds to the satisfaction of the judgment. By the bank's by-laws, stock could be transferred by surrendering the certificate, with the transfer indorsed thereon for cancellation, and at the same time signing a subscription in a book kept for such purpose. W's stock had not been transferred as the by-laws required. Case reserved.

Waite, J. 1. The assignment alone, without a compliance with the requirements of the by-laws, did not vest title to the stock in the plaintiff. 2. Plaintiff acquired no equitable interest against defendant, who had no actual notice of the assignment when the attachment was levied. 3. The suit being to recover a sum of money, plaintiff has an adequate remedy at law. Bill dismissed.

Cited: 29 Conn. 253; 33 id. 480.

MORGAN v THAMES BANK (1840) 14 Conn. 99.

For damages for refusal to transfer stock. Eleven shares of the stock in defendant bank were bequeathed by the will of K to A in trust for the wife of B, for her sole use, free from the control of her husband, and after K's death the trustee transferred this stock to the wife. Thereafter two shares, standing in the wife's name, were sold under execution against B and bought by plaintiff, whose demand to have them transferred on the books was refused. The court charged the jury that plaintiff was not bound to prove a conveyance from the officer making the sale. Verdict for plaintiff. Motion for new trial.

Storrs, J. 1. The personal property of the wife, on marriage, immediately vests in and becomes the property of the husband. 2. The court erred in instructing the jury that a conveyance was not necessary. Motion granted.

Cited: 14 Conn. 510; 15 id. 598; 19 id. 175; 24 id. 169; 26 id. 233, 235.

KILGORE v BULKLEY (1841) 14 Conn. 363.

On certificate of deposit. A certificate of deposit was issued by the C Bank of New York by its president, in favor of defendants, payable December 1, 1839, and indorsed in New York by defendants to plaintiff. It was presented at the bank on November 30, 1839, and protested for non-payment. Notice of protest, addressed to one defendant at East Haddam, Conn., was posted at New York on December 2. December 1 fell on Sunday. The bank was organized under a law of New York, providing that bank paper intended for circulation should be signed by the president or vice-president and cashier. Plaintiff introduced a decision of the superior court holding that it was the custom to present paper falling due on Sunday on the preceding day. Defendants read a decision of a court of superior jurisdiction, holding that it was the custom to present such paper on the following day. Evidence was received that no days of grace were allowed on such paper in New York. Verdict for plaintiff. Motion for new trial.

Storrs, J. 1. Only such paper as was intended to pass as currency was to be signed by the president and cashier; and this has no application to the paper in suit. 2. Defendants, by indorsement, warranted the validity of the paper. 3. The contract was controlled by the law of New York. 4. The decision of the supreme court was higher evidence than that of an inferior court, as to the usage in such cases. 5. Evidence, as to the custom in regard to days of grace on such paper, was properly admitted. 6. The notice of protest was sufficient. Motion denied.

Cited: 15 Conn. 549; 19 id. 140; 29 id. 57, 58, 59; 33 id. 529.

PHENIX BANK v CURTIS (1841) 14 Conn. 437.

Assumpsit against indorser. It was alleged that plaintiffs were a body incorporated by the laws of the State of New York, by the name of "The Phenix Bank of the City of New York." Profert of the charter was made. The defendant pleaded the general issue. No proof was offered by plaintiffs to show that they were a corporation with the right to sue as alleged; and no objection was taken by defendant on that account until the closing argument, when a request was made and refused

to instruct the jury that plaintiffs could not sustain the action without such evidence. Verdict for plaintiffs. Motion for new trial.

Williams, C. J. 1. Under the general issue, plaintiffs were not required to prove their right to sue, but they must prove in some way, what rights and possession vested in them; not to prove that they may sue, but that they could enter into the contract upon which they sued. 2. An objection on this ground could be raised at any time during the trial. The instruction asked should have been given. Motion granted.

Cited: 16 Conn. 427; 22 id. 131; 27 id. 91, 289; 29 id. 148.

STAMFORD BANK v BENEDICT (1843) 15 Conn. 437.

Foreclosure of a mortgage. Defendant was an accommodation indorser for W on four notes negotiated with plaintiffs, a bank. Subsequently W executed a new note for these notes and other indebtedness to the bank, secured by a mortgage. The proceeds of that mortgage were applied towards the payment of W's indebtedness other than that covered by the original notes. Defendant being called on to pay the notes prior to this foreclosure, gave a mortgage to the bank to secure his liability thereon. No instructions were given by W as to how the money realized at said foreclosure sale should be applied. Case reserved.

Church, J. 1. The creditor correctly exercised its privilege of applying the money realized on the foreclosure sale to the reduction of that part of the debts for which there was no other security. 2. A surety, until he has paid the full amount of the debt, is not entitled to subrogation as to securities held by the creditor. Decree for complainant.

Cited: 17 Conn. 101.

STAMFORD BANK v FERRIS (1845) 17 Conn. 259.

Assumpsit for stock dividend. On May 25, 1842, in an action by A and W against R, an attachment was levied upon stock held by R in defendant bank. Judgment was recovered against R, and execution issued in favor of A and W, and a copy, omitting the name of W, was served on defendant. The stock was sold on execution to plaintiff in January, 1843. The defendant claimed title to the stock under an assignment to E, its cashier, made to secure an indebtedness due from R to the bank. This transfer was made after attachment was levied, but prior to the sale to plaintiff. Plaintiff claimed that the transfer was in fraud of creditors. Dividends were declared September, 1843, and the stock had not been transferred to plaintiff on the books of defendant. The court instructed that the transfer vested title in E, and not the bank, notwithstanding the custom to make transfers in the cashier's name. Judgment for plaintiff. Error.

Church, J. 1. The variance between the original execution and the copy is immaterial. 2. Whether or not the transfer was made to E individually, or the bank, was a question that should have been submitted to the jury. Judgment reversed.

Cited: 21 Conn. 633; 22 id. 563; 47 id. 291.

HOYT v SEELEY (1847) 18 Conn. 353.

On bank check. The declaration alleged that the check was drawn by defendant, payable to W or bearer, and by him delivered to plaintiff, who took it in good faith. It was delivered directly to plaintiff by defendant. The check was not presented for two years and defendant had not been injured by the delay. Defendant contended that he had not put the check in circulation. Verdict for plaintiff. Motion for new trial.

Waite, J. 1. The allegation and proof were substantially the same. 2. A person signing a check payable to bearer, and placing it in the hands of a third person for a specific purpose, is liable thereon to an innocent holder, even though the third person has violated his instructions. 3. Delay in presenting a check, which has caused the drawer no injury, will not defeat a recovery. Motion denied.

Cited: 41 Conn. 429.

BRIDGEPORT BANK v DYER (1848) 19 Conn. 136.

On check. A check on a New York bank was cashed by the plaintiff, a Bridgeport bank, on Monday, June 1, for defendant. On June 1, the check was, according to custom, sent by boat to plaintiff's New York correspondent, and was presented for payment on June 6. Payment being refused, notice thereof was

promptly given. Evidence of the usage at Bridgeport in such cases was introduced to excuse the delay in presenting the check. The court charged the jury that the plaintiff was excused for the delay, and that plaintiff was entitled to interest at the rate in New York. Verdict for plaintiff. Motion for new trial.

Ellsworth, J. 1. Evidence of usage or custom of a particular business is evidence of the understanding of the parties when contracting in relation to that business. 2. The charge was correct. Motion denied, upon plaintiff reducing the rate of interest recovered, to the rate in Connecticut.

Cited: 32 Conn. 20.

SAVINGS BANK v TOWN OF NEW LONDON (1849) 20 Conn. 111.

Money had and received. Defendants, the taxing power, levied and collected a tax on bank stock owned by plaintiff, a savings bank. There was no provision exempting savings bank's property from taxation. Case reserved.

Ellsworth, J. All property of this nature, whether owned by a corporation or an individual, is taxable unless specifically exempt by law. Depositors are not stockholders. Judgment for defendants.

Cited: 32 Conn. 184, 186, 194; 35 id. 19; 52 id. 381; 64 id. 366.

EASTERN BANK v CAPRON (1853) 22 Conn. 639.

On promissory notes. Plaintiffs were the receivers of an insolvent bank holding notes made by defendant. At the time of the failure, defendant held unpaid bills issued by the bank and sought to offset them against the notes. Case reserved.

Waite, J. The offset cannot be allowed. Judgment for plaintiffs.

FANTON v FAIRFIELD COUNTY BANK (1855) 23 Conn. 485.

Assumpsit. On October 28, plaintiff left with the defendant bank the sum of money to pay their note, not then at the bank. Not being so applied, the fund was, on January 17, following, passed to plaintiff's credit. On February 5, plaintiff made an assignment for creditors to L, who brought this suit in plaintiff's name as his trustee. Notice of the assignment had been given and demand made on April 1. It was not shown that the trustee knew until after the assignment of the existence of the deposit. On March 23, the money was taken from the bank under an execution at the suit of B against plaintiff. The bank knew of the assignment before being factorized, and there was evidence tending to show that B also had notice. Judgment of nonsuit. Error.

Storrs, C. J. 1. The evidence should have been submitted to the jury. 2. If defendant had notice of the assignment of the debt before the factorizing process, the assignment vested in the assignee the equitable title to the debt. Judgment reversed.

FARMERS & CITIZENS BANK v PAYNE (1857) 25 Conn. 444.

On bills of exchange by indorser, a bank, against the acceptors. The declaration contained a general count for money had and received. It was claimed that the bills had been drawn for a special purpose, and had been fraudulently misappropriated, with the knowledge of the bank. There was evidence that a director of the bank, who had not communicated his knowledge to the board, knew of the purpose for which the bills were drawn and of the intention to misapply them, at a time when he was not acting for the bank. Verdict for plaintiff. Motion for new trial.

Storrs, C. J. 1. The plaintiff was entitled to recover on the general count for money had and received. 2. The knowledge of the director was not the knowledge of or notice to plaintiff of the objects and appropriations of the bills in question. Motion denied.

Cited: 26 Conn. 382; 37 id. 539, 548; 41 id. 264; 42 id. 480; 46 id. 149; 66 id. 240; 70 id. 325; 72 id. 667.

EAVES v PEOPLES SAV. BANK (1858) 27 Conn. 229.

To recover money paid on a forged order. The plaintiff deposited money in the defendant bank, and received a bank book, upon which was indorsed, "payment on deposits shall be made only to the depositor or his legal representatives on presen-

tation of this book." The bank was instructed by plaintiff to pay on his wife's order, whenever she might apply. X, representing herself to have been sent by the wife of E, who she stated was sick, presented a forged order upon which the bank paid the money in suit. The bank proved a rule among the local banks to pay upon presentation of the book, or upon an order, where there was reasonable evidence of its genuineness. Case reserved.

Ellsworth, J. 1. The bank had no authority to pay the money on a forged order. 2. The money was only demandable by the depositor, or his attorney; or, in case of death, by his legal representative. 3. The custom of the bank constituted no defense. Judgment for plaintiff.

Cited: 60 Conn. 308.

WEST WINSTED SAV. BANK v FORD (1858) 27 Conn. 282.

Petition to correct a deed and to foreclose a mortgage. Plaintiff was a state savings bank. The copy of the articles of incorporation, required to be filed with the town clerk, did not have the names of the incorporators appended, as required by statute. The defendant, one of the incorporators, borrowed money of the plaintiff, and gave a deed signed by one of plaintiff's members as a witness. Defendant sought, under the general issue, to question plaintiff's right to sue. Plaintiff sought to have the deed reformed. Case reserved.

Ellsworth, J. 1. A member of a savings bank is not a proper person to witness a deed in which the savings bank is the grantee, and such a deed is void. 2. Defendant's membership, acceptance of the money, and making of a deed to plaintiff estopped him from questioning the plaintiff's existence. 3. The question of the existence of a corporation cannot be raised upon the general issue. Decree for plaintiff.

Cited: 27 Conn. 145; 29 id. 148; 38 id. 513; 66 id. 17.

BANK OF NORTH AMERICA v WHEELER (1859) 28 Conn. 433.

Assumpsit in the name of the bank, on checks. Defendant pleaded in bar a judgment recovered in the State of New York by the receivers of plaintiff, who there sued in their own name on the same cause of action against the same defendant, which had been taken up by writ of error to the court of error. Case reserved.

Storrs, C. J. 1. The judgment is only voidable and stands good until set aside. It is a complete defense to this action. 2. The receivers are the representatives of the bank and a judgment recovered by them would have the same effect as if recovered in the name of the bank. Judgment for defendant,

Cited: 73 Conn. 414.

IN RE LITCHFIELD BANK (1859) 28 Conn. 575.

On receiver's accounting. The item in controversy was a claim made by the C Bank against the insolvent L Bank, for a balance due on two notes executed by the L Bank to the C Bank, prior to the failure of the former, to secure a loan then made. As collateral to these notes there had been deposited circulating paper of the L Bank, which was at a large discount, but had a face value greater than the amount of the notes. Afterward there was also deposited, as collateral, certain notes of V and S, which were unpaid. The agreement in regard to the L Bank's bills was, that they should be put into circulation if the notes of the L Bank were not paid at maturity. Some of the V and S notes had been discounted. After the failure, the C Bank, without notice to the receivers of the L Bank, sold the bills at a large discount. These notes were proved and allowed for their face value by the receivers. The superior court disallowed the claim. Motion in error.

Ellsworth, J. 1. The Connecticut bank is liable only for the injury which it has done to the Litchfield bank, the amount of which is just what the bank or the receivers had to pay to the bona fide holders of the bills. 2. The receivers should allow to the Connecticut bank, as a good debt in its favor, the original loan, with interest, deducting therefrom the amount of dividends paid on the bills; and the Connecticut bank is allowed to retain the Van Clief and Smith notes for any balance due. Judgment reversed.

Cited: 67 Conn. 335.

LITCHFIELD BANK v CHURCH (1860) 29 Conn. 137.

On promissory notes. Defendant claimed that he was induced by the fraud of plaintiff, a bank, to subscribe to plaintiff's stock. He had authorized an attorney-in-fact to subscribe, but had furnished him with no funds to pay the 10 per cent required by law in order to make the subscription valid, but it was in fact paid. The law provided that the commissioners should apportion the stock and certify the result, and they had done so. During the trial of this case, the court was adjourned from the court-house to a hotel where one of the jurors was sick, where the verdict was taken. This action was brought by the receivers of the bank, which had failed, to recover the amount of notes given for the subscription. The general issue was pleaded. Defendant raised the objection that the bank had been fraudulently organized. Verdict for plaintiff. Motion for new trial.

Ellsworth, J. 1. The verdict was properly received in the hotel. 2. Under the general issue, the question of the organization and existence of the corporation could not be raised. 3. The decision of the commissioners on the subscription and allotment of stock was final. 4. Defendant, being one of the actors in organizing the bank, cannot, as against creditors, raise the objection of fraud in the organization or in obtaining the subscription. Nor was it material that no funds were provided to pay the first instalment, as it was in fact paid. New trial not advised.

Cited: 30 Conn. 576; 73 id. 517.

LITCHFIELD BANK v PECK (1860) 29 Conn. 384.

On promissory notes. Defendant was induced by fraud to buy five shares of stock in the plaintiff bank, and to give the notes in suit therefor. When the bank failed the receivers brought this action to recover on the notes. The defense of fraud was interposed. Verdict for defendant. Motion for new trial.

Sanford, J. 1. The defendant was not a debtor of the bank, nor had he assumed any responsibility for its debts. 2. The receivers were not indorsees and the rule, which protects the bona fide holder of negotiable paper, can have no application. New trial not advised.

Cited: 70 Conn. 232; 71 id. 218.

TOWN OF NEW HAVEN v CITY BANK OF NEW HAVEN (1862) 31 Conn. 106.

To recover taxes. By its charter, the capital stock of the bank was exempt from taxation. A part of the building owned by the bank and in which it did business was not needed for banking purposes and was rented out, and it was claimed that this part was taxable. Case reserved.

Sanford, J. 1. The term "capital stock" included all the property of the bank. 2. The fact that a bank owned more real estate than was actually used for its business, would not render such property taxable. Judgment for defendant.

Cited: 61 Conn. 101.

COITE v SOCIETY FOR SAVINGS (1864) 32 Conn. 173.

To recover tax. A statute provided that each savings bank should pay to the state treasurer three-quarters of 1 per cent on its deposits and stock, as a tax in lieu of all other taxes. A part of the money of the bank was invested in United States bonds, which were by law exempt from taxation. It was contended that, as to this amount, no tax could be collected. Case reserved.

McCurdy, J. The tax was a tax on the bank as such, and not on its property, and is valid. Judgment for plaintiff.

Cited: 36 Conn. 527, 528, 529, 531, 538; 38 id. 206; 42 id. 119; 43 id. 159; 52 id. 381; 60 id. 309, 334; 68 id. 315.

OLMSTEAD v WINSTED BANK (1864) 32 Conn. 278.

Assumpsit on bank bills. The bills in question were stolen from the bank. B & Co. sold them after the theft to M & Co. who bought at a discount of 20 per cent. They had them protested, and sold them, with the protest attached, to S. S sold to W P S, who sold to plaintiff. It was claimed that B & Co. and M & Co. knew that the bills had been stolen, though there was evidence to show that an intermediate holder had bought in good faith. Verdict for defendant. Judgment for defendant. Motion for a new trial.

Butler, J. 1. The protest was evidence of notice that the bank claimed that the bills had been stolen and admissible on the question of bona fides. The purchase of the bills at a discount constituted no defense in itself. 2. If the bills were in fact stolen, any holder who came by them bona fide, in the regular course of business and for a valuable consideration, could recover on them against the bank. But such holder did not acquire such an absolute property in them which he could transmit to a purchaser who had knowledge of the theft. New trial denied.

PAINE v STEWART (1866) 33 Conn. 516.

Action against stockholder. The defendant was a stockholder in a bank organized under the laws of Minnesota, which imposed a double liability upon stockholders for the debts of the bank. Plaintiff was the holder of a draft for which the bank was liable, which was incurred while the defendant was a stockholder. The statute provided that the stockholders' liability should continue for one year after a transfer of the stock. Owing to the defendant's fraudulent representation, plaintiff had done nothing to recover from the bank for over a year, other than make a demand for payment. The paper was not signed by the cashier. General banking laws provided that all notes and bills, issued by the bank, be signed by the president and cashier. Verdict for plaintiff. Case reserved.

Butler, J. 1. The delay in commencing suit, directly induced by the act of defendant, did not bar the plaintiff, against whom the transfer was fraudulent. 2. The draft was valid, as the law referred to bills and notes intended for circulation. 3. Each stockholder was individually liable under the statute for the debts of the corporation to the extent of double the value of his stock, and could be sued alone therefor regardless of the solvency or insolvency of the corporation and without joining other stockholders. Motion denied.

Cited: 68 Conn. 525.

STATE v PHOENIX BANK (1867) 34 Conn. 205.

Bill for accounting and relief. Defendant, a domestic bank, was chartered with a capital of 10,000 shares. It continued under this charter until December 31, 1864. Its capital stock included 1,814 non-transferable shares, of which the state owned 1,220 shares. When the state should have paid for 500 shares, it had the right to appoint two additional directors. The Act of 1863 provided that when two-thirds of the stockholders of any bank, incorporated under state law, should vote to become a national bank, the bank shall be deemed to have surrendered its charter, and any dissenting stockholder shall be entitled to receive the fully appraised value of his stock, which shall be a debt of the bank. In November, 1864, the stockholders voted to incorporate under the national law. The directors carried this into effect, and transferred all the property of the old bank to the new. On November 22, 1864, the new bank notified the state treasurer that the charter of the old bank had been surrendered, and that the amount of the stock held by the state was subject to the order of the state. On February 2, 1865, this petition was filed for a proper ascertainment of the value of the stock and payment thereof to the state. The statute of 1865 (G. S. p. 156, sec. 329) provided that all stock, to which representation in the national association was refused, was entitled to share in the bank surplus. Case reserved.

Butler, J. 1. The subscribers to the non-transferable stock did not thereby become depositors or creditors, but stockholders and members of the corporation. 2. And it was competent for the legislature to create different classes of stockholders, one of which should have no right to vote on or transfer their stock. 3. As the stockholders acted under the law of 1863, the state has no right to representation in the new bank. 4. The Act of 1865 does not apply to the case. 5. These special stockholders were entitled to their joint proportion of the assets as ascertained by an appraisal and accounting. Decree for an accounting.

Cited: 34 Conn. 246; 38 id. 581.

STATE v HARTFORD NAT. BANK (1867) 34 Conn. 240.

Accounting. A state bank intending to reorganize as a national bank, was required to give thirty days' notice of its intention. The state was a qualified stockholder. The notice was not given as required in this instance; but in the reorganization, all the stockholders, general as well as qualified or special, were included.

It was claimed that the state was thereby, and by failure to give the notice required, entitled to be represented as a stockholder in the new bank. Case reserved.

Butler, J. It was competent for the bank to include all the stockholders, absolute and special, in the reorganization, and, having failed to give the notice as required, the bank is not now in a position to insist on the exclusion of the special stockholders from the reorganized bank. Decree for complainant.

STATE v TULLER (1867) 34 Conn. 280.

Information for theft. One count of the information was for stealing "on or about" September 4, 1856, certain bonds and notes. The statute of Connecticut provided for punishing offenses of this nature. The offense of stealing from national banks was punishable by an act of Congress. The information was in the state court. The bank had existed as a state bank long prior to June 13, 1865, when it was reorganized as a national bank. There was a verdict of guilty and a motion in arrest of judgment, on the grounds: 1, That the information was not sufficiently certain as to date; 2, that one of the jurors was disqualified for having formed an opinion; that his counsel waived the right to object to the panel; 3, that a state law could not apply to a national bank; 4, that the words "all banks" would not cover the case at bar; 5, that there could be no conviction if there were no breaking of the package before taking it from the bank; 6, that the court refused on request of the prisoner to find separately on each count. Verdict, guilty. Case reserved.

Butler, J. 1. The objections to the information, on the ground that it was too indefinite as to dates, are untenable. 2. The failure to object to the juror at the trial was a waiver of the objection to him. 3. The statute in the use of the words "all banks" intended to cover the case at bar. 4. The provision of the act of Congress, punishing thefts, covers cases relating to the property of the bank, and was not intended to have the effect of regulating the business of the bank with its customers. 5. The technical rule in relation to the breaking of a package is entirely inapplicable. 6. Whether the court should direct the jury to find separately on each count was a matter left to the discretion of the judge. 7. Counsel had power to waive objections. New trial denied.

Cited: 46 Conn. 368, 547; 47 id. 120; 72 id. 117.

STATE v CURTIS (1868) 35 Conn. 374.

Quo warranto. The First National Bank of West Meriden was organized under the National Banking Law. The relator brought this proceeding in the state court, in the name of the state, to try the right to the office of a director in the bank. The Act of Congress of 1864, sec. 57, provided that suits, actions and proceedings against any association under the act might be had in the federal or state courts, with exceptions not material here. Demurrer. Case reserved.

Butler, J. The state court has no jurisdiction. Demurrer. Sustained. Judgment for defendant.

NATIONAL PAHQUIOQUE BANK v FIRST NAT. BANK (1870) 36 Conn. 325.

Assumpsit for money had and received. Defendant, a national bank, having failed, a receiver was appointed by the comptroller of the currency. The claim presented by plaintiff was disallowed. The claim arose from the failure of the cashier of defendant to protest or make return on commercial paper sent to the defendant by plaintiff for collection, the amount of the paper having been paid by plaintiff to other banks from which it had been received. Plaintiff after waiting a reasonable time and assuming that the paper had been paid, charged the amount to defendant. By collusion between the cashier and the debtor, this paper was not paid nor entered on the books of the defendant, nor had the directors any knowledge thereof. Case reserved.

Butler, J. 1. The proceeding by the comptroller of the currency did not produce a forfeiture of the franchises or a dissolution of defendant corporation, so that thereafter no suit can be maintained against it by name. 2. The rejection of the claim by the receiver was not final or conclusive. The court had jurisdiction. 3. The bank was bound by the fraudulent acts of its cashier, and plaintiff could recover on the common counts as for money had and received. Judgment for plaintiff.

Cited: 52 Conn. 284; 56 id. 475.

RECEIVERS OF STONINGTON BANK v BAPTIST SOCIETY (1871)
38 Conn. 577.

Petition for instructions. Defendant, a charitable society, became a subscriber to the preferred stock of the S Bank under a law empowering it to do so. It was entitled to withdraw at any time on six months' notice, and receive back the amount paid on its stock. The notice of withdrawal was given less than six months before the receivers were appointed, the bank having gone into liquidation. The general creditors were paid in full, and the question was whether the society should get the full amount of its stock, there not being sufficient to pay all the stockholders, general and special, in full. The decree treated it as a creditor and paid it in full. Error.

Seymour, J. In case of insolvency, the special stockholders can only share in proportion with all other stockholders after all the debts are paid. Decree reversed.

BUNNELL v COLLINSVILLE SAV. SOCIETY (1871) 38 Conn. 203.

Assumpsit for money had and received. Defendant was a savings bank incorporated by special charter. While N was treasurer, the bank suffered a loss of 24 per cent of its deposits. By resolution of the directors this was charged against and deducted from the depositors, of whom plaintiff was one. Afterwards a certain part of the loss was recovered, and plaintiff obtained his portion thereof, though the charge as well as the credit was made without his knowledge. Thereafter plaintiff was paid all that was due him, less the deduction, and the general assembly passed a resolution confirming the act of the board in making the deduction. Plaintiff sued for the amount. Case reserved.

Park, J. 1. Savings banks are in fact incorporated agencies for receiving and loaning money on account of the owners. 2. The loss being occasioned by the agents of the plaintiff, it was in contemplation of law his own act and he cannot recover. Judgment for defendant.

Cited: 43 Conn. 159; 52 id. 381; 60 id. 309; 64 id. 366.

WOODRUFF v PLANT (1874) 41 Conn. 344.

Assumpsit on bank check. Plaintiff, residing at S, where there was no bank, wished to remit some money to G in L, and gave defendant, who had a bank account at M, money and a check of \$425, afterwards paid; and to accommodate plaintiff, defendant gave him his check for the amount. This was on the same day sent by mail to G, and was by him received the day following, and at once deposited in a bank for collection. By the next mail the bank sent the check to a bank in New Hampshire for collection, where it was received on the afternoon of the following day, and was presented for payment the next morning. Payment was refused, the banking house having failed on the day previous. Defendant knew when he gave the check what use was to be made of it, and where it was to go. Case reserved.

Foster, J. 1. This was not a case of bailment. 2. The check was presented in a reasonable time and defendant was liable. Judgment for plaintiff.

BRISTOL KNIFE CO. v FIRST NAT. BANK (1874) 41 Conn. 421.

Assumpsit for money had and received. Plaintiff, a customer of defendant, received a check drawn by H on the S Bank and indorsed by the latter to plaintiff's order. Plaintiff indorsed it "pay to the order of Cashier of First Nat. Bank, Bristol Knife Co., per W R," and inclosed it in a sealed envelope with a deposit tag for the amount, and sent the envelope by R, a brother of the president of the plaintiff, to the bank to deposit the check for plaintiff's credit. R opened the envelope, took out the check and deposit tag, destroyed the latter and presented the check for payment, saying that the plaintiff wanted the money to pay the hands. The paying teller paid the money, R took it and absconded and was not afterwards found. The court found that the payment was out of the regular course of business and gave judgment for plaintiff. Motion for new trial.

Loomis, J. 1. The messenger was not the agent of the plaintiff to receive the money. 2. The indorsement was made to prevent the bank from paying the check to any one except the plaintiff, and everybody except the bank itself would be precluded from collecting it in that form. New trial not advised.

OSBORN v BYRNE (1875) 43 Conn. 155.

Petition for advice. The T Savings Bank failed and plaintiffs were appointed receivers. There were five questions submitted, involving the right to setoff in each case. 1. B borrowed \$600 from the bank on July 29, 1864, giving her demand note, and afterwards deposited \$128.13, with the intention of using it to pay the debt, but it had not been so applied at the time of the failure. 2. J P B, on December 10, 1868, borrowed \$1,000, giving his demand note. He afterwards deposited \$563.03 in the name of his daughter, but for his own benefit. 3. G borrowed \$600 on February 12, 1870, and gave a like note therefor. On September 11, 1874, when it was generally believed that the bank was insolvent, G bought a deposit account from one of the depositors in the bank, the amount being \$500.85. 4. C E J, W C J and G H J, partners, owed the bank \$700. One of the partners was a depositor to the extent of \$634.53. 5. C E J was a depositor for \$104.05. Just before the bank failed she assigned her account to G H J, one of said partners, who indorsed the order to the firm. It was presented, but the bank refused to transfer the account to the firm. Case reserved.

Park, C. J. A setoff cannot be allowed in any of the cases, except possibly the first. As to that, if the officers of the bank knew the purpose for which her deposit was made, we think it can be setoff.

Cited: 60 Conn. 309; 64 id. 366.

MERCHANTS & M'F'RS BANK v STAFFORD NAT. BANK (1877) 44 Conn. 564.

Assumpsit. F & Co., on August 13, 1876, delivered for collection to plaintiffs, a national bank, at Detroit, Mich., a draft for \$500 on the M Co., payable at sight at defendant's bank in Connecticut. On the same day plaintiff indorsed it "Pay R. S. Hicks, cashier, or order, for collection," and attached to it a notice: "If not accepted or paid, return without protest," and inclosed it to defendant's cashier. The notice and draft reached defendant on September 2, and was presented to the drawee for acceptance on September 4. The treasurer of the M Co. knew of the draft and letter, and, believing that it had been paid, wrote to the drawers on September 4 that it had been so paid. This letter the drawers received September 5, and it was shown to plaintiff, who, relying thereon, paid the drawers the amount. The treasurer of the M Co. was also president of the defendant. The draft was retained until September 22, and then returned unpaid. Repayment was demanded by plaintiff of F & Co. and refused. This action is for damages for failure to return the draft in time to prevent the payment. Case reserved.

Shipman, J. It was the duty of the defendant to return the draft at once, after presentation and non-acceptance. The bank was guilty of laches in not doing so, and is therefore liable to plaintiff. Judgment for plaintiff.

DAVIS v WEED (1877) 44 Conn. 569.

To recover an assessment. When W died intestate, in 1871, he was a stockholder in the O National Bank of New York, of which plaintiff was appointed receiver on its insolvency on December 12, 1871. After the death of W, defendant was W's administrator; and this action was to recover an assessment of 40 per cent levied by the comptroller of the currency on January 19, 1877. Defendant alleged that all claims against W's estate, which had been presented as required by law, had been fully paid; and the estate had been fully administered and distributed, and that defendant had no property thereof in his hands. Case reserved.

Shipman, J. 1. The order of distribution does not prevent both the realty and the personalty of estates from being subjected to the payment of debts which accrued after the distribution. 2. A court of probate has no jurisdiction to try disputed claims against an estate. 3. The claim accrued at the date of the comptroller's order. The facts stated in the plea constitute no defense. Judgment for plaintiff.

Cited: 45 Conn. 601.

DAVIS v FIRST BAPTIST SOCIETY (1877) 44 Conn. 582.

To recover an assessment on bank stock. Defendants, a charitable society, held stock in their own name in the O National Bank, of which plaintiff was receiver at the time of its failure. The stock represented a fund left to the society in trust

to be put at interest in good securities, and apply the interest annually to the payment of house rent for the society. There was nothing on the books of the bank to show that defendants held as trustees. Defendants offered to prove that they had lost said fund by the failure of the bank, and relied entirely upon other funds left them by other donors to carry on their operations.

Shipman, J. Trusteeship must appear on the books, to relieve a stockholder from personal liability. The defendants occupied the same position as any other stockholder, and the matters pleaded and the testimony offered constituted no defense to the action. Judgment for plaintiff.

GOODWIN v AMERICAN NAT. BANK (1881) 48 Conn. 550.

Bill to compel transfer of stock held by a bank as collateral. When R P died, in 1874, he left a will in which his son L T P was named as executor. The estate owned seventy-five shares of stock in the A Fire Ins. Co. Thereafter L T P borrowed from defendant \$1,000 at four months, depositing this stock as collateral, and giving his note, as executor, therefor. He gave as reason for making the loan that he wanted the money to pay legacies. The loan was made in good faith, and the amount placed to the individual account of L T P. The note, not being paid, was renewed from time to time, and the last note has never been paid. Complainant was appointed executor in the place of the son, L T P, the latter having absconded without paying the legacies, leaving the accounts overdrawn, and being a defaulter to the estate. Case reserved.

Pardee, J. 1. There is nothing to show that the defendant had the least actual knowledge that the executor had not, when the last renewal was given, or at any time prior thereto, applied the money for the purpose mentioned. 2. The evidence fails to show knowledge in the bank or its officers of the fraud intended. Bill dismissed.

CRANDALL v LINCOLN (1884) 52 Conn. 73.

Bill in equity by a receiver against the former stockholders of the company, who had sold their shares of stock to the company and been paid for the same from the capital. A trust corporation having the powers of a savings bank, and whose capital stock was by its charter a trust fund for the payment of deposits in case of failure, purchased out of the capital stock, through R, its treasurer, its stock in the hands of the defendants. One defendant employed R as his agent, but did not know the purchaser. The capital stock being impaired, the company became insolvent. Case reserved.

Carpenter, J. 1. The capital stock of a company is a trust fund for creditors. The stock having been paid for from the capital, the transactions were illegal and cannot be sustained. 2. Equity will follow and reclaim trust property so far as it can be traced and identified. 3. It was for the seller to know who the purchaser was. Having sold through R, the latter's knowledge is imputable to him. The equities of the creditors are superior to his. The contract was in law, as well as in fact, with the agent. 5. The administrators must refund from the estate the money so received. Equity takes cognizance of all trusts, and a court of equity is the proper tribunal to enforce the equitable rights of the beneficiaries therein. The suit was properly brought in the name of the receiver. Superior court advised to render judgment against defendants.

Cited: 52 Conn. 439; 66 id. 18; 68 id. 31; 71 id. 215; 72 id. 130, 665.

BURTON v BANK (1884) 52 Conn. 398.

Action for money held as a deposit. A, plaintiff's father, maintained two accounts with the defendant bank, one in his own name and the other in the name of the plaintiff, his son, order of A. On the former book he filled out a blank order on the bank to pay the plaintiff, and on the latter a similar order, but directing payment on his death. The books remained at the bank subject to the order of A, who made further deposits and drew out money on both books after the dates of the order. The plaintiff never had possession of the books nor any knowledge of them during the lifetime of his father. Judgment for plaintiff. Appeal.

Carpenter, J. The law will recognize and enforce gifts where they are clearly established. Claims of this character are so open to fraud that the courts will not regard them with favor and will not sustain them unless fully proved. There

is no presumption in their favor. The court did not find in terms that there was a gift, and the facts stated failed to establish a gift during the lifetime of A. New trial granted.

Cited: 73 Conn. 641.

CITY BANK'S APPEAL (1886) 54 Conn. 269.

Claim against an insolvent estate, disallowed by the commissioners and taken to the supreme court. E and J, co-partners, presented notes made by E and indorsed by J to the bank for discount, and the money was credited to the firm account. Some of the notes when due were paid by the firm's check. The firm became insolvent, and the bank presented a claim for the balance of the notes against it. The co-partners contended that the notes were individual and given for a loan from the bank. The court charged: 1, That it was prima facie an individual obligation, and the burden of proof was on the bank; and, 2, that if the proof preponderated in favor of the bank, that the paper was partnership paper, discounted as such, and credit given to the firm at the time, then the verdict should be for the bank. Verdict for bank. Appeal.

Loomis, J. The charge was substantially correct. The co-partners were not injured by the charge, because there was no room for an equipoise of proof. Judgment affirmed.

Cited: 55 Conn. 212.

NATIONAL EXCHANGE BANK v GAY (1889) 57 Conn. 224.

Action on a guaranty. The defendant with others, associated as a joint stock corporation, executed to the plaintiff a joint and several guaranty "for the full, prompt and ultimate payment of all loans made by the plaintiff to the corporation." The existence of plaintiff would have been terminated February 24, 1883; but by an act passed in 1882, its existence was extended twenty years. The corporation failed in 1888. The defendant answered that the notes were not discounted prior to February 25, 1883, but were discounted after the expiration of the corporate existence of the plaintiff. The plaintiff replied that the notes sued for were renewals and extensions in whole or in part of loans and discounts made upon the faith of the bond prior to February 24, 1883. To this reply the defendant demurred and the case was reserved on demurrer for advice.

Pardee, J. 1. Defendant was a borrower not a surety. 2. The plaintiff's power to enforce payment upon its debtors, was not affected by the fact that the time of its first limitation had expired. 3. To guarantee, in addition to "full and prompt" payment, the ultimate payment, can have no other meaning than that the obligor should continue bound to the end of all substitutions, renewals and extensions. The reply to the answer is sufficient.

Cited: 67 Conn. 154, 155.

McCASKILL v SAVINGS BANK (1891) 60 Conn. 300.

Action by the assignee of a savings bank passbook, and holder of an order for money, to recover the money standing on the passbook to the credit of the depositor. H presented a fraudulent check to the defendant to open an account, and received a passbook containing an entry of deposit of the amount of the check. The plaintiff advanced money to H, and took from him an assignment of the passbook and an order on the bank for the money, which was refused by the defendant. The court, trying the facts, found the plaintiff was not a bona fide holder. The plaintiff claimed the book was negotiable, and that the bank was estopped, although the court failed to find the defendant negligent. Judgment for defendant. Appeal.

Loomis, J. 1. The passbook was not negotiable by itself nor by virtue of the written order. 2. No depositor can convey to another any greater right in the funds of the bank than he has himself. 3. The order is, in contemplation of the law, the mere appointment of some person as agent for the depositor to receive the money. 4. There is no foundation for the plaintiff's claim of estoppel. The book having been obtained by fraud, the bank is not considered as having issued it at all, and is therefore not liable thereon. Judgment affirmed.

PRICE v SOCIETY FOR SAVINGS (1894) 64 Conn. 362.

Action of scire facias against the savings bank as garnishee. The answer averred that the original debtor had opened an account by depositing with the defendant

the proceeds of a pension check which constituted his sole account. A Connecticut statute exempts pension money "while in the hands of the pensioner." On demurrer to the answer, the court reserved the case for the advice of this court.

Baldwin, J. 1. The statutes protecting the pensioner's interest in the bounty, are of a remedial nature and entitled to a liberal construction. 2. The bank was an agency for receiving and loaning money on account of its depositors. 3. While in the savings bank the money was in the hands of an institution conducted for the sole benefit of its depositors, and of which they were the equitable owners. 4. The pension money can fairly be said to have been still in his hands within the meaning of our statute of exceptions. Judgment advised for defendant.

GUINAN'S APPEAL (1898) 70 Conn. 342.

Appeal from a decree of the probate court accepting a final administration account. H died leaving no property, except a bank account, the books of which she delivered on her death bed to M, a sister, saying: "I give it to you; if anything happens I want you to have everything." Under the advice of the bank and of counsel, M procured letters of administration on the estate for the sole purpose of getting the money from the bank without trouble, and although she receipted for it in her name as administratrix, she claimed the money as her own. Having filed an account of no assets, exceptions to it were filed by the appellant, another sister of H, which exceptions were overruled. The appellant objected to the proof of the transaction and conversation of H and M, and of M with the bank and adviser, and claimed that M, by accepting the money as administratrix, was now estopped and that the gift was invalid. Judgment for respondent. Appeal.

Andrews, C. J. The delivery of the bank book, if the intent existed that M should take title to the money represented therein, would be a sufficient delivery to make a valid gift of the money. 2. The claim of estoppel really begs the question. She may show that she was administratrix. 3. All the evidence objected to was admissible either to show the delivery of the bank books or the intent with which the delivery was made. Judgment affirmed.

Cited: 73 Conn. 640.

STANDARD CEMENT CO. v WINDHAM NAT. BANK (1899) 71 Conn. 668.

Injunction and interpleader. The plaintiff made its promissory note payable to the B company. C, the treasurer of payee, took the note to defendant and, having discounted it, absconded. C at this time had been publicly charged with irregularities. C and the cashier of defendant were on intimate terms personally. The payee charges that such facts show knowledge on the part of the defendant of the fraud of the treasurer; that he had no power to indorse and discount notes, as the business of payee was a manufacturing one; and that no notes had ever been discounted by it in this state. This suit is brought to restrain the collection of the note, and the defendant and payee interplead. Judgment for payee. Error.

The court: 1. It is error to find facts on which there is no testimony. 2. The facts shown were not sufficient to legally charge the cashier of defendant with knowledge of fraud on part of treasurer of payee. 3. The defendant stands in the position of a bona fide holder for value without notice, and it acquired an absolute title to the note in question, for knowledge of fraud cannot be presumed from the fact thereof. Neglect or laches is not enough to divest an otherwise innocent purchaser of the character of a bona fide holder. 4. The treasurer of a corporation has power to lawfully negotiate notes. Judgment for defendant.

Cited: 72 Conn. 365, 582.

ROCKVILLE NAT. BANK v CITIZENS GAS LIGHT CO. (1900) 72 Conn. 576.

To recover on bonds. R, who was treasurer of defendant, wrongfully deposited with plaintiff three of the defendant's bonds as collateral for his note held by it, plaintiff taking in good faith without knowledge of the fraud. These bonds were part of a former issue which had been surrendered to defendant and new bonds issued in place thereof. They had not been canceled, were not matured, and bore on their face no evidence that they were not genuine, and were payable to bearer. R having died, this action was brought to recover on the bonds. Judgment for plaintiff. Appeal.

Hammersley, J. 1. Negotiable paper, taken as security for a pre-existing debt

not yet matured, is taken on a valuable consideration within the law merchant. 2. The fact that the bonds were signed by R as treasurer of defendant was not notice to plaintiff that R had no right to pledge them, or that they were not valid outstanding bonds. 3. The question of negligence on the part of defendant, in not having the bonds canceled, was one of fact, and the finding of the court thereon in favor of plaintiff is final. Judgment affirmed.

FIRST NAT. BANK OF WILLIMANTIC v BEVIN (1900) 72 Conn. 666.

On promissory notes. The notes in question were made by defendant and transferred to R before maturity, and in good faith received by the plaintiff from R, its cashier, as security for money due. It was alleged in defense that R had committed a fraud in so using the notes. Judgment for plaintiff. Error.

Andrews, C. J. The fraud of R, if there was any, cannot be imputed to plaintiff from the fact that he was its cashier. Judgment affirmed.

NATIONAL SAV. BANK v CABLE (1901) 73 Conn. 568.

Interpleader. B and wife, who were depositors in the plaintiff bank, indorsed on their passbook an order in favor of E to draw the money for the completion of a certain building. Most of the deposit was so withdrawn when E gave the defendant an order on the bank. The defendant's pleadings failed to show that the order was given for the purpose for which the account was transferred. The court ordered E and the defendant to interplead. Judgment for plaintiff. Error.

Torrance, J. 1. The order to pay the fund to E was not assignable except for the purpose for which it was made. 2. The court having found that the allegations of the complaint were true, the defendant was properly ordered to interplead. Judgment affirmed.

DAKOTA

NEILSVILLE BANK v TUTHILL (1886) 4 Dak. 295.

On promissory note. The plaintiff was a corporation authorized to do banking business by discounting notes and other evidences of debt. The plaintiff proved that it paid full value for the note before maturity. The defendant claimed that the act was ultra vires, and that, if there had been no purchase, the plaintiff was not the real party in interest. Verdict directed and judgment for defendant. Appeal.

Church, J. 1. The term "discount" is equally applicable to either loans or sales by way of discount. The transaction in question was a "discount" and was not ultra vires or illegal. Judgment reversed.

THOMPSON, REC'R, v McKEE (1888) 5 Dak. 172.

On promissory note. The defendant executed his promissory note to the Bank of S for \$1,000, which came into the hands of plaintiff as receiver of that bank. The defendant was permitted to testify that the note was given for the amount of a draft which the bank had cashed for W, on which draft defendant had signed his name at the request of the cashier, he being told by said cashier that it was wanted merely to show who had introduced W, and stated that defendant would not be held as an indorser. Judgment for defendant. Appeal.

Spencer, J. 1. The court erred in admitting the testimony of the defendant to prove such facts, because the effect of such testimony was to contradict the written agreement of defendant. 2. The facts alleged by defendant constitute no defense. It is not within the province of a cashier or president of a bank to excuse or limit the obligations of persons liable to it without payment. Judgment reversed.

FIRST NAT. BANK v DICKSON (1888) 5 Dak. 286.

Conversion of certificates of deposit. Three certificates were issued by the F Bank to Y, and by him indorsed to plaintiff. The certificates had been levied upon by the defendant, sheriff, in an action by H against Y, and had been protested prior to the conversion. Plaintiff was insolvent at the time. Defendant contended that the certificates were worth less than their face value. The president of the F Bank

had made an examination of the bank's assets in order to prevent a failure. He was asked these questions: State what you found the character of the assets to be—whether good or bad? Was the bank solvent or insolvent? What was the value of assets? Excluded. Judgment for plaintiff. Appeal.

Carland, J. 1. The face value of the certificates is *prima facie* the measure of damages. Defendant had a right to show the real value at the time of the conversion. 2. It was competent to show that the maker was insolvent. 3. The value of the property must be ascertained from persons who can speak of their own knowledge in relation thereto. Judgment reversed.

SIoux FALLS NAT. BANK v FIRST NAT. BANK (1888) 6 Dak. 113.

Action against bank on a cashier's check. The county treasurer, H, applied to the defendant for a loan of \$16,000, which the cashier made by delivering to H a cashier's check. The county commissioners took the check with a blank indorsement and turned it over to his bondsmen, who deposited it with the plaintiff. None of the parties had knowledge of the circumstances under which it was given. The defendant refused payment. On the appointment of a receiver for the bank, he moved to be substituted as defendant. Motion denied, but ordered that he be made a party. The bank sought to appeal from an order denying a dissolution of an attachment. Verdict directed for plaintiff. Appeal.

Per curiam. 1. The cashier's check, upon its delivery to H, as treasurer, immediately became the property of the county. 2. The defendant bank could not be heard to assert its want of power to issue the same or the existence of any fact which might be a defense between itself and H in his individual capacity. 3. The plaintiff having, by the transfer, succeeded to all the rights of the county, there was no error in directing a verdict. 4. The receiver had the right under the National Bank Act to be substituted as sole defendant. 5. The bank had no right to appeal. Judgment affirmed.

FIRST NAT. BANK v DICKSON (1889) 6 Dak. 301.

To recover the value of three certificates of deposit issued by the S Bank to Y, who deposited them with the plaintiff, who sent them forward for collection. When they reached S they were attached by the defendant D, sheriff, for the defendant H. The plaintiff, on learning of the dishonor and attachment of the certificates, charged them back to Y. The court directed a verdict for the defendants on the ground that the plaintiff had not proved title. Appeal.

Per curiam. Judgment reversed.

McLAUGHLIN v FIRST NAT. BANK OF DEADWOOD (1889) 6 Dak. 406.

Debt. B deposited in the defendant, in his own name, as "agent," \$79,000, which he drew out by his personal check, except \$3,500, which the defendant refused to pay. B was agent of the B Co. A former agent of the B Co. had overdrawn his account, which was deposited in the same form as that of B, to the extent of \$3,500. B sued to recover the amount, and then assigned his claim to the plaintiff for a valuable consideration. The B Co. also assigned its claim to the plaintiff for a valuable consideration. Thereafter a judgment was obtained against the B Co. and a receiver appointed. The receiver intervened in this action. Judgment for plaintiff. Appeal.

Spencer, J. 1. By accepting the deposit in this form, the defendant assumed the obligation of paying the checks properly signed. 2. Deposits in a bank create, between it and the depositor, the relation of debtor and creditor. 3. The claim of the depositor is a chose in action and not a bailment. 4. The bank is estopped from questioning its depositor's title. 5. The plaintiff's title was superior to that of the intervenor. Judgment affirmed.

Cited: 1 N. D. 466.

DELAWARE

FARMERS & MECHANICS BANK v POLK (1821) 1 Del. Ch. 167.

Bill for an account against P, late cashier of plaintiff, and the sureties on his bond. The bill alleged a deficiency in P's accounts, and prayed that an account be taken to ascertain the amount of the deficiency. Plaintiff's charter required

it to take a bond from its cashier "with condition of good behavior." The condition of the bond here was that P should well and truly discharge his duties as cashier. After the filing of the bill P died insolvent, and no administrator was appointed or any party made to represent his estate. The sureties contended: 1, That there were not proper parties before the court; 2, that the bond was not made according to the terms of the charter of the bank; 3, that there was adequate remedy at law.

Ridgely, C. 1. There was no defect of parties. 2. The bond is good at common law. It differs from the act in words only, and the act does not make void a bond which may differ from it in some mere detail. The defendants are bound by it. 3. The transactions are so intricate that it is impossible for a jury to examine them with accuracy, and courts of law cannot afford an adequate remedy. Decree for an accounting. On appeal this decree was reversed by the High Court of Errors and Appeals on the ground of laches and breach of duty in plaintiff's dealings with the cashier.

Cited: 7 Del. Ch. 56.

JOHNSON v FARMERS BANK (1832) 1 Harr. 117.

Assumpsit to recover deposit. Pleas: Non-assumpsit, payment, discount, and Act of Limitations. The plaintiff alleged that he had deposited \$600 with the defendant, and offered in evidence his bank book containing a credit of \$400, which had been altered from \$600. Also a letter signed by the cashier, stating that he had made the alteration, being convinced there was a mistake in the original entry of \$600. The defendant then offered to prove by the cashier that the deposit was but \$400. Objected to on the ground of interest in that the cashier would be liable for negligence in the event of recovery by the plaintiff. The defendant then produced a release under seal of the corporation, and the cashier proved the book of original entries and testified as to his recollection of the deposit; that it was entered on the bank's books as \$400 and that the accounts balanced. The plaintiff then offered to prove a demand. Excluded. The plaintiff contended that an entry made in a customer's bank book at the time of deposit was conclusive.

Per curiam. We have admitted the cashier, ex necessitate; the entries made by him as the agent of the defendant fall under the same rule. A demand, in the case of a claim on an individual, is not necessary. But with regard to deposits in a bank the rule is different. A demand being necessary, the proof of it is a part of the plaintiff's case and must be made in the opening. Verdict for plaintiff.

Cited: 2 Houst. 546.

McDOWELL v BANK (1834) 1 Harr. 369.

Injunction to restrain proceedings at law. The plaintiff owned shares of bank stock in his own name. He indorsed a promissory note for T, which the defendant discounted for accommodation of T. The note was protested for non-payment, and judgment was obtained against the plaintiff as indorser. No action was brought against the maker. T was a depositor in the bank, and frequently had on deposit amounts in excess of the note. No demand was made on the plaintiff for payment of the judgment until he sold his shares of stock, and the defendant refused to transfer them, claiming a lien thereon for the payment of the judgment. The bill alleged that the defendant should have paid the note out of the deposits of T, and demanded damages for refusal to permit the transfer of his stock, beside the injunction. The defendant admitted that T had made deposits and withdrawn same by check, but alleged that T did this "as justice of the peace, and not in his individual capacity and name." That, at the time of refusing to allow the transfer of the stock, there was a by-law of the bank "that any stockholder, being indebted to the bank, shall not be at liberty to sell or transfer his stock while his debt remained due and unpaid." T testified that he had no separate account as justice of the peace or notary. T's books and checks were in evidence in support of his testimony. Bill dismissed. Appeal.

Black, J. In a court of chancery and in this court, an indorser will be viewed as a surety and entitled to such relief as a surety may, on principles of equity, claim, notwithstanding that a judgment may have been obtained against him. As the defendant paid the checks drawn by T without any addition to show that they were drawn on a special fund, the inference is that the money was not received as a special fund. The creditors of T might have attached it, and it was

the duty of the defendant to have appropriated the funds deposited to the payment of the note. The plaintiff is entitled to interest on the value of the stock for the time it was withheld. Decree reversed.

Cited: 5 Del. Ch. 26.

COMMERCIAL BANK v LOCKWOOD (1835) 2 Harr. 8.

Scire facias on judgment. When plaintiff's charter expired it was revived by an act "reviving and extending the powers theretofore granted." A judgment was entered by the plaintiff against the defendant prior to the expiration of its charter but it was not satisfied. The scire facias was to revive the judgment, and the question was whether or not the judgment was extinguished by the termination of the corporation, and, if so, whether it could be revived.

Black, J. At the civil death of a corporation the real estate reverts to the grantor and his heirs, the goods and chattels pass to the people, but debts, having no tangible existence, cease to exist and the obligation of payment is gone. Therefore, when the plaintiff's charter terminated the judgment was extinguished. The legal effect of the act reviving the "powers, privileges, rights and immunities," and the necessary consequences thereof, are not such as to revive or create the debts due it before dissolution. Judgment for defendant.

Cited: 8 Houst. 227.

CORBIT v BANK OF SMYRNA (1837) 2 Harr. 235.

Assumpsit. Plea: Non-assumpsit. The plaintiff sent to S, one of the directors of defendant bank, \$1,600 in bank notes of the Bank of Maryland, with a letter to him to deposit the same to the plaintiff's credit. S delivered the notes to the cashier and the next morning the deposit was regularly passed to the plaintiff's credit. At the time the deposit was actually received by the cashier, the Bank of Maryland had stopped payment. On being informed of the failure of the Bank of Maryland, the defendant notified the plaintiff that the notes would be held as a special deposit and that the identical notes would be held subject to his order. At the time this action was commenced the notes were still in the defendant's hands and the Bank of Maryland had paid nothing. The plaintiff contended that when notes of another bank are received as cash and accredited to the depositor as cash, the bank could not thereafter treat the deposit as special; and that there was no consideration for the implied promise.

Black, J. 1. Bank notes are not money, because not legal tender, but if they had worked payment or satisfaction, actual or legal, they are to be considered as money. Notes taken at the time of making a contract pass as money, otherwise the risk is on the payer. In a case like the present, the law implies that the defendant took the notes at its own risk, no agreement express or implied having been shown to the contrary. 2. Since the responsibility of the solvency of these notes rested on the defendant, the legal obligation is sufficient consideration. Judgment for plaintiff.

BANK OF WILMINGTON v WOLLASTON (1840) 3 Harr. 90.

Action on a cashier's bond. Defendant gave a bond conditioned that, during office, he should faithfully perform his duties and account to plaintiffs for all the moneys coming into his hands as cashier. On leaving plaintiffs' service, he turned over the cash to them, and they turned it over to his successor uncounted. Some days afterward it was discovered that the cash was short. Plaintiffs offered to prove that the bank was a corporation by the printed volumes of the laws of the state, which contained its special charter. The statutes provided that these volumes should contain a statement of all acts of a public nature, and that these statements should be admissible in evidence. Rejected. After the bond was given, the bank's capital stock was increased. There was a two-year limitation upon actions of this character. Defendant quit the office less than two years before this action was begun. Defendant moved a non-suit.

Bayard, C. J. 1. The printed acts are proper evidence of plaintiffs' incorporation. 2. The defendant cannot establish an estoppel in pais without showing that plaintiffs' actions influenced his conduct to his injury. 3. The enlargement of the capital did not enlarge the sphere of defendant's duties. 4. The Statute of Limitations began to run in defendant's favor only from the time of quitting his office. Motion overruled.

STATE OF DELAWARE v BANK OF SMYRNA (1859) 2 Houst. 99.

Amicable action in the court of error to determine the validity of a tax law. The defendant was a corporation created by an act passed in 1822, which provided that it should pay a tax of one-fourth of 1 per cent per annum on its capital stock paid in, in lieu of other taxes. By act passed in 1822 the corporation was continued until 1843. The charter was renewed in 1837 by an act that extended also all its "rights, privileges and immunities" until 1857. In 1855 the charter was again renewed, but the act did not refer to the Act of 1822 in reciting the sources of the bank's corporate powers, nor did it repeat the words "rights and immunities" contained in the Act of 1837. By constitutional provision the legislature could not confer an immunity to exist more than twenty years. Subsequently a tax was levied upon its surplus funds.

Harrington, C. 1. Because of the omission from the renewing act of all mention of the exemption and immunities, they cannot be said to exist by express grant. Our constitution prohibits implied grants, and this leaves the surplus fund exposed to taxation. 2. The clause in the statute fixing one-fourth of 1 per cent on its capital stock in lieu of other taxes merely exempts the capital, and does not prohibit a tax on surplus or other property. Judgment accordingly.

SPARKS v FARMERS BANK (1869) 3 Del. Ch. 274.

Injunction, to restrain proceedings at law. The plaintiffs were sureties on two bonds given by H, the defendant's cashier; the condition being that "H shall faithfully discharge his duties as cashier." The defendant was proceeding to collect the amount of alleged defalcations when restrained by this injunction. H was re-elected several years in succession. The defalcations were represented by three checks drawn by H to his own order, one of which would fall within the Statute of Limitations. The plaintiffs in this proceeding contended: 1, That the office of cashier was an annual one; that their obligation on the bonds was only for the current year, and that no defalcation was shown to have occurred during 1862 or 1865; 2, that the directors neglected to use due care in supervising the accounts of the bank; 3, that the suit was not brought within two years after the defalcation occurred.

Bates, C. 1. Although the cashier's office is in a general sense an annual one, the term of the incumbent does not expire ipso facto upon the election of his successor or upon his own re-election, but his term continues and his official bond remains in force until his successor becomes qualified. 2. The directors owed a duty to the bank to exercise some degree of watchfulness over the cashier, but it does not follow that the bank owed that duty to the sureties. It is good faith and not diligence which is required of the creditor as a condition of his right to hold the surety. 3. The Statute of Limitations would apply to one check, but the bank is entitled to collect for that check also, because the fraud was concealed from the bank. A court of equity will not permit the statutory bar to be set up until the lapse of the prescribed term after discovery of the fraud. Injunction dissolved.

Cited: 2 Penn. 416.

NEWPORT NAT. BANK v TWEED (1870) 4 Houst. 225.

Assumpsit against indorser. Defendant alleged that he had indorsed a note for the accommodation of the maker, who delivered it to the president of the plaintiff, agreeing to pay usurious interest thereon.

Gilpin, C. J. If the president of the plaintiff knew that the note was indorsed for the accommodation of the maker, and if he exacted usurious interest, the plaintiff is chargeable with his knowledge and cannot recover.

LIEBERMAN v FIRST NAT. BANK (1900) 2 Penn. 416.

Injunction to restrain collection of judgments at law. Plaintiff was one of the sureties on the official bonds of S, teller of defendant. There were two bonds. During the life of the first, S fraudulently abstracted \$11,000, and during the life of the second he abstracted \$27,000. The defalcations were concealed by false entries. They were discovered and S made a full confession. Judgments were entered on the bonds. Plaintiff contended: 1, That the bonds were void as to him, because the cashier of the bank told him before he became surety that "S was a reliable man, and his accounts were straight, and as teller he could not take anything"; 2, Statute of Limitations. There was no evidence that the cashier

was authorized to make the representations to plaintiff as to the honesty of S. Injunction dissolved. Decree for defendant. Appeal.

Lore, C. J. 1. The cashier not being authorized by defendant to make representations in the matter of surety on the bonds of S, and it not being in line of his duty as cashier to do so, his statement could not bind defendant; nor can the published statements of the condition of the bank be held as an inducement to plaintiff to become surety for S. 2. The bar of the statute is removed by the concealed fraud of S. Any other construction would tend to promote skillful concealment of peculations. Decree affirmed.

DISTRICT OF COLUMBIA

SCHOYER v CRESWELL (1849) 3 MacArth. 5.

To recover deposit. Plea, that defendants are commissioners of an insolvent bank, and have declared one dividend. Plaintiff received his pro rata share as creditor. Replication, that defendants' rules provide that a depositor must give 60 days' notice of his intention to draw out the amount of his deposit; that plaintiff gave such notice, and the 60 days expired before the bank suspended payment; that before defendants took possession of assets plaintiff demanded payment. Demurrer. Sustained. Appeal.

Per curiam. It is immaterial whether or not plaintiff gave notice to the bank before suspension, as defendants could not pay out funds in their hands except as statute directs. Judgment affirmed.

THOMPSON v RIGGS (1864) 6 D. C. 99.

Assumpsit for money had and received. Defendants were bankers. Plaintiffs were depositors in 1861. Their deposits were of two kinds—depreciated paper money and specie or its equivalent. Deposits made in specie were paid in specie and those in paper were payable in kind. Later the bank refused to accept deposits of depreciated paper. Subsequently the United States suspended specie payment and so did defendants. In 1862, plaintiffs drew checks against their deposits. The checks were not presented for payment until 1864, when demand was made for the payment in gold. Defendants refused, but offered legal tender notes of the United States Treasury. Plaintiffs refused to accept, insisting upon payment in gold. At the time the plaintiffs made their deposits only gold and silver were legal tender. The Act of Congress of February 26, 1862, provided for an issue of United States Treasury notes and made them legal tender in payment of all debts, public and private. Verdict for defendants. Motion for new trial.

Wylie, J. 1. A special contract to pay a debt in gold or silver coin added nothing to the contract. 2. The liability of a banker to his customer does not arise out of a special contract, but is implied by the law. 3. The only relation between the banker and depositor is that of debtor and creditor. 4. Where there is a special contract between banker and customer, the usage of other banks is not admissible to vary the special contract. The law required defendants to pay in gold or silver. 5. The act was constitutional. Motion denied. Judgment affirmed by United States Supreme Court in 5 Wall. 663.

CLARK v NATIONAL METROPOLITAN BANK (1875) 2 MacArth. 249.

To recover a deposit. Plaintiff had a deposit with W Bank which it agreed to transfer to defendant bank. Plaintiff drew his check on W Bank to defendant's order, gave it to defendant, which placed it to his credit as a cash deposit. The day after check was deposited, its payment was refused by W Bank. Four days later, after banking hours, plaintiff was verbally notified of dishonor. The next day W Bank failed. It had continued to pay all checks presented and would have paid plaintiff's check had it been presented. Judgment for plaintiff. Appeal.

MacArthur, J. 1. In respect to a check on a banker, no negligence can be imputed to holder if he demands payment on the day following that on which he received it. 2. If payment is refused and notice is not given to drawer, and if holder retain possession of the check and meanwhile the bank fails, the loss should fall on the holder. A check is not due from drawer until payment has been demanded of drawee and refused by him. Judgment affirmed.

SECOND NAT. BANK v SMOOT (1876) 2 MacArth. 371.

On promissory note. Defendants, S and P, made their promissory notes to defendant D, at K Bank, at 12 per cent, to secure a loan from the bank. They were executed in Washington, D. C., and sent to the bank in Kansas which paid defendant S proceeds of note, less discount at 12 per cent until maturity. Notes were renewed from time to time, and finally all were paid except the one in suit, which was indorsed by defendant D to plaintiff. 12 per cent is the legal rate of interest in Kansas. Defense: Usury. Judgment for plaintiff. Exceptions.

Olin, J. 1. No valid contract was made for this loan until the notes offered as security for its payment were accepted by plaintiff and the money advanced on them. 2. To take out interest in advance is discounting a note without regard to rules of rebate or discount, and there is no distinction between banks and others. 3. A contract for a loan of money at a rate of interest which is legal in the state where contract is made and where the loan is to be advanced, though the money is to be repaid in a state where the rate of interest is lower, is not usurious, provided it be not a mere device to evade the laws of the state where money is to be repaid. Judgment affirmed.

UNITED STATES v NATIONAL BANK (1883) 2 Mackey 289.

Assumpsit. L, a paymaster in the army, in January, 1866, had a large deposit in the defendant. B had a claim against the government and employed T to collect it. On January 16, 1866, L, in settlement of B's claim, issued his check on the defendant, payable to the order of B, and sent it by mail to T. The check was indorsed by T in B's name. It was cashed by R, who then indorsed it to the order of the A Bank. On January 18, 1866, it was paid by the C Bank and charged to the defendant. On the next day it was paid by the defendant and charged to the account of L. This account was subsequently settled and the check returned to L, in whose possession it remained until January 1869, when the forgery of the indorsement of B was discovered and instant notice was given by L to defendant, and of its liability and advising it to seek recourse against the New York bank. The defendant contended that the United States was guilty of laches in not giving timely notice to the defendant. Judgment for defendant. Appeal.

Cox, J. 1. The omission to discover the forgery for three years after it was committed cannot be pronounced by the court as laches in law. 2. Recourse against other parties was not lost in consequence of the brief delay in giving notice of the forgery to the defendant. 3. The payment of the forged check gives no right of action on the paper itself. The right to sue would be in assumpsit for money had and received. 4. The right of the government to sue is clear. 5. This was virtually a notice and demand by the United States. Judgment reversed.

KEYSER, REC'R v HITZ (1883) 2 Mackey 473.

To enforce liability of stockholder. J transferred to his wife, the defendant, certain shares of the G Savings Bank. Subsequently a paper was signed by all the stockholders, including the defendant, authorizing the trustees, pursuant to the provisions of sec. 5154, U. S. R. S., to change the bank into the G National Bank. The comptroller executed the certificate required by law, authorizing it to commence business. The G Bank failed, and plaintiff was appointed receiver. The comptroller certified that he found it necessary to enforce the individual liability of the shareholders, under sec. 5151 R. S., which provides that shareholders in national banks shall be held responsible ratably for all debts of the bank to the extent of the amount of the par value of their stock. The defendant contended: 1, that she never owned any stock of the G National Bank; 2, that she was a feme covert; 3, she denied the existence of the G National Bank. Verdict directed for defendant. Error.

Cox, J. 1. It was competent for the G Savings Bank to avail itself of the provision in the statute for conversion into a national bank. 2. The certificate of the comptroller is conclusive as to the regularity of the proceedings. 3. A shareholder of a corporation is not permitted to deny the existence of the corporation. 4. The statute contains no exception in favor of married women, and the defendant is liable to the same consequences of ownership as a feme sole would be. 5. The transfer was valid. New trial ordered.

KEYSER, REC'R v HITZ (1883) 2 Mackey 513.

Bill for injunction to prevent sale. G Bank was holder of two promissory notes, drawn by C to order of H, trustee, and indorsed by him. These notes were loaned on realty for the benefit of defendant H, president of the bank. They were secured by trust deed to D & P, directors of bank, executed by H and wife. The property was acquired by Mrs. H before her marriage. On satisfaction of the debt, the deed provided for release to H. The transaction appeared on books of the bank as a loan. T, as agent of J, made a loan on the property in question on a first incumbrance. It was agreed that the prior trust deed should be released and a conveyance of the fee made to C, who should appear as a new borrower and execute the new deed of trust. The property was conveyed back to Mrs. H. The deed to C was at first by Mrs. H alone, then H was added as grantor. In 1877, T delivered J's certified check to P at the bank who indorsed it as cashier and subsequently as trustee individually. It was later indorsed to the credit of an account which P had with bank as trustee. C's notes were carried on the bank's books as assets until 1878, when they were entered as paid and loan marked "returned." The C notes are claimed by bank's receiver as assets. C wrote on their backs a guarantee of them and executed to receiver a reversion in the property to secure their payment. Receiver refused to pay interest of J loan, and T advertised property for sale. Decree for defendant, and canceling C deed and guaranty, and holding deed to T valid as to H's interest. Appeal.

James, J. 1. Trustees of a national bank act in a fiduciary capacity. They are trustees clothed by the statute with a power of management, and this power bound the bank to the contract. The loan should be at once applied to pay the C notes. 2. The bank received the money and cannot retain it, except in accordance with the terms of the contract under which it received it. 3. Complainant took nothing by C's deed, which was an attempt to secure a non-existing debt made by one who was a naked trustee without power to charge property. Decree affirmed.

AVERELL v SECOND NAT. BANK (1888) 6 Mackey 358.

Money had and received. The plaintiff went to the office of the defendant after hours, and was admitted to a back room, where he found the paying teller, to whom he gave a post-dated check. The teller promised to carry the check to the plaintiff's credit, and that the plaintiff could check against it. Defendant paid out checks of the plaintiff, among which were two drafts payable to the defendant to the amount of his deposit. The check left with the paying teller was returned to the plaintiff, duly protested at the request of the defendant. Judgment for defendant. Appeal.

James, J. 1. The check being protested at the request of the defendant, the defendant treated the check as being in its possession for collection, and thus ratified the act of the teller. 2. The defendant having received the check, was bound to give the check preference over its own claim for a balance due. Judgment reversed.

AVERELL v SECOND NAT. BANK (1890) 8 Mackey 246.

On check. Plaintiff received for value a post dated check on defendant, drawn by a depositor. Plaintiff, though not a depositor, presented the check to defendant after business hours, and found only the paying teller present. At the teller's direction, plaintiff signed his name in the signature book of the bank and deposited the check. Plaintiff was informed that when check was due the proceeds would be deposited to W's credit and he might draw against it. When the bank opened on morning of the day of maturity, the drawer had sufficient funds on deposit to pay it, but during the day his account was all checked out. Protest was made by the bank's notary, who made certificate. Judgment for plaintiff. Motion for new trial.

Cox, J. 1. A paying teller has no authority to receive deposits, and if he does so it is at the risk of the customer. 2. A notary's certificate is only prima facie evidence. 3. It is no part of a banker's duty to receive postdated checks before they are payable and to engage to present them to himself. 4. No subordinate officer of the bank could bind his employer by such an agreement. Judgment reversed. New trial ordered.

SECOND NAT. BANK v AVERELL (1894) 2 App. Cases 470.

On check. L, a depositor in plaintiff, gave his postdated check to H. H indorsed it to A. A presented check to plaintiff after business hours. D, the paying

teller, who sometimes took deposits in absence of the receiving teller, received the check from A. A was not a depositor, but D promised to pay check when due and place proceeds to A's credit. Under D's instruction, A indorsed the check and left it, after signing his name in bank's signature book. The paying teller had acted as receiving teller, without objection, to the knowledge of the cashier. Defendant's cashier was practically present during the entire transaction, and later saw check in D's possession. Check was protested. On the morning the check matured, L had sufficient funds on deposit to pay it, but it was paid out on other drafts during the day. Judgment for plaintiff. Appeal.

Shepard, J. If the bank receives and retains the check, it is bound to the depositor to receive the money on it as soon as possible. Judgment affirmed.

TWIN NAT. BANK v NEBEKER (1894) 3 App. Cases 190.

Debt. T National Bank went into liquidation and made the required deposit to redeem its outstanding circulation. Treasurer of the United States refused to surrender bonds until it paid him an assessment on its average circulation. Assessment was paid under protest, and the bank seeks to recover it. National Bank Act of June, 1864, sec. 41, provided that banks shall pay a duty of one-half of 1 per cent each half-year on their average circulation; that the treasurer is authorized, in case of default, to retain sums due out of interest accruing on bonds required to be deposited with him by national banks. Constitution, art. 1, sec. 7, provides that all bills for raising revenue shall originate in the senate. Judgment for defendant. Exceptions.

Shepard, J. 1. A bill for some other legitimate and well defined general purpose does not become a bill for raising revenue because, as an incident to the main object, it may contain a provision for the payment of certain dues, license fees or special taxes. 2. The controlling purpose of the bill was to provide for the creation and circulation of national bank notes as money under the sanction and guaranty of the United States. 3. There is no reasonable ground for supposing that the senate amendment was injected into the body of this bill without regard to its subject matter and solely for the purpose of raising revenue. Judgment affirmed.

LUMBERMANS NAT. BANK v HUSTON (1894) 3 App. Cases 202.

This case turns upon the same question decided in Twin City Bank v Nebeker, (3 App. Cases 190), and in accordance with the opinion therein the judgment is affirmed.

BROWN v OHIO NAT. BANK (1901) 18 App. Cases 598.

On promissory note. The defendant purchased certain shares of the capital stock of the plaintiff on credit, and executed his note for the purchase money, leaving the stock in the possession of plaintiff, as security for the payment of the note. Sec. 5201, U. S. R. S., prohibits national banks from making any loans on the security of the shares of its own capital stock. Plaintiff purchased the stock on the fraudulent promise of the bank to make him a director. The defendant contended: 1, That under the statute the plaintiff could not recover; 2, as the shares had only a nominal value, the shares were without consideration. Judgment for plaintiff. Appeal.

Shepard, J. 1. The statement of the transaction does not show a loan of money by the plaintiff upon the security of the shares of its capital stock. 2. The failure of consideration must be total to constitute a good defense to an action upon a promise. If there be any consideration at all the courts will not inquire into its adequacy. The representations were not of matters on which plaintiff had a right to rely. Judgment affirmed.

FLORIDA

UNION BANK v PARKHILL'S ADM'RS (1849) 2 Fla. 660.

Debt. The plaintiff was organized by the territorial government by an act which provided that the territory should issue bonds, payable to the bank, by selling which the capital stock might be secured; that the bank should sell stock, taking notes secured by mortgages therefor, and that, at the expiration of its

charter, it should pay to the territory the value of the bonds. The act provided that the bank might deduct, in advance, interest upon loans at the rate of 8 per cent per annum, and that every stockholder might borrow money upon his shares, provided the notes for the repayment thereof should be annually received by the bank and the interest paid up. The defendant's intestate became a stockholder, giving a note, secured by a mortgage, for the stock. He borrowed money on the stock, giving notes for the sum, which he neither renewed nor paid interest on. The bank, in calculating interest for a year, computed by the solar year; for less than a month they regarded each month as consisting of thirty days. Defendants pleaded *plene administravit*, and offered evidence of payments made by them which the judge of probates had rejected. Judgment for defendants. Error.

Lancaster, J. 1. The bonds, when procured, were the property of the bank, and when sold, the funds arising from the sale were the funds of the bank. When a stockholder of this bank pledged his shares, he pledged also the mortgage securities given for them. 2. The mortgage given by the stockholder to the bank was executed to secure payment by the bank of the principal and interest of the bonds issued by the territory and also to secure payment from the stockholder to the bank of his stocknote and interest. The bank, upon a stockholder's failure to renew his note and pay the interest, may secure judgment and may levy upon and sell the mortgage securities in satisfaction, *pro tanto*, of the judgment. 3. Where administrators, who neglect to settle and pay, are sued by creditors or cited by heirs, and employ counsel to defend themselves, no counsel fees should come from the estate. The authority of the bank to deduct interest in advance is an authority co-extensive with the loans or discounts it may make. The rule by which interest was computed by the bank is unobjectionable. 4. The order of the court of probates is conclusive until reversed, and the administrators cannot avail themselves, under a plea of *plene administravit*, of evidence of alleged disbursements not allowed by the judge of probates. Judgment reversed.

Cited: 2 Fla. 268, 298.

SOUTHERN LIFE INS. & TRUST CO. v LANIER (1853) 5 Fla. 110.

Bill to foreclose a mortgage. The plaintiff's charter required that 10 per cent should be paid on each share at the time of subscribing. Subsequently the legislature authorized the company to allow stockholders to surrender their certificates and to take certificates of full stock equal to the actual amount paid on the stock surrendered. The defendant bought one hundred shares of the surrendered stock and gave his bond and mortgage on land and slaves to secure the sum of \$10,000. Thereafter, upon the faith of his shares, he borrowed from the plaintiff \$6,000, for which he gave his notes. The bond and mortgage were deposited with the governor of the state. This bill was brought to foreclose the mortgage and to recover the amounts due on the bond and the notes. The state was made a party plaintiff. The defendant objected to the joinder of the state as a party by demurrer in his answer, and averred that the bond and mortgage were given as security to the late territory, and were without consideration and void: 1, Because the 10 per cent was not paid on the surrendered stock; 2, because the capital stock could not be sold for bond and mortgage. The company by its charter was required to loan its entire capital upon bond and mortgage. Bill dismissed. Appeal.

Semmes, J. 1. It is not necessary that there should have existed any liability on the part of the state; if the executive held the bond and mortgage in trust to indemnify another, the state was properly made a party plaintiff. Matters *dehors* the bill cannot be raised by demurrer. 2. The 10 per cent was required to be paid as a condition precedent, and cannot apply to the sale of the surrendered stock. 3. Since the plaintiff was required to invest its entire capital in bond and mortgage, there can be no objection in taking the bond and mortgage in the first instance in exchange for the stock. Decree reversed.

Cited: 5 Fla. 446, 541; 14 id. 428; 35 id. 42.

UNION BANK v CALL (1854) 5 Fla. 409.

Audita querela, to quash an execution, on the ground of a release subsequent to judgment. The judgment was for \$4,080.40 upon notes secured by a mortgage, executed by the plaintiff and W, and also a mortgage executed by the plaintiff as president of the T Co. In April, 1843, the bank assigned sundry notes, signed by the plaintiff and W, to D, and as security, the mortgages given to the

bank as security for the first mentioned notes, were also assigned to D, it being agreed that the bank would look to the parties on the notes for payment. On February 22, 1843, the bank, by an instrument signed by G as president, assigned to M the notes first mentioned, on which the judgment had been obtained; this instrument bore the seal of the bank. Upon the filing of this *audita querela*, the bank disclaimed any interest in the judgment, and the controversy in this proceeding was between M and the plaintiff. The plaintiff contended that under the assignment of the bank to D, he was released from this judgment. The defendant M offered in evidence the assignment to him of the notes upon which the judgment was based. M then offered in evidence entries in the books of the bank, which were rejected. He also offered to prove by W certain facts bearing on the assignment, which evidence was rejected. Defendant claimed that W acted as the agent of Call in making negotiations with D. Judgment for plaintiff. Appeal.

Baltzell, C. J. 1. There was no error in admitting the deed of assignment. 2. The book entries were properly excluded. 3. The evidence of W touching the contract of assignment was also properly excluded. 4. Notice to the agent is notice to the principal. 5. The instrument is under seal, and imports consideration. 6. The seal established *prima facie* that the amount secured was justly due, and the burden was on the defendant to show fraud, or want of authority. Judgment reversed.

Cited: 5 Fla. 461; 11 id. 137; 12 id. 543; 35 id. 374.

RANDALL v PETTES (1869) 12 Fla. 517.

On promissory notes against maker. In 1862, the defendant made the notes and had them discounted by the plaintiff, pledging cotton as security. This cotton was retained in the possession of the defendant and he afterwards sold it, depositing the proceeds in his account with plaintiff. From 1862, during several years, the defendant had large balances to his credit at the bank, which he drew out from time to time on his checks. The defendant alleged that the notes were given for confederate money, and offered to prove the specie value of confederate notes in March 4, 1864, for the purpose of scaling any balance which might be found in the plaintiff's favor. Objection. Sustained. When the notes were made, confederate treasury notes were worth ninety cents in gold, but were greatly depreciated when the notes became due. The defendant contended that under ord. 8 of the Constitution of 1865, the scaling process is applicable only when the debt became due; that plaintiff was bound in good faith to apply such balances as he had on deposit to the payment of the notes. Judgment for plaintiff. Appeal.

Randall, C. J. 1. The true construction of the ordinance is that no debtor should pay more than he actually received, and, on the other hand, that the creditor should not sustain any loss. The consideration therefore is the value of the property estimated at the formation of the contract. 2. The defendant exercised his right of appropriation of his funds by withdrawing them, and it is too late now to make the appropriation. 3. The bank was not obliged to apply the deposits toward the extinguishment without express orders. Judgment affirmed.

Cited: 14 Fla. 244, 381.

ALLEN v SAVINGS & TRUST CO. (1874) 14 Fla. 418.

To recover the amount of drafts paid by the plaintiff on a loan to the defendants, as partners. The money was used in the partnership business. An injunction issued to restrain defendants from disposing of partnership property, and a receiver was appointed. Plaintiff contended that the money thus loaned the defendants was impressed with a trust in their hands. Defendant alleged charter violation by plaintiff. Judgment for plaintiff. Appeal.

Randall, C. J. 1. The plea of charter violation cannot avail one who has obtained the bank's funds, and impaired the depositor's securities. 2. The trust fund having lost all means of ascertainment, no lien can be claimed. 3. The facts did not warrant the exercise of the remedy of injunction, and the appointment of a receiver. Judgment modified.

WITTICH v FIRST NAT. BANK OF PENSACOLA (1884) 20 Fla. 843.

Trespass on the case. The declaration alleged that the defendant had in its hands for collection a draft on the plaintiff, for which he gave it his check on the

Merchants bank; that defendant presented it there at 11 a. m. and was told it was good and would be paid at 1.30 p. m., the usual hour for exchanging checks among banks; that without further demand defendant had the check protested. The plaintiff claimed \$25,000 damages, but did not allege special damages. Demurrer, no cause of action. Sustained. Judgment for defendant. Error.

Randall, C. J. Although a protest of plaintiff's check may have been unnecessary, it cannot be inferred that any injury was suffered by the plaintiff in consequence of it, and there is no allegation of special damage sustained by means of any wrongful conduct of the defendant. Judgment affirmed.

MAXWELL v AGNEW (1884) 21 Fla. 154.

Assumpsit to recover amount of deposit. There was deposited with defendants, bankers, \$2,000 of plaintiff's money, and a certificate of deposit issued to her husband, or bearer. She gave the certificate to her husband to enable him to draw \$200. He drew the whole fund. Plaintiff sought by this suit to recover from the defendants therefor. Judgment for defendants. Appeal.

Randall, C. J. 1. The possession of the certificate by her husband, the money being payable to bearer, and the payment being made to him, without notice not to do so, is sufficient to protect the defendants against any other demand. 2. The certificate of deposit was in its effect a promissory note, payable to bearer and negotiable by delivery. Judgment affirmed.

Cited: 34 Fla. 499.

COLLINS v STATE OF FLORIDA (1894) 33 Fla. 429.

Indictment for larceny. The indictment alleged that C, "being a banker, to-wit: The president of the Lohe City Bank," received on general deposit \$43.50 "the property of W F W & Co." and concealed the same and became a defaulter. Sec. 27, p. 362 McClellan's Digest, provides: Any banker who receives on deposit money belonging to another, who shall use the same so as to default therein, shall be guilty of larceny. Secs. 28 and 29 provide that any officer in any incorporated bank or any person in the employment of said bank, who fraudulently converts the bank's property, or special deposits of others, to his own use, shall be guilty of larceny. Defendant convicted. New trial refused. Error.

Taylor, J. 1. It is impossible to legally convict defendant under the indictment with the facts in proof. A general deposit transfers the ownership of the money to the bank, and the relation between the bank and the depositor is simply that of debtor and creditor. 2. There has never been any limitation of time within which writs of error to this court from judgments of the circuit courts in criminal cases can be sued out. Judgment reversed.

FIRST NAT. BANK v SAVANNAH, F. & W. R'Y CO. (1895) 36 Fla. 183.

Assumpsit to recover interest. On December 19, 1889, the defendant companies gave the plaintiff a paper promising to pay on demand \$16,000, "with interest at 6 per cent per annum," "to secure" the plaintiff for paying certain checks to be drawn on it, the defendants agreeing to reimburse the plaintiff in from two to ten days after payment of such checks. The money was paid by instalments and repaid with interest from the time of each payment. The plaintiff claimed 6 per cent from December 19, 1889, up to the day of reimbursement. Demurrer, no cause of action. Sustained. Judgment for defendant. Appeal.

Mabry, C. J. According to the terms of the entire instrument itself, it does not import a promise to pay interest on the sums of money paid out from the date of the contract, but only from the times of payment. Judgment affirmed.

ARNIE v FIRST NAT. BANK (1895) 36 Fla. 398.

On promissory note. The defendant made a note for discount, with the proceeds of which he authorized and instructed G, the payee, his agent, to purchase United States bonds, to be used in organizing a bank in which he was interested. A discounted the note with the plaintiff who purchased for full value, knowing the purpose for which it was made. A afterwards appropriated the proceeds of the note to his own use; but the plaintiff was in nowise connected with the misappropriation. The defendant pleaded the general issue, without raising by special plea the corporate character of the plaintiff. Judgment for plaintiff. Appeal.

Taylor, J. 1. The plaintiff was an innocent purchaser before maturity. It was not a defense against an innocent indorsee that the proceeds were applied by the defendant's agent to other purposes than the one for which he took the note in trust. 2. By the plea of the general issue the defendant admitted the corporate capacity of the plaintiff and its right to sue as such. Judgment affirmed.

FLORIDA SAV. BANK v RIVER (1895) 36 Fla. 575.

Bill to foreclose mortgage. The defendant claimed that the mortgage was not executed as required by the state statutes. The testimony showed the defendant acknowledged it before R, as a notary public, and that R was vice-president of the mortgagee bank, but it did not show he was a stockholder. Bill dismissed. Appeal.

Mabry, C. J. It cannot be assumed as matter of fact, or of law, that because R was vice-president he was also a stockholder. Without such assumption it cannot be said that R was interested in the mortgage, and that his certificate of acknowledgement was for that reason void. Decree reversed.

OXFORD L. L. v FIRST NAT. BANK OF PENSACOLA (1898) 40 Fla. 349.

On drafts. The plaintiff shipped from A to P T Co. goods contracted for by the latter. The Bank of A sent the Bank of P a bill of lading for the articles shipped, accompanied by two drafts on the P T Co., one a sight draft and the other at thirty days, with instructions not to deliver the bill of lading until the first draft was paid and the latter one was accepted. The P Bank received payment for the sight draft, delivered the bill of lading, and returned the time draft to the A Bank unaccepted. The A Bank claimed that the P Bank was indebted to it for the amount of the unaccepted draft, and assigned its claim to the plaintiff, who sued the P Bank for \$3,000. Demurrer. Sustained. Judgment for defendant. Appeal.

Carter, J. In the absence of any special instructions, it is the duty of the agent to hold the bill of lading until the bill of exchange is either accepted or paid. Judgment reversed.

GEORGIA

PLANTERS BANK v LAMKIN (1816) Charl. R. M. 29.

Action on a security bond. The charter of the plaintiff, a bank, gave the directors power to take a bond from each employee for the faithful discharge of his duties, and such other duties as might be required of him. It had power, also, to define the employee's duties in the by-laws. Defendants were sureties on the bond of plaintiff's bookkeeper. The bond was conditioned on the faithful performance by the bookkeeper of his duties and all other duties required of him by plaintiff. The by-laws required each employee to perform such duties as plaintiff might direct. Plaintiff directed the bookkeeper to act temporarily as cashier. While so acting he embezzled plaintiff's funds. Special verdict subject to the court's opinion.

Berrien, J. 1. The phrase "other duties" means duties additional to and exclusive of the duties of the bookkeeper's employment. 2. The bond was taken in conformity to the act of incorporation. Postea to plaintiff.

HARTRIDGE v ROCKWELL (1828) Charl. R. M. 260.

Injunction. No facts given. The following points decided:

Davies, J. 1. The unemployed capital of a bank may be used by its directors in the purchase of its own stock, and the directors may sell stock so purchased. 2. Stockholders have no right to preference in the purchase of such stock. 3. Directors may purchase stock at the bank for themselves, and would not be regarded as holding it in trust for the stockholders. 4. The court will grant an injunction ex parte and before answer only in cases of great urgency or where irreparable injury might ensue. 5. In ordinary cases it is only granted upon the defendant's answer, or upon an order for time to answer, or on an attachment for want of answer. Injunction denied.

Cited: 18 Ga. 92.

BANK OF GEORGIA v MAYOR OF SAVANNAH (1832) 1 *Dud.* 130.

Certiorari to set aside tax assessment. The defendant, a city, by ordinance, directed a tax on bank stock operated on or employed within the city. Under this ordinance a tax was levied on the entire capital stock of plaintiff, a state bank, having branches in other cities of the state. Its stock was owned, in part, by the state. The legislature empowered the mayor and aldermen to raise by tax and assessment, on all the real and personal estate within the corporate limits, any sums necessary for the use and good government of the city.

Per curiam. 1. The necessary consequence of a tax imposed upon the entire capital is to subject so much of that capital as is used by the branches of the bank to be twice taxed. 2. By laying the tax on the institution, the city would be enabled indirectly to diminish the profits of the state. 3. The city, not having been given the express power to tax banks, has no implied power to do so. *Certiorari* sustained.

Cited: 8 *Ga.* 27, 29; 50 *id.* 543; 52 *id.* 269, 270.

LUMPKIN v JONES (1846) 1 *Ga.* 27.

On a note, payee against makers. The note was given for shares of stock in a bank that suspended specie payments and failed within six months after transfer of the stock. By charter, a suspension of specie payments avoided all transfers of the bank's stock made within six months previous. The bank had failed in 1838, but the Act of the Legislature of December 18, 1840, extended the time of such payments to February 1, 1841. The note was dated March 11, 1841, and the bank stock was transferred after the passage of the act. Defendant proved the suspension of specie payments more than six months before the note was given. Judgment for plaintiff. Appeal.

Warren, J. 1. The Act of December 18, 1840, was intended to relieve the suspended banks from the liabilities which they had incurred under their charters on account of their failure to redeem their liabilities in gold and silver. 2. If the Western Bank did redeem its liabilities in gold and silver, such redemption cured the temporary suspension of the bank so as to affect the rights of parties in the sale of stock. 3. The evidence was proper to show the note was not given within six months after the failure. Judgment reversed.

Cited: 8 *Ga.* 476; 16 *id.* 252; 26 *id.* 30.

TUTTLE v WALTON (1846) 1 *Ga.* 43.

Action on the case. G owned twenty-five shares of the stock of a bank. Its by-laws provided that the bank should have a lien on its stock for debts due it from the stockholders on dishonored notes. S became liable to the bank on a dishonored note. Subsequently the plaintiff obtained a judgment against G. G's stock was sold under execution to the plaintiff, who had notice of the bank's lien. Defendant, one of the bank's officers, refused to transfer the stock on its books. Judgment for defendant. Appeal.

Warner, J. 1. G purchased the stock subject to the condition in the by-law, and as between him and the bank, it was binding. 2. If the property purchased at sheriff's sale is encumbered by a lien, the purchaser takes it cum onere, and he has much less equity in his favor when he purchases the property, as in this case, with the full knowledge of the lien. Judgment affirmed.

Cited: 66 *Ga.* 700.

DANIELS v KYLE (1846) 1 *Ga.* 304.

On a check, indorsee against drawers. Defendants drew a check on a bank. The payee indorsed it to plaintiff. Plaintiff did not present it for payment, and notify defendants of non-payment until three months after its date. Plaintiff non-suited. Error.

Nisbet, J. The drawer has no right to complain of the holder's letting the money called for by the check remain in the hands of the drawee, or of his not presenting the check for payment, unless, by reason of the holder's delay in presenting, the drawer has sustained injury. Judgment reversed.

Cited: 5 *Ga.* 249; 30 *id.* 274; 92 *id.* 734; 95 *id.* 378; 100 *id.* 150; 112 *id.* 671, 672.

MERCHANTS BANK v BANK OF GEORGIA (1846) 1 Ga. 418.

On bill of exchange. Plaintiff, a bank, discounted a bill indorsed by S, "agent." Plaintiff knew the defendant, a bank, to be the principal. The defendant knew that plaintiff's charter relieved it from notifying indorsers of dishonor. The bill was afterwards presented to the F bank, and was dishonored. No notice was given defendant. Plaintiff's counsel offered to read in evidence the bill of exchange. Defendant objected because: 1, The name of the principal nowhere appeared on the instrument; 2, the indorsement was not signed by the president and countersigned by the cashier, as required by sec. 8 of defendant's charter; 3, that S exceeded his powers as general agent by indorsing the paper; 4, that demand and notice to the defendant had not been proved. Overruled. Judgment for plaintiff. Error.

Nisbet, J. 1. In the case of instruments not under seal, where the intent is not sufficiently clear that the principal is to be bound, the defect may be supplied by parol testimony. 2. The clause in the charter does not apply to such contracts as are necessary to the ordinary business of an agent, such as the indorsing of a bill of exchange. 3. A general power to discount bills confers the power to indorse. 4. No proof of notice, demand or protest is necessary to charge the indorser. Judgment affirmed.

Cited: 1 Ga. 594; 2 id. 218; 3 id. 297; 7 id. 87; 17 id. 121; 42 id. 538; 50 id. 509; 60 id. 381; 68 id. 480.

COLLINS v CENTRAL BANK OF GEORGIA (1846) 1 Ga. 435.

Bill for the sale of a railway. The complainant, a railway and banking company, being insolvent, asked to have its affairs terminated. Its charter provided that the railroad, with all its revenue arising therefrom, and all the equipment therewith connected, should be pledged for the redemption of the bills issued by it. Part of the road was built by the company and part by claimant C, who held a mortgage on the entire road to cover his claim. The other defendants were the billholders. Decree for defendants. Error.

Warner, J. 1. The charter gives the billholders a paramount lien on that part of the road only which was built by the company. 2. The lien of C attaches to that portion of the road that was built by him, and is paramount to the loan of the billholders. Decree modified.

Cited: 3 Ga. 374; 4 id. 327, 328; 9 id. 395; 18 id. 101; 40 id. 397, 398; 52 id. 559.

BULLARD v CENTRAL BANK OF GEORGIA (1846) 1 Ga. 461.

Motion to establish priority of claims. A railroad built by a banking company was sold under a decree. The company's charter provided that billholders should have a lien on the railroad. Plaintiff had made a deposit with the company of its bills owned by him. The deposit was to bear interest. Judgment for defendant. Error.

Warren, J. Plaintiff is not a billholder within the meaning of the charter. Judgment affirmed.

BOND v CENTRAL BANK OF GEORGIA (1847) 2 Ga. 92.

Assumpsit on a note. There was no allegation of a promise to pay or of delivery. The amended charter of plaintiff, a bank, authorized it to discount, buy, or loan on secured notes over \$2,500, the limit in the original charter. After the amendment, the plaintiff took defendant's unsecured \$8,000 note, payable to bearer, in payment of a pre-existing claim against X, without notice that defendant would refuse payment. Defendant was not allowed to orally prove the notice of refusal to pay, published in a newspaper. Judgment for plaintiff. Error.

Lumpkin, J. 1. The omission to allege the time of delivery is cured by verdict. 2. It was not necessary to allege that the note came within the amended charter. 3. The promise to pay was not a necessary allegation, as the note was payable to bearer. 4. The bank, being a bona fide holder for a consideration, took the note free from the defenses existing between the original parties. 5. A negotiable note taken in payment of an antecedent debt has a good consideration. 6. The note though unsecured can be collected. 7. The newspaper, containing the notice, was the best evidence. Judgment affirmed.

Cited: 3 Ga. 48, 81; 4 id. 445; 22 id. 258; 30 id. 154; 56 id. 149, 205; 67 id. 686; 69 id. 357; 70 id. 325; 79 id. 100; 110 id. 286.

ANDERSON v STATE OF GEORGIA (1847) 2 Ga. 370.

Debt on a bond. The bond given by defendant A, as agent of C Bank, to collect the assets of D Bank, was payable to the governor instead of the bank. The state owned stock in D Bank. The legislature ordered the affairs of the D Bank to be wound up by C Bank. The charter of the C Bank provided that the bonds of its officers should be payable to the governor. Defendant defaulted. The demand was not evidenced in writing. Interest was allowed from the time A received the money. Judgment for plaintiff. Error.

Nisbet, J. 1. The charter of the D Bank being repealed and its affairs transferred to the C Bank, the bond was properly made to the governor. 2. A is liable for interest on the money from the time he received it. Judgment affirmed.

Cited: 5 Ga. 442, 444; 6 id. 297; 70 id. 36; 113 id. 366.

McDOUGALD v CENTRAL BANK (1847) 3 Ga. 185.

On bill of exchange against indorser. The bill was made by T Bank signed only by defendant, its president, who then indorsed it to P & M Bank. P & M Bank indorsed it to C Bank, which indorsed it to plaintiff. Defendant moved for a continuance on the ground of the absence of a witness. Refused. The T Bank's charter provided that it should not be bound by any contract unless the same should be signed by president and countersigned by cashier. Plaintiff's charter provided that in suits commenced by it on notes, notice of demand and protest should not be necessary, to bind the parties thereto. Judgment for plaintiff. Error.

Lumpkin, J. 1. A motion for a continuance is an application to the discretion of the court, over which discretion a supervisory court will exercise control. 2. The president is bound by his indorsement whether the bank is or not. 3. It was not necessary to give notice of non-payment in order to recover. 4. The testimony of the absent witness was not material. Judgment affirmed.

DANIELS v KYLE (1848) 5 Ga. 245.

Assumpsit on check. In January defendants K and B drew the check in question to the order of G, who indorsed it over to the plaintiff. The bank suspended payment in March. The check was presented for payment in April and protested for non-payment. The defendant showed that the bank was solvent and paying promptly all checks when the check was drawn. The plaintiff offered to prove that at the time of the date of the check, the bank advertised for depreciated bills, and offered to accept the depreciated bills of other banks on deposit and pay in the same bills. Overruled. Judgment for defendants. Error.

Lumpkin, J. 1. To charge the drawer in case of dishonor, the holder is bound to present the check for payment and give notice thereof to the drawer within a reasonable time. 2. If payment is not thus regularly demanded and the bank should fail before the check is presented, the loss will be the loss of the holder. 3. The fact that the bank advertised for depreciated bills was no proof of insolvency, and the evidence was inadmissible. Judgment affirmed.

Cited: 30 Ga. 274; 95 id. 378; 100 id. 150.

BANK OF ST. MARY'S v MUMFORD (1849) 6 Ga. 44.

Assumpsit on note. The note was signed by K and also by both defendants, but contained the words, "I promise to pay." The defendants contended that they were securities only and had given notice to the cashier of the plaintiff bank, the "holder," to sue K under the Acts of 1826 and 1831, which provided that the securities should be released by failure of the holder of a note to sue the principal maker within three months after notice. The cashier of the plaintiff, called by the defendants, testified that he received a letter directing him to proceed against K. Suit was not brought within three months thereafter. A director of the plaintiff, called by the defendants, gave testimony tending to show that the note was signed by the defendants as indorsers. The return of the process October 29, in the suit against K, did not reach the court in time for the term of November 30, but it was changed to April term following. The notice to plaintiff bank was September 19. Judgment for defendants. Error.

Warner, J. 1. The plaintiff, being the holder of the paper, is necessarily embraced within the terms of the acts. 2. The parol evidence offered did not alter

the character of the contract, and is therefore admissible. 3. The rule that notice to an agent is notice to a principal applies to a corporation as well as a natural person. The suit against K was not within the three months after notice. Judgment affirmed.

Cited: 17 Ga. 102; 49 id. 313; 54 id. 639; 56 id. 518.

CAREY v GREENE (1849) 7 Ga. 79.

Assumpsit on bank notes. Defendant was the assignee of the C bank. The action was to recover the amount of certain bank notes issued by the bank. The plaintiff made demand of the assignee, who replied that he had no funds. The demand was made after the forfeiture of the charter of the bank. The defendant objected to the admission of the notes in evidence on the ground that the letters and numbers which appeared in each of the notes were not mentioned in the declaration. Overruled. The Act of 1832 required banks to pay 10 per cent damages for failure to pay specie on demand. The court charged the jury that the plaintiff was entitled to damages under the act. Judgment for plaintiff. Error.

Nisbet, J. 1. The law of 1832 applies to a bank and not to an assignee of a bank. As assignee, the defendant became the agent of the state to pay the debts of the bank, not to redeem bills. 2. It was not necessary to set forth the letter and number of the bills in the declaration. Judgment reversed.

Cited: 9 Ga. 208.

CAREY v McDUGALD (1849) 7 Ga. 84.

Assumpsit on certificate of deposit. The declaration alleged that the plaintiff, as assignee of the C bank, brought this action against the defendant as indorser on the following instrument: "P bank. Ga. 1-29-'42. \$3,900.00. W has deposited in this bank \$3,900, which sum said bank will pay to him, or his order, on this certificate, on the first day of January, next. Signed: R, Cashier." Demurrer to declaration on the following grounds: 1, Under the bank's charter notes are binding only when signed by the president and countersigned by the cashier; 2, by the Act of 1837 it was unlawful for any bank to issue a note payable at a longer date than three days after the date thereof. Sustained. Judgment for defendant. Error.

Lumpkin, J. 1. The instrument is negotiable and the indorsement sufficient to charge defendant. 2. The Act of 1837 applies to post notes only. 3. The provision of the charter requiring the signature of the president does not apply to such contracts or engagements as occur in or are necessary to the ordinary business of the bank usually performed by the cashier. Judgment reversed.

Cited: 7 Ga. 585; 9 id. 340; 20 id. 35; 64 id. 50.

MERCHANTS BANK OF MACON v RAWLS (1849) 7 Ga. 191.

Money had and received. The plaintiff held a fieri facias against B for \$2,000. Defendant, president of the plaintiff, sold it. He attached his receipt as president, without recourse on the plaintiff, but did not pay over the money to plaintiff. The president had no authority to sell from the board of directors. Defendant introduced the bank's books to prove certain items, then tried to prove they were not the bank's books. The verdict was handed by direction of the court, to plaintiff's counsel. He moved for leave to dismiss. Verdict for defendant. Appeal.

Nisbet, J. 1. The plaintiff need prove only his title and defendant's possession. 2. The sale was tortious, but the plaintiff may waive the tort and sue in assumpsit for the money. 3. The defendant, having introduced the books, cannot attack them by proof that they are not the books of the bank and thus discredit them as a whole. 4. A party shall not dismiss or be non-suited after the publication of the verdict, which is the instant it is handed to the person directed by the court to receive it. Judgment reversed.

Cited: 34 Ga. 575; 48 id. 593; 55 id. 20; 56 id. 609; 59 id. 66; 62 id. 347; 71 id. 460.

LANE v MORRIS (1850) 8 Ga. 468.

Debt by the owner of bills of P & M Bank against a stockholder. Demurrer. Overruled. Plea: That the bank had property at the commencement of the action.

The defendant proved that the original book containing the list of stockholders had been lost while in the possession of the bank's assignee, and gave parol evidence, without showing that he had searched for it. The charter provided that all stockholders who sold their stock had to publish notice thereof in a newspaper for 60 days; and that a sale within six months prior to the failure of the bank did not relieve them from liability. The bank refused to pay specie generally. Defendant contended that the plaintiff should assert his rights through a receiver of the bank. Judgment for defendant. Error.

Lumpkin, J. 1. The absence of the original book of entries, being accounted for, parol evidence of the contents of the bank books was admissible. 2. The plea, failing to specify the property of the bank, was too general to take issue on. 3. All the stockholders are liable, who have not sold their stock and given 60 days' notice in a newspaper, and a sale is no protection, if within six months of the failure. 4. The charter, not requiring the notice to contain the purchaser's name, such a notice was sufficient. 5. A refusal by the bank to pay specie generally is a failure within the charter. 6. The right of the billholder to hold a stockholder is one which he can assert in his own name, before and after dissolution. Judgment reversed.

Cited: 8 Ga. 492; 11 id. 497, 508; 12 id. 118; 16 id. 342; 19 id. 347, 369; 25 id. 40; 26 id. 98, 103; 63 id. 474; 74 id. 269; 76 id. 370.

HIGHTOWER v THORNTON (1850) 8 Ga. 486.

Bill alleging that plaintiff is a judgment creditor of a bank; that a fieri facias has been returned nulla bona; that only part of the capital had been paid in; that the directors refused to call for the balance and to make an assessment; that the bank was insolvent and that its charter had been declared forfeited by a court; and praying that the defendants, stockholders, may be decreed to pay into court such sums on their unpaid stock as will be sufficient to discharge the plaintiff's demand. Bill dismissed. Error.

Lumpkin, J. 1. The liability is equitable only, resulting from the defendant's undertaking to the corporation that he would subscribe so much to the capital stock of the company. 2. The capital stock of the bank is a trust fund for the payment of complainant's demand. 3. The subscription is a debt which the corporation can call for. 4. A court of equity will compel the corporation and stockholders to discharge the debt to the extent that the capital stock remains in the hands of the stockholder. 5. The equity of the creditor is equally strong where the stockholder has contracted to pay but has not paid his portion of the capital stock. 6. The capital stock is the amount specified in the charter, namely, \$1,000,000, and not merely the amount paid in. Decree reversed.

Cited: 8 Ga. 509; 11 id. 492, 510; 18 id. 86, 87; 19 id. 347; 26 id. 33, 42, 45, 54, 55, 56, 59, 63, 73; 30 id. 601, 606; 40 id. 103; 56 id. 195; 76 id. 370; 81 id. 508; 112 id. 718.

CAREY v GILES (1851) 10 Ga. 9.

To set aside an assignment. The Bank of M was indebted to the Bank of C upon a certificate of deposit. B, cashier of the branch bank and agent of the Bank of C, demanded the deposit. The Bank of M assigned to B notes and checks for the amount due the bank, without approval from the directors. The bank of M failed. Plaintiff was appointed its receiver. Defendant was assignee of the C Bank. Plaintiff contended that: 1, The cashier had no authority to make such an agreement; 2, that the transfer was void. M Bank was not a party to the suit. Some parties were made defendants, who had made notes and had been sued thereon in other counties, and evidence was given by them. A deposition was read to prove that the M Bank's president and most of the directors had resigned and that X had assumed the presidency. The court charged, that the transfer was fraudulent, if the Bank of M, while insolvent transferred to Bank of C an amount more than sufficient to pay its indebtedness and Bank of C agreed to repay any surplus. Judgment for plaintiff. Error.

Nisbet, J. 1. By the transfer, the legal title to the notes passed to the C Bank and that bank held the surplus, if any, subject to the claim of the creditors. 2. The agreement was not improper. 3. The evidence was proper. 4. The facts showing fraud were properly received. 5. M, being extinct, cannot be a party. Judgment reversed.

LANE v MORRIS (1851) 10 Ga. 162.

To enforce liability of stockholders. The action was by a billholder to recover for defendant's pro rata liability under the charter. There was a return of nulla bona upon a fieri facias under plaintiff's judgment against the bank. The defendant had paid in only \$25 per share. The cause of action accrued in 1842; the action was brought in 1847. Plea: The four-year Statute of Limitations. Sustained. The charter declared that the stock should consist of \$1,000,000, in shares of \$100 each. The statute provided that all actions for debt grounded upon any contract, except a specialty, should be commenced within four years, but those founded on bonds or instruments under seal, within twenty years. The court charged that defendant was liable for interest from the time of the return; and that defendant's pro rata liability must be proved from the amount paid in. Judgment for the defendant. Error.

Warner, J. 1. A liability founded on a statute is in the nature of a specialty, and not barred until twenty years. 2. The stock must be estimated at \$100, as fixed by the charter. 3. But a stockholder is not in default, and so liable for interest, until a demand upon him by the billholder. Judgment reversed.

Cited: 11 Ga. 497, 498, 510, 511; 12 id. 118; 16 id. 330; 26 id. 46, 54, 55, 56, 59, 73; 30 id. 599, 600; 63 id. 474.

CENTRAL BANK OF GEORGIA v LITTLE (1852) 11 Ga. 346.

Debt. The plaintiff was a bank. Defendant was administrator of an estate indebted to plaintiff. Plaintiff contended that it was entitled to a preference over other creditors of the estate. By sec. 10, Act of 1792, the debts due by an intestate are payable in the following order: Funeral expenses; charges of administration; debts due the public. Plaintiff's charter declares that the transfer by the state to plaintiff of all bonds, notes and debts due the state did not divest the state of any rights accruing to it by virtue of its sovereign capacity. Judgment for defendant. Error.

Warner, J. 1. The charter provision is not within the prohibition of the constitution. 2. The debt is not one due the public. 3. Under the plaintiff's charter it was competent for the general assembly to declare that the debts due the bank should be entitled to priority of payment in the distribution of a decedent's estate in the same manner as debts due the public. Judgment reversed.

THORNTON v LANE (1852) 11 Ga. 459.

Debt to enforce liability of stockholder. The M bank issued its bills in 1838, and suspended specie payment in 1841. The stockholders who had given notes were required to pay 50 per cent thereon, which payment was made in bills of suspended banks. In 1838, defendant bought from two original stockholders 100 shares of stock, which were transferred, without the sixty days' notice required by the charter, six months prior to the failure of the bank. In 1843, A was appointed assignee, and, until 1846, held more than sufficient of its assets to pay the claim. In 1848, A confessed judgment to the plaintiff; and in 1849 this action was brought. Execution was returned nulla bona. Defendant set up the Statute of Limitations; that he was not one of the original stockholders, but assignee of the stock for others; that there was variance between the execution and the judgment. Judgment for plaintiff. Error.

Lumpkin, J. 1. All the stockholders who have sold the stock within six months prior to the failure are liable. The billholder can hold the person of the stockholder bound for the ultimate redemption of the bills of the bank, in proportion to the number of shares and their value. 2. The debts of the corporation are extinguished by its dissolution. 3. The personal liability is not barred for twenty years. 4. On showing the impossibility of obtaining judgment against the corporation, the billholder may proceed against an original as well as present stockholders. It is not necessary to wait until all remedy against the bank is exhausted. 5. Where the legal effect of the words used in the judgment and execution is the same, a mere verbal variance will not avoid the execution. Judgment affirmed.

Cited: 11 Ga. 550, 551; 12 id. 495; 16 id. 222, 342, 344, 345, 347, 359; 18 id. 341; 19 id. 345, 347, 369, 378; 26 id. 33, 42, 44, 54, 55, 56, 59, 63, 69, 73, 74; 30 id. 599, 601; 40 id. 399; 57 id. 315; 59 id. 526; 60 id. 298; 63 id. 474; 83 id. 518; 85 id. 265; 110 id. 75, 718.

NEAL v MOULTRIE (1852) 12 Ga. 104.

Debt against defendants, as directors of the Commercial Bank of Macon, under the charter of the bank, which prescribed that the amount of the debt of the bank shall not exceed three times the amount of the stock paid in, over and above deposits, and that, in case of excess, the directors shall be liable in an action of debt. Pleas of general issue and Statute of Limitations of six months, for fines, penalties and forfeitures; also, the expiration of the charter. The action was dismissed. Error.

Nisbet, J. 1. The liability of the directors is a statutory liability, in the nature of a specialty, subject to the rule of the common law in relation to domestic judgments, which presumes payment or satisfaction only after twenty years. 2. The charter provision is not a penalty, but remedial. The limitation of six months does not apply. Judgment reserved.

Cited: 18 Ga. 334; 30 id. 599; 59 id. 595; 63 id. 474.

NAPIER v POE (1852) 12 Ga. 170.

Mandamus. Defendants were appointed commissioners by the legislature to receive subscriptions for bank stock. C and others subscribed for the whole amount, paying 10 per cent thereof by draft at thirty days. Before the thirty days elapsed, plaintiff offered to subscribe for the whole amount, tendering the 10 per cent in legal tender, as required by the charter. The offer was refused. The drafts were paid at maturity. Plaintiff contended that the first subscription was void, because, as he alleged, the required 10 per cent had not been paid, and because but three of the parties, first subscribing, were citizens of Georgia. The charter required five of the directors to be citizens of the state. Writ refused. Error.

Nisbet, J. 1. Defendants have a discretionary power as to when the payment of the 10 per cent shall be made. 2. Defendants have power to determine what is or is not a bona fide subscription. 3. The commissioners are not called on to sit in judgment on the qualifications of directors. Judgment affirmed.

Cited: 17 Ga. 589; 32 id. 284; 38 id. 628; 68 id. 131; 73 id. 144.

BANK OF ST. MARY'S v STATE (1853) 12 Ga. 475.

To recover a penalty. The action was brought under a penal statute, which prohibited banks from issuing change bills, under the denomination of five dollars. The subsequent Act of 1851, sec. 52, repealed all other acts regulating bank bills and remitted all punishments thereunder. This act was passed after this suit was commenced, but before judgment was rendered. Judgment for plaintiff. Appeal.

Lumpkin, J. 1. The Act of 1851 repealed the statute on which this action is based. 2. The claim in a suit, under a penal statute, is inchoate, and only becomes vested on judgment; no judgment can be rendered on a repealed statute; and it is competent for the legislature to pass such statute before final judgment. Judgment reversed.

Cited: 16 Ga. 361; 26 id. 37, 46, 47, 48, 58, 62, 102; 28 id. 90; 30 id. 601, 603; 37 id. 185; 66 id. 45.

DOUGHERTY v THE WESTERN BANK (1853) 13 Ga. 287.

Assumpsit on bank bills. The action was brought against defendant, a state bank, on its bills. One was payable on demand, the other on demand at Rome. No demand for payment was averred. Defendant pleaded the Statute of Limitations. Judgment for defendant. Error.

Nisbet, J. 1. In the case of the bill payable generally, the action is sufficient demand. 2. Demand need not be alleged by plaintiff in a suit on a bill payable at a designated place. But failure to demand may be set up by defendant and recovery prevented to the extent of defendant's injury, if he has been injured by such failure. 3. These notes or bills are to be treated as money. The Statute of Limitations had no application to them. Judgment reversed.

Cited: 49 Ga. 421; 64 id. 50; 72 id. 405.

LANE v HARRIS (1854) 16 Ga. 217.

Debt. Plaintiff held bills of a bank in which the defendant was a stockholder. A stockholder was liable for the bank's bills in proportion to the number of shares he held. Plaintiff's offer to prove, that he had a judgment against the bank's

assignee and execution had been returned nulla bona, was refused on the ground that the exemption did not show the bank's charter had been forfeited and an assignee appointed. Plaintiff's offer of the bank bills, without proving the signatures, was refused. By the pleadings, plaintiff was only allowed to recover such portion of his claim as it bore to defendant's interest in the entire capital of the bank. Defendant had no notice that a levy was to be made. Judgment for defendant. Error.

Starnes, J. 1. The court will take judicial notice of the forfeiture of the charter and the appointment of the assignee. 2. The execution of the bank bill should have been proved. 3. The return of nulla bona is not conclusive against defendant unless he had notice that the levy was to be made. A billholder is entitled to recover from the stockholder the full amount claimed by him, if it does not exceed the amount of the stockholder's stock. Judgment reversed.

Cited: 18 Ga. 109, 114, 116; 19 id. 331, 347, 349; 20 id. 311; 21 id. 244; 40 id. 396, 687; 42 id. 579; 56 id. 565; 60 id. 181; 80 id. 158; 111 id. 194.

MOULTRIE v SMILEY (1854) 16 Ga. 289.

Debt against bank directors. Pleas: General issue, and that, after the suit was commenced, the bank had become extinct. The charter of the bank made the directors liable if the debts were three times the capital stock paid in. The charter was forfeited after suit was instituted. Defendants were the directors. Judgment for plaintiffs. Error.

Lumpkin, J. The action against the directors did not abate upon the expiration of the charter. Judgment affirmed.

Cited: 19 Ga. 380, 381, 385, 386; 21 id. 515, 516; 26 id. 33, 34, 51, 57, 62, 63, 68, 97, 101; 30 id. 604; 40 id. 687; 66 id. 178.

LESSEE OF VEASEY v GRAHAM (1855) 17 Ga. 99.

Ejectment. Both parties claimed title under the H Bank. The defendants offered in evidence an unsealed deed from the H Bank to its president, signed by the president and countersigned by the cashier. The president immediately went into possession of the land, put it under cultivation, and possession under him was maintained for over seven years. The plaintiffs contended that the deed was void on its face; also that the holding of the president of the bank gave no notice that he was merely holding it as trustee for the bank. Judgment for defendants. Error.

Lumpkin, J. 1. The deed is prima facie good. 2. A contract made by a trustee with himself is voidable only. 3. The receipt of the money and the retention of it for such a length of time, is such an acquiescence in the sale as to amount to a confirmation. 4. The deed was at all events good as color of title. 5. The very nature of the possession itself gave notice of an adverse holding. Judgment affirmed.

Cited: 66 Ga. 225.

MAHONE, ADM'R v CENTRAL BANK (1855) 17 Ga. 111.

Bill of discovery and injunction. The bank recovered judgment against complainant on a draft indorsed by his intestate, before R's name, as a prior indorser, had been erased. Complainant sought to restrain collection of the judgment. The sworn answer denied all knowledge of the erasure. By the charter, the statute did not run against the Central Bank, and no notice or demand was required from it. No action was brought on the draft for eleven years. The plaintiff's intestate did not take any steps to protect himself from loss. A statute fixed the order of payment of a deceased person's debts. Motion to dissolve the injunction was sustained. The motion to dismiss the bill was refused. Error by both parties.

Starnes, J. 1. The equity of the injunction being sworn off by the answer, the injunction was properly dissolved to await the hearing. 2. Demand and notice are not necessary to charge an indorser of a bill due the Central Bank; and the Statute of Limitations does not run against outstanding debts. 3. The indorser, failing to take any steps to protect himself, cannot make lapse of time a bar. 4. A debt due to the Central Bank is a debt due the public, and within the statute providing for the order of payment of a deceased person's debts. Judgment affirmed.

Cited: 17 Ga. 193; 55 id. 376; 57 id. 436, 483.

THE CENTRAL BANK OF GEORGIA v WILLIAMS (1855) 17 Ga. 193.

Motion, to quash execution. The bank had obtained judgment against the defendant, which had not been entered for over seven years. The defendant contended that the judgment and fieri facias had become dormant. A statute exempted debts due plaintiff from all limitations. The subsequent statute of 1823 made judgments dormant after seven years, but did not refer expressly to judgments held by plaintiff. Fieri facias quashed. Error.

Starnes, J. Plaintiff's judgment is not rendered dormant by the Act of 1823. Judgment reversed.

ROBINSON v BANK OF DARIEN (1855) 18 Ga. 65.

Actions to enforce bank stockholders' liability. Defendant was incorporated, and the state became the owner of half the stock. The bank held land in another state. The bills of the bank made the common currency of the state. Later the share owned by the state was vested in the Central Bank for capital. By Act of 1834, which the plaintiffs contended was unconstitutional, the state was relieved of calls for instalments on the stock. By Act of 1841, the Central Bank wound up the affairs of the Bank of D. Creditors, protesting against the act, acted upon it. The state had not paid all its subscriptions. The state accepted bills of the Bank of D in payment of taxes. By fraud some bills were issued which came into the hands of an innocent holder. The creditors did not rely on the balance due from the state. Some of the bills were lost. There was no evidence that the charges of the agent appointed to wind up the affairs of the Bank of D were excessive or fraudulent. By the Act of 1784, the state was given a priority in the payment of its claims. The state had redeemed more than half of the bank's circulation. Indemnity bonds were not given by the creditors who had obtained judgments on the lost bills. The plaintiffs, as creditors of the Bank of D, seek to hold the state liable for their demands. Judgment for defendant. Appeal.

Lumpkin, J. 1. The charter being modified so as to relieve the stockholder from further liability on his subscriptions, the unpaid instalments to the capital stock of a bank cannot be considered a trust fund for the payment of debts. 2. These parties, not having parted with their property, on the faith of this fund, cannot complain. 3. An act of the legislature, though unconstitutional, is at least notice to those who accept or act upon it. 4. The state, as a stockholder, is not liable on the unpaid balance of the stock owned by the Bank of D. 5. The reasonable expenses of the agent for winding up the affairs of the bank are to be allowed. 6. The bills of the bank, being the common currency of the country, should be protected in preference to its other debts. The state, by being a stockholder, did not lose its right to priority. Execution creditors are entitled to a preference of legal assets. 7. All the available means of the bank are legal assets. 8. The state, having redeemed more than half of the circulation, is not liable for the balance. The state, as a stockholder, is liable for bills fraudulently issued, and in the hands of an innocent party. 9. A creditor, having obtained a judgment on bills subsequently lost, can recover by giving indemnity. Judgment reversed.

Cited: 19 Ga. 331; 35 id. 44; 40 id. 396; 42 id. 579; 51 id. 122; 55 id. 178; 57 id. 564; 59 id. 653; 62 id. 478; 66 id. 614, 616; 80 id. 600; 101 id. 245; 111 id. 294.

BANKS v DARDEN (1855) 18 Ga. 318

Assumpsit on a certificate of deposit. The certificate was made by a bank of which the defendant was a director. Pleas: That the other directors should have been joined; the Statute of Limitations of six months; that the certificate was fraudulently transferred. The charter made the directors liable if the indebtedness of the bank exceeded three times the paid-up capital. One fourth the capital stock was paid. Defendant refused to state under oath what he would prove by an absent witness. The statement was in writing, as required by the statute granting continuances. The suit was against one director. The others were absent. The bank books were put in evidence and certain papers read. Parol evidence of facts, outside the books, was given. The certificate was issued as an accommodation and was signed contrary to the agreement. The assignor, after the assignment had been made, demanded payment. There was no evidence that the directors were present or assented. Judgment for plaintiff. Error.

Lumpkin, J. 1. It is not necessary to state under oath what is expected to be proved by an absent witness. 2. The directors were jointly liable, and neither

absence nor dissent would relieve them. 3. A statutory remedy is to be strictly followed. This being a statutory remedy, the action was not barred under twenty years. 4. Parol evidence may be received to prove facts outside of the books of the bank. Though the entire book is in evidence, the party may select and read such part as he sees fit. 5. The assignor's title to the paper being good, a demand made by him inures to the benefit of the transferee. To hold the directors, it must be shown that the total amount of the debts owed by the bank exceeded three times the capital stock actually paid in at the time. Judgment reversed.

Cited: 20 Ga. 307; 30 id. 588, 603; 34 id. 539; 55 id. 479; 63 id. 474; 64 id. 248; 68 id. 463; 80 id. 477.

McDOUGALD, ADM'R X v BELAMY, ADM'R (1855) 18 Ga. 411.

Debt. Plaintiff's intestate, one of the directors of a bank at its organization, falsely certified that the necessary amount of the capital stock had been paid, and then withdrew from the directory. To be relieved from liability, a stockholder was required by the charter to give notice of the transfer of his stock. No such notice was given. Plaintiff's intestate obtained some of the bank's bills and sued defendant's intestate, a stockholder. The bank directors, stipulating for their ultimate redemption, issued the bills. They acted within the scope of their general management. Judgment for plaintiff. Error.

Lumpkin, J. 1. Under the charter, plaintiff's intestate cannot recover unless he proved that he had transferred his stock and had given notice thereof. 2. From the time of the transfer he ceased to be a stockholder inside of the charter, so far as his rights and obligations as a member of the corporation were concerned. 3. The intestate having participated in the illegal organization of the bank, his administrator cannot recover. The illegal organization did not prevent the bank and its stockholders from being liable to creditors and billholders. 4. The acts of the directors, within the scope of general management, bind the bank. 5. The bank was liable for the redemption of the bills issued by order of the directors. 6. The directors, stipulating for the ultimate redemption of the bills, rendered the stockholders liable on the special agreement. Judgment reversed.

Cited: 19 Ga. 342; 20 id. 307, 309; 26 id. 107; 29 id. 439; 54 id. 639, 641; 59 id. 696; 68 id. 434; 94 id. 318, 110 id. 838.

McDOUGALD v LANE (1855) 18 Ga. 444.

Debt by a billholder against a stockholder in a bank to enforce the liability to redeem bills of the bank. Judgment for plaintiff. Error.

Starnes, J. 1. The court erred in not permitting the attorney for plaintiff to testify that a set of interrogations was served on him sixty days before the court. It was not a matter or thing acquired from his client. His clerks might have had as accurate knowledge as he. 2. The court below held that the bills issued by the bank were not illegal and void, because 25 per cent of the capital stock of the bank had never been paid in specie at any time, and that they constituted a good demand against the stockholders. Any other doctrine would be an outrage on reason and justice. 3. The liability of the stockholder for the redemption of the bills was not secondary and collateral to that of the directors for excess of debts contracted. There is nothing in the charter that the directors shall be first sued, or that they shall be sued at all. The provision is that they may be sued. 4. An innocent billholder, not participating in the fraudulent organization of the bank, is entitled to recover. If a billholder did take part in the unlawful organization, he cannot enforce an action on his bills. 5. An order requiring the plaintiff to deposit the bills in court, would have been premature before final judgment or payment of the bills. Judgment reversed.

Cited: 20 Ga. 307, 309.

ADKINS v THORNTON (1856) 19 Ga. 325.

Debt, brought by T, a stockholder in the Planters & Mechanics Bank, insolvent, to compel redemption of bank bills. Demurrer to declaration on the ground that it contained no averment of the amount of bills of the bank unredeemed and in circulation. Sustained, and action dismissed. Error.

McDonald, J. 1. The bank being insolvent, the plaintiff has a right to recover from the defendant, on the unredeemed notes issued by the bank, a sum bearing the same proportion to the aggregate amount of outstanding bills, as his stock bears to the capital stock. 2. There is no averment in the declaration of the

amount of outstanding unredeemed notes, proof of which is necessary to make out the plaintiff's case. Judgment affirmed.

Cited: 19 Ga. 365; 66 id. 567; 112 id. 593.

ROBINSON v LANE (1856) 19 Ga. 337.

Debt for redemption of bank bills of the P Bank, against the defendant as a stockholder. The assignee received from L about \$75,000 in bills. Defendant's offer to prove what L said when he delivered up the bills, was overruled. The transfer book showed that certain shares of the stock had been transferred to defendant by S, an agent for other stockholders. This was without defendant's knowledge. Plaintiff offered evidence of declarations made by the bank's officers as to ownership. Later defendant transferred the stock to the bank. The court charged the jury that, to ascertain the defendant's liability, the amount of his stock must be determined; and if that exceeded the bills sued on, a verdict for the whole amount of the bills must be rendered. The court refused to charge that the forfeiture of the bank's charter extinguished the debts. It was contended that the Act of 1843, forfeiting the bank's charter was unconstitutional. Judgment for plaintiff. Error.

Lumpkin, J. 1. The concomitant declarations of L are admissible, forming part of the *res gestae*. Defendant is presumptively liable on the bills issued before he re-transferred the stock to the bank, and *prima facie* he is not liable on the bills issued after that time. 3. The aggregate body of stockholders are liable under the charter for the bills issued by the bank; and the liability of each is to be ascertained and fixed by the following proportion: As the whole capital stock is to the entire outstanding circulation, so is each stockholder's share to his part to be redeemed. 4. Declarations of the bank's officers, as to the ownership of the stock, were inadmissible as against defendant. 5. The request to charge was properly refused. 6. The fact that the body of the act does not correspond with the title does not make it unconstitutional. Judgment reversed.

ROBINSON v BEALLE (1856) 20 Ga. 275.

Debt to enforce stockholder's liability. Defendant was stockholder in a bank. The charter provided that the property and person of the stockholder should be held bound in proportion to the number and value of his shares. Plaintiff owned bills of the bank on which he obtained judgment. Execution had been returned *nulla bona*. The stockholders had turned over to D, cashier of another bank, the bank notes and specie, and in return received specie certificate on that bank, with understanding that specie was not to be demanded. Plaintiff sought to hold defendant for payment of the bills. Plaintiff introduced the bank's transfer books, under objection, to prove the ownership of the stock in defendant. Plaintiff's witness was allowed to state his opinion of the cashier's authority. Defendant set up release and the Statute of Limitations. Judgment for plaintiff. Error.

Benning, J. 1. The transfer books were properly admitted. 2. The directors being liable to the stockholders, the plaintiff, by releasing a director, would release the stockholders. 3. A witness cannot be allowed to give his opinion as to the cashier's authority. 4. The habitual performance by the cashier of acts similar to the act in respect to which the cashier's authority is questioned, may be shown in evidence of such authority. 5. The amounts paid to plaintiff by other stockholders, in compromise of his claims, cannot be considered in estimating defendant's liability. 6. Failure by the directors to repudiate a tortious act of the cashier, of which they had or should have had knowledge, renders the bank liable for its consequences. 7. The six years' Statute of Limitations applies to suits on bank bills. Judgment reversed.

Cited: 57 Ga. 315; 59 id. 696; 88 id. 802.

MERCHANTS BANK OF MACON v RAWLS, ADM'R (1857) 21 Ga. 289.

Assumpsit. Rawls, the defendant's intestate, the president of the bank, received the money on two executions owned by the bank, and did not pay the money over. The action is brought on one of the collections. Pleas: General issue, Statute of Limitations, payment, setoff and former recovery. R, the attorney in the case, was offered as a witness. Evidence was offered to prove a nonsuit in a former suit for the same cause of action. Judgment for defendant. Appeal.

McDonald, J. 1. Rawls was agent of the bank, and when he collected money he

was bound to pay it over without waiting for a demand. The collection of money in each case was a cause of action, on which an action for money had and received would lie, at the instance of the principal. The court should not have refused so to charge. 2. An attorney cannot testify in a case in which he is employed. 3. In the absence of a special pleading, the evidence was admissible. Judgment reversed.

DARDEN v BANKS (1857) 21 Ga. 297.

Debt to enforce stockholder's liability on a certificate of deposit for \$6,325 payable "in current notes." Demurrer to declaration. Demurrer sustained. Error.

Benning, J. The certificate of deposit was within sec. 2, Act of 1837, making penal the issuing of bank bills payable in any other manner or with any other thing than gold or silver coin. The certificates were negotiable, and were in every essential particular the promissory notes of the bank. The demurrer was properly sustained. Judgment affirmed.

MERCHANTS BANK OF MACON v RAWLS, ADM'R (1857) 21 Ga. 334.

Bill to recover money paid under a contract induced by fraud. Plaintiff's intestate, R, agreed to purchase stock in defendant bank. A controversy grew out of the agreement. It was submitted to arbitration "in reference to the question of the obligation of the contract." The arbitrators found for the bank. Plaintiff purchased the stock at par value. The bill alleged that plaintiff's intestate was induced to enter into the original contract by defendant's fraud. The bank offered in evidence its books of account. Not admitted. Judgment for plaintiff. Error.

Benning, J. 1. The books of the bank were admissible in evidence for the bank. 2. The language of the submission involves only the question as to whether the contract was or was not binding. Judgment reversed.

Cited: 64 Ga. 249.

MOULTRIE v HOGE (1857) 21 Ga. 513.

Debt against the directors of a bank. Plaintiff held bills of the bank. The charter made the directors liable for all bills issued during their term of office, when the bank owed an amount exceeding three times the amount of stock paid in, over and above the money on deposit. The bank's charter had expired at the time of suit. Judgment for plaintiff. Error.

Benning, J. By the expiration of the bank's charter, the plaintiff's cause of action became extinguished. Judgment reversed.

Cited: 26 Ga. 56, 58, 59, 68, 77.

FORCE v DAHLONEGA TANNING CO. (1857) 22 Ga. 86.

Affidavit of illegality. The defendant was incorporated by Act of the Legislature of December 4, 1841, which made the stockholders individually liable for the debts of the company, and authorized a fieri facias, issued upon a judgment against the company, to be levied upon the property of any stockholder. The plaintiff, having recovered a judgment against the defendant, issued a fieri facias and levied on the property of M, one of the incorporators of the company. M then filed his affidavit of illegality, denying that he was a stockholder at the commencement of the action, and alleging that the fieri facias could not be levied upon his property because the plaintiff had not proceeded to obtain judgment under the Act of December 10, 1841, which provided a different method of procedure from that contained in the act incorporating the defendant, and which superseded the remedy therein provided. The court rejected evidence offered by the plaintiff to show that M continued to be a stockholder until the time of commencement of suit. Judgment for defendant. Error.

Lumpkin, J. 1. It is unreasonable to suppose that the assembly intended the Act of December 10 to supersede and repeal the remedy provided in the charter granted by it on December 4 to the defendant company. 2. The burden is upon the stockholder to prove that he has disposed of his stock, inasmuch as the Act of 1838 requires him to publish that fact in two papers for a certain time before he can be relieved of liability. The defendant M is therefore liable, unless he alleges and proves he has discharged himself under that statute. Illegality is the proper remedy in such a case. Judgment reversed.

Cited: 30 Ga. 100.

MOISE v CHAPMAN (1858) 24 Ga. 249.

On bill of exchange against the acceptor. The bill sued on came into the hands of plaintiff, as receiver of the insolvent M bank, and was overdue. The defendant claimed a setoff and tendered bills of the bank, some of which were in his hands when the bank stopped payment; some were gotten before this suit was commenced, and some were gotten afterward at much less than their face value. Judgment for plaintiff for costs only. Exceptions.

Benning, J. 1. If the defendant would have been entitled to pay this bill of exchange to the bank in bills of the bank, he is so entitled against the receiver. 2. The fifteenth section of the Act of 1832, "to secure the solvency of all the banking institutions in this state," contains in effect a legislative declaration that all the paper of a bank, while held by the bank itself, is subject to be paid in the bills of the bank. Judgment affirmed.

Cited: 74 Ga. 269; 94 id. 97.

SCHLEY v DIXON (1858) 24 Ga. 273.

Bill to enforce contribution from stockholders. The plaintiff, having obtained judgment from the P Bank on a bill of exchange bought of it, the execution thereon having been returned unsatisfied, brought this bill against the stockholders in the bank and the representatives of deceased stockholders, alleging that only a very small portion of its capital stock was paid, and notes of stockholders were given for the balance; that those of defendants who were not originally stockholders had acquired stock, substituting their notes for those of the former holders; and that defendants had issued to the governor false reports upon which the plaintiff had relied; that the bank had become insolvent, and notes given for stock were unpaid or had been destroyed by defendants. Demurrer. Bill dismissed. Exceptions.

McDonald, J. 1. The capital stock of an incorporated bank, when paid in, is a trust fund in the hands of the officers for the stockholders and, after issue of notes, for creditors. 2. When notes are issued before the required portion of the stock is paid in, the creditors may proceed against holders of stock not duly paid up and against the directors for breach of trust. Such conduct is fraudulent, and the culpable parties are liable for the consequences. The suit is maintainable in this court in behalf of all persons in the position of the plaintiff. 3. It will be presumed that the judgment against the bank was regularly obtained. 4. The personal representatives of fraudulent trustees, since deceased, are liable to the injured parties. 5. It makes no difference that some of the defendants were not original subscribers, so long as they were, or became, parties to the fraud. Judgment reversed.

Cited: 81 Ga. 514; 83 id. 493.

MOTT v SEMMES (1858) 24 Ga. 540.

Garnishment. A stockholder was indebted to a bank on a stock note, and his stock was thereafter transferred to another person who verbally undertook to relieve such stockholder from any liability on his note. On the faith of the transferee's possession of such stock he was elected a director in the bank. The bank thereafter incurred a liability for which it is sought to charge defendant. Judgment for defendant. Error.

Lumpkin, J. The defendant, whether liable to creditors of the bank in another proceeding or not, cannot be made liable by process of garnishment. Judgment affirmed.

SOUTHERN BANK OF GA. v WILLIAMS (1858) 25 Ga. 534.

On bill of exchange. The defendant was sued as an acceptor. Plea: That the plaintiff had no legal organization. Demurrer to plea. Overruled. Judgment for plaintiff. Error.

McDonald, J. The fraudulent organization of the bank cannot be pleaded collaterally. Judgment reversed.

Cited: 32 Ga. 292.

ROBISON v BEALL (1858) 26 Ga. 17.

Action to enforce stockholders' liability. Plaintiff held bills of a bank in which defendant was a stockholder, and liable by charter for its debts. Plaintiff obtained

judgment on the bills against the bank. Execution returned nulla bona. The bank's charter had expired before defendant acquired his stock. One share was purchased from the bank itself. Defendant offered evidence to show that plaintiff had bought the bills at a discount. Not admitted. He was not allowed to prove a champertous agreement between plaintiff and plaintiff's attorney in connection with the suit. Judgment for plaintiff. Error.

Benning, J. 1. There is no law prohibiting the circulation of notes that are under par. 2. One purchasing at a discount may collect the par value. 3. The champertous agreement did not make the bills void as between plaintiff and defendant. 4. The bank had a right to acquire and transfer its own stock. 5. The stockholders' liability expired with the expiration of the charter. Judgment reversed.

Cited: 71 Ga. 866; 84 id. 389.

SOUTHERN BANK v MECHANICS BANK (1859) 27 Ga. 252.

On bills of exchange. Service was acknowledged and process waived on the original declaration by H, and at the appearance term he made affidavit as cashier of the defendant that it had a substantial defense and was unprepared for trial. The bills sued on were indorsed by the plaintiff. The plaintiff, having offered in evidence notarial protests, which were objected to as not showing non-payment and notice of dishonor, then offered another set of protests that did show these facts, and the defendant's objection thereto was overruled. The defendant contended that the case should be dismissed because H was without authority to accept service; and because plaintiff did not show title to the bills in itself; and because the court admitted the second set of protests to prove notice of dishonor; and because the demand is not under the charter of the bank. Judgment for plaintiff. Exceptions.

Lumpkin, J. 1. The appearance of the defendant to make the affidavit at the appearance term ratified H's act in acknowledging service. After pleading, it cannot deny sufficiency of the service. 2. The indorsements of plaintiff on these bills prove title out of it, and, since these indorsements were not stricken out, the objection that plaintiff failed to prove title is a valid one. 3. The second set of notarial protests was admissible, being probably of as good authority as those first offered, it not appearing that either was the original. 4. Under the charter of defendant bank, a demand upon it for payment must be made before a judgment can be recovered, as there provided. Plaintiff's reliance on the affidavit, made at the appearance as provided by the defendant's charter, precludes a claim that this action is not under that charter. Judgment reversed.

Cited: 44 Ga. 638; 56 id. 176; 111 id. 145.

CHEROKEE INS. AND BANKING CO. v JUSTICES (1859) 28 Ga. 121.

Mandamus. The plaintiff applied for a mandamus, to be directed to the inferior court of W county, to compel it to pass an order requiring the treasurer of the county to refund a tax assessed for county purposes upon the bank's capital. Mandamus refused. Exceptions.

Lumpkin, J. 1. The Act of 1821 confers a general power upon the inferior court to levy taxes for county purposes "upon the inhabitants of any county." 2. As to its capital stock, a bank is not an inhabitant of any particular county, the stockholders being usually scattered over the state. Judgment reversed.

Cited: 48 Ga. 310.

PATTEN v NEWELL (1860) 30 Ga. 271.

Action on a draft. The defendant drew a draft in favor of the plaintiff. At maturity defendant had no funds in the hands of the drawee for its payment. The draft was never presented for acceptance or payment. Defendant claimed there had been an acceptance. There was an erasure of an indorsement upon the draft, but otherwise it was smooth and not written upon. The court instructed that if the draft bore evidence of an erased acceptance, plaintiff could not recover without accounting for and explaining the same; and that if this was a bank transaction, defendant was entitled to notice on non-acceptance. Verdict for defendant. Error.

Lyon, J. 1. A charge unwarranted by the facts is erroneous. 2. Parol evidence was inadmissible to establish whether the paper was intended to be negotiated in bank or was a banking transaction. 3. As between the holder and

drawer, the drawer is not entitled to notice of non-payment. Judgment reversed.
Cited: 50 Ga. 240; 52 id. 133; 59 id. 778; 64 id. 50; 100 id. 150; 112 id. 672.

HARGROVES v CHAMBERS (1860) 30 Ga. 580.

Debt. Action against the surviving directors of the P Bank to recover the amount deposited in said bank by the plaintiff's testator, for which certificates of deposit were issued. The defendants were charged with liability of these certificates, because, at the time of their issue, the bank's debts exceeded three times the amount of its capital stock, and the bank's charter made the directors individually liable to creditors of the bank in case of such excess. Judgment for defendant. Error.

Lyon, J. 1. It was not necessary that the representatives of the deceased directors be joined as defendants, although they may be at the discretion of the plaintiff. 2. The Act of 1837, forbidding banks to put in circulation paper intended to circulate as money redeemable more than three days after date, does not make these certificates invalid, for they were redeemable at once. 3. These certificates represent debts within the meaning of the charter. 4. The fact that the bank assets were wasted by the assignee is no defense to the directors, for the assignee was selected by the bank. The plaintiff cannot be made to suffer, even though the assignment was ratified by the legislature. 5. The liability of the defendant's being statutory, and not upon contract, it is not barred by the Statute of Limitations before twenty years. 6. The judgment of forfeiture, pronounced against the bank under the Acts of 1840 and 1842, did not extinguish this liability, for the acts expressly prevent such an effect. 7. The expiration of the bank's charter did not extinguish its debts or the liability now sought to be enforced. Judgment reversed.

Cited: 75 Ga. 795.

BETHUNE v DOUGHERTY (1860) 30 Ga. 770.

Assumpsit. The holder of bills of the C Banking Company sued the defendant, alleging him to be the assignee of the bank, and thus liable on the bills under the Act of 1843. Pleas: Statute of Limitations, and non-acceptance of appointment as assignee. It was shown that the defendant had admitted, in an equity suit, that he had, under the appointment made by the deed of assignment, executed a deed of property belonging to the bank. The plaintiff read in evidence, over objection, the bills sued on. Defendant offered in evidence his letter to the governor, declining the appointment as assignee, made by the Act of the General Assembly in 1843. The court refused to charge that if the defendant accepted this appointment the plaintiff could not recover, and that, if six years had elapsed since forfeiture of the bank's charter, the Statute of Limitations was a bar. Judgment for plaintiff. Exceptions.

Lumpkin, J. 1. The factum of these bank bills is presumed under the Act of 1856, in the absence of a plea of non est factum, so they were properly admitted in evidence. 2. The defendant's appointment was made by the deed of assignment and merely confirmed by the Act of 1843; so his letter to the governor is of no effect after proof that he acted under the deed of assignment. 3. The Statute of Limitations is no bar to the plaintiff's action, for he really seeks to enforce a trust, and the plaintiff, having availed himself of his right to an action at law under authority of the legislature, will not be therein deprived of a right which could not be taken from him in equity. Judgment affirmed.

Cited: 49 Ga. 421; 60 id. 543.

DAVIS v BANK OF FULTON (1860) 31 Ga. 69.

On bill of exchange, against D as drawer and indorser, and W & Co. as acceptors. The defendants pleaded payment, setoff, misjoinder of defendants, and that there was no such bank as the Bank of Fulton. The defendants moved a nonsuit. Overruled. Judgment for plaintiff. Error.

Jenkins, J. 1. By an act to regulate the admission of evidence (Cobb's Digest 272), bank charters are public acts, and courts take judicial notice thereof. 2. Sec. 11 of the plaintiff's charter expressly authorized the joinder of parties, as in this case. That this section was not expressly recited in the title of the act of incorporation did not make the charter of the plaintiff bank unconstitu-

tional, as "containing matter in the body of the act different from what is expressed in the title thereof." Judgment affirmed.

Cited: 62 Ga. 476, 478; 66 id. 178, 613.

PLANTERS & MECHANICS BANK v ERWIN (1860) 31 Ga. 371.

Action to recover on bank notes purporting to be the notes of the defendant bank. They were notes signed by the vice-president, H, and countersigned by the assistant cashier, M H. The plaintiffs introduced an extract from the minutes of the bank, which showed that T had been appointed vice-president, and that his name had been stricken out and the name of H interlined; that the name of B had been stricken out, and the name of M H interlined, as assistant cashier. These interlineations were in a different handwriting from the other part of the record. The defendant pleaded non est factum. The court charged the jury that the presumption of law was that the alteration in the minutes was made at the time the order appointing H and M H was entered. Verdict for plaintiff. Error.

Lumpkin, J. 1. The court erred in charging the jury as to the alteration in the minutes. The court should have presumed nothing, for in such a case the law presumes nothing; the question should have been passed upon by the jury. 2. Bills signed by a vice-president and an assistant cashier, when there was a president and a cashier, are not valid. Judgment reversed.

Cited: 45 Ga. 544; 75 id. 243, 539; 98 id. 474.

THE MECHANICS BANK v HEARD (1867) 37 Ga. 401.

Assumpsit on bills of the defendant, a bank. The defendant pleaded that the stockholders, at a meeting held February 20, 1866, surrendered the charter of the bank; that notice of the surrender was forwarded to the governor of Georgia, and that the bank then ceased to exist. This surrender, the defendant claimed, was authorized by the code of the state, sec. 4, par. 1685. Judgment for plaintiff. Error.

Harris, J. The act of the state creating this bank was a contract, and, by the general law of contracts, it cannot be dissolved but upon the consent of both parties. The defendant bank was not dissolved by the resolution of its corporators, and when the suit of the plaintiff was instituted it was an existing banking corporation. Judgment affirmed.

Cited: 53 Ga. 629; 54 id. 410, 421; 56 id. 257; 71 id. 120; 96 id. 10; 107 id. 599; 111 id. 768.

CENTRAL RAILROAD AND BANKING CO. v WARD (1868) 37 Ga. 515.

Bill to compel a transfer of shares of stock of the defendant. The plaintiff W sold the plaintiff O 50 shares of the defendant's stock, in June, 1866, and appointed S, an attorney, to make assignment and transfer of the stock. O requested the defendant to make the transfer upon the books of the company. The request was refused. The defendant answered that the stock was part of a large number of shares once held by persons who were then treated as alien enemies to the Confederate States of America, and that it was sequestered by the District Court of Georgia as property of alien enemies; that the defendant, in 1862, was ordered, through regular judicial proceedings, to transfer the stock to the Confederate States, receiver, which was done; that the receiver had transferred to another; and that the plaintiff held through mesne transfers from the receiver, all of which transfers were made while the Confederate States were in existence. A special verdict found the facts as stated by the answer. Decree ordering the defendant to permit the transfer to be made by S. Exceptions.

Warner, C. J. The plaintiffs, and those under whom they claim, derived their title to the stock under proceedings of an unauthorized and unrecognized organization, which has failed and ceased to exist, and their title thereto, being so derived, failed with it. The judgment of the court below, upon this branch of the case, is reversed. In the absence of fraud or collusion on the part of the company, the transfer of the stock on the books thereof does not make it liable as a guarantor or warrantor of the vendor's title. Judgment of the court below, on this point, affirmed.

Cited: 46 Ga. 40.

DOBBINS v WALTON, ASSIGNEE (1868), 37 Ga. 614.

Insolvency proceedings. The A Banking Company made an insolvent assignment to the defendant. J obtained a judgment on an insurance policy and claimed a priority. B, assignee of a judgment obtained before the assignment, claimed a pro rata share with the other claims. D obtained a judgment on the bank's bills and claimed a priority as a billholder under sec. 1493 and 1495 of the revised code. At the time of the assignment the company owned 44 shares of the G Banking Company, held in the name of its president, which were transferred to the assignees, and was indebted to this company for \$38,000. The latter had withheld the dividends on the stock from the assignees, and claimed a lien on the stock superior to the other claims. Secs. 1493 and 1495 of the revised code, art. 3, gave holders of bills a preference over other creditors. The court held that the judgment shared equally with the billholders, and that the banking company had not lost its lien and should be paid in preference to all other demands. Decree entered accordingly. Error.

Walker, J. 1. The sections apply to banks alone whose charters have been forfeited and their assets placed in the hands of receivers. 2. The assignment gives no preference to any of the creditors. 3. The assignee of a voluntary assignment for the benefit of creditors stands in no better situation than the assignor. 4. One of the preferences authorized by law was a lien on the stock for the amount due by the assignor. Judgment affirmed.

Cited: 59 Ga. 280; 68 id. 141; 74 id. 267, 269.

BELCHER v WILCOX (1869) 40 Ga. 391.

Bill for direction against bank creditors. Plaintiff was the assignee of the bank of C. He averred that the bank had assigned to him all its property to pay its debts; that within six months billholders who were stockholders presented bills to a certain amount; that billholders who were not stockholders presented bills to a certain amount; the chancellor decreed that the expenses of administering the assets be first paid, and that the assignee pay out the balance to the billholders then before the court, pro rata, in the proportion that the whole demands allowed bore to the fund. Appeal.

Brown, C. J. 1. In the distribution of the assets of an insolvent bank, each bank bill should take in proportion to the quantum of consideration paid therefor by the holder. 2. The billholders who are stockholders may present their bills and share equally with the other billholders in the distribution of the assets of the bank. The true rule is to distribute the assets among all the billholders whose bills are presented to the receiver before distribution, and leave the billholders, who are not stockholders to their remedy against all the stockholders on their personal liability for the balance. 3. Special preference is given by law to billholders over all other creditors of the bank. Judgment reversed.

Cited: 42 Ga. 578, 579; 60 id. 181.

JONES v WILTBERGER (1871) 42 Ga. 575.

To enforce stockholder's liability. Plaintiff was a depositor in a bank in which the defendant was a stockholder. The bank failed. Plaintiff recovered judgment against it for the amount of his deposit. Execution was returned nulla bona. Defendant owned \$25,000 of the stock. A clause in the charter provided, "the persons comprising the company shall be held and bound in their private capacity, in proportion to the number of shares held by each, for the ultimate redemption of all deposits made with the company, and which may remain unpaid during the time such persons shall remain stockholders." Defendant contended that the redemption by him of the debts of the company, after suit under the charter, discharged him of liability. Defendant proved by receipt from the assignee that he had paid and canceled the debts to the amount of \$20,170.46, and had turned over to all the assignees the evidences of deposits. The books showed where defendant had paid depositors therein named, and signed by them. Judgment for defendant. Error.

McCay, J. The stockholder may discharge himself by paying his proportionate share of the outstanding bills. He is not bound to each billholder, but any suing billholder may recover from any stockholder until he has paid up his proportionate share. The statement of the assignee as to the debts and his transactions in their liquidation are prima facie evidence against the creditors. The judgment, however, is reversed by a majority of the court, on the ground that

the court erred in holding that defendant could discharge himself, after notice of suit, by paying depositors other than plaintiff, an amount equal to his full proportionate share of all the indebtedness by the bank to depositors. Judgment reversed.

Cited: 56 Ga. 565; 60 id. 181; 111 id. 194.

THE GEORGIA NAT. BANK v HENDERSON (1872) 46 Ga. 487.

Case for negligence in failing to protest a bill. Plaintiff delivered to the defendant a bill of exchange for collection. Defendant, treating it as a bank check, presented it for payment and protested it for non-payment on the day of maturity, without allowing for days of grace. The plaintiff could not recover from the drawers because of their insolvency. Judgment for plaintiff. Appeal.

McCay, J. 1. A bank, taking a negotiable paper for collection, is guilty of negligence if it fails to have the bill duly protested for non-payment. 2. By the failure of the bank to have it duly presented on the third day of grace, to give notice to the indorsers, they were discharged. 3. It was not necessary for plaintiff to prove in this action that he was the holder of the bill at maturity. That is presumed. Judgment affirmed.

THE MANUFACTURERS BANK v LAMAR (1872) 46 Ga. 563.

On bank notes. The bank notes in question were issued by the defendant, a state bank. The plaintiff had paid taxes regularly on these notes, and had purchased most of them since the war, paying about forty cents on the dollar. Judgment for plaintiff. Error.

Montgomery, J. 1. If the plaintiff had not paid taxes on the notes the defendant was entitled to a dismissal of the suit. 2. The burden of proof was on the plaintiff to prove that he had paid the taxes. 3. A state bank in 1862 was not authorized to issue bills not redeemable in gold or silver coin. The Ordinance of 1865 did not permit parties to give in evidence an illegal intention to relieve themselves from liability. Judgment affirmed.

Cited: 51 Ga. 155.

KIMBRO v THE BANK OF FULTON (1873) 49 Ga. 419.

On bank notes. Plea, Statute of Limitations. The bank notes in question were issued by the defendant, and dated September 20, 1868. The defendant also pleaded that the obligations sued on were given and used with the intention of aiding and encouraging the late rebellion. The Act of March 16, 1869, provided that all bank notes issued prior to June 1, 1865, stood on the same footing as other contracts and came within the provisions of the act. Judgment for defendant. Error.

Trippe, J. 1. The Statute of Limitations does not apply to bank bills as their date is no evidence of the time when they were issued. 2. The bank when sued on its bill, should show by its plea, if it relies on the statute, such facts as will bring the bills within its operation. A plea that the contract is void under the constitution is not sufficient when it states generally that the contract was made to aid and encourage the rebellion. It should set forth the facts going to show how and in what way it gave such aid and encouragement. Judgment reversed.

Cited: 52 Ga. 526; 60 id. 542, 543.

MANUFACTURERS BANK v ELLIS (1874) 51 Ga. 154.

Action to recover the amount of bank bills issued by the defendant, payable to bearer, a part of which were issued before the war, and the others in May and June of 1862. Defendant was chartered by an act of 1850. The defendant pleaded that the bills issued in 1862 were issued and used as confederate currency and were illegally used; that those issued in 1862 were intended and universally understood to be payable in confederate treasury notes, and should be scaled under the ordinance of 1865. The plaintiff demurred. Sustained. Exceptions.

Warner, C. J. The act incorporating the defendant and authorizing it to issue bills, was passed in 1850, and it was bound by its terms. It had no authority to issue bills in 1862, under any other charter, and there can be no pretense that bills so issued were in aid of the rebellion. When it assumed by its plea that it

did so, it repudiated the validity of a public law of the state. Defendant should have set out all the terms of and parties to the alleged illegal contract. Judgment affirmed.

MAYER v CHATTAHOOCHEE NAT. BANK (1874) 51 Ga. 325.

Action of garnishment, on a complaint against M. The defendant made answer showing \$8.47 due M. The book of the bank showed that after the service upon it and before its answer, M made various deposits to meet checks, which had been drawn against them, stating as to each deposit that it was to meet some check which he had drawn. The court charged the jury that if the deposits of M, since the service on the bank, were made to pay checks drawn against them, and if the bank had paid out those amounts on the checks, it was only liable for the \$8.47 disclosed. Verdict for \$8.47. Exceptions.

McCay, J. 1. The garnishee is to answer not only as to his indebtedness to defendant at the time of service, but also as to his subsequent indebtedness, and what effects he has received between that date and the date of answer. 2. The deposits remained the property of the depositor. 3. A bank under summons of garnishment, which receives deposits of the defendant and pays them out, does so at its risk. Judgment reversed.

Cited: 62 Ga. 352; 78 id. 544.

LOWRY v SLOAN (1874) 51 Ga. 633.

Bill for an injunction to restrain defendants from enforcing executions issued on judgments. The judgment was obtained against the bank on its bank bills. The execution having been returned nulla bona, defendants levied on the property of the plaintiff, one of the stockholders. The defendants received \$790 from their share of the assets of the bank, turned over to them in payment of their claim as billholders. The charter of the bank, sec. 11, makes the property of the stockholder to the amount of his shares, liable for the redemption of the bills of the bank. Sec. 18 declares that the stockholders of the bank, at the time when a list of stockholders was advertised, next before the failure of the bank, shall be considered the stockholders at the time of the failure. By the charter, a judgment against the bank was binding on the stockholders. The plaintiff had notice of the suits against the bank and made no defense. The plaintiff made an offer of compromise to the defendants, which was accepted but was not executed by the former. On motion to dissolve the injunction, the court modified it by allowing the defendants to collect \$2,000 on their executions. Defendants excepted.

Warner, C. J. 1. The plaintiff, in contemplation of the law and provisions of its charter, has had his day in court so far as the defendants' judgments are concerned. 2. The plaintiff failing to carry out his offer of compromise had no reasonable or equitable ground of complaint that the defendants took their judgments against him. 3. The defendants having received their pro rata share of the bank's assets, it is the equitable right of the plaintiff to have the amount of the same credited on the defendants' executions against him. Judgment reversed.

LOWRY v PARSONS (1874) 52 Ga. 356.

Action to enforce the liability of a stockholder. The charter of the bank made the individual property of stockholders, as well as their joint property, liable for the redemption of the bills of the bank and for the payment of its debts, provided that the judgment must have been satisfied from the bank's property if possible. If insufficient, then the execution might be levied on the stockholders' property, and the same sold, until the execution should be satisfied. The defendants obtained a judgment against the bank and, the execution being returned nulla bona, collected the money from one of its stockholders. Plaintiffs, previous judgment creditors, claimed a prior lien to the defendants on this money. Judgment for plaintiffs. Error.

McCay, J. 1. A judgment against the bank is a judgment also against the stockholders. 2. Notice to the bank is notice to them and the judgment is conclusive as to them. 3. Judgments have dignity according to date. Judgment affirmed.

GEORGIA RAILROAD AND BANKING CO. v DABNEY (1874) 52 Ga. 515.

Assumpsit for deposits. The defendant pleaded in answer that the deposits were confederate treasury notes, or checks, or drafts, representing and payable in such currency; that it was so understood by both parties when they were made; that in the early part of 1864 the intestate of the plaintiff was notified to withdraw the deposits, or the amount thereof in confederate treasury notes would be set apart for him as a special deposit; that he did not withdraw his deposits; and that such special deposit was set aside and remained until that date. The court charged that the case was within the ordinance of November 8, 1865, which provided that all contracts between June 1, 1861, and June 1, 1865, not yet executed, should receive equitable construction and that either party might prove the consideration and intent of parties, as to the particular currency in which payment was to be made, and its value at any time. Verdict for plaintiff. Motion for new trial. Overruled. Exceptions.

Trippe, J. 1. Under the ordinance of November 8, 1865, the contract between the depositor and the bank, between the first of June, 1861, and the first of June, 1865, enables the depositor to give in evidence the value thereof at the time of deposit, and the intention of the parties as to the particular currency in which the payment was to be made, and the value of such currency at any time. The charge that the case came within this ordinance was not error. 2. The notice to the depositor to withdraw his deposits, or confederate notes would be set aside for him as a special deposit, was not a tender. The jury had the power to give a verdict for the value of confederate money, rated at what it was worth at the time the deposit was made. Judgment affirmed.

BRANCH v BAKER (1874) 53 Ga. 502.

Assumpsit to recover amount of bank bills from stockholder. Bills were issued by the M bank, and acquired by plaintiff. Plea, that they were issued and put into circulation by the bank to aid the confederate states in the rebellion. The court charged that under the state constitution plaintiff could not recover unless he proved that the bills were not issued in aid of the rebellion. Demurrer to plea. Overruled. Judgment for defendant. Appeal.

Trippe, J. 1. Actions by the bona fide holders of bank bills which were issued payable to bearer, and which circulated as money, cannot be controlled by provisions of the constitution of 1868, nor can the illegality of such issue be set up against the holder. 2. If said provisions of the constitution were intended to apply to such cases, they are void under the tenth section of the first article of the federal constitution. 3. The measure of recovery is to be ascertained from the amount of outstanding bills at the time of action and the proportion thereto of defendant's stock, less the amount of the bills he has taken up since suit. Judgment reversed.

STONE v DAVIDSON, ASSIGNEE (1876) 56 Ga. 179.

To enforce stockholder's liability. An execution was issued by plaintiff against a stockholder of a bank, and notice given to the stockholders by publication, pursuant to secs. 3371, 3372 and 3373, of the code, in June, 1869, and a fi. fa. was levied in 1870. The facts of this notice, and the number of shares held by each stockholder, and also of the president's certificate to the stockholders did not appear of record. An affidavit of illegality was made by defendant on the ground that the debt, being an issue of bank bills and having been contracted in 1865, and the fi. fa. not having been issued till 1870, the Statute of Limitations of 1869 barred the action. Judgment for plaintiff. Error.

Jackson, J. 1. The issue of the execution, and not the publication of the notice required by sec. 3371 of the code was the beginning of the action. 2. The statute did not require the record evidence of notice of publication, and of the other facts mentioned. Judgment affirmed.

MILLIKEN v STEINER (1876) 56 Ga. 251.

Claim for land. The plaintiff claimed title under G, assignee of the M Bank. The assignment was executed in 1866, and in 1867, the land was levied on under a judgment against the bank. The question was whether the assignment to G was valid. The charter of the bank provided that the directors should serve

until the end of the first Monday in January ensuing, after election; that at the first meeting after election they should choose one of their number president; that if it should happen that an election should not take place on the proper day, the corporation should not be deemed dissolved, but that an election should be had on some other day. At a meeting of the stockholders held December 20, 1865, the directors were authorized to cause the president and cashier to execute the assignment in question. It was made and delivered in 1866, no new board of directors or officers having been chosen. The court below held that the assignment was valid, and under such instructions the jury found that the property levied upon was not subject to levy. Judgment for plaintiff. Appeal.

Warner, C. J. 1. The provisions of the bank charter that it should be lawful on any other day to hold and make an election of directors, manifestly contemplated that in case an election shall not be held on the day fixed, the acts of the president and cashier shall not be void. 2. If the officers who executed the assignment were not de jure officers of the bank, they were at least de facto officers, and the persons contemplated by the stockholders to make it. 3. Sec. 1494 of the code, providing the manner in which creditors might set aside an assignment, applies only to a voluntary surrender of the charter. Judgment affirmed.

Cited: 59 Ga. 280; 66 id. 615.

MEADOR v DOLLAR SAV. BANK (1876) 56 Ga. 605.

On certificates of deposits. The certificates were payable to the depositor's order, with interest at 7 per cent on call, and 10 per cent per annum. The action was instituted against the bank and the indorsers. Defendant L indorsed the certificates payable to the order of G, and G indorsed in blank. The court admitted parol evidence that the certificates were sold by L to G on an express agreement that L was not to be liable as indorser, and that the indorsements by him were in blank for the purpose of enabling G to collect from the bank. Objection. Overruled. Judgment for defendants. Error.

Bleckley, J. 1. The certificates were virtually payable upon call, which means the same as on demand; and paper payable on demand is due immediately. 2. For a holder to be within the rule of protection, he must have acquired title before the instrument became due. 3. The court erred in admitting evidence as to the indorsement of L. Judgment reversed.

Cited: 62 Ga. 243; 64 id. 50.

HOUSER v PLANTERS BANK (1876) 57 Ga. 95.

On promissory notes. Defendant borrowed money from plaintiffs, agreeing to give interest at the rate of 18 per cent per annum. At the time, the interest was usurious by statute. But after the Act of 1873, abolishing all usury laws, and before its repeal, while there was no law against usury, the notes in suit were given for the money borrowed, and all interest, legal and usurious. Defendant contended that the consideration was illegal and not good to support a new promise, and these two notes were void. Judgment for plaintiff. Error.

Jackson, J. 1. There was nothing illegal in this promise, because there was no law against usury when it was made. 2. This is a case where the consideration is void in part, but good in part. The good part, the righteousness of paying back the money borrowed, is a good consideration to support a promise to pay the money so borrowed and lawful interest thereon. Judgment affirmed.

CITY BANK OF MACON v KENT (1876) 57 Ga. 283.

Action for cash deposited in the defendant bank. The defendant pleaded that the deposit was made by G, who held a general power of attorney from the plaintiff for the management of the money; that the power was exhibited when the deposit was made, and the payment of the deposit was made to G on checks signed by the plaintiff, before the power was revoked; that the acts were ratified by the plaintiff. Judgment for plaintiff. Motion for new trial. Overruled. Exceptions.

Bleckley, J. 1. The power of attorney of G conferred authority to draw out as well as to collect. The agency did not expire when the money was deposited. 2. The officers of the bank were justified in treating as genuine checks presented by the agent bearing the name of the principal. They were sufficient receipts and acquittances for the money paid upon them. 3. The element of ratification goes

to the general fact of the use and control of the money by the agent. 4. A charge that a witness may impeach himself by confession to conduct which, if true, would exclude him from respectable society, is error. 5. Indictments against a witness in a canon contract, found after suit brought, are irrelevant though for forgery and larceny with respect to the consideration of the contract. Judgment reversed.

Cited: 59 Ga. 248; 61 id. 408; 63 id. 171; 75 id. 82; 77 id. 383; 88 id. 339; 91 id. 527; 94 id. 502; 102 id. 667.

CHATTAHOOCHEE NAT. BANK v SCHLEY (1877) 58 Ga. 369.

Trover to recover the value of bonds left with the defendant's assistant cashier, who gave it to the plaintiff, and she indorsed "will pay dividends and coupons" to H. The defendant delivered the bonds to H, who converted them. Verdict for plaintiff. Motion for new trial. Overruled. Exceptions.

Bleckley, J. 1. The bank, though acting without reward, became a bailee, and was responsible for gross negligence. 2. The defendant had no right to surrender the bonds themselves. 3. It is error to charge the jury that they are to determine what is in evidence. Judgment reversed.

Cited: 62 Ga. 99.

CHERRY v LAMAR (1877) 58 Ga. 541.

When a bank's charter, as a condition precedent to the collection of stock subscription, requires calls to be made by the directors and notice given, the Statute of Limitations does not run in favor of the subscribers until the condition is complied with. The judgment creditors of a bank, who, having exhausted their legal remedy, proceed in equity to secure payment of their debts, are not barred if the debts are not barred as between the bank and its debtors. 3. Where the creditors' rights depend upon judgments obtained on its bills, it is immaterial that the cause of action on the bills is barred by the Statute of Limitations.

BURKE v SPEER (1877) 59 Ga. 353.

Bill to restrain the collection of taxes. The complainants, bank stockholders, alleged that they had given in all their property subject to taxation, but that certain *fi. fas.* were proceeding against them for tax upon their bank stock. The president and cashier of the bank had offered to give the receiver of taxes a list of the stock and stockholders, or to return the stock regularly as agents of the stockholders. The defendant tax receiver claimed that the bank should return the tax and pay it as a bank. The Law of 1876 levied a tax on bank stock. Judgment for defendants.

Jackson, J. 1. The legislature had the power to levy the tax, and it being a tax to raise revenue for the state, there can be no judicial interference. 2. The bank did not pay the tax, and the only resort was to make the stockholders pay it under the law. Judgment affirmed.

Cited: 64 Ga. 791; 66 id. 430.

CENTRAL GEORGIA BANK v CLEVELAND BANK (1877) 59 Ga. 667.

Where a bank receives a bill from its correspondent for collection, it is bound to obey the instruction of its customer, and is responsible for any damage resulting from its failure to do so. Where a bill is sent to a bank, in respect to which certain services appropriate to the business of the bank are to be rendered, this is a bailment, for which the bailor in legal contemplation intends to pay a reasonable compensation.

MAYOR OF MACON v MACON SAV. BANK (1878) 60 Ga. 133.

Bill to restrain the collection of taxes. The city of Macon imposed a tax of \$150 per annum on all persons and banking corporations carrying on the business of banking companies in the city. The defendant denied the right of the city to tax its business. Its capital or stock was taxed as capital or property. The Act of 1871-'02, sec. 14, granted the power to the city to levy and collect a tax upon all other persons exercising within the city any profession, trade or calling or business of any nature whatever. Code, sec. 5, declares that the word "person" in all statutes shall include corporations. Judgment for complainant. Error.

Jackson, J. 1. The bank is embraced by all statutes which use the word "persons" as if called therein a corporation. 2. This is not a tax on the franchise

granted to the bank by the charter. 3. A power to tax granted to any municipal corporation becomes part of the charter, and hence the franchise is not violated by this tax, because it became a part of the charter and modified the franchise. Judgment reversed.

Cited: 62 Ga. 650; 64 id. 131.

HOLLAND v HEYMAN (1878) 60 Ga. 174.

Complaint to recover on certificate of deposit. Plaintiffs, depositors, sued H, a stockholder of a bank, to recover for the indebtedness of the bank. The defendant proved that he had held by assignment, duly proven claims against the bank, that he had surrendered them, and that they had been canceled. The amount of the claims was larger than his liability. The plaintiffs proved that defendant was a director in the bank at the time of its bankruptcy and that he had bought up the claims at a discount. Objected to as inadmissible under the pleadings. Overruled. Judgment for plaintiffs. Appeal.

Bleckley, J. 1. The bankruptcy of a corporation does not put an end to its corporate existence, nor vacate the office of the directors. 2. After a bank has been adjudicated a bankrupt, a member of its last active board of directors cannot buy up claims against it at a discount and entitle himself to credit therefor, at full face value, on settlement with creditors on his personal liability as stockholder. 3. When a stockholder is sued as such, and he defends on claims against the bank purchased by him, his legal disability as a director to purchase at a discount may be urged by a plaintiff in reply without any allegation to that effect in the pleadings. In Georgia there is no replication. Judgment affirmed.

Cited: 71 Ga. 121.

JOHNSTON v TALLEY (1878) 60 Ga. 540.

Bill to procure division of bank assets. The M Bank surrendered its charter to the state in 1877. At the time there were undisposed of assets. The bank had ceased doing business before January 1, 1865, and its bills had then ceased to circulate. It had sustained its corporate existence for the purpose of realizing and liquidating. The complainants asked a division of the remaining assets, and that all outstanding bills be barred. Claims were filed by T and others founded on bills of the bank. The court held that the assets were a trust to which the Statute of Limitations did not apply, and decreed payment of the bills. Appeal.

Bleckley, J. 1. Holders of the stagnant bills should have brought suit upon them by January 1, 1870. 2. The bar of the statute can be urged by the stockholders in a contest with the creditors over the assets. Judgment reversed.

FALK v ROTHSCCHILD (1878) 61 Ga. 595.

Action against the indorser of a promissory note payable at a national bank. The defendant moved a nonsuit upon the ground that no notice of non-payment or of protest to him was shown. Motion granted. Judgment for defendant. Error.

Bleckley, J. The proof of notice is part of the plaintiff's case. Notice to indorsers of paper payable at national banks has not been dispensed with by any statute of the United States. A nonsuit as to indorser was properly granted. Judgment affirmed.

Cited: 66 Ga. 703.

BRANCH v KNAPP (1878) 61 Ga. 614.

Bill to enforce the liability of stockholders. The complainants were holders of the bills of the bank. They filed the bill in 1877 and sought to hold the defendants liable for unpaid subscriptions on their stock, because the assignees had not attempted to collect these debts; and also because, under the charter, the stockholders were bound to redeem the bills of the bank in proportion to the amount of the stock held by each. In 1870 the bank made an assignment. The assignees filed a bill to distribute the assets among the creditors, showing that the bank had surrendered its charter, which had been accepted by the legislature in 1869. A final decree of distribution was entered. The complainants participated in the 20 per cent dividends. Causes of action of this nature were barred in six years. The defendants moved to dismiss the bill for want of equity. Granted. Exceptions.

Bleckley, J. 1. After the assignment, the unpaid stock became payable to the assignees at once without notice. 2. The Statute of Limitations began to run as soon as the legislature accepted the surrender of the charter. Judgment affirmed. Cited: 64 Ga. 519.

MERCHANTS AND PLANTERS NAT. BANK v TRUSTEES OF MASONIC HALL (1879) 63 Ga. 549.

Bill for an injunction restraining the further distribution of the assets of the bank, and the appointment of a receiver. The complainants obtained a judgment against the bank, and execution was issued which was returned nulla bona. The bank had gone into liquidation. The president and the stockholders were made parties. The stockholders filed a bill in the United States Court some time before, but no receiver had been appointed. Judgment for complainants. Error.

Jackson, J. 1. The bank is no longer an agent of the United States, it having gone into liquidation. 2. If the bill filed in the United States Court were similar to this and could accomplish the same end, to wit, the collection of this debt, neither law nor equity would require the state court to wait upon the United States Court in a case like this. Judgment affirmed.

RICE v GEORGIA NAT. BANK (1879) 64 Ga. 173.

Assumpsit. Defendant owed the plaintiff bank \$12,000. As collateral security plaintiff held claims of defendant against the state amounting to \$17,000. There was an accounting between plaintiff and defendant. Plaintiff surrendered to defendant his notes and marked them paid. The collaterals were distributed between the parties. Plaintiff gave a new note for the balance. The court instructed the jury that the burden of proof was on the defendant to show that the accounting was intended to operate as a payment and cancellation pro tanto of plaintiff's claim against defendant. Judgment for plaintiff. Appeal.

Hillyer, J. As a matter of law the transaction on its face constitutes a payment, and if the bank alleged the contrary, the burden was on the bank to prove it. Judgment reversed.

MERCHANTS AND PLANTERS NAT. BANK v TRUSTEES OF THE MASONIC HALL (1880) 65 Ga. 603.

Bill to recover money and to appoint a receiver, charging that defendant was indebted to the plaintiffs on a judgment for damages; that the bank had gone into voluntary bankruptcy, and committed other acts harmful to the plaintiffs. Thereafter, before plea or answer, the bill was amended. The amendment set forth in detail the facts alleged in general terms in the bill. The plea was that inasmuch as the secretary and treasurer of the Masons in disposing of the bonds committed a felony, the Masons could not maintain this action without prosecuting on the criminal side, or showing some good reason why. The defendants also insist that when the amendment was filed it was a new case. Demurrer. Sustained. The court refused to refer the cause to an auditor. The defendant offered his answer as evidence. The amendment was allowed. Appeal.

Hawkins, J. 1. There was no error in allowing the amendment. The creditors of the bank could compel Branch to account for the assets as far as to pay their debts. And the bank, having gone into voluntary liquidation and ceased its connections with the government of the United States, was subject to like proceedings as domestic corporations. If its president had and held a fund liable to the payment of debts, a court of equity could reach and appropriate such assets in payment of a debt of the bank. 2. The demurrer was properly sustained. 3. A proper amendment does not operate to postpone the trial term. 4. The court was right in refusing to refer the case to an auditor. 5. The defendants could not use the answer as evidence. 6. As the case was not brought here for delay, damages will not be awarded. Judgment affirmed.

THE CITY BANK OF MACON v CROSSLAND (1880) 65 Ga. 734.

Bill to subject the assets of defendant, a bank, in the hands of an assignee to the payment of debts, and to obtain decrees for the debts of the complainants preparatory to enforcing the same against the stockholders. The court referred the cause to a master. He found the amounts due complainants, the names of the stockholders and amounts owed by them and defendant's assets. The court there-

upon allowed each complainant a judgment against defendant for the amount due him, with interest and costs. Decree for complainants. Appeal.

Hawkins, J. 1. The complainants were properly in a court of equity. 2. The creditors rightly obtained the decree. 3. Should they seek to enforce these judgments against the stockholders, and the stockholders pay them, the stockholders would be subrogated to their rights. 4. There could be no decree for creditors not before the court. 5. Receiving payment of a part of complainant's debts, and the ratification thereby of the deed of assignment, did not impair the right to seek satisfaction of their claims reduced by a legal or equitable proceeding against the assets of the bank or of the stockholders. Judgment affirmed.

Cited: 111 Ga. 809.

TERRY v MERCHANTS AND PLANTERS BANK (1880) 66 Ga. 177.

Debt on a dormant decree obtained in the United States Circuit Court against the defendant bank. On motion it was ordered that the case be dismissed, the defendant having become extinct by the expiration of its charter after suit was begun. Motion to reinstate the cause denied. Exceptions.

Crawford, J. There was nothing for the court to act upon but a dead corporation pursued by an individual creditor to obtain an individual judgment upon a dormant decree. We think that the ruling of the judge was right. Judgment affirmed.

SEAY v BANK OF ROME (1881) 66 Ga. 609.

Bill for receiver and injunction. The defendant, a bank, gave a bond as a state depository, which created a lien in favor of the state on the property of the bank to the amount of \$50,000. The bank assigned, owing the state more than this sum. Defendant contended that the bond was void because provided for by an act, to establish state depositories, and to prescribe their duties and liabilities. The court below held that the state was entitled to a prior lien over all other creditors for the full amount of the debt due it. Exceptions.

Cripp, J. 1. Upon the execution of the bond, the law gave the state a lien on all the property of the bank. 2. Aside from the bond, the state has priority of payment out of the state of an insolvent. 3. The clause providing for the bond was sufficiently indicated by the title of the act. 4. The lien of the state extends to all defendant's property. Judgment affirmed.

Cited: 74 Ga. 269; 79 id. 161; 94 id. 97.

NAPIER v CENTRAL GEORGIA BANK (1882) 68 Ga. 637.

On promissory note. The Central Bank brought suit on two promissory notes for money advanced on twenty-five shares of factory stock. In the notes it was stipulated that if they were not paid at maturity, the bank might sell the stock and supply the proceeds to the payment of the notes without further notice to the maker. The notes were unpaid, but the stock was not sold. The defendant pleaded that he had given notice to the bank to sell the stock both before and after the maturity of the note, that the bank had disregarded the notice because some of its officers and stockholders were largely interested in the factory stock, and were engaged in an effort to depreciate the same; that they did so depreciate its value, and that the defendant was injured by the refusal to sell as directed in the sum of \$1,250. Demurrer. Judgment for plaintiff. Error.

Crawford, J. The plea stated a good defense. Judgment reversed.

Cited: 10 Ga. 746.

NUTTING v HILL (1883) 71 Ga. 557.

Assumpsit on promissory note. Plaintiff sued as assignee and receiver of a bank. Defendant pleaded as a setoff that the bank had been indebted to certain depositors, who, after the assignment made by the bank to the plaintiff, assigned their claim to defendant. Demurrer to plea. Sustained. Judgment for plaintiff. Error.

Blandford, J. The demurrer to the setoff was properly sustained. It nowhere alleged that the plaintiff's assignee was an assignee with notice, or that they were not bona fide assignees without notice. Code (sec. 2244) is decisive of this question. Judgment affirmed.

COLQUIT v SIMPSON (1884) 72 Ga. 501.

To recover land purchased by the president of the Bank of Rome as an individual. The defendant, as governor of the State of Georgia, under an act of the legislature of 1879, issued an execution against the bank and its sureties, which was levied upon the land in question, April 1, 1881. The question raised was whether the land was subject to the state's lien and to levy. The jury found the property subject, and the court granted a new trial. Error.

Jackson, C. J. 1. The law informed plaintiffs that the bank was a state depository; they knew that the grantor was president, and that the bank had to give bond and security. This was enough to put them on inquiry whether the grantor was not one of the sureties. The forgery of Mrs. Deason's name to the bond was no defense. 2. They were not purchasers without notice of the state's lien. Under the Act of October 16, 1879, the levy was rightfully made. Claimants can make no defense that the surety could not make. The bank is not a public officer under the code, secs. 148-171. The verdict of the jury was right. Judgment reversed.

Cited: 72 Ga. 515, 519.

MATHIS v MORGAN (1884) 72 Ga. 517.

Injunction to restrain sheriff from enforcing levy on the property of plaintiff as surety on a bond given by a bank as principal, it having been appointed a state depository. Plaintiff contended: 1, That, as the governor selected the bank as a solvent bank, when it was insolvent, and published it as one of the depositories, which fact induced plaintiff to become a surety, he was freed from liability; 2, that, as he delivered the bond to the president of the bank in escrow not to be delivered to the state until certain other persons signed, and as one of these other signatures was forged, plaintiff was freed from liability; that the bank charter was forfeited because all the original members had sold out; that the returns were not according to law. Injunction granted. Exception.

Jackson, C. J. 1. The case of the surety is not bettered because he put his name to the bond of the bank because of its selection as the agent of the state. Nor did the state, by reason of the law which required the selection of a solvent bank, represent it to be solvent, and thereby make a false representation on which the surety relied when he signed the bond. The surety was put on inquiry as to the bank's condition. The conduct of the governor was not fraudulent. The charter of the bank was not forfeited. It was incumbent on the surety to see that the bank faithfully accounted and made proper returns. The forgery of Mrs. Deason's signature is no defense. The surety is estopped. Judgment reversed.

Cited: 76 Ga. 802.

SAVANNAH BANK & TRUST CO. v HARTRIDGE (1884) 73 Ga. 223.

Assumpsit on a promissory note. Defense: That the note was without consideration, and recoupment. H, the cashier of the plaintiff, wishing to procure money of the bank to buy stock in another corporation, applied to the defendant, who knew that an officer of the bank could not become its debtor. The defendant purchased the stock, and H advanced money on his note. The stock was deposited as security, H assuming the payment of the note, the stock to belong to H. The bank did not know of the agreement. Soon after the note was given, H gave the defendant permission and he affected a sale of it on time. H refused to deliver the stock. The sale, if carried out, would have paid all except \$2,900 of the note. Afterward the stock was sold by the plaintiff, leaving \$7,900 of the note unpaid. The jury found the recoupment for the defendant, and for the plaintiff on the other issue. Motion by plaintiff for a new trial. Denied. Exception.

Blandford, J. 1. The contract between the defendant and H, being contrary to the rules of the bank, and known to the defendant to be so, was illegal, and the bank was not bound thereby without notice or ratification. 2. The bank held the note of the defendant and the stock pledged for its payment, unaffected by any arrangement made with H. Judgment reversed.

Cited: 75 Ga. 154; 92 id. 739; 110 id. 847.

CENTRAL R. R. v FIRST NAT. BANK (1884) 73 Ga. 383.

Money had and received. A draft drawn on M and G was indorsed by the cashier of the plaintiff, authorizing the C Bank as agent to collect the same. The

draft was left by the C Bank with the defendant, which collected the proceeds. On demand by plaintiff the proceeds were refused, the defendant contending: 1, That the C Bank was indebted to it, and had received credit for the amount collected; and, 2, that there was no privity between the plaintiff and the defendant. The C Bank had failed before the proceeds were collected. Judgment for plaintiff. Error.

Blandford, J. 1. The defendant had no right to retain the proceeds of the draft as payment for any balance due it by the C Bank. 2. The reception of money by one, and the demand by the other, make all the privity that is necessary to maintain this action. Judgment affirmed.

FOUCHE, ASSIGNEE, v BROWER (1884) 74 Ga. 251.

Bill for an accounting and for a delivery and transfer of property. The defendant became the owner of all the stock of the Bank of R. He transferred it all to F S & Co., and simultaneously with the transfer, without consideration, the firm conveyed to the defendant all of the property and assets of the bank except the banking house. The bank was insolvent and the question raised was whether the voluntary assignee could maintain a suit against the defendant for his participation in this alleged fraud. The assignment was made by the bank. Verdict for defendant. Motion for a new trial. Overruled. Error.

Hall, J. The voluntary assignee cannot maintain suits for the benefit of creditors, for whom he holds in trust the effects assigned, which the assignor could not maintain. Judgment affirmed.

Cited: 77 Ga. 634, 635; 107 id. 817.

REYNOLDS, ASSIGNEE, v SIMPSON (1885) 74 Ga. 454.

On bank checks. The assignee of the R Bank sued defendants for \$1,500 paid out by the bank on defendants' checks. Plea: setoff of protested drafts of the bank. B was the manager of certain iron works which failed. B had drawn large drafts on the iron works, which had been discounted by the R Bank. B told S, president of the bank, that if he could work off the raw material and sell it, the debts due the bank could be paid; but in order to do this it would be necessary to have supplies. S thereupon told defendants to let B have goods until he should instruct them otherwise, and that the bank would pay for them. The defendants accordingly sold the goods to B. The directors and stockholders of the bank approved the action of S. Subsequently the bank assigned to the plaintiff. The assignee contended that the bank exceeded its powers by engaging in a business venture to collect its debts, and that the verdict was contrary to the evidence. Defendants testified to whom and under what circumstances the credit was given. The court instructed that the bank would not be liable if the contract made it a surety, and if B was also liable for the goods and received the benefit, it was a contract of suretyship. Judgment for defendants. Error.

Hall, J. 1. Where a banking corporation acquires possession of property in payment of a debt, and furnishes supplies for its preservation, the corporation is not chargeable with exceeding its corporate powers. 2. The defendants' testimony was a statement of fact and was properly received. 3. The instruction was proper. Judgment affirmed.

SAVANNAH BANK & TRUST CO. v HARTRIDGE (1885) 75 Ga. 149.

Assumpsit on a promissory note. H, the cashier of the plaintiff bank, made a contract with the defendant to purchase stock for him. The defendant gave his note to the plaintiff and deposited the stock as security. H advanced the money of the plaintiff to pay for the stock. The contract was known to both to be contrary to the rules of the plaintiff. The defendant, by M's permission, sold the stock, and H refused to transfer it, stating that he would sell the stock and pay the note. The bank did not know of this until long subsequent. The defendant sought to recoup the difference between what the stock would have brought at the time the cashier refused to transfer, and what it finally brought. There was no evidence of a ratification by the bank. The court charged that defendant had a right to dispose of his stock to protect himself, and recoup his loss, and the jury allowed the sum claimed by defendant in recoupment. Judgment for plaintiff. Error by plaintiff.

Blandford, J. The consummation of the contract amounted to a misappro-

priation of the bank's funds for which Hatch and Hartridge were liable. The charge as to the recoupment and setoff was proper. Judgment reversed.

Cited: 76 Ga. 551; 78 id. 588.

DICKEY v LEONARD (1886) 77 Ga. 151.

Assumpsit. The plaintiff purchased from the defendant, the assistant cashier of the Citizens Bank, drafts on New York. At the time the bank was insolvent. The drafts being unpaid were returned to the plaintiffs, who were compelled to pay the full amount thereof. Plaintiffs sued L for the loss sustained. They alleged that the defendant undertook and promised, when he sold the drafts, that the bank had sufficient funds in New York to meet them when presented in due course of business, which promises deceived and defrauded the plaintiffs. There was no allegation that plaintiff parted with his money because of fraud of defendant. There was no super se assumpsit. Judgment for defendant. Appeal.

Blandford, J. 1. The action is not one of debt. 2. The declaration was bad as an action of assumpsit. 3. As an action for damages on account of the fraud of the defendant it is fatally defective. Judgment affirmed.

MORGAN v BROWER (1886) 77 Ga. 627.

Bill to charge a former stockholder. The defendant owned all the stock in the Bank of Rome. There were no debts due by the bank when he determined to go out of business. F S purchased the building and fixtures, and requested the defendant to transfer the charter to him. He transferred all the shares of stock to F S without consideration, but at the same time the bank transferred all the assets, amounting to \$40,000, to the defendant, who gave notice under sec. 1496 of the code of his transfer of stock. Afterward the bank became a state depository, and the plaintiff became a surety to the state. The bank failed, and the plaintiff paid \$25,000 to the state as surety. There were other creditors of the bank, whose indebtedness accrued after the transfer of stock by B, and after the lapse of six months after the notice of the transfer. The plaintiffs sought to hold the defendants liable to the amount of the assets of the bank at the time he made the transfer of stock. Evidence of the good faith in the transaction was admitted. Judgment for defendant. Appeal.

Blandford, J. 1. As the defendant's acts were not relied upon for any purpose by the plaintiffs, there is no liability on his part to them, and they can maintain no suit in equity against him. The evidence was properly received. Judgment affirmed.

THE CONTINENTAL NAT. BANK v FOLSOM (1887) 78 Ga. 449.

On attachment bond. The plaintiff, a national bank located in New York City, which had given a bond as a condition of commencing an attachment suit, sued the defendant, as principal, and C W, of Fulton County, Ga., as surety on an attachment bond. The plaintiff was a resident of Fulton County, and suit was brought in the state court having jurisdiction. The bank filed one plea to the jurisdiction, and another to the effect that service on C W, as surety, was not legal service upon it as provided by sec. 3354 of the Georgia Code, because said section was unconstitutional. Judgment for plaintiff. Appeal.

Hall, J. 1. The bank having voluntarily submitted itself to the jurisdiction of the court in the attachment proceedings, the court has jurisdiction on the attachment bond. 2. By sec. 3354 of our code, service upon the surety was service upon the principal, and this law does not conflict with the fourteenth amendment of the Constitution of the United States. Judgment affirmed.

RICKS v BROYLES (1887) 78 Ga. 610.

Rule to show cause why the defendant should not pay plaintiff certain money. Defendant was receiver of a certain concern. It was his duty to take charge of furniture, dispose of it, and hold the proceeds subject to the court's order. Instead he deposited the proceeds without any order from the court in a private bank, which failed. Judgment for defendant. Exceptions.

Bleckley, C. J. 1. Where money awaiting the result of litigation is in the possession of a receiver at the place of permanent custody, and he has no further duty in respect to it but that of preservation, it is already in court. 2. The receiver, being

the hand of the court to hold it, he cannot pay it or part with his actual custody of it by depositing it in bank, save at his own risk, without some leave or direction authorizing him how to dispose of it. 3. It was a loan made under the name and with all the evidence of a general deposit. Judgment reversed.

Cited: 96 Ga. 259.

FLOURNOY v THE FIRST NAT. BANK (1887) 79 Ga. 810.

On bill of exchange. The First National Bank brought suit on a draft drawn by S & Bro. on the defendants and accepted by them. The bank discounted the bill for S & Bro., who were its customers, and at the time of maturity had a large amount on deposit. The defendants claimed that the bank was bound to apply the funds of the drawers to the payment of the bill. One witness was examined before a commission to take testimony. It did not expressly certify to the identity of the witness examined. Judgment for plaintiff. Appeal.

Bleckley, J. A bank which is the holder of a bill of exchange owes no duty to the acceptor to pay it out of the drawer's fund on deposit. There is no such duty devolving on the payee of the dishonored paper. It is the drawer who is surety for the acceptor, not the acceptor for the drawer, hence recovery should be had first from the acceptor. The payee of a bill is not affected by the equities between drawer and acceptor. There is no statute or rule of court which requires any certificate of identity, though such statement in the return is usual and proper. That the commission examined the wrong person is not to be presumed. Judgment affirmed.

HILL v SILVEY (1888) 81 Ga. 500.

Bill to enforce contribution by stockholders. By the charter of the Citizens Bank the minimum capital stock was fixed at \$1,000,000, which was by an amending act reduced to \$200,000. Under the amending act there was a subscription list of more than \$400,000. A call was made for 50 per cent of the amount subscribed. No publicity was ever given to the subscription list. Some time later, resolutions were passed by the stockholders declaring that certificates of stock be issued to each stockholder on an amount of stock as large as the sum actually paid in by him. The capital stock was never greater than \$187,000. The bank became insolvent and receivers were appointed. They brought suit to collect from the stockholders the remaining 50 per cent on their subscription. Judgment for defendants. Appeal.

Gustin, J. The rule with regard to unpaid subscriptions is this: Whatever sum is subscribed by the stockholders, and held out to the public as the stock of the corporation, is liable to be called in for the payment of its debts. The stock as originally shown by the subscription list was never held out to the world as the stock of the corporation, and the creditors did not rely thereon. The resolutions released the stockholders. To the extent of \$200,000, the minimum capital stock allowed by the charter, creditors had a right to presume that the stock had been subscribed and to that extent the stockholders are liable. Judgment affirmed.

THE ATLANTA NAT. BANK v BURKE (1888) 81 Ga. 597.

Money had and received. The plaintiff took from K a promissory note payable one year after date, and a deed to secure it, both signed by K's wife, and gave K a check payable to Mrs. K. The check, with Mrs. K's name forged thereon, and indorsed by K, was presented by the latter at the defendant bank and cashed. Later plaintiff's bank book was balanced and his checks returned. On maturity of the note interest was paid to the plaintiff by K, and a renewal note given. Mrs. K's signature to the notes and deed and her indorsement on the check were forged. This was unknown to the bank and to plaintiff for three years. Plaintiff sued the bank to recover the amount of check with interest. Verdict for plaintiff for the principal with interest from date of the check. A new trial was denied on condition that the plaintiff strike off the interest to date of suit. Appeal and cross appeal.

Blandford, J. 1. The bank did not pay the money to the plaintiff or to the person to whom he directed it paid, or to her order, for the indorsement was forged. Nor was the plaintiff guilty of such laches as to relieve the bank of liability to him. 2. The bank was entitled to hold the money without interest as it was a general deposit. The bank not having paid out the money, there is no reason why the depositor should have interest on it. Judgment affirmed.

GEORGIA RAILROAD AND BANKING CO. v LOVE AND GOOD WILL SOCIETY
(1890) 85 Ga. 293.

To recover deposit. The plaintiff made deposits with the defendant company, and thereafter M, the treasurer of the plaintiff, withdrew from the bank by checks a certain sum. C, the secretary of the plaintiff, by forging M's name to several checks, withdrew from the bank a larger amount. The plaintiff sued the bank for the amount deposited less the sum checked out by the treasurer. The bank tendered the net balance. Judgment for plaintiff. Error.

Simmons, J. When a bank receives money on deposit from a person, it must be certain when it pays it out that it does so upon the depositor's order. It cannot avoid liability by showing that it acted in good faith, and that it believed from inquiry that the person presenting the checks was authorized to sign them. The bank is liable when it pays money on a forged check. Judgment affirmed.

HILL v WESTERN & ATLANTIC R. R. CO. } (1890) 86 Ga. 284.
HILL v THE GATE CITY NAT. BANK }

Money had and received. The plaintiff, as receiver of the Citizens Bank of Georgia, brought separate suits against the defendants, alleging that after the insolvency of the Citizens Bank was known to the defendants, the bank without consideration delivered to them the amounts now sued for, and then made an assignment for the benefit of its creditors. Motion for nonsuit in each case. Sustained. Exceptions.

Falligant, J. Sec. 4429 of the code applies specially to banks, and is intended to prohibit preferences by a bank insolvent at the time, or in contemplation of insolvency. Where an insolvent bank makes an assignment, and the assignees accept the trust, the title to all property passes to the assignee together with the right to sue for all credits. Such transfers as these are fraudulent and void, except as to bona fide purchasers without notice, and the effects so fraudulently transferred become a trust fund in the hands of the transferees, which may be recovered by the receivers. A depositor or other bona fide creditor who draws his check will be considered a bona fide purchaser under sec. 4429 of the code. For a receiver to maintain these suits it is not a condition precedent that the officers consenting to the transfer be first prosecuted. Judgment reversed.

Cited: 107 Ga. 582.

FREEMAN v EXCHANGE BANK OF MACON (1891) 87 Ga. 45.

On bill of exchange. A bill of exchange was drawn at Kansas City by B upon R, agent, Macon, Ga., payable at sight to their own order. It was indorsed by them thus: "For deposit to the credit of B." There was a second indorsement in these terms: "Pay Exchange Bank, or order, for collection account of National Bank of Kansas City. M, cashier." The bill, after its receipt for collection under the latter indorsement, was paid to the Exchange Bank at Macon, and thereupon, while that bank had possession of the money, a garnishment, issuing at the instance of the plaintiff as a creditor of B, was served upon it. Verdict for defendant. Petition for certiorari dismissed, and finding of jury sustained. Appeal.

Bleckley, C. J. An indorsement for collection or the like is but the creation of a power, the indorsee being a mere agent to receive or enforce payment for the indorser's use. A suit is not maintainable by such indorsee against the indorser. The garnishment fastened upon the proceeds before the agency created by the indorsement had been fully executed. The Kansas City Bank was still the immediate agent under B, and the defendant was a subagent under it. The latter held the money as bailee for the ultimate use and benefit of the owners, and it could therefore be reached by garnishment. Expert testimony is not admissible to aid in the interpretation of an indorsement having a definite legal import, and being expressed in terms free from ambiguity. The jury erred in finding for the garnishee, the certiorari should have been sustained for that reason. Judgment reversed.

Cited: 89 Ga. 108.

FREEMAN v SAVANNAH BANK AND TRUST CO. (1891) 88 Ga. 252.

Money had and received. Defendant received a check by mail from the bank of D, dated at Darien, for \$278.81, drawn on defendant in favor of plaintiff by the H & D Co. The check was indorsed with plaintiff's name, and also "Pay to the order of Savannah Bank and Trust Company for collection for account of Darien

Bank, Darien, Ga. Frank S. Bander, cashier." The defendant, having funds of the drawer, credited the bank of D, and charged the drawer with the amount. On March 7 defendant received from plaintiff notice that the indorsement was forged. On May 2, defendant returned the check to the bank of D, charged the amount to that bank, and credited the drawer with a like sum, stating the indorsement to be forged. Judgment for defendant. Appeal.

Per curiam. The payee of a check whose indorsement thereon has been forged has no right of action against the bank upon which it is drawn for money had and received, because the bank, supposing the indorsement to be genuine, charged the amount of the check to its depositor, and credited its correspondent. Judgment affirmed.

MAY v JONES (1891) 88 Ga. 308.

Libel. The plaintiff brought an action of libel against the defendant and the Merchants Bank of Atlanta for damages to his credit as a business man by reason of a draft being protested for non-payment by the defendant, a notary public and employee of the bank. Demurrer. The action was dismissed. Error.

Lumpkin, J. It is libel for a notary public to maliciously and falsely protest the acceptance of a manufacturer, and to send it back "to the source from whence it came." A bank is not liable for the negligence or misconduct of a notary employed by it to protest negotiable paper. The notary is not an agent or servant of the bank, but is a public officer sworn to discharge his duties properly. When he acts in his official capacity, the bank has no longer control over him and cannot direct how his duties shall be done. Where a declaration sets forth a cause of action as to one of two or more defendants, it will be error to sustain a joint demurrer. Judgment reversed.

Cited: 88 Ga. 339; 89 id. 368; 111 id. 870.

MUNNERLYN v AUGUSTA SAV. BANK (1891) 88 Ga. 333.

Money had and received. The plaintiff in behalf of beneficiaries sued to recover of the bank certain money claimed to have been deposited by him as trustee. Defendant pleaded that the money in question was paid back to the plaintiff. He moved to strike out the plea on the ground that the defendant was not legally discharged by permitting plaintiff to draw by his own check money collected by the bank upon his check as trustee. Judgment for defendant.

Lumpkin, J. When a trustee deposits money in a bank to his credit as agent, he may sue for it as trustee and join the beneficiaries. The bank would be discharged by paying it back to the individual who made the deposit; and in the absence of knowledge or notice to the contrary, would have the right to assume that he would appropriate the money to its proper uses and trusts. In the case of general deposits, the Statute of Limitations does not run until demand is made. A deposit by a trustee to his credit as agent is not a conversion of the fund deposited. Judgment reversed.

Cited: 94 Ga. 357; 98 id. 520; 102 id. 204.

MERCHANTS NAT. BANK v GUILMARTIN (1892) 88 Ga. 797.

Debt. The plaintiff deposited bonds with the defendant bank as a special deposit, and they were stolen from the bank by the cashier and appropriated to his own use. The deposit was not taken in the regular course of defendant's business, but simply for the accommodation of plaintiff. Plea of nil debet. Judgment for plaintiff. Error.

Lumpkin, J. The act of the cashier by which he appropriates a gratuitous special deposit in the bank is not an act done in the bank's business and within the scope of his employment. Such a fraud is not to be imputed to the bank as its own fraud. A special deposit is gratuitous when it is accepted for the depositor's accommodation. Judgment reversed.

Cited: 95 Ga. 284, 395.

EAGLE & PHOENIX M'F'G CO. v BELCHER (1892) 89 Ga. 218.

Where the evidence was not clear whether money was deposited with a bank by a grandparent for the benefit of a grandchild, or whether it was delivered by the mother of the child to the grandparent for the purpose of deposit, and the bank,

after receipt of a written notice from the mother forbidding payment, paid the money to the grandparent, it was held that the questions were properly for the jury.

PLANTERS LOAN AND SAV. BANK v BERRY (1892) 91 Ga. 264.

Attachment under the state law of Georgia. The bank gave a bond to dissolve the garnishment. Judgment was entered under the bond against the bank and the sureties. Appeal.

Bleckley, J. The judgment was the outcome of the original suit brought against the bank by attachment. It could not be heard as the court had no jurisdiction. The giving of the bond was not equivalent to an appearance. The United States statutes prohibit the seizure of property of national banks before judgment by attachment under state laws. The judgment was wholly void. Judgment reversed.

TOWNSEND v STATE (1893) 92 Ga. 732.

Indictment for forgery. The defendant was held for making a bill of exchange in a fictitious name, and he was convicted under sec. 4453 of the code relating to the issuance of a bill of exchange in a fictitious name. The only question was whether a bank check, in the ordinary form, is a bill of exchange. Error.

Simmons, J. The forgery of a check can be dealt with under another provision of the code. A check is not in common-law parlance, or in the technical language of the books, called a bill of exchange. The paper in question being an ordinary bank check, the conviction was wrong. Judgment reversed.

MERCHANTS NAT. BANK OF SAVANNAH v DEMERE (1893) 92 Ga. 735.

Trover for bonds. G, the cashier of the bank, desiring to borrow \$10,000, induced the plaintiff to apply to the bank in his own name for a loan of that amount, it being privately understood between them that the money when obtained should be turned over to G, and that he should furnish certain stocks and bonds to be put up in D's name as collateral security to the bank on the plaintiff's note for the loan. The loan was granted, and the money turned over as agreed. The bank was ignorant of the nature of the transaction. G committed suicide. Upon examination of his accounts it was discovered that he had abstracted the collaterals in question, leaving the plaintiff's note unsecured. The plaintiff's note falling due, he tendered a check in payment of it and demanded the collaterals he had deposited to secure it. The demand being refused, he brought an action of trover against the bank for them. Verdict for plaintiff. Appeal.

Simmons, J. It was fraud on the part of the cashier to withhold the facts from the other officers of the bank at the time of the loan, and the plaintiff, being privy to the deception and having stood by without communicating the facts until his partner in the fraud had misappropriated the collaterals, cannot now require the bank to make good to him their value. Where other loans are made under an agreement pledging collateral for the payment of any general balance due or to become due, the borrower cannot withdraw such collaterals without consent of the bank, or payment of the loan, if the bank is the holder of other just demands against him. Under the Evidence Act of 1889, plaintiff could not give testimony concerning a conversation had with the president of the bank, it appearing that he was dead, and it not being shown that the persons in whose presence it took place, heard what was said. Judgment reversed.

Cited: 106 Ga. 332; 108 id. 532; 110 id. 149; 112 id. 827.

MERCHANTS NAT. BANK v GUILMARTIN (1893) 93 Ga. 503.

To recover special deposit. Plaintiff deposited with defendant certain bonds, subject to his order, which defendant took gratuitously as an accommodation to plaintiff. He had demanded the bonds, but the bank had refused to deliver them, pleading that without fault on its part they were stolen by its cashier. There is evidence that the president of the bank knew that G was engaged in numerous speculations on margins. Verdict for plaintiff. Motion for new trial overruled. Error.

Simmons, J. The standard of care in bailments of this kind is that care which men of common sense use in the management of their own property. The bailment being gratuitous, the bank is liable only for gross negligence. The burden is on the plaintiff to show that the bank was grossly negligent. If the president knew that the cashier was a speculator or had such knowledge as

would have put any man in the exercise of slight diligence on inquiry as to the transactions of the cashier, and if no such inquiry was made, and because of the failure to make inquiry, the cashier was left in charge of the plaintiff's property, with the opportunity to steal it, and did steal it, the jury could consider these facts in deciding whether the bank was guilty of gross negligence. Judgment affirmed.

Cited: 95 Ga. 395.

STATE v BROBSTON (1894) 94 Ga. 95.

Petition for direction. The defendant was receiver of the Brunswick State Bank, which was a state depository, and became insolvent while indebted to the state, which contended that its claim should be fully satisfied in preference to all others. Many depositors were also indebted to the bank on promissory notes, and claimed the right in settling with the receiver to set off against their notes to the bank the amounts of their respective deposits. The court ordered the receiver to disregard the claim of the state as a prior lien on the assets of the bank to the exclusion of the depositors, and to offset upon said notes whatever sums might have been to the credit of the depositors at the time of the closing of said bank. The plaintiff excepted.

Lumpkin, J. These notes were assets only in so far as there might be due to the bank balances upon them after deducting the amounts of the respective deposits, if those deposits were made bona fide while the bank was engaged in the transaction of its regular business, and had control of its books. A receiver takes the property over which he is appointed receiver, subject to any setoff which the defendant might have against the original owner. A receiver acts at his peril in allowing setoffs, and will be responsible for any error he may make. Judgment affirmed.

BAILIE v AUGUSTA SAV. BANK (1894) 95 Ga. 277.

Assumpsit. The plaintiff deposited a check in the defendant bank, which forwarded the same to the bank at Wilmington, on which it was drawn. Two days later that bank failed, having made no remittance for this check. It then had to the credit of the drawer an amount considerably in excess of the amount of the check. Judgment for defendant. Appeal.

Simmons, C. J. Ordinarily a bank receiving from a depositor a check on another bank, and crediting it on the books not as cash but as a check, will not be held to be an absolute purchaser of the check. A customer from whom a bank receives paper for collection has a right to assume that the undertaking of the bank comprehends the whole service to be performed, and that the agent employed by the bank is its own agent and not the agent of the customer. An agent is liable for a subagent employed by him. Judgment reversed.

COMER v DUFOUR (1894) 95 Ga. 376.

On check against an accommodation indorser. The parties agreed that the defendant indorsed a check for B, who was a stranger to the bank where it was presented. It was cashed, and on the same day forwarded by mail to a correspondent, the C Bank, for collection. The C Bank sent it to the drawer for payment by its runner, and it was paid partly in cash and partly by the drawer's check on the W Bank. The runner kept the check about two hours before presenting it, although the W Bank was near. The drawer failed before the check was presented. The C Bank replevied the original check during the afternoon and protested it, and on the next day returned it. Judgment for defendant. Appeal.

Simmons, C. J. If the acceptance of the drawee's check does not of itself discharge an indorser of the original check, he will be discharged if its substituted check is not presented promptly and the collection is thereby defeated. The check could have been presented in a few minutes. The delay defeated the collection. The collecting bank failed to exercise due diligence, and its principal, the plaintiff, was not entitled to recover against the indorser. Judgment affirmed.

MERCHANTS NAT. BANK v CARHART (1894) 95 Ga. 394.

Assumpsit to recover the value of certain property deposited by the plaintiff with the bank for gratuitous safe-keeping, and subject to his order. C proved the

deposit and subsequent demand, and the refusal of the bank to deliver the property. Judgment for plaintiff. Appeal.

Lumpkin, J. A prima facie case for the plaintiff was made out by introducing evidence of the deposit and failure to deliver same upon demand made therefor. The burden was cast upon the defendant of showing that it had exercised at least slight diligence in the care and keeping of the property. It should have shown that it exercised a slight supervision of the cashier, and had no reason to suspect him. The question whether or not the bank observed that degree of diligence which was due to the plaintiff is not dependent upon the fact that under similar circumstances it trusted its cashier with its own property of like kind. What the bank ought to have done cannot be arrived at by showing what it actually did in other matters relating to its own affairs. Judgment affirmed.

GEORGIA SEED CO. v TALMADGE & CO. (1895) 96 Ga. 254.

Interventions. The M Bank failed, and its assets were placed in the hands of a receiver. At the time of the failure, the M Bank was indebted to the defendant on promissory notes not yet matured. The M Bank had to its credit on deposit with the defendant an amount of money less in amount than the aggregate of the notes. Before the failure, the M Bank had drawn checks on the defendant in favor of the plaintiff which the defendant refused to pay, claiming the right to appropriate the deposit to the payment of the notes. Judgment for defendant. Error.

Lumpkin, J. 1. It was the right of the defendant to appropriate the money on deposit, as far as it would go, by way of equitable setoff. 2. The defendant is also entitled to share pro rata in the distribution of the bank's assets for the balance. Checks drawn before failure on general deposits are not assignments of the deposit pro tanto. Judgment affirmed.

ATLANTA NAT. BANK v DAVIS (1895) 96 Ga. 334.

For the wrongful refusal of plaintiff's check. Plaintiff gave the check to a creditor in payment of a debt of \$12.48. Upon presentation, defendant, through an error, refused payment, although plaintiff had funds on deposit. Judgment for plaintiff for \$200 damages. Error.

Lumpkin, J. A bank cannot send out paper with a badge of dishonor upon it, and then excuse itself by alleging its own carelessness. Plaintiff's recovery is not limited to nominal damages. "Temperate" damages are proper. Judgment affirmed.

HUGHES v NEAL LOAN & BANKING CO. (1895) 97 Ga. 383.

On a check. The plaintiff was old and illiterate, and having obtained a pension, received a check payable to her order. H acted as her agent and presented the check, purporting to bear the plaintiff's indorsement, made by her mark, attested by G D. The bank cashed it on the further indorsement of J D, who accompanied H when it was presented. The plaintiff testified that she never saw the check before it was collected, never indorsed it or authorized it to be done; that she had made a settlement with H, and taken part cash and part note. Nonsuit. Appeal.

Per curiam. Though the indorsement might not have been authorized, a settlement with H ratified his unlawful collection, and the bank through which the collection was made, was not holden to the plaintiff. Judgment affirmed.

HOBBS v CHEMICAL NAT. BANK (1895) 97 Ga. 524.

On a note made by M and U, payable to the order of the defendants at the plaintiff's bank, and by defendants indorsed to the plaintiff in due course of business. The indorsement on the note read: "Pay to the order of Cashier." There was no averment in the declaration that J was cashier of the plaintiff, or that it owned the note. A demurrer, that the indorsement showed no title in plaintiff, was overruled. Plaintiff introduced a certificate of the notary on the presentment of the note to the defendants for payment, which was refused, and that he protested it as to drawer and indorser. There was no statement of the certificate that notice had been given. Defendants moved for nonsuit, because there was no evidence of any notice to indorsers of demand and protest for non-payment. Motion overruled. Exception. Judgment for plaintiff. Error.

Simmons, C. J. The court erred in not granting the nonsuit. In order to bind the indorsers, it was necessary to show not only that the note had been protested,

but that "notice of the non-payment and protest" had been given to them. The certificate of protest is not evidence that such notice had been given; it should contain averments sufficient to show that everything requisite had been done on the part of the holder to authorize a demand upon the indorser. Judgment reversed.

Cited: 102 Ga. 113.

BROBSTON v PENNIMAN (1895) 97 Ga. 527.

On promissory note. L, C and P agreed to form a partnership, L and C to contribute \$2,500 each in cash. L was president and C was cashier of the B Bank. To raise the money they executed a note for \$5,000 in the name of the partnership and negotiated it to the bank. P had no knowledge of the transaction. The bank through its receiver brought this action against the partnership. Judgment for defendant. Error.

Lumpkin, J. The partnership had no concern in the matter, it being a transaction for the benefit of the two members who contracted the loan. These members represented the bank in making the loan and taking the note. It was within the immediate scope of their business and authority, as representatives of the bank, to make just such transactions as the one in question. Whatever they knew with reference to the transaction must be chargeable to the bank. It may be true that the conduct of these officials was a fraud upon and a wrong to the bank. If so, it had its remedy against them, but it cannot hold the partnership accountable for what they did. Judgment affirmed.

Cited: 109 Ga. 27; 110 id. 845; 112 id. 826.

CAMP v SOUTHERN BANKING & TRUST CO. (1895) 97 Ga. 582.

On a draft against drawer and indorser, and against C & C, the acceptors, as partners. One of the partners pleaded that the firm dissolved before the acceptance, and that proper notice of the dissolution was published; that the draft was not accepted by him, nor by any one authorized. At the time of the dissolution the plaintiff held a number of these drafts, the one in suit being given in part as a renewal of a former draft. Plaintiff had no knowledge of the publication of the notice. One of the firm told plaintiffs' messenger, a collector of commercial paper, of the dissolution. Judgment for plaintiff. Error.

Lumpkin, J. The plaintiff was such a creditor of the firm of C & C as to be entitled to actual notice of the dissolution. The publication in the newspaper, of which it had no knowledge, was not notice, either actual or constructive. The information given to the messenger did not amount to a notice to the plaintiff. His agency was of a special and limited character. He was not a general agent. Judgment affirmed.

Cited: 106 Ga. 482.

FIDELITY & CASUALTY CO. v GATE CITY NAT. BANK (1895) 97 Ga. 634.

On bond. Defendant undertook by its bond to make good to plaintiff any loss, not exceeding \$10,000, which plaintiff should sustain from the fraud or dishonesty of R, as receiving teller, or in connection with duties to which he might be subsequently assigned. R was subsequently appointed assistant cashier, and was guilty of conduct entailing a loss to plaintiff far exceeding the defendant's bond. Through the negligence of plaintiff's cashier the thefts were not promptly discovered. Judgment for plaintiff. Error.

Lumpkin, J. 1. Defendant is as much bound to answer to plaintiff for the consequences of R's dishonesty in the capacity of assistant cashier as of teller. 2. The defendant guaranteed that R would remain honest and faithful. Only after actual knowledge that he was otherwise was plaintiff under any duty to defendant to notify it. The negligence of its cashier will not charge plaintiff with notice. 3. The allegation that the bank furnished the proof of loss was not sustained by proof that defendant had waived such proof of loss. For this reason it was error to deny a nonsuit. Judgment reversed.

JAMES v CROSTHWAIT (1895) 97 Ga. 673.

Fraud. C sued J, a banking partnership, alleging that the latter had given L a passbook showing a credit of \$4,146.23, being paid-up capital of an association. L offered plaintiff shares in the association, and the latter inquired from J

whether the amount credited in the passbook was correct. J answered: "Go to L. He will tell you just how it is. Put yourself in his hands; he will treat you right." In fact, the entry was wholly false. Relying on J's statement, plaintiff bought a one-third interest in the association. The interest was worthless. Judgment for plaintiff. Error.

Simmons, C. J. 1. A banker may give to a customer a valid credit upon his books in a stated amount without deposit, but this cannot be accomplished by entering the credit in the customer's favor, and immediately canceling it by another entry, predicated on the fact that the customer is required to draw at once a check for the full amount of the credit. 2. When the banker has delivered to a customer a deposit book containing a credit in his favor, which is ab initio false, and a third person inquires of the banker as to the truth, explaining that he contemplates purchasing an interest to which the credit relates, a jury is warranted in finding that his conduct amounts to fraud which could entitle the latter to recover. Judgment affirmed.

CHATHAM BANK v BROBSTON (1896) 99 Ga. 801.

Bill to determine stockholders' liability. The B Bank failed and went into the hands of a receiver. The charter of the bank declared that the stockholders should be liable to creditors to the amount of double their stock therein. The plaintiff, a creditor of the bank, brought suit against the defendants, stockholders, to enforce their liability to creditors under the bank's charter. Some of the stockholders held stock as collateral security. Judgment for plaintiff. Error.

Lumpkin, J. The liability to creditors under the bank's charter attaches as well to those who hold stock as collateral security as to those who are purchasers. Under the charter of this bank and the general rule of law applicable thereto, a stockholder is individually liable for his pro rata part of the corporation debts created before he acquired his stock, as well as for debts created during his ownership of the shares. A stockholder's liability to creditors continues after he has transferred his shares unless he gave notice of transfer as required by sec. 1496 of the code. When two or more successive owners are liable, the creditors, though entitled to recover against each severally, can have but one satisfaction, and this being had will operate as a satisfaction as to all the rest. Where the whole amount of stock was only \$50,000, creditors cannot collect more than that amount and an equal amount in addition thereto, nor from any one more than his equal and ratable part of such additional amount. Judgment affirmed.

Cited: 110 Ga. 838.

TOMLIN v THORNTON (1896) 99 Ga. 585.

On a check against the drawer. The check was drawn upon the C Bank, March 6, and deposited for collection in the N Bank, March 9, and presented on March 11. The C Bank closed its doors on the 10th. The court directed a verdict for the plaintiff. Error.

Lumpkin, J. The payee or holder of a check must present it for payment within a reasonable time, to charge the drawer in case of dishonor. Reasonable time is a question of fact. Judgment reversed.

WITHAM v COHEN (1897) 100 Ga. 670.

Fraud. Plaintiff purchased from C, one of the defendants, five shares of stock of the Bank of E. C then executed a proxy for said shares, to one of the other defendants, who voted the same at a subsequent meeting over the protest of the plaintiff and in fraud of his just rights. The plaintiff contended that he had an agreement with a majority of the stockholders to elect him president of the bank for five years, and that he would have been so elected but for the willful and malicious action of the defendants. Demurrer. Sustained. Judgment for defendant. Appeal.

Little, J. 1. C had no power to execute a proxy. Hence, the voting of such proxy amounted to a tort injuriously affecting the property rights of plaintiff. 2. Recovery for loss of salary would be, in any event, limited to one year's salary, as proxies are revocable at the pleasure of the stockholders. Judgment reversed.

COUNTY OF GLYN v BRUNSWICK TERMINAL CO. (1897) 101 Ga. 244.

Creditor's petition. The plaintiff deposited county money in the B Bank. The defendant and others were also depositors. The bank failed. Plaintiff claimed

a preference over all other depositors in the distribution of the assets. The court decided that plaintiff must share, pro rata, with the other creditors. Exception.

Simmons, C. J. We have no statute which gives a county, which is a depositor in a bank, a lien or preference over other depositors of the same class. In the absence of any legal right of preference in such cases, the county must stand upon an equal footing with other depositors. Judgment affirmed.

CENTRAL GEORGIA L. & L. CO. v EXCHANGE BANK OF MACON (1897)
101 Ga. 345.

Levy and claim. The E Bank agreed with R that it should advance him money to pay for cotton by honoring R's checks on it. The legal title to all cotton purchased by R was to vest in the E Bank immediately on payment of checks, and to belong absolutely to it until resold by its permission. R turned over to it as collateral security the bills of lading representing the cotton purchased. When R's draft upon his customer was paid, the E Bank received the money advanced and deducted the exchange and credited R with the net proceeds. R purchased from D & Co. 21 bales of cotton and the E Bank paid R's check for it, when it was levied upon by plaintiff as R's property. The E Bank interposed a claim. The court held it not subject to execution. Judgment for claimant. Error.

Lumpkin, P. J. 1. In none of the cotton purchased by R did the claimant have any interest whatsoever, beyond the right to hold it as security. 2. The claimant did not occupy the position even of a partner in the business; much less was it exclusive owner of the business. To pass the legal title to personalty, it is essential that there be either an actual or constructive delivery of the property. 3. When R surrendered possession of the cotton to the claimant, the lien of plaintiff's judgment had attached. Judgment reversed.

AMERICAN TRUST & BANKING CO. v BOONE (1897) 102 Ga. 202.

Petition to recover trust fund. J, administrator of B, having a check of \$5,000 to his order as administrator, indorsed it as administrator, and deposited it in his personal account in the defendant, stating to the bank's officer that he was sole heir. Defendant charged against this deposit \$1,910.74, the amount of defendant's individual notes of J, held by it, and allowed him to draw individual checks, leaving a balance of \$1,810.53. J was adjudged insane, and, before defendant had notice of this fact, it paid a check drawn by him for \$139. He died shortly thereafter. Plaintiff was appointed administrator de bonis non, and sought to hold defendant responsible for the misappropriation of the \$5,000 fund. Judgment for the amount of the notes, the balance admitted, and the check for \$139, with interest. Motion for new trial. Refused. Exceptions.

Cobb, J. 1. A bank may lawfully pay the checks drawn by the person depositing the money, though a trustee, whether signed in his representative capacity or not. 2. The fact that the depositor stated that he was the owner of the fund, and defendant acted upon such statement, would not relieve defendant from its liability to the true owner of the fund, when it appeared that such statement was not true. 3. The bank was liable for interest upon the whole amount from the date of demand. As J at the time the check was paid by the bank, was in fact insane, the check was absolutely void. Judgment affirmed.

Cited: 107 Ga. 500.

MERCHANTS NAT. BANK OF ROME v FOUCHE (1898) 103 Ga. 851.

Damages for refusal to deliver stock. The capital stock of defendant became impaired 25 per cent, and an assessment was laid thereon. One of the stockholders did not pay his assessment and his stock was offered for sale under sec. 5205 of the U. S. R. S. The plaintiff bid it in for \$10.90 per share. Defendant refused to deliver the stock on tender of the amount. Judgment for plaintiff. Error.

Fish, J. The law imperatively states that a sufficient amount of the delinquent stock shall be sold to make up the assessment. As the bid for the stock, in this case, did not equal the amount of the assessment for the payment of which it was offered for sale, there was no legal sale, and the plaintiff acquired no right or title. Judgment reversed.

LINTON v CHILDS (1899) 105 Ga. 567.

Injunction to restrain collection of taxes. A statute in Georgia imposed a tax of \$10 a year upon "presidents of each of the banks of the state." Defendant, tax collector of Clarke County, levied execution on certain property of the plaintiff for the collection of the tax mentioned. Plaintiff was president of the National Bank of A. Judgment for plaintiff. Exception.

Little, J. 1. The imposition of this tax was not made in the exercise of the police power. 2. The act of the general assembly, which imposes a tax on the president of each bank of the state, is inoperative when sought to be applied to the presidents of national banks doing business in this state. Judgment affirmed.

MOORE v RIPLEY (1899) 106 Ga. 556.

Petition to enforce stockholders' liability. Plaintiff, receiver of a bank, filed a petition against the stockholders in an ordinary suit at law. The amount for which judgment was sought was not alleged otherwise than for the full amount of their statutory liability. By the act of incorporation each was made individually liable to the extent of the stock held by him. The Act of 1894 declared that such liability was an asset of the bank to be enforced by the receiver. The petition did not set out the amount of the indebtedness of the bank, but it alleged insolvency and no assets, and that, in order to pay the indebtedness, it would be necessary to assess each stockholder the full amount of his statutory liability. General demurrer. Overruled. Exception.

Little, J. 1. The petition, in the absence of a demurrer specifying the defects therein, is good in substance. 2. The receiver had a legal right to institute an action against the stockholders to enforce the liability for the benefit of creditors. 3. Courts of law in this state administer equitable relief when it is so prayed, and the facts warrant such action. 4. The Act of 1894 did not affect any vested right of a creditor acting under the bank's charter. Judgment affirmed.

CLARKE v INGRAM (1899) 107 Ga. 565.

Petition to set aside trust deed. The Bank of A was insolvent and a temporary receiver appointed. Defendants, three of its creditors, loaned it money to resume its business, and took a deed of trust of all its assets, the proceeds to be applied to the payment of defendants. This arrangement was ratified by the court. In less than a month the bank was again insolvent, and a permanent receiver was appointed. Plaintiff intervened and prayed that the trust deed be declared void. Judgment for plaintiff. Error.

Lumpkin, P. J. 1. If the information afforded to defendants did not constitute "express" notice of the main fact itself—the bank's insolvent condition—we are at a loss to conceive of any case in which the doctrine of express notice could properly be applied. That they did not avail themselves of this notice is utterly immaterial. 2. Nor can they be heard to deny that they understood the import of what was clearly and plainly brought to their attention. Judgment affirmed.

Cited: 113 Ga. 1075.

UNION SAV. BANK & TRUST CO. v DOTTENHEIM (1899) 107 Ga. 606.

Ejectment. Plaintiff borrowed from defendant \$2,700, and executed to it a deed of the land in question, to secure sixty notes of \$63 each, falling due monthly for five years, aggregating \$3,780, made up by adding interest on the full amount for five years at 8 per cent. This resulted in plaintiff being liable for \$578 more than legal interest. Secs. 2388 and 2391 of the civil code authorized "all savings institutions, which pay interest to depositors and whose deposits are not subject to checks," to make contracts like the one in this case. Plaintiff did not pay the notes and defendant took possession of the land. The court held the sections of the code cited to be special laws and unconstitutional. Judgment for plaintiff. Exceptions.

Cobb, J. 1. The transaction has all the elements of usury in it. 2. We would not be justified in declaring that the general assembly has exceeded its power in passing the act in question. 3. A transaction where principal and interest are payable at fixed times, is valid. Judgment reversed.

Cited: 107 Ga. 631, 633; 113 id. 473.

HILLSINGER v GEORGIA RAILROAD BANK (1899) 108 Ga. 357.

Garnishment proceedings. The garnisheed bank issued to A, the principal debtor, a certificate of deposit "payable to the order of himself on return of this certificate properly indorsed; not subject to draft." The question was whether the deposit was subject to draft. The certificate had never been returned nor demand of payment made. Judgment discharging the garnishee. *Certiorari*.

Lumpkin, P. J. The paper itself must be brought back to the bank and demand made for the money. This return being a condition precedent to the right to demand payment, it follows that the instrument is not to be considered due until payment has been demanded. Judgment affirmed.

SPINKS v ATHENS SAV. BANK (1899) 108 Ga. 376.

Petition for specific performance. M borrowed money from defendant, and made a deed to secure it. Defendant gave M a bond for a title, which M transferred to R, defendant's attorney, to sell half the land to raise funds. R agreed to sell to plaintiff, who paid or tendered the full price. Defendant refused to receive payment. Plaintiff then brought this action against defendant for specific performance, claiming R was its agent. Judgment for plaintiff. New trial granted. Exception.

Simmons, C. J. 1. The fact that R was attorney for the bank did not authorize him to make the sale. 2. Nor would the fact that one of the directors learned that the sale had been made bind the bank. 3. Corporate action was necessary for ratification, which did not exist. Judgment affirmed.

FIRST NAT. BANK OF DALTON v BLACK (1899) 108 Ga. 538.

On promissory note. B was superintendent of the C Co., and P was its vice-president, and an officer of the plaintiff, intrusted with its business. Plaintiff held a note of the C Co., secured by a mortgage on its property. A *fiery facias* was levied on this property for taxes, which were a lien prior to the mortgage. To raise money to pay the taxes, P, acting for plaintiff, requested the defendants to execute the note in suit, which they did upon P's assurance that they would never be called on to pay it, and that it would be paid out of the proceeds of the mortgage when foreclosed. The mortgage was foreclosed, but the note was not paid. Defendants gave a renewal note on P's reassurance that they would never be called upon to pay it. Judgment for defendants. New trial refused. Exceptions.

Lewis, J. 1. To compel the defendants now to pay the note would be sanctioning the perpetration of a fraud, and enforcing a contract without any consideration. The fact that P was an officer of the C Co., can make no difference. 2. A bare renewal, by giving a new note therefor, without any additional consideration, would not amount to such a settlement, as would estop the maker of the note from defending, because of no consideration for the original obligation. Judgment affirmed.

MORRIS, ADM'R, v GEORGIA LOAN AND BANKING CO. (1899) 109 Ga. 12.

To recover money due on policy of insurance. R took out an insurance policy, and being unable to keep up his premiums, defendants C & P agreed to advance them as they became due. To secure them, R assigned them the policy and gave his note for \$4,300. The only consideration was the premiums advanced. C was cashier of defendant, to which the note and policy were transferred. After R died, defendant, through C, as cashier, collected the full amount of the policy, but refused to pay M, the administrator of R, any more than the difference between the amount collected and the note. Judgment of nonsuit. Exception.

Little, J. 1. An assignment of a policy of life insurance to a creditor by the insured, and for the purpose of securing his indebtedness, is valid only in the amount of the debt and the expenses incurred by the creditor in keeping up the policy. 2. A policy of insurance is a contract which is not negotiable, but is assignable. The law merchant in no sense applies to the assignment of a contract of insurance. 3. If C was not the agent of the bank, then the discounting was illegal, and the owner is entitled to the note or its proceeds. If he was the agent, his action would be a fraud upon the rights of the owner, of which the bank cannot take advantage. Judgment reversed.

Cited: 110 Ga. 846; 112 id. 826.

ATLANTIC NAT. BANK v GEORGE (1900) 109 Ga. 682.

To recover deposit. W deposited certain funds in defendant. He gave plaintiff an order on the bank for "the amount you are due me." After defendant accepted this order, it paid a \$300 check drawn by C previous to the order. The court instructed the jury: "If W gave this order, intending that it should cover the balance left after the payment of the check, and this intention was known to the plaintiff, he cannot recover. Verdict for defendant. New trial granted. Defendant excepted. Error.

Little, J. The court erred in granting the new trial. The verdict was amply supported by the evidence. We see no objection whatever to the charge. Judgment reversed.

MERCHANTS NAT. BANK OF ROME v CAMP (1900) 110 Ga. 780.

On promissory note. The defense was payment, and that the note had been fraudulently altered so as to be payable to J. King, Pres., meaning the president of plaintiff, instead of J. King. It was proved that certain stock was accepted by King in payment of the note; that, at the date of payment, the note had been transferred to the bank; that King had full authority to make any kind of settlement as to notes held by the bank. Judgment for defendants. Exception.

Cobb, J. It is immaterial whether the note was payable to J. King, or J. King, Pres. If it were payable to J. King, and he owned it at the day of payment, of course the defendants were by the payment discharged from all liability thereon. If, on the other hand, it was payable to J. King, Pres., and was the property of the plaintiff, payment to J. King would discharge the defendants from liability. Payment to an authorized agent is payment to the principal, although the payor is ignorant of the agency. Judgment affirmed.

FOUCHE v MERCHANTS NAT. BANK OF ROME (1900) 110 Ga. 827.

Petition by creditors to compel payment of stock subscriptions. The R Co. became insolvent. F & F obtained a judgment against it and sued to satisfy their judgment. The certificates contained the words "full paid and non-assessable." The defendant bank was a transferee of the stock, and not an original subscriber. The bank received its stock from its president, who was an original subscriber, and who dealt with himself as an officer of the bank in the transaction. Defendant contended that plaintiffs had extended credit to the company with the knowledge that the subscriptions had not been paid. Defendant A claimed to have transferred his stock before plaintiffs' cause of action accrued. The court refused to admit evidence contra. Nonsuit. Exceptions.

Lewis, J. 1. The bank assumed the liabilities of the original subscriber to that stock, and is chargeable with the knowledge of its agent and president that the subscription on this stock had never been paid. 2. The rights of creditors not parties are not affected by the fact that subscribers to stock in the corporation entered with the company into any device or contrivance for the purpose of relieving themselves from liability. Full payment of the shares for which they subscribed cannot be pleaded against the rights of creditors who are not parties to such transactions. 3. A party has a right to introduce only a portion of a record. 4. It cannot be presumed as a matter of law that A was not a stockholder. 5. The knowledge of the president of the bank accepting a transfer of stock was imputable to the bank. 6. The recital in the certificate was no defense. 7. A bare knowledge by a creditor when he extends credit to a corporation, that the subscriptions to its stock have not been paid, does not imply that he waived his rights in law against the stockholders. Judgment reversed.

ENGLISH-AMERICAN LOAN & TRUST CO. v HIERS (1901) 112 Ga. 823.

On promissory note. Defendant took out a policy of insurance in the M Co. and gave his note for the first premium. The note was sent to Shedden, an agent of the M Co. and a director in the plaintiff bank, and was by him discounted in the bank. Subsequently defendant found the policy to be materially different from that for which he had applied, and made efforts to have the M Co. return his note, which was refused. In discounting the note, Shedden dealt directly with the cashier of the bank, who had no notice of any defect. Judgment for defendant. Motion for new trial. Overruled. Exception.

Lewis, J. 1. The fact that Shedden was a director of the bank would not

charge that institution with any knowledge which he might possess of a defense to the note. 2. The burden is on defendant to prove his allegations as to purchase with notice. 3. The plaintiff who took bona fide, without notice, will be protected. Judgment reversed.

SINGLETON v BANK OF MONTICELLO (1901) 113 Ga. 527.

Petition to foreclose a mortgage given to secure a note. Plea: that the consideration was "illegal, void, and contrary to public policy, being for money loaned to defendant to promote a gaming transaction." The money was procured to invest in margin on cotton, and plaintiff's cashier had knowledge of that fact before the note was discounted. The loan was made by the special solicitation of B, the broker with whom the margin was placed, who was a director in the plaintiff. A part of the amount was left in the bank, and the cashier delivered it to B, also to be used on margin, without authority from the defendant. Demurrer to plea. Sustained. Judgment for plaintiff. Appeal.

Lewis, J. 1. Speculation in "futures" is contrary to public policy. 2. Knowledge of the cashier that the defendant was borrowing the money for the purpose of engaging in a gaming transaction would not, without more, vitiate the claim. These averments in the plea, if sustained, make out a case of activity on the part of the bank in furthering the gaming transaction, such as would render the note and mortgage void. 3. The knowledge of the cashier was imputable to the bank. The bank cannot take advantage of the cashier's act, and, at the same time, repudiate his knowledge of the attendant circumstances. Judgment reversed.

PEOPLES SAV. BANK v SMITH (1901) 114 Ga. 185.

On promissory note. Defendants were S & R, partners, who made a promissory note, signed in the firm name, to the F Bank and indorsed to plaintiff. The petition alleged "said defendant refuses to pay, and prays for process against said defendant." S filed no defense. R answered that the partnership was not liable because the note was given for a personal debt of S to the plaintiff and the F Bank, and that the processes were so applied, all in the knowledge of the plaintiff. The verdict rendered was, "We, the jury, find for the defendant." Motion for new trial. Refused. Exception.

Lumpkin, J. 1. The issue was whether or not the partnership of Henry G. Smith & Co. was liable to the plaintiff upon the note sued on. 2. The verdict in favor of "the defendant" is not void for uncertainty. 3. When the holder of a promissory note surrenders to the makers thereof collateral given to secure its payment, the relation of principal and agent exists between them, so far as third persons are concerned. 4. The principal was in law chargeable with knowledge of all facts known by the agent. 5. The giving of checks on the partnership deposit in payment of the individual debt of a member of the firm was not such a "course of dealing" as justified the bank in assuming that it was within the scope of the partnership business to give its note in payment of an individual partner's debt to the bank. Judgment affirmed.

BUENA VISTA LOAN & SAV. BANK v GRIER (1901) 114 Ga. 398.

Execution on judgment. Defendant loaned money to M, who gave a promissory note, secured by certain shares of stock of the plaintiff bank, as collateral. On these certificates were the words: "Transferable only on the books of the company." The stock was never so transferred to plaintiff. Sec. 1855 of the civil code provides: "Except as against the claims of the corporation, a transfer of stock does not require a transfer on the books of the company." Plaintiff, having a judgment against M, levied on the stock in defendant's hands as M's property. By consent, an order was entered that the case be heard by the presiding judge in vacation, the bank knowing he was related to some of the stockholders. At the trial, plaintiff objected to the judge. Objection overruled. Judgment for defendant. The bank excepted.

Lumpkin, J. 1. The objection to his trying the case came too late. 2. Neither sec. 1855 of the civil code, nor the recital in the certificate were designed to confer upon the corporation any lien. The object of the section was to protect such liens as it actually had. 3. When pledged property is seized under execution in favor of another, the pawnee need not formally foreclose his lien, but may give the notice provided for by sec. 2962 and claim the proceeds of the sale in the hands of the levying officer. Judgment affirmed.

DOTTENHEIM v UNION SAV. BANK & TRUST CO. (1902) 114 Ga. 788.

Ejectment. Plaintiff conveyed to the defendant title to a lot of land as security for a debt. The deed stipulated that in event of default of payment the grantee should sell the property at public outcry, make the purchaser title to the same, and summarily put him into possession. The plaintiff defaulted in payment of the debt and the defendant obtained possession without his consent, but in a peaceable manner. Plaintiff claimed that the deed was void for usury. Judgment for plaintiff. Appeal.

Per curiam. 1. The Act of 1889 conferred on savings banks of the class named therein the powers and privileges conferred by the Act of 1888 on building and loan associations. In view of this act, the deed was not void for usury. 2. Being in possession after default, the defendant was entitled to remain for the purpose of subjecting the land to the payment of the debt in the manner pointed out in the deed. 3. A deposit, "subject to check," means subject to unrestricted payment in banking hours. 4. An agreement by a bank with its depositors, as to when and how much interest it should pay, is valid. Judgment affirmed.

HAWAII

BROWN v BISHOP (1883) 5 Hawaii 54.

Assumpsit by an administrator to recover a deposit made in the defendants' savings bank. K deposited money, and took a passbook, headed "B & Co. in account with L K, to order of his father, K." K died and his administrator drew the deposit. L K died and his administrator claimed to recover the amount for the estate. The deposit was made while L K was an infant, and there was no further evidence of a delivery than that contained in the book. The judge directed a verdict for the defendants. Exceptions.

Austin, J. 1. The words in the bank book were sufficient to constitute a valid direction to the defendants to pay the money only to the order of the father. 2. K controlled the fund and there was no such delivery as is necessary to constitute a valid gift. Exceptions overruled.

HAWAIIAN GOVERNMENT v BISHOP (1890) 8 Hawaii 102.

Bill for discovery against bankers for a disclosure of the names of their depositors, and to recover the several amounts for the purposes of taxation. The defendants demurred to the bill. Demurrer sustained. Dole, J., gave his opinion: No such right as the plaintiff claims exists by statute. When ordinary deposits are made in a bank of deposit, the property in the money passes to the bank, which becomes debtor to the depositor. The bank is liable for the taxes upon them. Appeal.

Judd, C. J. We are of the opinion that the decision of Mr. Justice Dole should be sustained, and we hereby adopt the same and affirm the decree.

IDAHO

THE PEOPLE v MOORE (1873) 1 Idaho 504.

Action to collect taxes on shares of stock held by defendant in a national bank. Sec. 6 of the law of the state provided that no tax should be imposed on non-residents higher than that imposed on property of residents. Sec. 1 of the Act of Congress of 1864 required the shares in these banks to be taxed where such bank was situated, but at no greater rate than is assessed on other capital in the hands of individuals. The Act of 1868 provided that national bank shares, owned by non-residents of a state, might be taxed where said bank was located and nowhere else. Defendant contended that a territory had no authority to tax national bank shares. Demurrer. Sustained. Judgment for defendant. Error.

Noggle, C. J. Congress has sufficiently authorized this territory to pass a law requiring the taxation of national bank shares. Congress could not have intended

that municipal taxation should be uniform through the territory or the state. There is no law in the territory that authorizes the taxation of national bank shares. The situs of the shares is fixed within the state wherein the bank is located, and in the present case within the Territory of Idaho. Judgment affirmed.

GREENE v BANK OF CAMAS PRAIRIE (1901) 64 Pac. Rep. 888.

Action on a deposit. G made a deposit of his own money in the name of the plaintiff and thereafter drew all the money out on check drawn by himself, and signed in plaintiff's name per G. This was done under the suggestion of defendant's cashier, so that the deposit could not be attached by G's creditors. G died, and plaintiff, who knew nothing of the deposit till after his death, brought the action to recover the deposit. Defendant proved by its cashier that G desired to make the deposit so it could not be attached, and informed G he could have it in plaintiff's name, and the money would be paid out on checks paid by him. Objection overruled. Exception. Judgment for defendant. Appeal.

Sullivan, J. 1. It was no error to allow the cashier of defendant to testify to the terms of the deposit agreement. 2. A depositor, contracting for the care of his money, can control his funds until he has disposed of them, no matter in what name the account is kept, so long as it is understood to be his account, and has not been put beyond his control by some act that he cannot revoke. Judgment affirmed.

ILLINOIS

STATE BANK v KAIN (1823) 1 Breese 45.

The receipt of the cashier of the State Bank for money received of an individual is evidence of a deposit by that individual, and the cashier has authority to receive and receipt for the same, and enter it upon the books of the bank.

HARGRAVE v BANK OF ILL. (1825) 1 Breese 84.

On bill of exchange. The defendant bank indorsed a bill given it. Defendant's instruction that it was necessary for the plaintiff to produce legal evidence of its incorporation was refused. The plaintiff contended that the defendant by indorsing the bill given to the bank, admitted the existence of the corporation. Judgment for plaintiff. Error.

Smith, J. 1. The act of indorsement did not establish the legal existence of the bank. 2. When a corporation sues either to recover real property or on a contract, it must at the trial, under the general issue, prove that it is a corporation. Judgment reversed.

Cited: 55 Ill. 314.

LINN v STATE BANK OF ILLINOIS (1833) 1 Scam. 87.

Debt. Plea: That the note was sealed and delivered to the plaintiffs in consideration of bills issued by them under and by virtue of an act establishing the State Bank of Illinois, and that issuing said bills was a violation of art. 1, sec. 10, of the United States Constitution, which forbids a state to "emit bills or credit." Demurrer. Sustained. Judgment for plaintiffs. Error.

Lockwood, J. 1. The issuing of these bills is emitting "bills of credit" and is a violation of the United States Constitution. 2. The sealed note was therefore given for an illegal consideration and is null and void. Judgment reversed.

Cited: 102 Ill. 531.

BANK OF WASHTENAW v MONTGOMERY (1840) 2 Scam. 422.

On promissory note. Demurrer on the ground that a bank had no right to sue, out of the state from which it derived its corporate vitality. There was no statutory prohibition against such a suit. Judgment for defendant. Error.

Smith, J. Corporations may institute suits in the courts of other states than those under whose laws they have been established, unless there is a prohibition by statute. Judgment reversed.

Cited: 101 Ill. 223; 54 Ill. App. 151.

STATE BANK v AERSTEN (1841) 3 Scam. 135.

Assumpsit. The plaintiff sued on half a bank note, the other half having been lost in the mail. Judgment for plaintiff. Appeal.

Treat, J. 1. By severing the note the negotiability thereof is destroyed. 2. Therefore the holder of one half can recover if he prove title to the whole. Judgment affirmed.

STACY v STATE BANK OF ILL. (1842) 4 Scam. 91.

Assumpsit. The defendant bank offered a reward for the discovery of a robbery, one-half for the detection of the robber, and one-half for the recovery of the money stolen. After the publication of the offer, the president of the bank recovered from the robber the greater part of the money. The fact of the recovery of the money was known to the plaintiff, a director without compensation, and other directors; subsequently plaintiff had the robber committed. Judgment for defendant. Error.

Treat, J. The whole object of the reward had been fully accomplished before the plaintiff made any effort to detect the robber. It was plaintiff's duty to communicate to the bank, without reward, any information he had which would lead to a recovery of the money stolen. Judgment affirmed.

Cited: 179 Ill. 159; 16 Ill. App. 184; 94 id. 389, 390.

BANK OF ILLINOIS v KING (1843) 4 Scam. 199.

Assumpsit for non-payment of deposits. Plea: A general notice to pay deposits in nothing but notes of its own, and a tender of such notes. Demurrer sustained to first plea. Judgment for plaintiff. Error.

Shields, J. 1. The plea was defective in not averring that the notes tendered were current at the time. 2. The general notice set forth in the plea did not change the nature of the undertaking to pay in current notes. Judgment affirmed.

WILMANS v BANK OF ILLINOIS (1844) 1 Gil. 667.

On promissory note. Plea: Denial of the corporate existence of the plaintiff. Demurrer. The plaintiff sued the defendant as maker. The defendant contended: 1. That the Act of 1835 renewing the charter of the bank for twelve years was in violation of the state constitution. 2. That the bank had forfeited its charter by suspension of specie payments. Judgment for plaintiff on demurrer for the aggregate amount of debt and damages, without distinguishing the amount of either. Error.

Wilson, C. J. 1. The renewal of the charter of the bank was not in conflict with the state constitution. 2. The proper manner of trying the question, whether the bank has forfeited its charter, is by a writ of quo warranto. 3. The entry of judgment for debt and damages was erroneous, but it is competent for the court to enter that judgment here without remanding the case for that purpose. Judgment reversed.

Cited: 14 Ill. 248; 18 id. 136; 21 id. 30; 32 id. 111; 111 id. 175; 143 id. 504; 164 id. 342; 190 id. 389; 60 Ill. App. 591; 92 id. 180.

PEOPLE EX REL. STICKNEY v MARSHALL (1844) 1 Gil. 672.

Quo warranto, to oust the defendants from the exercise of the franchise of banking. Plea: That by the Act of December, 1816, by the Territory of Illinois, incorporating the Bank of Illinois, and the Act of 1835, by the state, extending the charter, and Act of 1837, increasing the capital stock of certain banks, and providing means to pay interest on a loan, they were authorized to exercise the franchise. Demurrer. Overruled. Plaintiff contended that the several acts were unconstitutional. Judgment for defendants. Appeal.

Wilson, C. J. 1. The legislature of the Territory of Illinois had authority to grant the charter. 2. The charter was a contract, which could be changed or modified only by the parties to it. 3. The Act of Extension of 1835 did not create a new bank charter. 4. No express inhibition can be shown in the constitution, or inferred from it, against the continuance of an existing bank charter. 5. The law under consideration is not a violation of the constitution. Judgment affirmed.

Cited: 6 Ill. 670; 62 id. 271; 92 id. 616; 93 id. 199, 204; 109 id. 307; 120 id. 329; 133 id. 459, 576; 146 id. 455; 152 id. 552; 191 id. 267; 195 id. 473; 40 Ill. App. 454; 92 id. 651.

ATWOOD v CALDWELL (1850) 12 Ill. 96.

Where a party sought to enjoin the sale of certain lands by the assignee of the Bank of Illinois, and to compel specific performance of a contract to convey, the court held, that the laws for the liquidation of the bank were designed to vest the assignee with authority to sell the real estate either at public or private sale, and having exercised that right within a reasonable time, the complainant has no just cause to complain.

Cited: 19 Ill. 88.

DUNLAP v SMITH (1851) 12 Ill. 399.

On a promissory note. A note payable to the Bank of Illinois, for a sum in state indebtedness, was made by D, and was passed by a general assignment to the plaintiff. At maturity, the marketable value of state indebtedness was twenty cents on the dollar; the value of notes of the bank thirty cents, and certificates eighteen cents. The consideration of the note was not shown. The plaintiff claimed that the note was given for stock. If given for stock it was payable in specie. Defendant contended that it was payable in the notes and certificates of the bank. Judgment for plaintiff. Appeal.

Trumbull, J. 1. In the absence of evidence, the presumption is that the note was not given for a subscription to stock, and that it was an ordinary debt. 2. The defendant's right to discharge the judgment in the notes of the bank is clear. Judgment reversed.

Cited: 14 Ill. 105.

RYAN v GALLATIN COUNTY (1852) 14 Ill. 78.

Debt. The defendants as assignees of the Bank of Illinois were sued to recover taxes due on money loaned. The defendant had no personal property whereon to levy the taxes. Demurrer. Defendants contended that: 1, The taxes should be paid by the stockholders and creditors; 2, the defendants cannot be sued in a court of law; 3, by the charter of the bank, it was required to pay into the state treasury, annually, one-half per cent on the capital stock paid in, and that it was exempt from further taxes. It was also averred that the state, as a stockholder, was the owner of property in such a sense that it was exempt from taxation; and that the remedy, if there was any at law, was by distress. Overruled. Judgment for plaintiff. Error.

Trumbull, J. 1. The assignees were bound, while the property remained in their hands, to discharge the taxes. 2. They could be sued in debt for the collection. After the assignment the assets which had belonged to the bank, became taxable as other property. 3. It is only property which the state owns, that is exempt from taxation. 4. The remedy by distress is not exclusive. Judgment affirmed.

Cited: 61 Ill. 398; 96 id. 488; 3 Ill. App. 383.

MARINE BANK OF CHICAGO v AUDITOR (1852) 14 Ill. 185.

Mandamus to compel the auditor to pay a distributive share of the two-mills tax. Where it appeared that the bonds had been deposited with the auditor under the general banking law, the court held that the stock, while thus deposited, was not entitled to a share in the distribution of the two-mills tax; and that the auditor, upon receiving the security designated by law, had authority to allow banks to withdraw stock deposited by them.

BROWN v HOGG (1852) 14 Ill. 219.

A bank, in order to prevent a sacrifice of its own security, and to secure payment of an existing indebtedness—there being nothing in its charter to the contrary—may purchase a judgment which is a prior lien on lands mortgaged to it; and in such a case may purchase the lands under an execution sale on such judgment.

PEOPLE EX REL. EXCHANGE BANK v CAMPBELL (1853) 14 Ill. 400.

Mandamus to compel the state auditor to accept the quarterly report required by statute to be made by banks within a specified time. The report was mailed, but was not received before the time limit expired.

Treat, C. J. The statute is mandatory; the report must actually be received, or the bank charter is forfeited. Mandamus denied.

THOMAS v SLOO (1853) 15 Ill. 67.

Bill against a trustee of an insolvent bank to compel him to execute an agreement of compromise made with C and R as assignees of the bank. Defense, that the agreement was made by C alone; that the agreement was without consideration; that the property, agreed to be conveyed by the plaintiffs, would not sell for one-half of the amount due from them to the bank; that the bank held a mortgage upon real estate, which was to be released and a part only to be conveyed. Decree for plaintiffs. Appeal.

Caton, J. 1. The law which authorized C and R to compromise the debts of the bank, did not authorize either one to do it alone. 2. The agreement by C amounted to a release of a part of the security, without corresponding benefit or consideration. 3. The compromise cannot be enforced. Decree reversed.

RYAN v DUNLAP (1855) 17 Ill. 40.

To foreclose mortgage. Defendant was assignee of the Bank of Illinois. S, after mortgaging land to the bank, to secure debts due and future advances, conveyed to G, who mortgaged to D, to secure him as surety on a bond. The bond was compromised and notes were given in satisfaction, with D as surety. D, having paid the notes, claimed indemnity under the mortgage. After the mortgage to D, G mortgaged to N, reciting the mortgage of S to the bank. The bank gave C a power of attorney to release mortgages. C gave the bank a note for the amount of the S mortgage, and gave a mortgage on the same property to secure the note. The mortgage was surrendered by the cashier with an indorsement that it had been paid, when, in fact, it had not been paid. The bank's books showed the mortgage had been satisfied. The cashier had power to release mortgages before C's appointment, but there was no proof that he released any thereafter. Subsequently the bank went into liquidation. In an action by D against the bank and others to foreclose his mortgage, the court decreed a sale of the property and a division of the proceeds, and that the assignee had no priority by virtue of the S mortgage. Error.

Scates, C. J. 1. The assignee cannot revive the mortgage as a prior lien. 2. The cashier had authority to make the discharge of the note and mortgage notwithstanding the authority of C. The mortgage of S was paid and discharged. Decree affirmed.

Cited: 18 Ill. 299; 20 id. 169; 23 id. 33; 31 id. 434; 35 id. 314; 37 id. 511; 49 id. 86; 59 id. 369; 95 id. 358; 117 id. 289; 121 id. 375; 156 id. 395; 31 Ill. App. 542; 49 id. 186; 59 id. 137.

MORRIS v THOMAS (1855) 17 Ill. 112.

Injunction. The Bank of I obtained a judgment against the plaintiff, and levy was made on his lands. Afterward C was appointed receiver of the bank and authorized S to compromise the debt with plaintiff. Plaintiff settled the debt with S, by conveying land and paying a small balance in money. C died, and plaintiff, who was appointed trustee of the bank, sued out a new execution and ordered the lands sold, knowing the judgment had been satisfied. Defendant contended that C had no authority to receive the land in payment of the debt; that the debt was secured; that the land taken in compromise was of no value; that there was a remedy at law, if one existed. Bill dismissed. Appeal.

Scates, C. J. 1. The defense that the party having a remedy at law, has none in equity, is not sustainable in this case. 2. The power to compromise and settle debts is not a power to forgive the debt on being partly paid, or by purchasing property at exorbitant prices. 3. Where judgment has been rendered and property sufficient to pay it levied upon, there is no room for compromise by abandoning part of the claim. Decree affirmed.

Cited: 19 Ill. 88; 48 id. 105; 55 Ill. App. 452.

PEOPLE v DUBOIS (1857) 18 Ill. 333.

Mandamus. Proceeding against the state auditor to show cause why he did not notify the O Bank to redeem bills issued by it, in conformity with the Act of 1851, as amended by Act of 1857. The petition alleged that bills in denominations of \$5 were presented by a notary public, and that the cashier refused to redeem in gold, but tendered American quarter dollars. The protest and petition failed to

show that the coin was authorized by the Act of June 1, 1853, which provided for redemption of sums less than \$5, in coins from half dimes to half dollars. The auditor refused to issue notice upon the ground that the tender made was legal.

Caton, J. 1. The protest did not show affirmatively that the bank was in fault. 2. The bank had a right to pay any amount in small coins of a date previous to the Act of 1853. Application refused.

Cited: 24 Ill. 443.

BANK OF PERU v FARNSWORTH (1857) 18 Ill. 563.

On certificate of deposit. The certificate was made payable four months from date, signed by the cashier and indorsed by the depositor of defendant bank to the plaintiff. The defendant was incorporated under the general law of February 15, 1851, providing that no banking association or individual banker should issue or put in circulation any bills or notes, unless the same were payable on demand. Judgment for plaintiff. Appeal.

Caton, J. The promise sued on contained all the elements of a promissory note, and was made in express violation of the law, and void. Judgment reversed.

Cited: 19 Ill. 392; 37 id. 140; 144 id. 619; 99 Ill. App. 404.

SWIFT v WHITNEY (1858) 20 Ill. 144.

Assumpsit. Defendants were bankers who issued a paper, in form a certificate of deposit, payable in currency to plaintiff. The court estimated the damages by taking the value of bank bills or notes. The defendants objected that the instruments were inadmissible under the common counts. Judgment for plaintiff. Appeal.

Walker, J. 1. The instruments appear to possess all the requisites of a promissory note, and are admissible under the common counts. 2. A tender in such bills, in discharge of a debt, is good, if not refused; and the court did right in assessing damages in currency on these notes. Judgment affirmed.

Cited: 21 Ill. 102; 27 id. 411; 28 id. 183, 476; 29 id. 478; 30 id. 403; 32 id. 77; 37 id. 143; 39 id. 615; 41 id. 83, 95; 42 id. 517; 46 id. 437; 47 id. 85; 84 id. 370; 187 id. 499; 10 Ill. App. 39; 17 id. 319; 44 id. 641; 49 id. 621; 69 id. 61.

BANK OF THE REPUBLIC v COUNTY OF HAMILTON (1858) 21 Ill. 53.

For the reduction of assessment. The assessment was on the property of the plaintiff bank. The county refused to reduce it. Two questions were raised: 1, Whether the plaintiff could object to a change made by the Law of 1857, in ascertaining the value of the property of the bank, from that provided by the general banking law; 2, whether the bank was taxable on bonds deposited with the state auditor to secure the issues of the bank. Judgment for plaintiff. Error.

Caton, C. J. 1. There is nothing in the Act of 1857 showing that the legislature intended to bind itself never to change the mode there provided for assessing banks. 2. Bonds deposited with the auditor to secure a bank's circulation, being vested in the auditor in trust, cease to be taxable as bonds; but the amount of their value becomes taxable as bank capital paid in. Judgment affirmed.

Cited: 21 Ill. 308; 24 id. 435, 438; 34 id. 377; 76 id. 567; 80 id. 430; 181 id. 229.

PEOPLE v RIDGLEY (1859) 21 Ill. 65.

Quo warranto. Under an Act of March 1, 1847, providing for the closing of the affairs of the Bank of I, the governor of the state appointed R, M and C trustees to take charge of the assets and wind up its affairs. The governor thereafter removed R, M and C, and appointed the relators in their places. The petition alleged that R, M and C continued to hold the books, papers, and assets, and exercise the trust unworthily, and their removal was asked. Defendants pleaded that they had taken a conveyance from the bank; that they were acting under the trust; that the interest of the state had been relinquished to them, and asked to be continued in the trust. Demurrer to plea. Overruled. Judgment for defendants. Appeal.

Breese, J. 1. An information in the nature of a quo warranto, being a criminal proceeding, is not allowed against a person for assuming a franchise of a private nature, not connected with public interests. 2. The governor cannot deprive the

creditors of the property thus conveyed, and cannot make vacancies and fill them. 3. Defendants were not officers but were trustees, whom the governor had no power to remove. Judgment affirmed.

HINCKLEY v KERSTING (1859) 21 Ill. 247.

Where a banker, dealing in depreciated bills, purchased some that were bad from a person acting in good faith, the rule of caveat emptor applies; seller is not liable to make them good, if the instrument proves to be of less value than the price given; it is presumed that persons engaged in a particular trade are better acquainted with the value of the articles they are buying and selling than is the community generally.

RUPERT v RONEY (1859) 22 Ill. 325.

Where a party makes a special deposit with a banker of funds not current, and afterward takes them away, his own acts operate as a bar to recovery against the banker for his refusal to receive them back on deposit.

METROPOLITAN BANK v GODFREY (1860) 23 Ill. 579.

To set aside a chattel mortgage and bill of sale. A co-partnership, engaged in the construction of a railroad, was indebted to the complainant W on notes. The defendant G became the sole owner of the partnership assets, and W recovered a judgment on the notes. G conveyed all his property to D pursuant to an agreement that the land was to be a security for any deficiency arising upon the sale of certain personal property which had been delivered to him for the purpose of raising funds to complete the railroad contract. G also gave D a chattel mortgage as further security, but was permitted to remain in possession of the land and mortgaged property. D conveyed all the property to K, who took without consideration and with notice of G's equities. K, under D's instructions, subsequently transferred the property to the bank, a New York corporation, to which D was indebted. The bank held the notes given by D, and entered the property thus acquired upon their books as a security. Judgment for complainant, canceling the deed from D and K to the M Bank, and awarding the lands to G, subject to satisfaction of W's judgment. Appeal.

Breese, J. 1. As the lands were intended to be reconveyed to G, the contract must be reformed. 2. The bank acted beyond the scope of its authority. 3. The record of a mortgage must disclose the real state of the incumbrance. If it is given for security, it should state that fact. 4. Taking a conveyance of land, and setting it up as a purchase, when it was intended as security, is, under most circumstances, regarded as a fraud. 5. To constitute one a bona fide purchaser, so as to entitle him to a preference, something more than the mere receiving of a conveyance in payment of a pre-existing debt is essential. 6. Possession by a grantor, after the transfer of the property, is evidence of notice of some right sufficient to put a person interested upon inquiry. Decree affirmed.

Cited: 27 Ill. 425; 36 id. 499; 39 id. 427; 71 id. 158; 72 id. 455; 87 id. 154; 108 id. 36; 129 id. 456; 135 id. 98; 156 id. 31; 174 id. 320; 180 id. 548; 181 id. 157; 11 Ill. App. 673; 25 id. 90; 42 id. 352; 54 id. 395; 67 id. 37; 79 id. 498; 95 id. 74, 297.

REAPERS BANK v WILLARD (1860) 24 Ill. 433.

Bill to restrain the state auditor from putting the plaintiff bank in liquidation. The defendants, owning bills of the plaintiff, presented them for redemption. The president took a bag of small coins, counted out the amount, handed it to the notary, and so proceeded until three o'clock, when he refused to redeem any more that day, although he had redeemed only \$150. The notary protested the bills not redeemed. The next day the same process was repeated, and the protested bills forwarded to the auditor, who notified the president to pay the bills. The bill alleges that the plaintiff believed the auditor was about to sell the stock pledged to the bank and call in the circulation. The Act of February 14, 1857, provided that in presenting bills for payment the whole amount presented should be treated as though but a single obligation. Decree, that the temporary injunction be made perpetual, upon the plaintiff's depositing with the auditor legal coin for the redemption and payment of its circulating notes, and in default thereof that the bill be dismissed. Appeal.

Caton, C. J. 1. The mode of redeeming was adopted to harass and annoy the billholder so as to deter him and others from presenting bills for redemption. 2. The auditor was proceeding to do an act he was required by law to do. 3. The Act of 1857 is constitutional, and applied to the bank as well as to the billholder. Decree affirmed.

Cited: 34 Ill. 376; 166 id. 417.

MUNN v BURCH (1860) 25 Ill. 35.

Bill to enforce payment of a check. The complainants sold B wheat to be paid for by W, who gave the complainant a check drawn on the defendants, bankers. The check, being deposited on the same day for collection was at once presented to the defendants for payment. The clerk received and charged it to the account of W, who at the time had sufficient money on deposit to pay it. The drawee having failed, the complainant paid the bankers and brought this action. Bill dismissed. Appeal.

Caton, C. J. 1. Where a custom is so universal that all men are presumed to know it, the courts will recognize and act upon it. 2. The mere fact of opening an account with a banker implies a contract to withdraw his funds in parcels. 3. A banker agrees with a depositor to pay out to the person presenting his checks such sums as they may call for. 4. A check of a depositor upon his banker transfers to the payee the title to so much of the deposit as the check calls for. 5. At the time the check was presented for payment, the drawer had sufficient money in the bank to pay it, and the right of the parties were then fixed. Judgment reversed.

Cited: 28 Ill. 173; 29 id. 267; 30 id. 404; 42 id. 241; 43 id. 500; 68 id. 401; 80 id. 209, 213; 83 id. 37; 137 id. 643; 149 id. 352; 171 id. 533; 181 id. 203; 183 id. 481, 482; 184 id. 152; 186 id. 443, 444; 13 Ill. App. 137; 20 id. 29; 30 id. 92; 37 id. 218; 40 id. 592; 44 id. 411; 50 id. 442; 58 id. 385; 60 id. 615; 69 id. 683; 70 id. 410; 72 id. 317; 98 id. 456; 99 id. 468.

ÆTNA INSURANCE CO. v CITY BANK (1861) 25 Ill. 243.

Case. The plaintiff placed a bill with the defendant bank in the usual course of banking for collection. The drawee lived at a distance, and the bill was promptly forwarded to the defendant's correspondent, at that point, a responsible banker, with instructions to collect. It was presented, payment refused, and no protest made. It was presented two weeks later, payment refused and protested. Judgment for defendant. Appeal.

Walker, J. When a bank receives a bill for transmission, it has fully discharged its duty by sending the instrument in due season to a competent reliable agent, with proper instructions for its collection. Judgment affirmed.

Cited: 28 Ill. 472; 158 id. 269; 187 id. 224; 18 Ill. App. 192; 58 id. 66; 59 id. 591; 78 id. 343.

CHICAGO FIRE INSURANCE CO. v KEIRON (1862) 27 Ill. 501.

On a certificate of deposit, issued by defendant. The deposit was made in Illinois currency, and was payable in like funds. The plaintiff held the certificate by indorsement. On presentation, the cashier of defendant offered to pay it in Illinois currency, which he said was worth fifty or sixty cents on the dollar. Judgment for plaintiff. Appeal.

Walker, J. "Illinois currency" is paper money, without reference to the banks by which it is issued, which passes in this state in lieu of coin, or the paper of the banks chartered in this state. The deposit cannot be paid in depreciated or in broken bank paper. Judgment affirmed.

Cited: 30 Ill. 402; 32 id. 77.

MARINE BANK OF CHICAGO v CHANDLER (1862) 27 Ill. 525.

Money had and received. The defendant bank received money from collections made for the plaintiff, and placed it in its general fund, which depreciated. The defendant had no directions to hold the funds received at the risk of the plaintiff. It claimed a deduction to the amount of the depreciation, and averred a special custom of banks in that locality to charge back the depreciation. Plaintiff and others made a contract to receive and pay out bills during the war, but the con-

tract was abrogated before this action accrued. Judgment for plaintiff. Appeal.

Walker, J. 1. This was an ordinary deposit and not a bailment. 2. The relation of the parties was that of debtor and creditor, and the loss by depreciation or otherwise must fall upon the bank. 3. No special custom of banks can change the law. 4. Plaintiff was not bound by the contract. Judgment affirmed.

Cited: 28 Ill. 92; 30 id. 402; 32 id. 77; 43 id. 433.

McCAGG v WOODMAN (1862) 28 Ill. 84.

Where a banker, having on hand funds of a depositor sufficient to meet the payment of a note of the depositor in his favor, assigns for the benefit of creditors, the depositor is entitled to set off the sum due him by the banker, in an action by the assignee on the note.

MARINE BANK OF CHICAGO v BIRNEY (1862) 28 Ill. 90.

Where a bank has received a sum of money on deposit, and thereafter offers to pay the depositor the amount of his deposit in depreciated bills on local banks in accordance with an alleged custom, it must respond in payment in currency of equal value to coin, or the full amount of the credit in paper of equal value to that received, and evidence of a local custom is not admissible to alter the agreement.

CHICAGO INS. CO. v STANFORD (1862) 28 Ill. 168.

On checks against the drawee. The plaintiff had a deposit with the defendant, which did a banking business. He drew several bona fide checks in small amounts, in the regular course of business, against his deposit. The defendant refused to pay them, upon presentation, except in depreciated bank notes. The plaintiff sued separately to the use of the payees of the checks. The defendant contends that there is only one cause of action. Judgment for plaintiff. Error.

Caton, C. J. 1. The banker who keeps a deposit account with his customer agrees that the depositor may draw out his deposit in sums, as he may find convenient, and that he will pay his checks when presented. 2. These checks were drawn, bona fide, in favor of the payees, in the regular course of business. Judgment affirmed.

Cited: 80 Ill. 214; 149 id. 352.

NORTHERN BANK OF ILLINOIS v ZEPP (1862) 28 Ill. 180.

On certificate of deposit, payable in currency. The deposit for which this certificate was issued, was given by the defendant, after it had filed with the auditor a certificate of its desire to withdraw its bills from circulation. Plaintiff had no knowledge of this certificate. Currency was worth more than the coin in which the defendant offered to pay the certificate. The State Banking Act of January 10, 1855 (Gates' Comp. 124), provided that any bank, which desires to close the business of circulating notes, may file a certificate of that fact with the auditor and surrender its bills, and thereafter shall cease to do any banking business, except to wind up its affairs. Judgment for plaintiff, for value of the certificate in currency. Error.

Walker, J. 1. Until notice is brought home to a depositor in the bank, he cannot be affected. 2. Plaintiff was entitled to recover the value of the certificate in currency. Judgment affirmed.

GALENA INS. CO. v KUPFER (1862) 28 Ill. 332.

On a check drawn by the defendant, in favor of the plaintiff, on the bank of G for current funds. The check was for \$400. The bank's offer to pay it in depreciated bank notes was refused, and this action brought. The defendant claimed that the plaintiff was liable for the depreciation of the funds which the bank offered him after his refusal to accept them, and that evidence of the local meaning of the phrase "current funds," could be given. Judgment for plaintiff, for \$280. Appeal by plaintiff.

Walker, J. 1. The plaintiff had a right to resort to the defendant to recover that money in circulation without any discount. 2. When a word has a general and well defined signification, it is not competent to change that meaning by

evidence. 3. The defendant having no funds in the bank which the plaintiff was bound to accept, loss cannot be attributed to the plaintiff. Judgment reversed.

Cited: 32 Ill. 77; 34 id. 292; 35 id. 443; 43 id. 435; 46 id. 437; 154 id. 125.

CHICAGO INSURANCE CO. v CARPENTER (1862) 28 Ill. 360.

To recover a balance of an account. In April, 1861, the defendant, conducting a banking business, was unwilling to receive on deposit Illinois bank bills, until the plaintiff, who was a regular depositor, agreed to receive and pay them out in the same paper. Plaintiff sued for deposits made before and after the agreement. Judgment for plaintiff for specie value of deposits prior to the agreement, and for the current value of those made subsequent. Appeal.

Walker, J. No injustice resulted by allowing plaintiff par value for his deposits prior to the agreement, and market value on the balance of those made afterward. The defendant only has to make payment in accordance with the understanding of the parties when the transaction occurred. Judgment affirmed.

Cited: 32 Ill. 77.

MARINE BANK OF CHICAGO v RUSHMORE (1862) 28 Ill. 463.

Money had and received. The plaintiff, a resident of New York, sent to the defendants for collection certificates of deposit, payable in "Illinois currency." The defendants were instructed not to remit at once, but to hold until New York exchange should be lower. When the collection was made, currency had depreciated. The proceeds were credited to the plaintiff by the defendants, and mingled with the general funds. Currency continued to depreciate, but the defendants held the proceeds, without notifying the plaintiff of that fact. When payment was demanded, the defendants tendered Illinois bank notes, which had ceased to circulate as currency, and were greatly depreciated in value. Judgment for plaintiff, for the value of currency at the time deposit was made. Error.

Breese, J. 1. When the money was collected and mixed up with the general funds of the bank, it became a general deposit. 2. If the defendants were simply the agent, by mingling the funds of the principal with their own, or using them, they became the debtor of their principal. 3. These proceeds were not held by the bank as bailee. 4. This offer of depreciated notes was no tender. 5. The holder was entitled to payment in current funds, or funds equivalent to coin. Defendants were remiss in their duty in not informing plaintiff of the downward tendency of the exchanges. Judgment affirmed.

Cited: 30 Ill. 403; 32 id. 77; 35 id. 163; 51 id. 512; 77 id. 265; 91 id. 338; 137 id. 582; 182 id. 377; 44 Ill. App. 178; 58 id. 66; 74 id. 435; 98 id. 622.

WILLARD v DUBOIS (1862) 29 Ill. 48.

Mandamus. The H Bank, organized under the General Banking Law of 1851, deposited with the auditor security for the issue of bank notes. Plaintiff filed with the auditor, pursuant to law, the evidence of protest for non-payment of certain of the H Bank's notes. The bank was placed in liquidation. Plaintiff claims that in addition to dividends he is entitled to interest upon the protested notes at the rate of 12½ per cent from the date of protest, in addition to his dividend upon their amount. The Law of 1851 provides for the payment of 12½ per cent interest as damages for non-payment of bank notes from the date of refusal until payment. It further provides for a notice to be given by the auditor that all notes will be redeemed pro rata out of the trust funds of the drawer, whether protested or not. An amendatory Act of 1857 provides that for failure to pay its notes with 12½ per cent interest from date of protest, the auditor shall proceed according to the law.

Breese, J. All contracts to pay money give the right to interest from the time when the principal ought to be paid, but it cannot be sued for apart from the principal sum. Banks and bank notes have no immunities not accorded to the citizen. The law allows 12½ per cent in lieu of legal interest. The relator's right to damage in lieu of interest upon the protested bill is as perfectly rested as the right of any billholder to the bill themselves. Peremptory mandamus awarded.

Cited: 90 Ill. App. 61.

MARINE BANK OF CHICAGO v OGDEN (1862) 29 Ill. 248.

Assumpsit. Defendant was a banking institution organized under the free banking law. It was for all practical purposes identical with the C, F & M Insurance Company, both having the same stockholders and officers. Separate books were kept, though the funds of both were commingled. Plaintiffs made a general deposit with the insurance company, subsequently giving a check on its account. The insurance company on presentment of the check offered to pay it in bank bills in payment of its deposits. The check was returned to plaintiffs by the payee. Judgment for plaintiff. Error.

Walker, J. 1. The drawing of the draft was an assignment of that sum on deposit by the depositor to the payee of the draft. 2. There is no principle of law which should change the check from a draft for cash to an instrument for depreciated bank bills. 3. The agreement of the depositor could not affect the payee's rights, and by taking up the check the depositor has acquired the rights of the payee. 4. The institutions could not form a partnership; but if the bank was the real party in interest, and the insurance company merely its agent, a recovery might be had against the bank. Judgment affirmed.

TINKHAM v HEYWORTH (1863) 31 Ill. 519.

On the case: Plaintiff deposited with defendants, bankers, a draft for collection. Defendants collected the amount and credited the plaintiffs' account. Upon demand, defendants refused to pay over the amount collected. Judgment for plaintiff. Appeal.

Caton, C. J. Where a banker collects a draft for his customer and deposits it to his credit, an action for trespass on the case will not lie. The relationship becomes that of debtor and creditor. Judgment reversed.

Cited: 95 Ill. 241; 40 Ill. App. 520.

FAY v STRAWN (1863) 32 Ill. 295.

To recover the proceeds of a draft. The plaintiff requested the defendants, who were bankers, to collect a draft on Chicago. It was agreed, because of the unsettled condition of the currency, that the defendants should send the draft to B & Co. of Chicago, and when paid, the proceeds were to be expressed to the defendants in a package, the same package was to be delivered to the plaintiff. It was expressly stipulated that the defendants assumed no risk. The draft was indorsed to B & Co., who collected it, and failed three days later. The proceeds, by a mistake, had been credited to the defendants by B & Co., who never remitted the funds. The court allowed plaintiff to prove that, when drafts were received for collection, it was customary to credit the party passing them in. Judgment for plaintiff. Error.

Walker, J. 1. Proof of usage can only be received to show the intent or understanding of the parties in the absence of a special agreement. 2. When the draft was sent forward by the defendants to B & Co., they became the agents of the plaintiff for collection. Judgment reversed.

Cited: 83 Ill. 37.

SMITH v BYRAN (1864) 34 Ill. 364.

Scire facias, to make the defendants parties to a judgment. The plaintiff obtained a judgment against an insolvent bank, of which the defendants are stockholders. Before issuing execution against the bank, he brought this writ of scire facias. The constitution of 1848, art. 10, sec. 5, provides that the acts of the general assembly, authorizing banking corporations, shall not go into effect, unless submitted to a popular vote. The bank was organized under the Act of 1851, which provided, by sec. 4, that its stockholders should be individually responsible to the amount of their shares. This liability could be enforced by creditors after the assets of the bank were exhausted. The Act of February 14, 1861, provided that, where the bank was insolvent, a creditor might proceed against the stockholders, on his judgment against the bank, without waiting for the return of the execution unsatisfied. This act was not submitted to a vote of the people. Judgment for plaintiff. Error.

Breese, J. 1. This act does nothing more than provide a more speedy remedy to a bank creditor, by which the liability of a stockholder can be sooner reached

than by the general law. 2. A corporation is subject to changes in legal remedies. The obligation of the contract of these stockholders has not been increased, or impaired, or in any way affected by this act. Judgment affirmed.

Cited: 82 Ill. 493; 166 id. 414; 192 id. 582; 70 Ill. App. 495; 99 id. 106.

STRONG v KING (1864) 35 Ill. 9.

Assumpsit on a bill of exchange. Plaintiff was the assignee of a sight draft, indorsed to him by S. The draft was presented by the holder, S's agent, on the day of its reception, to the drawee for payment. It was delivered to the drawee in exchange for the drawee's check for the amount. This check was deposited on the same day in a bank, and sent through the clearing house. It was rejected on the next business day, the drawee having suspended business. On the next day payment of the draft was demanded of the drawee and refused. The draft was protested and notice mailed to defendant, the drawer. Defendant, with knowledge of all the facts, thereafter agreed to pay the draft. Judgment for plaintiff. Appeal.

Walker, C. J. 1. The holder of sight draft, in order to charge the drawer and indorsers, must put it in circulation, if within reach of the drawee, not later than the next business day after its reception. 2. The bare reception of a check for the amount of a draft from the drawee will not be considered as payment, even if the draft is surrendered to the drawee. 3. If such check is appropriated, however, to the use of the holder, it thereupon becomes a payment of the bill for which it was received. 4. The mere deposit of a check with a banker does not operate as such an appropriation, as, in general, tellers have authority only to take checks for collection. 5. Where, however, a banker credits the depositor with the amount of the check, he becomes the holder thereof; and the check is accepted as payment of the bill for which it was received. 6. A delay caused by collecting through the clearing house is not more excusable than would be a delay caused by failing to send a messenger. 7. A promise to pay a bill by a drawer or indorser, with knowledge of the failure to make proper protest, amounts to a waiver of the laches. Judgment reversed.

Cited: 59 Ill. 347; 71 id. 644; 76 id. 306; 92 id. 53; 124 id. 208; 164 id. 504; 98 Ill. App. 456.

HOWES v AUSTIN (1864) 35 Ill. 396.

On a bank check by the indorsee. Defenses, the general issue on common counts; a special plea on special counts, declared a bar to those special counts. The plaintiff introduced the check in evidence, under the general issue. The questions of diligence in presenting the check for payment, and whether loss resulted from failure to do so, at an earlier period, and the legal effect were presented to the jury. Defendant contended that judgment declaring the special plea a bar to the special counts, was a bar to the common counts. Judgment for plaintiff. Appeal.

Walker, C. J. 1. A judgment entered for defendant on the special counts was not a bar to the recovery on the common counts. 2. The check was admissible under the common counts. 3. The questions of diligence in presenting the check, and of loss from failure to do so, were properly presented to the jury. Judgment affirmed.

Cited: 73 Ill. 388; 2 Ill. App. 210; 52 id. 46.

TURNEY v WILTON (1865) 36 Ill. 385.

Bill to enjoin waste. Complainant's grantor mortgaged certain premises to the State Bank. A suit to foreclose was commenced by the bank in February, 1848, and decree rendered therein in May, 1849. The premises were bought in by the bank, under whom defendant claimed title. By statute, the charter of the bank expired on October 31, 1848, and on that day its officers transferred all its rights to trustees, who continued the foreclosure proceedings in the corporate name. The statute provided for the appointment of trustees to close its affairs, which should have the same powers as those possessed by trustees under another statute, referring to the closing of the affairs of another bank. That statute provided that the trustees should have the power to prosecute actions in the corporate name. The trustees of the State Bank were required by statute to close its affairs on February 28, 1849, but a statute of February 10, 1849, extended the time to 1851, and authorized the trustees expressly to maintain suits at law. Complainant claimed

that this provision showed that the legislature did not construe the prior statutes as giving the trustees the right to prosecute actions in the corporate name. Decree for complainant. Appeal.

Breese, J. 1. Where a statute confers powers which are recited in another act, the latter must be treated as if it were incorporated in the former. 2. Legislative construction is not conclusive on the courts, and its weight is much lessened where such construction arose, evidently from misapprehension. 3. The trustees of the State Bank had authority under the statutes to prosecute actions in the corporate name. Decree reversed.

Cited: 133 Ill. 437.

HUNT v DIVINE (1865) 37 Ill. 137.

On certificate of deposit. The defendants, private bankers, issued to B a certificate of deposit, payable three months after date on the return of the certificate. No place of payment was named. The certificate was indorsed to the plaintiff, who brought suit at the end of three months, without previously demanding payment or returning the certificate. The General Banking Law of 1851, sec. 20, forbids banking associations or individual bankers from issuing notes not payable on demand. Judgment for plaintiff. Appeal.

Breese, J. 1. The defendants are private bankers, and not an institution having general banking powers, issuing notes for circulation, within the meaning of the banking act. 2. This instrument is simply a promissory note. 3. No demand was necessary. 4. The return of the certificate cannot be a condition precedent to recovery. Judgment affirmed.

Cited: 102 Ill. 259; 144 id. 129, 619; 181 id. 284.

MUSICK v HODGEN (1865) 38 Ill. 352.

Assumpsit. Plaintiff agreed with defendants that money derived from certain sales should be deposited with H and G to the credit of defendants, who should hold it in their names merely as a convenience to plaintiff. H and G failed, and plaintiff demanded the amount of the deposits. Judgment for plaintiff. Appeal.

Lawrence, J. If plaintiff simply borrowed the use of defendant's name and defendants derived no advantage from the arrangement, they could not be made to suffer for an act of gratuitous kindness. Judgment reversed.

Cited: 47 Ill. 125.

MARINE BANK v FERRY'S ADM'R (1866) 40 Ill. 255.

On promissory note. Defendant was administrator of the estate of F. F was one of three makers of the note held by plaintiff. D, a co-maker, paid his share of the note, and defendant's teller thereupon erased his name and released him on the note. A deposition by D was offered in evidence and refused. Judgment for defendant. Appeal.

Breese, J. The act of the teller was not within the scope of his authority and did not release D. Being liable to contribute, D was an interested party, and his deposition was properly excluded. Judgment reversed.

Cited: 47 Ill. 125.

WOOD v MERCHANTS SAV. LOAN AND TRUST CO. (1866) 41 Ill. 267.

On promissory note. The defendant made the note payable at C Bank in Chicago. After maturity, plaintiff presented the note at said bank, where the defendants then had sufficient funds on deposit to pay it. It was marked "good" by the teller, and was taken away without receiving the money. The bank failed the next day. No instructions had been given by defendants to the bank as to the payment of the note. The defendants contended that the certification and failure to get the money released them. Judgment for plaintiff. Error.

Breese, J. 1. The holder of such paper is not under any obligation to present the note for payment when payable. 2. The fact of making a note payable at a particular bank is not an agreement that the maker may deposit at the bank the amount of the note and thus discharge his obligation; or that the money so deposited is at the risk of the holder of the note. 3. The bank had no right to pay the note without directions so to do from the depositors, and the certification did not alter the case. Judgment affirmed.

Cited: 70 Ill. 87; 77 id. 492; 100 id. 602; 102 id. 259; 109 id. 484; 19 Ill. App. 174; 37 id. 481; 49 id. 122; 101 id. 252.

FIRST NAT. BANK OF CHICAGO v PETTIT (1866) 41 Ill. 492.

On a check. An agreement was made between the defendant bank and A, whereby the defendant agreed to honor A's checks drawn on M to a certain amount for corn to be purchased on the security of a bill of lading. The bank paid checks beyond the amount agreed upon, some of the checks paid being for objects different from that for which the credit was extended. The check sued on was drawn under this agreement with A; but, the credit having been exceeded when it was presented, payment was refused. Judgment for plaintiff. Error.

Lawrence, J. The agreement was made with A upon the credit of the corn, and not with A as the agent of M. The bank having paid A's checks until his account, including the credit, was overdrawn, it had done all that it agreed to do. Judgment reversed.

Cited: 48 Ill. 37; 27 Ill. App. 263.

BICKFORD v FIRST NAT. BANK OF CHICAGO (1866) 42 Ill. 238.

On certified check. During banking hours the defendant drew the check in favor of A on the C Bank, by which it was at once certified, and was deposited with the plaintiff bank, and credit for the amount given to A. According to custom, and in regular course, it was presented for payment at the C Bank the next morning; but the bank having failed, it was dishonored and was duly protested. Due notice of protest was given. Without disclosing his agency, defendant acted for another person. Judgment for plaintiff. Error.

Breese, J. 1. This check was like an inland bill of exchange, and the drawer understood on his part that the drawee should accept and pay; and if he did not pay, the drawer is answerable, he having due notice of the non-payment. 2. Due diligence was used in making demand. 3. Defendant was personally responsible. Judgment affirmed.

Cited: 42 Ill. 254; 43 id. 500; 64 id. 322; 80 id. 214; 89 id. 109; 109 id. 485; 117 id. 107; 137 id. 642; 149 id. 352; 158 id. 539; 165 id. 73; 169 id. 520; 171 id. 535; 181 id. 283; 2 Ill. App. 209; 18 id. 192; 20 id. 29; 23 id. 209; 35 id. 590; 36 id. 114; 37 id. 480; 54 id. 605; 64 id. 304; 65 id. 491; 70 id. 248; 80 id. 158; 88 id. 457; 98 id. 456.

HINKLEY v BELLEVILLE (1867) 43 Ill. 183.

Action to recover a penalty for a violation of a city ordinance in not taking out a banker's license. The city charter conferred the power to pass the ordinance. Judgment for plaintiff. Appeal.

Lawrence, J. The business of the banker includes that of money-changer, and he may be required to take out a license under the charter. Judgment affirmed.

Cited: 9 Ill. App. 129.

THE PEOPLE v McCALL (1867) 43 Ill. 286.

A tax assessment having been levied upon the shares of stock of a national bank, an abatement was granted by the board of supervisors, and affirmed on appeal under the authority of "Van Allen v Assessors," 3 Wall. 584.

WILLETTS v PAINE (1867) 43 Ill. 432.

On check. The check, drawn by the defendant on F, was not presented for payment until 25 days later, and was protested still later. Meantime the drawee failed. The banker testified that the defendant had on deposit depreciated currency, with which the check would have been paid, had it been presented. The court instructed that recovery was sought on the check as a foreign bill of exchange; that as such it was not presented in time; that the burden of excusing the delay was on plaintiff; and that whether there was such an excuse depended on the condition of affairs with the bankers; that if the defendant's deposit was to be repaid dollar for dollar, then he had the right to draw the check; but, if otherwise, he had no right to do so, and the delay in presenting it would be immaterial. Judgment for defendant. Error.

Lawrence, J. 1. The charge was correct. 2. On the face of the check and protest the drawer was discharged by the delay. Judgment affirmed.

Cited: 73 Ill. 388.

BROWN v LECKIE (1867) 43 Ill. 497.

On certified check. The defendant drew a check in favor of the plaintiffs on S, who certified it and charged the amount against the drawer. When presented for payment, S's offer, to credit the amount to plaintiffs on their indebtedness to S, was refused. Plaintiffs thereupon returned the check to defendant and demanded another or money. Judgment for plaintiffs. Error.

Walker, C. J. 1. In the case of a certified check the amount thereof is at once withdrawn from the control of the drawer, whether or not it is charged against him by the bank; and the payee may sue the bank upon which it is drawn for the amount. 2. As the holder of the check is only treated as the agent of the drawer in collecting the amount, it would be manifestly wrong to permit the banker to set off the debt of the holder against the debt he owes the drawer. Judgment affirmed.

Cited: 80 Ill. 214; 109 id. 485; 114 id. 491; 115 id. 430; 137 id. 642; 158 id. 539; 159 id. 469; 181 id. 283; 20 Ill. App. 29; 37 id. 480; 42 id. 289; 72 id. 317.

THE PEOPLE v MINER (1868) 46 Ill. 374.

Where a tax was assessed against the shareholders of a national bank, under law then in force, and was voluntarily paid, the state was not compelled to refund the tax merely because of some technical illegality in assessment, and the money could not be recovered under such circumstances.

Cited: 46 Ill. 377; 56 id. 162; 196 id. 546.

NELSON v FIRST NAT. BANK (1868) 48 Ill. 36.

Bill to enforce payment of check. The defendant bank agreed with A to cash his checks to a certain amount. A agreed with plaintiff that checks drawn for a certain purpose should be paid from this fund. This agreement being known and assented to by the bank, checks were drawn and paid for purposes not embraced in the agreement; and when a check, drawn in accordance with the agreement, was presented, payment was refused because the credit had been exceeded. Defendant contended that the agreement, not being in writing, it was not liable. Decree for defendant. Appeal.

Lawrence, J. 1. The credit being given on the faith of a promise communicated to it, and the check being capable of sufficient identification, the bank was bound to honor the check. 2. The promise to pay or accept a non-existing check is not within the Statute of Frauds. Judgment reversed.

Cited: 95 Ill. 513; 148 id. 382; 3 Ill. App. 569; 33 id. 643.

MCVEAGH v CITY OF CHICAGO (1868) 49 Ill. 318.

Bill to restrain the collection of a tax on plaintiff's shares of stock in a national bank. The Law of 1867 made bank stock assessable in that one year in July instead of April. All personal property was assessed. A law, authorizing the taxation of shares of stock of state and national banks, provided for a deduction of the value of the real estate held by the banks from the value of the shares. The plaintiff contended that the act was unconstitutional; that it was void, so far as it made the assessment for the current year in July; that it was contrary to sec. 41 of the National Banking Act, in that the shares were valued at a greater rate than other monied capital, because no deductions were allowed for debts due and owing by the shareholder, as allowed in assessments against all other personal property. Plaintiff did not show that he was injured by the assessment in July. Actual notice of assessment was not proved, but notice by publication was given as required by law. Demurrer. Sustained. Error.

Breese, C. J. 1. If the plaintiff complained of the assessment of the shares in July instead of April, it would be necessary for him to show injury. 2. The object of the National Banking Act was that the shares should be assessed at the place where the bank was located, at a rate not greater than should be assessed upon other monied capital. 3. The objection, that the shares were valued at a greater rate than other monied capital of the state, was not well founded. 4. The Act of 1867 was constitutional. 5. Actual notice was unnecessary. Decree affirmed.

Cited: 49 Ill. 331; 52 id. 415; 76 id. 573.

CUSHMAN v CARVER (1869) 51 Ill. 509.

Where a banker notified his correspondent that he would thereafter require all his drafts to be paid in a certain kind of currency, and the correspondent forwarded the amount deposited to the banker's credit in depreciated currency, but the banker did not open the package to ascertain the character thereof until one week after its receipt, he will be deemed to have waived any objection to the character of the currency, and to have made the money his own at its nominal value.

CITY OF CHICAGO v LUNT (1869) 52 Ill. 414.

Where private bankers invest their capital in United States securities, such securities are exempt from state and municipal taxation.

FIRST NAT. BANK OF MADISON v HART (1870) 55 Ill. 62.

Assumpsit to recover reward. The bank offered a reward to "bank officers or police detectives" for the detection and conviction of a forger, and for return of the money. The plaintiff, through whose efforts the arrest and conviction were obtained, was neither a bank officer nor a police detective, but he wrote the bank that he suspected the party afterward convicted, and said he would claim the reward if the party were convicted. Defendant wrote, inclosing a copy of the offer of reward, and telling the plaintiff to keep a close watch. A detective in the employ of the bank conferred with plaintiff; the person charged confessed, the arrest and conviction followed, with a voluntary restoration of the property lost. Judgment for plaintiff. Error.

McAllister, J. A contract was made directly with plaintiff, which he fully performed; and he was entitled to recover. Judgment affirmed.

Cited: 74 Ill. App. 285; 92 id. 619.

FIRST NAT. BANK v HAIGHT (1870) 55 Ill. 191.

Where a party receives money at a bank in a package, and having an opportunity to count the same, does not, but relies upon the count of the bank official, such acceptance will not be conclusive upon him; but it will require clear proof to open the transaction and to recover a deficiency due to mistake.

BOARD OF SUPERVISORS v MANNY (1870) 56 Ill. 160.

Assumpsit to recover back taxes. The plaintiff was the owner of shares of national bank stock. The defendant assessed taxes on these shares for the years 1865 and 1866. The plaintiff paid the taxes under protest. There was no proof that the bank had ever paid taxes on the capital stock. The plaintiff contended that the Act of February 14, 1857, required the capital stock to be taxed, instead of the shares, in banking corporations; that property cannot be held liable to double taxation; and that the statute authorizing the taxation of stock in banks does not conform to the limitations of the Act of Congress of June 3, 1864, creating national banks. Judgment for plaintiff. Appeal.

Thornton, J. 1. No recovery can be had in assumpsit. 2. The plaintiff was under obligation to pay taxes assessed upon his shares of stock. Even though the assessment was informal and irregular, and not strictly in conformity with the statute, the money cannot be recovered. Whether our statute conforms to the act of Congress is a question which does not arise in this case. Judgment reversed.

Cited: 1 Ill. App. 215; 34 id. 223; 64 id. 256; 194 Ill. 164.

SURGES v KEITH (1870) 57 Ill. 451.

Trover for value of shares of railway stock. Plaintiff left with defendant's agent shares of stock with a power of attorney authorizing the agent to sell and transfer the stock. Defendants were bankers, the firm being composed of five members. Three members withdrew subsequent to the deposit. Later the agent sold the stock and subsequently plaintiff demanded, in writing, its return. The court instructed that if defendants knew of the deposit and the stock was wrongfully converted, then all the defendants were liable, notwithstanding the dissolution of the firm before the act of conversion. The power of attorney was not produced at

the trial, but both sides treated it as in existence at time of sale. The value of stock at time of sale was less than par. The measure of damages was assessed at the value of the stock at time of trial. Judgment for plaintiff. Appeal.

McAllister, J. 1. In an action for conversion, a demand upon a member of a firm after its dissolution will not bind the retired partners. 2. Under the power of attorney, the agent had a license to sell and trover will not lie. 3. The measure of damages in actions of trover is the current market value of the property at the time of the conversion, with interest to the time of the trial. Judgment reversed.

Cited: 81 Ill. 363; 91 id. 563; 119 id. 561; 125 id. 636; 9 Ill. App. 243; 13 id. 26; 15 id. 538; 17 id. 196; 28 id. 338; 33 id. 201; 58 id. 44; 90 id. 527; 93 id. 116.

CUTLER v REYNOLDS (1872) 64 Ill. 321.

Where a check is drawn on one party payable to another at some future date, it is substantially an inland bill of exchange, and the Act of 1861, relative to "uniformity in calculating the days of grace," is applicable thereto.

FIRST NAT. BANK OF MENDOTA v SMITH (1872) 65 Ill. 44.

Bill to restrain the collection of taxes from a national bank on all the shares of stock levied upon in the county in which the bank was located. An act of the legislature provided that all the shares of stock in a bank should be assessed in the county where the bank was located. The plaintiff contended that the legislature had no power to tax shares in any other county than that in which the shareholders resided. Demurrer. Sustained. Bill dismissed. Appeal.

McAllister, J. 1. The exercise of the power by the legislature was proper. 2. National bank stock is taxable at the place where the bank is located regardless of the residence of the stockholders. Decree affirmed.

Cited: 67 Ill. 298; 88 id. 173; 57 Ill. App. 688.

MANUFACTURERS NAT. BANK v BARNES (1872) 65 Ill. 69.

On a deposit. Plaintiff, who deposited with defendant bank, gave a power of attorney to his clerk, good for 15 days, to sign checks. The clerk drew a check after the expiration of the time and appropriated part of funds so obtained to his own use. Meanwhile the bank book had been balanced frequently, and checks returned to plaintiff, who failed to discover the checks in excess of authority. Judgment for plaintiff. Appeal.

Lawrence, C. J. The bank's negligence, in paying checks of the clerk drawn after expiration of power of attorney, cannot be excused by neglect of plaintiff to examine the returned vouchers. Judgment affirmed.

Cited: 115 Ill. 149.

CITY INS. COMPANY v COMMERCIAL BANK (1873) 68 Ill. 348.

Attachment. The court in Rhode Island appointed a receiver for the defendant bank. In an attachment by plaintiff against real estate in Illinois, the receiver interpleaded, and moved to quash the writ on the ground: 1, That he was the owner of the property; 2, setting up that the bank was in liquidation and his appointment as receiver; 3, a full statement of all the facts including proceedings in the Rhode Island court. Demurrer. Overruled as to second and third plea. Issue on first. Judgment for receiver. Writ quashed. Appeal.

Scott, J. 1. Although, by the laws of the state creating it, the effects of this corporation are in the hands of a receiver, comity does not prevent this state from affording this remedy against the property of the bank not in the hands of a bona fide purchaser. 2. A party may interplead where the only property attached is real property. 3. Neither the laws nor the decree of a court of another state can operate to divest title to real estate in Illinois. Judgment reversed.

Cited: 102 Ill. 325, 329; 103 id. 431; 112 id. 239; 130 id. 95; 145 id. 91; 180 id. 435; 3 Ill. App. 544.

FOURTH NAT. BANK v CITY NAT. BANK (1873) 68 Ill. 398.

Injunction. The drawer of a check on plaintiff bank had deposited in it the proceeds of his note there discounted. The defendant bank cashed a check of the maker of the note drawn on plaintiff, before the note matured; but, owing to un-

avoidable delay, the check was not presented for payment until ten days later. Plaintiff asked that a suit at law by defendant against plaintiff for the amount of the check be enjoined, because: 1, A bank has a lien on funds of its depositors for debts due it from depositors whether due or not; 2, a petition in bankruptcy having been filed against drawer four days before check was presented for payment, the assignee in bankruptcy has a claim against drawer's funds. Demurrer. Sustained. Appeal.

Breese, C. J. 1. A banker's lien extends only to securities or valuables, not to funds of deposit. 2. Before the adjudication in bankruptcy, the right of defendant had become fixed, and its equity was complete before the petition in bankruptcy was filed. Judgment affirmed.

Cited: 149 Ill. 352; 169 id. 521; 171 id. 534; 181 id. 283; 13 Ill. App. 137; 20 id. 29; 50 id. 442.

FOLLANSBEE v PARKER (1873) 70 Ill. 11.

Assumpsit to recover the proceeds of stock. Plaintiff owned shares of bank stock, held by defendants in their name, with a stock broker in New York. Plaintiff directed defendants to wire to New York to sell the stock. On the way to the telegraph office, defendants met X, who ordered them to sell stock of the same kind that they held for him. The stock sold at a profit, and benefit was given to X. Plaintiff brought suit for the profit due him on the sale. Judgment for plaintiff. Appeal.

Breese, C. J. The defendants were in error in appropriating the telegram to the benefit of X. Judgment affirmed.

FIRST NAT. BANK OF QUINCY v RICKER (1874) 71 Ill. 439.

Money had and received. Plaintiff, a private banker, paid to defendant bank the amount of a check signed by a firm which had an account with him. The check purported to be signed by a member who seldom drew checks, and with whose signature the plaintiff was not familiar. The check was a forgery, and certain officers of defendant were suspicious when it was presented by and paid to defendant. Defendant contended that plaintiff was estopped to deny the signature of his own depositor. Judgment for plaintiff. Appeal.

Scott, J. 1. A drawee of a check is presumed to know the signature of the drawer and, having parted with funds on a forged check, he is, in the absence of fraud by the party presenting, estopped from recovering. 2. The plaintiff was not negligent in paying this check, as the officers of defendant failed to communicate to him their suspicions. Judgment affirmed.

Cited: 151 Ill. 300; 152 id. 306; 159 id. 89; 2 Ill. App. 211; 49 id. 509.

BANK OF CHICAGO v HULL (1874) 74 Ill. 106.

Practice. Plaintiff was a depositor in defendant bank. The declaration was accompanied by an affidavit, showing the nature of the plaintiff's demand and the amount due, and to the affidavit was attached a bank book, written by the defendants, showing their own figures and the balance due the plaintiff. The statute did not require the affidavit to be made by plaintiff. No affidavit of merits was made by defendant, and the court struck out the plea of the general issue. Judgment for plaintiff. Appeal.

Breese, J. 1. The affidavit and bank book were a full bill of particulars. 2. The statute having been complied with by the plaintiff, it was incumbent on defendants to accompany their plea with an affidavit of merits. The court properly struck the plea of the general issue from the files. Judgment affirmed.

Cited: 82 Ill. 495.

SCHROEDER v HARVEY (1874) 75 Ill. 638.

Assumpsit for money paid upon dividend warrants drawn by B upon the M Bank in favor of the creditors of the bankrupt. The warrants, in the nature of checks, were cashed by defendant for a clerk of the drawer and deposited in F Bank for collection. F Bank sent them to the M Bank, which paid and charged them to B. On discovery of the forgery of the payees' names, M Bank credited B's account with the amount and returned the warrants. F Bank took up the checks, notified the defendant, and on his refusal to pay, brought suit, by its assignee. Defendant contended that if the names were forged, F Bank and those under whom it claimed

were negligent in giving notice. In delivering such checks, the payee was always required to sign a receipt on the stub in the check book. No such receipts were obtained, and three of the payees testified that their names were forged. The forgeries were discovered August 4, and the defendant was notified by the F Bank August 9. The jury found that all the signatures were made by S. It was not shown affirmatively that they were unauthorized. Judgment for plaintiff. Appeal.

Sheldon, J. 1. The evidence was sufficient to establish that the indorsements were not those of the payees. 2. There was no such negligence on the part of any of the banks as would release the defendant. 3. The indorsements were prima facie proved to be invalid, when it was proved they were not in the handwriting of the payees. Judgment affirmed.

Cited: 134 Ill. 257; 8 Ill. App. 71.

BRAHM v ADKINS (1875) 77 Ill. 263.

Assumpsit to recover a bank deposit. The plaintiff put in evidence an ordinary deposit slip, showing that he had deposited with the defendants, who were bankers. The slip was signed by the defendants. There was no evidence of a demand. Judgment for plaintiff. Appeal.

McAllister, J. The paper was prima facie evidence of a general deposit, and no demand by the depositor, or some person by his order, being shown, the plaintiff failed to show a cause of action. Judgment reversed.

Cited: 95 Ill. 242; 140 id. 150; 163 id. 73, 82; 165 id. 114; 182 id. 376; 11 Ill. App. 511; 35 id. 326.

WHEELOCK v KOST (1875) 77 Ill. 296.

Bill by creditors of a national bank against its stockholders. The bank was insolvent and executions, issued on the several judgments held by the plaintiff, had been returned nulla bona. Defendant W contended: 1, That he was not a stockholder, because he had made a loan to the bank, and the stock was issued to him as collateral security; 2, that the bank was not legally incorporated; 3, that the decree was too large. Decree for complainants. Appeal.

Scott, J. 1. As to the creditors, defendant is a stockholder. 2. A stockholder cannot plead defective organization against a bona fide creditor, if there was a corporation de facto. 3. Each individual shareholder is bound equally and ratably for the debts of the bank, in proportion to the par value of his stock, in addition to the amount invested in such shares, but no liability rests upon him for his fellow shareholders. Decree affirmed.

Cited: 120 Ill. 360; 195 id. 119; 35 Ill. App. 416; 93 id. 39; 100 id. 467.

PALMER v NASSAU BANK (1875) 78 Ill. 380.

On promissory note. The note was made by the defendant to the Cook County National Bank. The bank, under the style of "B, Pres.", indorsed the note to B, and he indorsed the same to the plaintiff. The affidavit to the declaration was headed: "State of Illinois, Cook County, ss:" and the jurat was signed "P, Notary Public." The court struck out general issue for want of an affidavit of merits. The defendant contended: 1, That there was no sufficient affidavit with the declaration to demand an affidavit of merits, in that it purported to be sworn to before a notary, but failed to state of what county or state he was a notary; 2, that no title was shown in the plaintiff, because the blank indorsement was not filled up at the trial; 3, that the president of the bank could not be both buyer and seller, and that therefore the plaintiff's title was through a void indorsement. Judgment for plaintiff. Appeal.

Sheldon, J. 1. The affidavit is sufficient in the respect objected to. 2. Possession of a note, indorsed in blank, is evidence of title. 3. The indorsement does not appear to have been the act of B, but of the bank under the style of "B, Pres."; but we know of no inability in the bank, through B, its agent and president, to transfer by indorsement the legal title of the note to B. Judgment affirmed.

Cited: 185 Ill. 65, 68; 50 Ill. App. 507; 70 id. 209; 100 id. 254.

CUSHMAN v ILLINOIS STARCH CO. (1875) 79 Ill. 281.

Money had and received. Defendant C was treasurer of the plaintiff corporation, and also a member of the defendant banking firm, with which plaintiff depos-

ited. At a meeting of the stockholders, his successor as treasurer was elected, and notice thereof was given him by mail. Subsequently the deposit in question was made. The plaintiff put in evidence a certificate of deposit, and proved that it was signed by the proper officer of the defendant. While C was treasurer of the plaintiff, its deposits were passed to C's account, and the deposit in question was put to the credit of C. Of this arrangement between the bank and C, plaintiff had no notice. The defendants attempted to show that they had no notice that C's successor had been elected. Judgment for plaintiff. Appeal.

Scott, C. J. The production of the certificate of deposit, with proof that it was signed by a proper officer of the bank, made a prima facie case against the defendants, and their liability cannot be discharged by evidence of a private agreement between the bank and C, especially as respects a deposit made after C ceased to be treasurer of the plaintiff. Judgment affirmed.

UNION NAT. BANK v OCEANA CO. BANK (1875) 80 Ill. 212.

On check. The check was drawn by L, on the defendant, in favor of G, who indorsed and delivered it to the plaintiff. The drawer stopped payment. Evidence tending to establish a defense as between the drawer and the drawee was rejected. Judgment for plaintiff. Appeal.

Scott, C. J. Where a depositor draws his check on his banker, it operates to transfer the sum named to the payee, who may sue for and recover the amount from the bank; and transfer of the check carries with it title to the amount named in the check to each successive holder; and after the check has passed to the hands of a bona fide holder, it is not in the power of the drawer to countermand the order of payment. Judgment affirmed.

Cited: 114 Ill. 492; 118 id. 486; 149 id. 352; 159 id. 469; 171 id. 535; 181 id. 283; 183 id. 482; 184 id. 152; 9 Ill. App. 153; 20 id. 29; 42 id. 289; 69 id. 683; 84 id. 109.

FIRST NAT. BANK v MYERS (1876) 83 Ill. 507.

Assumpsit. Plaintiff made a deposit with the defendant bank. It was delivered to the president, who counted it, and gave a certificate for that amount. Subsequently the cashier counted the money and found it \$500 short, the amount in dispute. Plaintiff and the cashier were the only witnesses called. Judgment for plaintiff. Appeal.

Walker, J. 1. It was for the jury to decide to whom they would give the credit. 2. Having given the certificate of deposit, it is evidence of so high and satisfactory a character that, to escape its effect, the maker must overcome it by clear and satisfactory evidence, which we think it has failed to do. Judgment affirmed.

FRIDLEY v BOWEN (1877) 87 Ill. 151.

To foreclose a mortgage on real estate given to secure a promissory note. The answer alleged that defendant, the owner of the land, sold it to T. Subsequently he induced T to reconvey the land to him. Meantime T borrowed money of M National Bank, and gave plaintiff, the president of the bank, the note and the mortgage in question. By United States Banking Law, national banks were prohibited from loaning money on real estate. Decree for plaintiff. Error.

Scott, J. 1. This mortgage must be regarded as having been made to the bank, otherwise, if such devices to evade the law were tolerated, the inhibitions found in the banking law in regard to loans on real estate would be rendered nugatory. 2. Mortgages on real estate taken by such associations to secure current loans are without authority of law and void, and the courts will not lend their assistance to such associations to make such securities available. Decree reversed.

Cited: 102 Ill. 534; 164 id. 445; 4 Ill. App. 312; 63 id. 607.

FULLER v LEDDEN (1877) 87 Ill. 310.

Debt against a stockholder of a state bank to recover a deposit. The charter provided that each stockholder should be liable to double the amount of stock held or owned by him, and continue liable for three months after giving notice of the transfer of the stock. The deposit was made in 1873. Defendant sold his stock on January 24, 1874; notice of transfer was given March 19, 1874, and the action

was commenced July 25, 1874. Defendant contended that the creditor's right of action was limited to three months after notice of transfer. Judgment for plaintiff. Appeal.

Craig, J. The words of the act have reference to the continuance of the liability, and not to the time within which action shall be instituted. Judgment affirmed.

Cited: 96 Ill. 143; 102 id. 356; 103 id. 391; 105 id. 643; 108 id. 363; 120 id. 361; 124 id. 621; 176 id. 496; 9 Ill. App. 370; 17 id. 404; 47 id. 138; 51 id. 39.

KIMBALL v CORN EXCHANGE NAT. BANK (1878) 1 Ill. App. 209.

Bill to recover money paid under an illegal tax assessment. Plaintiff bank also prayed for an injunction to prevent the collector from paying over the moneys to the municipal corporations for which the tax was imposed. Plaintiff paid the tax to avoid a levy by the collector under a custom of national banks to pay taxes assessed against stock, and make a deduction from dividends to cover it. Plaintiff contended that equity had jurisdiction in order to prevent multiplicity of suits. Decree for plaintiff. Appeal.

Bailey, J. 1. The payment was made under such a degree of duress that the taxpayer may recover it. 2. The proper remedy was an action at law for money had and received. 3. It is not a case for equity to interpose to prevent multiplicity of suits. Decree reversed and bill dismissed.

Cited: 45 Ill. App. 447.

ALLEN v KRAMER (1878) 2 Ill. App. 205.

On check. The defendants gave the check drawn on G, bankers of New York, with whom they had a deposit. The check was received by the New York partner of the plaintiff firm on November 30, and on the same day was forwarded to and received by the Philadelphia partner on December 1. It was indorsed and deposited in a Philadelphia bank which forwarded it to a New York bank for collection on the same day. On December 3, payment was refused by G because of doubt of the genuineness of the defendant's signature. The check was again presented and refused after banking hours. G telegraphed the defendants who informed the bankers that the signature was genuine. The check without being again presented was protested and notice given to the defendants. There was no evidence that the defendants were injured. Judgment for defendants. Appeal.

Bailey, J. 1. The delay was not unreasonable and the presentment for payment was made in apt time. 2. Want of due presentment or notice of dishonor of a check does not discharge the drawer unless he has suffered some loss or injury thereby. 3. The law makes it the duty of the drawees to know the signatures of the depositors, the drawers. 4. A presentment of the check while the drawees were still solvent, a refusal of payment upon grounds for which the plaintiffs were in no way responsible, followed by protest and notice, fixed the liability of the drawers. Judgment reversed.

McLEAN COUNTY BANK v MITCHELL (1878) 88 Ill. 52.

Assumpsit to recover money which defendant had drawn out in excess of his deposit in plaintiff bank. The defendant's bank book, and the bank's ledger showed two deposits of the same amount on the same day. The bank claimed there was but one deposit, and that the bank book was a mere transcript from the ledger. The deposit blotter of original entries and the cash book showed but one entry. The bookkeeper entered the deposit on the individual deposit ledger from the cash book, but failed to check it, and afterward, seeing the unchecked entry on the cash book, he entered it again. The cash when counted agreed with the blotter and cash book. The court instructed that if the bank gave defendant credit twice for one deposit, the bank could not recover if such credit did not give defendant credit for more than he had in the bank, and if there was nothing due to plaintiff from defendant. Judgment for defendant. Appeal.

Craig, J. 1. The evidence preponderates in favor of the fact that but one deposit was made. 2. The instruction was erroneous. Judgment reversed.

Cited: 123 Ill. 590; 175 id. 439; 16 Ill. App. 499; 35 id. 294; 43 id. 58.

DANVILLE BANKING AND TRUST CO. v PARKS (1878) 88 Ill. 170.

Bill by a banking company against defendant Parks, as assessor and collector of taxes of D township, to restrain the collection of taxes on the property and

shares of stock of the bank. Complainant contended that it was double taxation, and also that the shares of stock held by non-residents are not liable to taxation in the township. Demurrer. Sustained. Bill dismissed. Appeal.

Breese, J. 1. The tangible property of a bank and the shares of stock are distinct kinds of property under different ownerships, the first being the property of the bank, and the second the property of the individual stockholders, and taxation of both is neither double nor unconstitutional. 2. The shares of stock in private banks are taxable at the place where such banks are located, without regard to the residence of the owners of the shares. Decree affirmed.

Cited: 184 Ill. 227, 228.

MAPES v SCOTT (1878) 88 Ill. 352.

Ejectment. Plaintiffs made a trust deed of the land to D to secure a note. The note and deed were transferred to the National Bank of J, and plaintiffs then conveyed the property to the bank by warranty deed. The bank conveyed to M, who conveyed to defendants. Plaintiffs contended that no title passed to the bank because the bank was incapable under its charter of taking, holding, and conveying real estate. Plaintiffs occasionally shipped goods to defendants. The bank taking the shipping bills cashed the drafts, sending them on for acceptance and payment. Defendants as collateral security gave the note and deed to the bank. The deed of conveyance from plaintiffs to the bank was in satisfaction of the notes. By the National Banking Law, a bank could take real estate security for a pre-existing debt. Judgment for defendants. Error.

Dickey, J. The debt of defendants on their note, for which the note and deed were given as collateral security, was a debt to the bank previously contracted in the course of its dealings within the meaning of the banking law. Judgment affirmed.

Cited: 99 Ill. 630.

MIX v NAT. BANK OF BLOOMINGTON (1878) 91 Ill. 20.

On promissory note. The note was made by the defendant, payable to N, at plaintiff's bank, and indorsed to plaintiff, before maturity. Pleas: General issue; nul tiel corporation; non est factum; and partial failure of consideration. The plaintiff put in evidence the certificate of the comptroller of the currency, showing the plaintiff's right to do business as a national bank. The court refused to instruct the jury that if they believed that the note was changed in a material part, without the defendant's consent, after execution, that it was void, and could not be recovered upon. Evidence on the question of alteration was given the defendant, who said that he thought the words "with interest at 10 per cent per annum from date, if not paid at maturity," were afterward inserted. The person who drew the note testified that it was not changed at all. The note was transferred to the bank as collateral security for a pre-existing debt. Judgment for plaintiff. Error.

Sheldon, J. 1. The evidence on the question of alteration was such that the error in refusing the instruction asked was immaterial. 2. We think the certificate of the comptroller of the currency was properly admitted. 3. The defense of a failure of consideration was not available against the plaintiff, the indorsee. Judgment affirmed.

Cited: 104 Ill. 501; 17 Ill. App. 627; 62 id. 40; 73 id. 256.

PEOPLE v LOEWENTHAL (1879) 93 Ill. 191.

Quo warranto to test the rights of the defendants to conduct a banking business as a corporation. Sec. 5 of art. 10 of the constitution of 1848 provided that no law, authorizing a corporation with banking powers, should go into effect until voted upon by the people at a general election, and approved by a majority of the voters. The Act of 1868, to incorporate the International Mutual Trust Company, under which the defendants were operating, was not submitted to a vote of the people. Other organizations had been similarly organized, and the law had been construed generally as not being contrary to the constitution. The Act of 1868 originated in the Senate, was regularly passed and sent to the House. There was no report of any committee of the Senate on the bill, nor anything to show that it was actually engrossed before its passage. It was read in the House, referred to a committee, "reported back with amendments," and passed. It was objected that it appeared that the bill was amended in the House, and these amendments were

never concurred in by the Senate. The bill appeared signed by the speaker of both houses, approved by the governor, in the duly published laws as a state law. Judgment for defendants. Error.

Sheldon, J. 1. The act incorporating the company is not unconstitutional merely because not submitted to a vote of the people. The argument ab inconvenienti has weight. 2. The provisions of the constitution of 1870, art. 11, secs. 2, 5 and 7, may be considered a constitutional recognition of these pre-existing corporations with banking powers. 3. The act embraces but one subject, which is sufficiently expressed in the title. 4. The presumption is that the law was regularly passed; and the evidence is not sufficient to overcome the presumption that the bill was regularly passed. Judgment affirmed.

Cited: 93 Ill. 229; 97 id. 333, 575; 101 id. 227, 232; 106 id. 207; 109 id. 509; 125 id. 596; 127 id. 127; 8 Ill. App. 648; 24 id. 540; 39 id. 225.

BROMLEY v GOODWIN (1880) 95 Ill. 118.

On certificate of deposit, by the plaintiff, a depositor, against a stockholder in M, a company having a savings bank department. The charter provided for the issue of certificates of deposit; the deposit to be held in trust for the depositor, and not mingled with the general funds of the company; and the stockholders were made individually liable, to the extent of their stock, for such deposits. S, the president of M, gave to plaintiff a real estate mortgage which recited that the money had been loaned. The transaction was recorded in a book of M, other than the savings record book. The plaintiff contended that the deposit was made in the savings department under the above provision; but the defendant maintained that it was an ordinary deposit, for which he was not liable; and the jury so found. Besides giving irrelevant, though not misleading instructions, the court charged that it must be made to appear by a preponderance of evidence that the plaintiff not only deposited the money as savings, but also in trust with said corporation. No exceptions were taken. The plaintiff's offer to give in evidence a bill in chancery, which showed the defendant to be a stockholder, was refused; there was sufficient other evidence on that point. Judgment for defendant. Error.

Craig, J. 1. Unless the money was deposited as savings and in trust, the stockholder could not be held individually liable. 2. A general deposit in a bank does not create a personal liability against the stockholder. 3. We cannot interfere with a verdict when there is any evidence to sustain it, though such evidence would have justified a different finding. 4. It was the duty of the plaintiff to have excepted to the instructions given; and not having done so, he cannot now raise the question. 5. The instruction given, to the effect that the jury must find by a preponderance of evidence that the deposit was in trust, was in the language of the statute, and was correct. 6. The giving of an instruction on a point not at issue, but which failed to mislead the jury, is not error. 7. There being sufficient competent evidence to prove that defendant was a stockholder in the company, it was not reversible error to reject the bill in chancery as evidence of that fact. Judgment affirmed.

Cited: 120 Ill. 359; 18 Ill. App. 110; 24 id. 542; 101 id. 541.

WARD v JOHNSON (1880) 95 Ill. 215.

Injunction. A bank, of which defendant was receiver, issued to complainants, as a special form of certificate, an agreement and declaration of trust, when deposits were made for investment in the savings deposit fund. The trust provided that such deposits should be secured by all collateral and securities taken or received as a result of the investment of the money, and also by the general property of the bank, in preference to any other obligations. The deposits in question were made in that department. The bank was not in fact a savings bank, but was a stockholder's bank. A circular issued by the bank stated that a provision had been made for a gradually increasing safety fund. It was contended that the bank had no power under its charter to issue certificates and create a preference in favor of the holders thereof. Decree for complainants. Appeal.

Scholfield, J. 1. A bank, which has power to incur indebtedness, has an implied power to borrow money, and, as a necessary incident, has power to make any proper arrangement to repay the same, including power to convey to a trustee securities and property which shall be a special fund to secure and repay the loan. 2. The creation of the investment department was properly incident to the power

granted by the charter. 3. The bank should not be allowed to plead *ultra vires*. 4. The bank was not estopped by its circular. 5. The representations were not binding on the plaintiffs. Decree affirmed.

Cited: 154 Ill. 392; 163 id. 73; 30 Ill. App. 493; 32 id. 659.

WINCOCK v TURPIN (1880) 96 Ill. 135.

Bill by the receiver and one depositor to restrain depositors in an insolvent bank from enforcing the liability of stockholders, and to restrain the depositors from prosecuting suits at law for that purpose. The bill did not allege that the stockholders were liable for the unpaid balance of their stock, or under a clause in the charter which rendered them liable to depositors to the amount of the shares of stock held by them, or that their liability was not incurred in some other way. Demurrer. Overruled. The bill was taken as confessed. Error.

Walker, J. 1. The bill is too indefinite, vague, and uncertain to sustain a decree granting the relief sought. 2. The claim against stockholders is an individual claim of the depositors, and the receiver has no right to interfere with it. 3. The depositor does not show any fact that requires equity to restrain the other depositors from collecting their claims. Decree reversed.

Cited: 99 Ill. 287; 101 id. 219; 102 id. 357; 105 id. 643; 108 id. 363; 110 id. 322; 114 id. 164; 120 id. 359; 153 id. 14; 161 id. 435, 510; 176 id. 499; 9 Ill. App. 370; 18 id. 112; 24 id. 542; 46 id. 380; 47 id. 134; 77 id. 435; 84 id. 563.

OTIS v GROSS (1880) 96 Ill. 612.

Money had and received. The Circuit Court of Cook County designated the S Savings Bank as the depository of money under the control of the court. After deposits had been made, without any special designation thereof, the bank failed. This proceeding was brought against the receivers to compel a preference as to such deposits. The funds had been mingled with the general funds of the bank. Judgment for plaintiff. Appeal.

Walker, J. 1. This was not a special deposit or a mere bailment. 2. When the receiver was appointed, it became the duty of the court to distribute the fund according to the rights of all the creditors, and there was no preference in regard to these funds. Judgment reversed.

Cited: 141 Ill. 268; 157 id. 69; 182 id. 356; 43 Ill. App. 346; 81 id. 257.

THE HOME NAT. BANK v NEWTON (1881) 8 Ill. App. 563.

Action against bank for refusing a check. Plaintiff gave defendant his note for \$1,500. On the last day of grace he had but \$300 on deposit which defendant applied to payment of the note. Later on, the same day, defendant refused payment of the check. Judgment for plaintiff. Appeal.

Wilson, J. The bank can apply the plaintiff's balance to the payment of the note on the last day of grace, without waiting till the close of business hours on that day. Judgment reversed.

THE DECATUR NAT. BANK v MURPHY (1881) 9 Ill. App. 112.

To recover deposits. Plaintiff deposited with defendant a check drawn by B on M. It was customary for banks to exchange checks, and settle the difference, if any bad check was returned and cash paid for it, before the close of business for the day, at four o'clock. The check was so returned after M had it an hour. Plaintiff contended the check was in fact paid, and alleged a custom to place paid checks on a spindle on which this check was placed, and a custom which required greater diligence in examining checks than M used in this case. The evidence did not support plaintiff's contention. Judgment for plaintiff. Appeal.

McCulloch, J. 1. The actual acceptance and payment of the check in question was not proved. 2. In the absence of a controlling custom M had a reasonable time to examine the check in question. 3. Defendant, having been diligent and without fault in endeavoring to make the collection, was entitled to charge plaintiff with the amount credited on the check. 4. Immediate examination of the check was not required. Judgment reversed.

HOGUE v EDWARDS (1881) 9 Ill. App. 148.

On check drawn on defendant by N, and payable to plaintiff in Chicago exchange. Defendant, N's banker, gave to N, in exchange for this check, a draft on a Chicago bank payable to plaintiff. Plaintiff did not receive the draft. Judgment for plaintiff. Error.

Pillsbury, J. 1. In such a case there is no privity between the bank and the creditor that will support an action against the bank. 2. N was not the plaintiff's agent, and therefore at any time prior to its actual delivery he could refuse to send the draft or could give it back. Judgment reversed.

MUNGER v JACOBSON (1881) 99 Ill. 349.

Where a bank is insolvent and its directors, being the only solvent directors in the state, are called upon to pay the amount for which they are liable under the statute, the mere fact that there is a distribution proceeding pending, is no reason why a decree should be delayed. Interest on a director's liability is not generally allowed, except where statute authorizes it.

Cited: 140 Ill. 296; 53 Ill. App. 249; 74 id. 354.

LIBBY v UNION NAT. BANK (1881) 99 Ill. 622.

Bill to subject real estate to sale and apply proceeds to payment of notes. S, being indebted to defendant bank, to secure it, gave notes secured by a trust deed of land made to M. The plaintiff, under a prior trust deed, sold the land to C, president of the bank, and he gave a note and a trust deed of the same property to secure payment. C, without formal action by the directors, often represented the bank. C died, and plaintiff brought this action making the bank and C's representatives defendants. Congress authorized the bank to hold land as a security for a debt. Decree for plaintiff against the estate of C. Appeal by both parties.

Dickey, J. 1. A national bank may purchase land to secure a debt due it, and may take title in the name of the president. The president had authority to make the purchase. 2. It was the debt of the bank, and not that of the president. Decree reversed.

ELLIS v FIRST NAT. BANK OF OLNEY (1882) 11 Ill. App. 275.

Assumpsit on promissory note given in exchange for other notes, upon two of which illegal interest of 12 per cent was reserved by plaintiff bank. Plea: Usury. Replication that the action was not brought within two years after the receipt of the usurious interest; and that its rights and liabilities were governed by the National Banking Act of 1864, which provided that knowingly reserving usurious interest was a forfeiture of the entire interest, and that twice the amount of the interest could be recovered as a penalty if the action were commenced within two years from receiving it. Defendant contended that the interest could be set off. Demurrer to replication. Overruled. Error.

Baker, P. J. 1. The two years' limitation, provided by the National Banking Law, has no application where the illegal interest has simply been retained or reserved. 2. The penalty provided by the act cannot be set up by way of setoff or counterclaim. Judgment reversed.

WELGE v BATTY (1882) 11 Ill. App. 461.

Goods sold and delivered. Plaintiff sold goods to defendant, and, at his direction, drew for purchase money. Defendant's bank honored the check, charged the amount to defendant's account, and drew in favor of plaintiff's collection agent on a bank in another city. Defendant's bank failed and the draft was dishonored. Judgment for plaintiff. Appeal.

Higbee, J. There was such a payment as to discharge defendant from liability. Judgment reversed.

FIRST NAT. BANK OF SPRINGFIELD v COLEMAN (1882) 11 Ill. App. 508.

To recover deposits. Plea: Payment. Defendant issued to plaintiff two certificates of deposit payable at a future date. The amounts were drawn out by checks by the plaintiff's husband. Nine years later, plaintiff's attorney made a demand in her behalf. The court held that the certificates, by their own force, drew interest after the day of payment. Judgment for plaintiff, allowing interest. Appeal.

McCulloch, J. 1. There is nothing in the fact of the money being made payable at a future day to distinguish it from an ordinary deposit, except that appellant was not bound to pay until the day arrived. 2. These so-called certificates were sufficient evidence of the existence of the debt to save the cause of action until barred by the Statute of Limitations, relating to written instruments; and if there had been unreasonable or vexatious delay of payment, interest might have been recovered. 3. On a general deposit, the banker is entitled to a demand before suit. 4. Defending in good faith, a suit brought for recovery of the money, is not a vexatious delay. 5. The holding of the court was error. Judgment reversed.

RICHARDSON v THE INTERNATIONAL BANK (1882) 11 Ill. App. 582.

Assumpsit. A partnership overdrew their account with defendant. The partnership was dissolved and the surviving partner gave notice that future deposits made by him were for the payment of checks drawn under the new arrangement. The bank did not object. Some of the deposits by the survivor were the proceeds derived by the survivor from firm contracts. The surviving partner made deposits sufficient to cover the check given by him to the plaintiff, but the defendant appropriated them to the balance due from the firm, and refused payment. Judgment for defendant. Appeal.

Bailey, P. J. The bank was liable to the plaintiff for the amount of the check. Judgment reversed.

LAING ADM'RS v BURLEY (1882) 101 Ill. 591.

Proceeding to enforce a shareholder's statutory liability for the debts of a bank. D held certificates of shares of stock in a national bank. Upon his death, these certificates were indorsed by C, defendant's intestate, as an heir of D, and the bank issued a certificate of stock to her, without recording the transfer, according to its by-laws. The banking law made a shareholder liable for the debts of the bank. Judgment for defendant. Appeal.

Scott, J. A party holding shares of stock in a bank, issued upon a certificate not recorded in accordance with the by-laws of the bank, is a shareholder, and subject to the liabilities under the National Banking Law. Judgment affirmed.

Cited: 105 Ill. 442.

FIFTH NAT. BANK v HYDE PARK (1882) 101 Ill. 595.

Bill to recover trust fund. W, treasurer of complainant, deposited the village funds, in his individual name, with respondent bank. The bank did not know that all the funds belonged to complainant. W borrowed money from the bank on his own note and claimed the loan was for complainant. The bank, in good faith, accepted payment by W's check on the village funds. Decree for complainant. Appeal.

Dickey, J. The bank did not knowingly partake in the breach of trust and is not liable. Decree reversed.

Cited: 155 Ill. 543.

SPRINGFIELD M. & F. INS. CO. v PECK (1882) 102 Ill. 265.

Bill for separate maintenance. Defendant, the husband of plaintiff, held certificates of deposit on defendant bank. An injunction issued restraining the bank from paying him the money. After the service of the injunction, the bank paid the certificates, which had been fraudulently assigned to L. The bank contended that the allowance to the complainant was too large; that the bank, by paying the certificates, violated no mandate of the court; and that the bank was not bound to determine the honesty of the assignment by the husband. Decree for plaintiff. Appeal by the bank.

Scott, J. 1. Whether the complainant's allowance was excessive was no concern of the bank. 2. The bank violated the mandate of the court by paying out the funds after the service of the writ of injunction. 3. The bank was not bound to determine the honesty of the assignment by the husband. 4. The bank should not have paid the money until the termination of the suit in which the injunction issued. On a bill for separate maintenance the court will restrain the husband from taking his property beyond the jurisdiction of the court. Decree affirmed.

PENN v BORNMAN (1882) 102 Ill. 523.

Action against an indorser. Defendant indorsed a large quantity of paper taken by the bank of which he was a director. Plaintiff was assignee of the bank. The bank's charter declared that no director should be indebted to it, directly or indirectly, to an amount greater than 75 per cent of his stock. The notes indorsed by defendant exceeded 75 per cent of his stock in the bank. There was no evidence of fraud on part of defendant. Judgment for defendant. Appeal.

Mulkey, J. The bank could not, in violation of this prohibition, contract ad libitum with its directors, and be permitted to recover. Judgment affirmed.

Cited: 103 Ill. 463, 465; 129 id. 465; 138 id. 97; 151 id. 539; 155 id. 177, 361, 367; 157 id. 317; 158 id. 529, 540; 164 id. 450; 13 Ill. App. 597; 19 id. 306; 21 id. 123; 26 id. 154; 36 id. 432; 40 id. 122; 53 id. 403; 75 id. 49; 93 id. 181.

WORKINGMEN'S BANKING CO. v RAUTENBERG (1882) 103 Ill. 460.

Action against P, the maker and guarantor of a note, given to the plaintiff bank. P was a director in the bank. The charter provided that "no director should be indebted to the corporation, at any time, to an amount greater than 75 per cent of the amount of his stock." At the time the note in suit was given, P was indebted to the plaintiff in excess of 75 per cent of his stock. Defendant contended that the loan was illegal, and that the guarantor should not be held to pay such a claim. Judgment for defendant. Appeal.

Scott, C. J. The loan made by the plaintiff was prohibited by the provisions of its charter, and no recovery can be had on the note. Judgment affirmed.

Cited: 13 Ill. App. 597; 19 id. 306; 21 id. 123.

COATES v PRESTON (1882) 105 Ill. 470.

Action on a check. G, a member of the firm of C G & Co., gave plaintiff a check for \$2,190 on defendants. C G & Co. were then indebted to defendants, who were bankers, more than \$2,180. Defendants claimed setoff. The defense was that G had never had to his credit over \$2,111. Demurrer to defense. Overruled. Judgment for defendants. Appeal.

Scott, C. J. If the drawer did not have a sufficient sum deposited for full payment, the bank could refuse to pay the check, or any part of it. Judgment affirmed.

Cited: 119 Ill. 410; 167 id. 549; 173 id. 496; 185 id. 584; 66 Ill. App. 471; 70 id. 594; 82 id. 76.

GAUCH v HARRISON (1883) 12 Ill. App. 457.

Action against stockholders. Plaintiff was a creditor of the bank. The defendant was a stockholder in the P Bank, the charter of which provided that stockholders should be liable individually for an amount equal to the amount of their stock in event of a default in payment of corporate debts. The bank became insolvent and was placed in the hands of an assignee. Defendant purchased claims against the bank at a discount, and surrendered them at face value in payment of an indebtedness to the bank. This was done before notice of this action. Defendant set up these facts by way of defense. Judgment for defendant. Appeal.

Wall, J. At best the defendant could only reduce his liability the amount he actually paid for such claims. Judgment reversed.

Cited: 15 Ill. App. 272; 51 id. 38.

SHAFFNER v EDGERTON (1883) 13 Ill. App. 132.

On checks. The plaintiff carried on a manufacturing business. B, an employee, made most of the sales and collections. B collected the checks on defendant bankers, indorsed the firm name thereon, received payment, and reported the collection to the plaintiff, who received and credited it to the proper accounts. B defaulted. Judgment for plaintiff. Appeal.

Bailey, P. J. 1. Plaintiff, while holding the money, will not be permitted to deny B's authority, but will be deemed to have ratified his acts. 2. The presumption is that the money paid over was that received for the checks. 3. If B could not indorse, his presentment was a nullity and the liability of the bank has never

been fixed. 4. The presentment for payment of the checks by B was not a negotiation of the checks, and indorsement was unnecessary. Judgment reversed.

Cited: 50 Ill. App. 442.

DELAND v THE DIXON NAT. BANK (1883) 14 Ill. App. 219.

Assumpsit for balance due depositor. Plea: Setoff of notes which depleted plaintiff's bank account. Plaintiff was the accommodation maker of a note so that T, the bank's cashier, might deal with the bank. The defendant also discounted a note drawn on D, in which plaintiff had one-half interest, and applied plaintiff's share of the proceeds to past due notes of plaintiff's held by it. The notes so paid off were returned to plaintiff who paid no further interest on them, and the defendant collected the note on D. Plaintiff demanded the difference between the proceeds collected and the amount of the discount. Judgment for defendant. Appeal.

Lacey, P. J. 1. The money or credit obtained by T of the bank was a good consideration as against the plaintiff. 2. Plaintiff had ratified the discount of the note on D. Judgment affirmed.

GOLDER v BRESSLER (1883) 105 Ill. 419.

Partition. Title through de facto trustees. Defense: No title. R, M, and C, claiming to have been duly appointed under an act of the legislature, were discharging their duties as trustees to wind up a bank's affairs. The Act of 1845 provided that a vacancy might be filled by the remaining trustees, title to vest in the appointee. The Act of 1847 provided that the governor should appoint three trustees to wind up the affairs of the bank under the Act of 1845. The assignment provided that vacancies in the trustees should be filled by the court of chancery. C resigned. R and M appointed X in his stead, but C made no reconveyance. M died. R and X, without filling the vacancy, conveyed the land in question, which through mesne conveyances came to plaintiff. Plaintiff offered in evidence a certificate of the secretary of state, that R, M, and C had been appointed trustees. Objection. Overruled. Exception. Decree for plaintiff. Error.

Mulkey, J. 1. The appointment of R, M, and C is presumed valid and cannot be attacked collaterally. 2. Title vested in X by express legislative enactment. 3. As the terms of the power creating the trust did not imperatively require a vacancy to be filled, the act of the survivors was valid. 4. The burden of proof was on defendant to show no title in plaintiff. 5. The Act of 1845 should control the filling of vacancies in the board under the Act of 1847. 6. On the appointment of X, he became seized of the estate of C, in the trust property. Decree affirmed.

Cited: 109 Ill. 442; 133 id. 600; 191 id. 294; 197 id. 38, 429; 57 Ill. App. 576; 88 id. 463.

FIRST NAT. BANK v SHERBURNE (1884) 14 Ill. App. 566.

On promissory note. The defendant gave the note in payment for a machine which the payee warranted. The plaintiff's cashier took the note in the usual course of business for value. Defendant refused to pay the note, alleging that the machine was not as warranted. The plaintiff's president knew of defendant's claim, but did not notify the directors or cashier of it, and did not know of the assignment until sometime after it occurred. The National Bank Act provided that a bank should have power to carry on the business of banking by discounting and negotiating notes, drafts, bills of exchange, and other evidence of debt. Judgment for defendant. Appeal.

Baker, J. 1. The reasonable presumption from the fact that the note was taken in the usual course of business of a national bank would be that it was discounted. 2. Although in form it was a purchase of the note, yet in substance it was a loan by way of discount. 3. Under U. S. R. S., a national bank may make a purchase by way of discount equally as well as a loan. 4. The knowledge of the president was not notice to the bank, and the plea of a failure of consideration was no defense. Judgment reversed.

Cited: 53 Ill. App. 569.

KUNKELMAN v RENTCHLER (1884) 15 Ill. App. 271.

Action against stockholders to enforce personal liability imposed by the charter of the bank. Defense that judgments by other creditors, in an amount equal to his

liability, had been obtained. Reply that a settlement of judgments for an amount less than their face value had been made. Demurrer. Replication. Sustained. Judgment for defendant. Appeal.

Baker, J. Where the judgment has been discharged for a less sum than the amount due upon it, then the sum actually paid, instead of the face value, should be regarded. Judgment reversed.

THE RIDGELY NAT. BANK v PATTON (1884) 109 Ill. 479.

Action on a check. Plaintiff received from K a check, reading "pay to P for account of C or order." Defendant applied the deposit made by K to meet the check to K's note due W that day, and dishonored the check. Plaintiff, as attorney for C, also sued K in attachment. Defendant set up: 1, That the instrument was not a check; 2, plaintiff's position, as mere agent, was inconsistent; 3, there should have been an election of remedies. Judgment for plaintiff. Appeal.

Sheldon, C. J. 1. The instrument is a check, and treating it as an assignment to the amount of the deposit, reconciles any supposed inconsistencies. 2. Although the law will not permit a party to have more than one satisfaction for his debt, yet it permits him to carry on several remedies at the same time. 3. Defendant had no right to apply the deposit to the payment of the note without an order from the depositors. 4. After demand for payment of the check and refusal by the bank, plaintiffs were entitled to sue thereon in their own names. 5. Defendant was not prejudiced by the attachment suit. 6. There was no estoppel in bringing that suit. 7. The fact, that the check was payable to plaintiffs, who were mere collecting agents, does not change the legal aspect, as plaintiffs were trustees for C & Co. Judgment affirmed.

Cited: 165 Ill. 75; 42 Ill. App. 289; 61 id. 279; 80 id. 158; 81 id. 109.

DELAND v DIXON NAT. BANK (1884) 111 Ill. 323.

Assumpsit for a deposit. The plaintiff was a depositor with the defendant from 1873 to 1877. In April, 1877, defendant delivered to plaintiff a passbook with 42 vouchers, which contained a full statement of moneys received by defendant and moneys paid out. During that period, plaintiff had no passbook, but the entire account was kept by defendant. This statement showed the account balanced. The defendant claimed as setoff two promissory notes executed by the plaintiff, and T, the cashier of the defendant. One of the checks had been signed with the plaintiff's name by the cashier in 1876. T claimed he had authority from the plaintiff to sign his name to the check, which the plaintiff denied. The plaintiff took no action in regard to the transaction until 1879, when he claimed a balance due. The court instructed the jury that if they believed the plaintiff had proved his case by only one witness, and that he had been contradicted as to all material portions of his testimony by one witness of equal credibility and means of knowledge, then, as a matter of law, the plaintiff has not proved his case. The trial court rendered judgment for defendant. Judgment affirmed. Appeal.

Craig, J. 1. When plaintiff established that the money had been deposited in the bank, the burden of proof rested on the bank to show that the money had been paid out under the authority of the plaintiff. 2. The jury are the sole judges of the weight to be given to all evidence introduced for their consideration, and the instruction of the court should not infringe upon this rule. 3. The failure of the plaintiff to assert his rights before, should not be regarded as a ratification and confirmation of an unauthorized act as matter of law. Judgment reversed.

Cited: 46 Ill. App. 515; 79 id. 273. (S. c. 14 Ill. App. 219, ante p. 206.)

RENTCHLER v KUNKELMAN (1885) 17 Ill. App. 343.

To enforce the liability of defendant, a stockholder in an insolvent bank. The bank charter provided that for default in the payment of any liability contracted by it, the stockholders should be held individually responsible for an amount equal to the amount of stock held by them. Plaintiff held a certificate of deposit dated February 11, 1878, payable in one year. The bank becoming insolvent, made an assignment on April 22, 1878. The action was commenced on February 8, 1884. The Statute of Limitations was five years. Judgment for plaintiff. Appeal.

Pillsbury, P. J. 1. When the plaintiff can maintain his action, the statute commences to run against him and not before. 2. The plaintiff had no legal right to demand payment of the money until by the terms of the certificate it was due. Judgment affirmed.

FLEISCHER v RENTCHLER (1885) 17 Ill. App. 402.

Assumpsit to enforce the liability of a stockholder. Plea: Statute of Limitations of five years. The defendant was a stockholder in an insolvent bank. The charter provided that on default in the payment of any liability contracted by the corporation, the stockholders should be held individually responsible for any amount equal to the amount of stock held by them respectively. On May 15, 1877, the plaintiff received from the bank a certificate of deposit payable one year after date. In April, 1878, the bank failed. The Statute of Limitations permitted an action on unwritten contracts, expressed or implied, to be brought within five years, but on written contracts to be brought within 10 years, after the cause of action accrued. The action was brought more than five years, and less than 10 years, after the action accrued. Demurrer. Overruled. Judgment for defendant. Appeal.

Pillsbury, P. J. 1. This certificate of deposit would not be barred until 10 years after it became payable. 2. The stockholders' liability was that of partners, and was co-eval with that of the corporation, and both became bound by the same contract. Judgment reversed.

Cited: 17 Ill. App. 346; 48 id. 635.

HELMLE v QUEENAN (1885) 18 Ill. App. 103.

Bill to enforce the liability of a stockholder. Plaintiff was a creditor of, and defendant a stockholder in a bank incorporated as a savings bank by a special act. An amendment provided that the stockholders should be individually responsible, to a certain extent, for all losses, but the form of enforcement of the law was not designated. The bank made an insolvent assignment. Decree for complainants. Appeal.

Pleasants, J. 1. The liability of the stockholders under the amendment was not primary, and the court erred in holding that they were liable for the full amount due from the bank at the time of the suspension. 2. The complainant's rights were purely legal, arising on a statute which does not designate the form of their enforcement, and therefore the remedy was at law. 3. Losses are the unsatisfied claims after applying the assets. Decree reversed.

HAINES & WHITNEY CO. v MCFARREN (1885) 19 Ill. App. 172.

On a draft. The plaintiff drew a draft on B, which was accepted payable at the S Bank, and indorsed it for deposit in the F Bank. The F Bank transmitted the draft for collection to the defendant bank. At the time B had sufficient deposits to pay the draft. B afterward withdrew his deposit and died insolvent. Plaintiff contended defendant should have presented the draft to S Bank. The acceptor had not given S Bank directions to pay the draft out of his funds on deposit. Demurrer. Sustained. Judgment for defendant. Error.

Conger, J. A bank where a draft is made payable would have no right to pay it or apply the money deposited there by the acceptor of such draft, except by the special direction of such acceptor either verbally or by check or draft or some other writing. Judgment affirmed.

NATIONAL BANK OF AMERICA v INDIANA BANKING CO. (1885) 114 Ill. 483.

Garnishment of bank account. The writ was served August 10. On the 11th, the garnishee paid two checks drawn on the attachment debtor on the 7th and 9th, respectively; also, a note indorsed by the attachment debtor, and previous to the 10th discounted by garnishee for him. The garnishee claimed a credit as to these items. Other drafts were made after the writ was served. Sec. 13 of the Garnishment Act provides that the garnishee is entitled to a credit as to all demands of which he could have availed himself, if not summoned. The check, dated August 9 was made in Indiana, where a check is not an assignment of so much of a deposit. Judgment for plaintiff. Appeal.

Scott, J. 1. The checks drawn before August 10 operated as if the money had been drawn before the service of the writ. 2. The payment of the later checks was in fraud of the attachment creditors. 3. The attachment debtor could not, after service of the writ, buy back the note. 4. The check of August 9 was governed by the law of this state, where it was payable. Judgment reversed.

Cited: 118 Ill. 486; 149 id. 24; 156 id. 534; 157 id. 183; 159 id. 469; 167

id. 525; 171 id. 535; 181 id. 282; 20 Ill. App. 29; 27 id. 262; 40 id. 358; 41 id. 447; 42 id. 156; 50 id. 333; 55 id. 540; 57 id. 372; 66 id. 471; 72 id. 317; 80 id. 143, 158; 82 id. 538; 85 id. 216, 218, 295.

CRAIN v THE FIRST NAT. BANK (1885) 114 Ill. 516.

On a note. W, in defendant's name, negotiated a loan with plaintiff on defendant's note, signed by W, and used the money. W was the sole clerk of defendant's banking department, and drew their sight drafts, received deposits, issued certificates therefor, and wrote letters for the firm. He had authority to use the firm's name and to sign the firm's name to notes at certain places, but not elsewhere. Defendant had no account with plaintiff, and had not authorized the loan. Plaintiff proved a local custom to borrow money on time. Also a paper in the handwriting of one of the five defendants, containing the signatures of the persons authorized to sign for defendants. The paper contained the handwriting of both W and defendant M. Judgment for plaintiff. Appeal.

Sheldon, J. 1. There was a holding out by defendant of W as possessing authority to borrow money and execute notes in the firm's name, and defendant is liable. 2. The testimony as to the custom was proper. 3. The paper was properly admitted, as an admission of defendant M. Judgment affirmed.

Cited: 152 Ill. 141; 74 Ill. App. 624; 82 id. 81.

DEWAR v BANK OF MONTREAL (1885) 115 Ill. 22.

Conversion of bank deposit. Plaintiff gave W money to deposit with defendant. W took out a certificate of deposit in his own name, although defendant's manager knew the money belonged to plaintiff. When plaintiff protested, W indorsed the certificate to him. Subsequently W obtained the certificate, without the knowledge or consent of plaintiff, and drew the money. Plaintiff then agreed to accept a mortgage from W as security. W put him off three years. Judgment for defendant. Error.

Mulkey, C. J. If plaintiff clothed W with real or apparent authority to receive payment, or ratified it, or led the bank to suppose he did, the law is with the defendant. Judgment affirmed.

MURPHY v THE PEOPLE (1886) 19 Ill. App. 125.

Indictment. The defendant, a banker, was charged with receiving a deposit when, at the time of receiving it, he was insolvent. The Act of 1879, entitled an act for the protection of bank depositors, provided that any banker receiving any money, who at the time of receiving the deposit was insolvent, whereby the deposit should be lost to the depositor, should be deemed guilty of embezzlement. There was no averment of knowledge of insolvency and fraudulent intent. Verdict guilty. Error.

Wilkin, J. 1. It was not necessary under the statute to aver that the defendant knew of his insolvency. 2. The intent is not an element of the crime. 3. The legislature intended, by this act, to reach persons assuming to do a banking business, and who, through their insolvency, cause loss to their depositors. The allegation of insolvency is material. 4. The burden of proof was not on the defendant to show that he was solvent at the time of receiving the deposit. Judgment reversed.

Cited: 173 Ill. 38.

HIDE & LEATHER NAT. BANK v WEST (1886) 20 Ill. App. 61.

Trover for warehouse receipts. The plaintiffs sold D corn for cash, the transaction to be closed that day, August 8. Before three o'clock, the plaintiffs delivered the warehouse receipts for the corn to D, and received in payment two checks payable at the defendant bank. The checks were deposited in the plaintiffs' bank, and on August 9 payment was refused. Near the close of banking hours of August 8, D, depositors with defendant, having overdrawn their account, transferred the receipts to defendant as security for the overdraft, and drew on M, payable to the defendant, which took in good faith. This memorandum draft was an assignment of the receipts which were indorsed to the defendant. The bank credited D and had paid out the whole amount on D's check, except a small sum, when D failed. Judgment for plaintiffs. Appeal.

McAllister, J. The bank stood in the relation of a bona fide purchaser of the receipts for valuable consideration and without notice, and the plaintiffs had no right to reclaim the property as against the bank. Judgment reversed.

PUBLIC GRAIN & STOCK EXCHANGE v KUNE (1886) 20 Ill. App. 137.

Bill to cancel check. The complainant gave to defendant F his check drawn on the defendant bank. F handed the check to the defendant E, without indorsing it, but on the same day, and, before it had been presented to defendant bank, ordered payment stopped. F informed the complainant, who sent a written notice to the bank by F, not to pay the check. In the meantime the check had been presented to the bank by the defendant E and certified. As the complainant had not the full amount on deposit, the defendant E deposited enough to make up the sum. Decree for complainant. Appeal.

Bailey, P. J. 1. As the check was not indorsed, the defendant E cannot occupy the position of a bona fide holder for value. 2. The certification of the check was a mere voluntary act by the bank, which it was under no legal duty to perform. 3. The notice to the bank was sufficient to put it on inquiry, and its subsequent certification of the check was its own wrong. Decree affirmed.

Cited: 84 Ill. App. 109.

GAAR v FIRST NAT. BANK OF CENTRALIA (1886) 20 Ill. App. 611.

Trial of right of property. The bank and other claimants held the notes of M. Other of the claimants were sureties for M, and took up the obligations upon which they were sureties and substituted their own therefor. M then gave a chattel mortgage to all the claimants jointly upon the property in controversy, to secure the notes, including those taken up by the sureties. The mortgage was less than two years old, and was conditioned that the mortgagees should have the right to take possession of the property covered thereby in the event of its seizure by other persons. A part only of the notes had matured. When defendants, who were unsecured creditors of M, caused the property to be levied upon, defendants contended that those claimants, whose notes were due at the time of the levy had lost their lien by failing to assert it when their notes became due; and that the bank had no lien because prohibited by the National Banking Act. Judgment for claimants. Appeal.

Green, J. 1. None of the mortgagees had the right to foreclose before the last note was due, although the lien of each was preserved during the two years for which the mortgage was a lien under the statute. 2. As the notes and mortgage were not for money loaned, but were taken for pre-existing debts, it was not prohibited by the federal law. 3. The condition giving the mortgagees the right to take possession of the property in the event of its seizure by third parties was valid. Judgment affirmed.

FIRST NAT. BANK OF MONMOUTH v BROOKS (1886) 22 Ill. App. 238.

Assumpsit on a certificate of deposit. The plaintiff made a deposit with the defendant bank with the request that it be indorsed on his note held by B, or loaned to plaintiff's use in case B would not receive the money. This memorandum was written in the certificate of deposit given by the defendant's cashier, who was its executive officer and transacted most of its business. The defendant contended that the undertaking, to carry out the requests of the plaintiff in the name of the bank, was ultra vires. The cashier was a defaulter to an amount larger than the deposit. Judgment for plaintiff. Error.

Lacey, J. 1. The cashier had the power to receive for the bank the plaintiff's money on general deposit, as he did, and contract to repay in such cases is implied from the fact of deposit. 2. As the money was deposited with the bank, the plaintiff had a legal right to recover whether it was afterward embezzled or not. 3. As soon as the money was received, the bank was estopped from denying its obligation, and the plaintiff's cause of action arose after demand and refusal. Judgment affirmed.

Cited: 32 Ill. App. 659; 59 id. 138; 63 id. 478.

MCDONALD v MOSHER (1886) 23 Ill. App. 206.

On check. December 17, the plaintiff received from the defendant, in payment of a debt, a check for \$54 on the E Bank. The check was not presented for pay-

ment until December 19, when the bank failed. The defendant, at the time of giving the check and when the bank failed, had sufficient funds to meet the check, and up to the close of business on December 18, the bank met all its obligations. The plaintiff lived two miles from the village where the bank was located, and claimed that, on account of the snow and cold, it was not practicable to go to the bank on December 18, although he was able to do the usual work on the farm that day. Judgment for plaintiff. Appeal.

Baker, P. J. A check payable at the place where it is given is presumed to be presented for payment on that or the following day, and if not so presented, and a loss is occasioned by the subsequent insolvency of the drawee, the drawer is discharged by the delay. Judgment reversed.

Cited: 64 Ill. App. 304.

DROVERS NAT. BANK v ANGLO-AMERICAN P. & P. CO. (1886) 117 Ill. 100.

Money had and received. Plaintiff deposited a check certified by R of Cadillac, Mich., with defendant and received credit. Defendant sent the check to R, who sent a Detroit draft. Defendant, wanting a Chicago draft, returned the draft, and R, having failed, charged plaintiff with the amount. R was the only banker in C, known to defendant, and appeared to be solvent. Judgment for plaintiff. Appeal.

Scholfield, J. It was not reasonable care to select one known to have interests against the plaintiff. Judgment affirmed.

Cited: 158 Ill. 270; 58 Ill. App. 69.

QUEENAN v PALMER (1886) 117 Ill. 619.

Bill to enforce liability of stockholders. Defendants were stockholders in a bank, in which plaintiff was a depositor at the time of its failure. The statute under which the bank was organized provided that the stockholders thereof should be responsible, respectively, in an amount equal to their stock, to make good losses to depositors or others. Defendants contended that the statute was penal in its nature, and that a court of equity had no jurisdiction. Decree for plaintiff. Appeal.

Scott, C. J. 1. The statute is not penal in its provisions. 2. Equity, as well as a court of law, has jurisdiction to enforce the liability imposed thereby. Decree affirmed.

Cited: 120 Ill. 360; 132 id. 207; 149 id. 154; 163 id. 81; 30 Ill. App. 74; 37 id. 362; 40 id. 182; 43 id. 429; 48 id. 638; 51 id. 38.

INTERNATIONAL BANK v FERRIS (1886) 118 Ill. 465.

Assumpsit. The plaintiff, the owner of two drafts, drawn by B, went to the defendant bank with B, a customer of the defendant, and left the drafts for collection. The defendant alleged that it was instructed by the plaintiff to hold the money subject to the direction of either B or himself, and that thereafter B directed that the amount be placed to the credit of his account, which was done. B's account was overdrawn. The jury were instructed that if the plaintiff had assented to the proceeds being subject to the order of B as well as himself, and B had directed them placed to his credit, the plaintiff could not recover. Judgment for plaintiff. Error.

Magruder, J. If the plaintiff instructed the bank to collect the money and hold it until he called for it, and the bank, in violation of such instructions, paid the money to B by crediting it to the latter's account, the bank was liable to plaintiff for the money and the instruction was proper. Judgment affirmed.

Cited: 35 Ill. App. 183; 68 id. 577; same case: 18 Ill. App. 143.

MERCHANTS NAT. BANK v RITZINGER (1886) 118 Ill. 484.

Assumpsit. The instrument sued on was as follows: "Original. Indianapolis, July 15, 1884. Pay this, our first check, (second unpaid), to the order of W, \$2,000. (Sgd.) A & J H. To Merchants National Bank, Chicago, Ill." It was drawn in Indiana, and indorsed by W. Plaintiff contended that it was a check; defendant that it was a foreign bill of exchange. Judgment for plaintiff. Error.

Scholfield, J. The instrument is a check and not a foreign bill of exchange.

The words "original" and "second unpaid" do not change its legal effect. Judgment affirmed.

Cited: 42 Ill. App. 289.

FIRST NAT. BANK v DUNBAR (1886) 118 Ill. 625.

For conversion of bonds. Plaintiff made a special deposit of bonds with defendant bank. Defendant's cashier, to hide his embezzlement, took these bonds out of the special deposit, without the knowledge or consent of plaintiff, and put them with defendant's assets. Defendant failed and a bank examiner took charge of its assets, including these bonds. Plaintiff's demand for the bonds of defendant was refused. Judgment for plaintiff. Appeal.

Scholfield, J. The cashier's knowledge was the defendant's knowledge, and it did not acquire a legal title to the bonds. Judgment affirmed.

Cited: 138 Ill. 356; 145 id. 271; 156 id. 410; 28 Ill. App. 334, 337; 35 id. 224; 86 id. 62.

FELSENTHAL v THIEBEN (1887) 23 Ill. App. 569.

Action for money obtained through fraud. The defendant, a depositor in the banking house of the plaintiffs, entered into an arrangement with the plaintiffs' bookkeeper, by which the checks would be drawn on the plaintiffs by the defendant and the money obtained from the teller in the usual way. These checks would not be charged to the defendant's account on the plaintiffs' books, but would be concealed or destroyed when they came into the hands of the bookkeeper. By this means the plaintiffs' loss was large. Defendant contended he did not profit by the transaction. Judgment for defendant. Error.

Moran, J. If the defendant loaned the bookkeeper his checks, knowing that the money drawn on them was not to be charged in the account against him, he would be liable to the bank, though he did not profit by the transaction. Judgment reversed.

FIRST NAT. BANK v MARSHALL (1887) 26 Ill. App. 440.

Accounting. Defendant, the F Bank, did banking business until 1885. In that year, at a meeting of the stockholders, complainant, a stockholder, with others, voted to liquidate. The O Bank, also a defendant, was organized by the same officers and directors as the F Bank. The complainant did not become a stockholder in the new bank. The United States bonds, the banking house lease, and other property held by the old bank, were sold to the new bank. In settling the affairs of the old bank the complainant received his pro rata share. Complainant contended that he was entitled to a share of the profits in the new bank, and the good will had not been included. Decree for complainant. Appeal.

Pillsbury, J. 1. The complainant cannot object to the transfer of the assets of the bank in which he was a stockholder, as, with full knowledge, he took his money arising out of the payments made by the latter bank for such assets. 2. The bank, having ceased to exist as a banking institution, had no good will to dispose of. Decree reversed.

FIRST NAT. BANK OF JERSEYVILLE v BELT (1887) 29 Ill. App. 194.

Money had and received. M sold the plaintiff cattle with an agreement to repurchase them at \$4.50. During the summer he had purchased part. It was agreed on December 2, that they should be repurchased at \$4.30 per hundred, and M shipped them to his men in the plaintiff's name. He telegraphed his men, in the name of the plaintiff, to give net proceeds, with which they complied by answer, to the plaintiff. Notwithstanding the notice, the men deposited the proceeds in the name of M, and sent the account of sale to M, who telegraphed them at once that the cattle belonged to the plaintiff. The plaintiff's demand of money from defendant was refused on the ground that M was indebted to them on an overdraft, and that he had already been credited with it. Defendant had notice of the plaintiff's claim. Judgment for plaintiff. Appeal.

Pleasants, J. The defendant having received notice that the money belonged to the plaintiff and had been improperly deposited in M's name, had no right to credit the amount on account of an overdraft due from M. Judgment affirmed.

INTERNATIONAL BANK v JONES (1887) 119 Ill. 407.

On a check by payee against the bank. O and T kept an account in the name or O & Co. in defendant bank. The firm dissolved while indebted to the bank on overdrafts, and O continued in business under the old name. Having deposited in that name money belonging to the new firm, O drew a check against it payable to plaintiffs. The bank refused payment of the check, claiming the right to set off the entire deposit upon the indebtedness of the old firm. The evidence was in conflict as to the bank's knowledge of the dissolution and of O's intention to make the deposit to cover this check. Judgment for plaintiffs. Appeal.

Scholfield, J. A bank has a right of setoff, as against a deposit, only when the individual, who is both depositor and debtor, stands, in both these characters alike, in precisely the same relation toward the bank. Judgment affirmed.

DROVERS NAT. BANK v O'HARE (1887) 119 Ill. 646.

Money had and received. The plaintiff shipped cattle to his agents with instructions to sell and remit the proceeds, by sending them to the H Bank. The agents deposited the proceeds with defendant bank with notice that it was for the credit of H Bank, for the use of plaintiff, and a certificate of deposit was issued to the H Bank. H Bank failed; and on the next day the defendant, not knowing of the failure, transferred the sum to the N Bank to the credit of the H Bank, but without mention that it was for the use of plaintiff. The N Bank applied it upon the indebtedness of the H Bank to it, and refused to account therefor to plaintiff. The defendant relied upon instructions received sometime before from the H Bank to transfer all deposits made with it for the credit of the H Bank to the N Bank, and upon the custom of banks in that city to transfer such deposits to the correspondent of the country bank for whose credit the deposit was made. Judgment for plaintiff. Appeal.

Shope, J. 1. Defendant bank, receiving this money with knowledge that it belonged to plaintiff and was to be transmitted to the H Bank in a trust character, neither the prior instructions from the H Bank nor the custom of city banks, relied on, could justify the defendant in depositing the money in the N Bank without any notice of the trust character impressed upon it. 2. Defendant held the money for the use of plaintiff, and is answerable to plaintiff for the loss. Judgment affirmed.

Cited: 150 Ill. 501, 515; 165 id. 110; 181 id. 177; 18 Ill. App. 182; 26 id. 517; 33 id. 101, 103; 46 id. 465; 56 id. 149; 60 id. 636.

ROOT v SINNOCK (1887) 120 Ill. 350.

Assumpsit. The complaint set forth the incorporation of U Bank; that in the course of its banking business, it became indebted to the plaintiff for a sum deposited; and that it had suspended payment; and, after refusing plaintiff's demand for payment, had made an assignment for the benefit of its creditors; that the defendant was a stockholder in said bank at the time of its suspension and before, and became liable to pay the bank's indebtedness to the plaintiff to the amount of his stock reckoned at the par value. Demurrer: 1, That the section of the bank's charter providing that "The stockholders in this corporation shall be individually liable, to the amount of their stock, for all debts of the corporation," imposed a liability to pay the bank's creditors merely the unpaid balance upon subscriptions to stock; 2, that it did not affirmatively appear that the defendant was a stockholder when the cause of action accrued. Judgment for plaintiff. Appeal.

Scholfield, J. 1. The charter provision imposes a liability upon stockholders to an extent measured by the amount of their stock at par value, and not merely the amount unpaid upon the same. 2. It is sufficient to fix this liability that the stockholder be such when the suit is brought to enforce it. Judgment affirmed.

DELANO v CASE (1887) 121 Ill. 247.

Where the directors of a bank negligently permit it to be held out to the public as solvent, when in fact it is insolvent, they, being trustees for depositors as well as for stockholders, will be bound to the observance of ordinary care and diligence, and will be held liable for damages resulting from their negligence.

MYERS v THE UNION NAT. BANK (1888) 27 Ill. App. 254.

On checks. S gave the defendant a note payable on demand, and afterward drew the checks payable to the plaintiff. The plaintiff telegraphed the defendant, asking whether the checks would be paid, if presented on Monday. The defendant answered that the account was good at that time. On receipt of the plaintiff's telegram, the defendant immediately made a demand on S for payment of the note. The note not being paid, the defendant charged it to S's account which exceeded his credit account. The plaintiff presented the check the afternoon of the same day, and payment was refused. Judgment for defendant. Appeal.

Garnett, J. 1. A bank is not bound to accept the checks of its depositors by telegram, but only on presentment. 2. The equity of the bank is equal to that of the plaintiff and there was no privity between them. Judgment affirmed.

Cited: 46 Ill. App. 298; 50 id. 338, 444.

AMERICAN EX. NAT. BANK v CHICAGO NAT. BANK (1888) 27 Ill. App. 538.

On check. On June 13, K drew a check for \$10,000 on the defendant bank payable to the order of R, and delivered it to the payees, who presented it to the defendant on June 14 for certification, which was refused. The plaintiff bank received the check on June 14, in the usual course of business. On June 15, at the opening of business, the plaintiff, presenting the check to the defendant, demanded payment, which was refused. The defendant indorsed upon the check, "payment stopped," and returned it to plaintiff. The defendant stated that it was notified by K on June 14, and also on the morning of June 15, to stop payment. Both notices were subsequent to presenting the check for certification and payment. When the check was presented for certification and payment, the defendant's books showed a credit balance to K of more than \$10,000. Judgment for plaintiff. Appeal.

Moran, J. The statement of the defendant that payment of the check had been stopped, rendered any further presentation unnecessary, and the rights of the parties should be determined by the condition of K's account at the time. Judgment affirmed.

Affd.: 131 Ill. 547.

HAYDEN v ALTON NAT. BANK (1888) 29 Ill. App. 458.

To recover the amount of a deposit. G, a depositor in defendant bank, owed it money when he died. The plaintiff took charge of G's business at the request of the creditors, and while acting as agent, opened an account in his own name as agent for G and deposited the money. G was indebted to the bank on joint notes which became due before the commencement of this action. Defendant contended that the money deposited belonged to G, and that it had a right to set-off the notes. Judgment for defendant. Appeal.

Green, P. J. 1. The bank could set off a joint and several note against the demand due from it to one of the makers. 2. Where a depositor is indebted to a bank, the latter has a right to apply so much as may be necessary of the funds deposited to the payment of his matured indebtedness. 3. If a suit is brought in the name of an agent, the other contracting party can maintain the same defense as if the suit were brought in the name of the principal. Judgment affirmed.

Cited: 65 Ill. App. 488.

STATE NAT. BANK v REILLY (1888) 124 Ill. 464.

On a check. This check was drawn on defendant to plaintiff's order for a dividend due him as creditor of S, a bankrupt. On the check was a marginal memorandum of the name of the bankrupt and the official number of the case. The defendant was the officially designated depository of the court. Sufficient money had been received from the estate of S, to cover this check, but it had been checked out by previous checks drawn by the clerk. Deposits were always made to credit each case by its calendar number, but defendant treated the account as an entirety, and paid out all checks drawn by the clerk until the deposits were exhausted. Clerk was dishonest and failed to deposit all the money received by him. Rule 28 in bankruptcy provides that each court shall designate a depository in which all moneys received by assignees, or paid into court in any proceedings in bankruptcy, shall be deposited. Money so deposited can be drawn upon a check stating date, sum, and account for which it is drawn, signed by clerk of the court. Judgment for defendant. Error.

Scott, J. 1. The contract between the bank and the depositor is that the former will pay according to the checks of the latter. 2. The bank is bound to presume that the trustee is doing his duty, and to honor his checks accordingly. 3. All that the statute requires of the depository is, that it safely keep all trust funds intrusted to its custody by the court or its officers. 4. The practice among banks of paying checks of their depositors, and of not observing memoranda upon such checks, has the sanction of the law. Judgment reversed.

SCHALUCKY v FIELD (1888) 124 Ill. 617.

Bill to enforce stockholder's liability. Plaintiff was a depositor in G Bank and defendant was a stockholder. Plaintiff received from the bank a passbook in which deposits and interest were duly entered by bank from time to time. There was a balance due to plaintiff in 1877 when the bank failed, and he subsequently received a payment on account. This suit was brought in 1883. Bank's charter provides that when a default is made in payment of its debts, the stockholders are liable to an amount equal to their stock. Limitation Law, sec. 15, provides that all actions on unwritten contracts must be brought within five years; sec. 16 provides that actions on written contracts or other "evidence or indebtedness in writing" shall be commenced within ten years. Judgment for defendant. Appeal.

Magruder, J. 1. The entries constituted evidence of indebtedness in writing within the meaning of the statute. 2. An action at law by a single creditor will lie against any stockholder of any insolvent corporation to enforce an individual liability created by its charter. 3. The liability of the stockholders to the creditors is primary, and is that of partners unincorporated. 4. Stockholders occupy the same relation to the creditors as the bank does, so far as the Statute of Limitations is concerned. Judgment reversed.

Cited: 140 Ill. 150; 142 id. 569; 161 id. 510; 176 id. 499; 30 Ill. App. 77; 33 id. 371; 47 id. 136; 48 id. 635.

REED v THE PEOPLE (1888) 125 Ill. 592.

Quo warranto. Proceedings instituted by the attorney-general to test the validity of an act (Laws of 1887, p. 77) providing for the organization of savings societies. It provided that corporations organized thereunder might receive deposits, discount notes, and invest the proceeds in public securities, pay interest and dividends. It declared that no corporation, organized thereunder, should be deemed a bank. The act was not submitted to a vote of the people. The State Constitution, art. 11, sec. 5, required all acts of the legislature, authorizing or creating corporations with banking powers, to be submitted to a vote of the electors. Defendant organized under and exercised the privileges of the act. Judgment for relator. Appeal.

Craig, J. 1. The act in question was unconstitutional because it was not submitted to a vote of the people. 2. Defendant was a savings bank by organization and by its transactions. The provision that no such corporation should be deemed a bank did not control. Judgment affirmed.

Cited: 132 Ill. 41; 163 id. 204.

METROPOLITAN NAT. BANK v RACE (1889) 32 Ill. App. 127.

On a guaranty. Defendant guaranteed a promissory note of the R Company, of which he was president. When the company opened its account with plaintiff, in pursuance of a by-law, it instructed plaintiff not to cash any checks unless signed by the treasurer and countersigned by the secretary. Defendant lived in another town. Seven checks were signed by the treasurer and countersigned by the vice-president. Plaintiff cashed them after finding out that the secretary was absent. Three of these checks were accommodation paper for which the company were paid and credited later through the plaintiff. Four went to pay the company's bona fide debts. Defendant contends that plaintiff would have had sufficient funds of the company to pay the note, had not these checks been improperly paid and charged. Judgment for defendant. Appeal.

Wall, J. The corporation must be held to have ratified and approved what it thus enjoyed. Judgment reversed.

OWENS v STAPP, REC'R (1889) 32 Ill. App. 653.

Bill to cancel notes and for other relief. In 1880, the bank, through H, its cashier, loaned complainant J O \$2,400. J O gave three notes payable to H in three years secured by a mortgage on land belonging to his wife, complainant M O. H sold these notes to several of the bank's customers. Afterward J O borrowed \$280 more from the bank. In 1883, the bank, through H, loaned J O \$3,500 in order to cancel the old notes and satisfy the \$2,400 mortgage. From the proceeds of this loan, J O was to pay the \$280 and the back interest. The balance was to be credited to J O on the books of the bank. J O executed the notes and mortgage for \$3,500, but H did not deliver the old notes nor satisfy the mortgage, alleging as a reason that the bank did not have one of the notes. H allowed J O to make certain overdrafts. Two of the new notes were negotiated by H, whereby one of the old notes was canceled. One of the new notes was held by the bank when it made an assignment to the defendant. Just before the assignment, the mortgage for \$3,500 was recorded. The receiver filed a cross bill and prayed for foreclosure of the mortgage. Decree for defendant. The decree allowed interest on the overdrafts. Appeal.

Upton, P. J. 1. It was error to allow interest on the overdrafts. When a transaction is once executed in whole, or in part, the bank cannot repudiate it, although it be *ultra vires*. 2. When a corporation is acting within the scope of its organization, all parol contracts made by its authorized agents are held as express promises of such corporations. Judgment reversed.

Cited: 59 Ill. App. 138.

DUMOND v MERCHANTS NAT. BANK (1889) 33 Ill. App. 95.

Money had and received. B & T deposited in the U S Y Bank money to the credit of the E Bank, for the use of the plaintiff. The U S Y Bank delivered a large check to the defendant, which was accompanied by the deposit ticket, showing that the amount stated in the ticket was included in the check. Subsequently the plaintiff delivered to the defendant a letter from the E Bank, stating that it had suspended payments, and to pay the amount of the deposit ticket to the plaintiff. The defendant refused to pay the money to the plaintiff. Judgment for defendant. Appeal.

Moran, J. 1. The defendant never consented to become the plaintiff's debtor, or to become depositor of funds for his use. 2. There was no privity of contract between the plaintiff and defendant. No action will lie by the plaintiff to recover of the defendant. Judgment affirmed.

Cited: 46 Ill. App. 465. Affd.: 150 Ill. 515.

FOLZ v NELKE (1889) 33 Ill. App. 370.

Action to enforce the liability of a stockholder. The defendant was a stockholder in an insolvent savings bank. The charter of the bank makes the stockholders liable for the debts of the bank to the amount of their stock. The plaintiff, a depositor in the bank when it suspended payment, instituted this suit to recover the balance due him from the bank, as shown by his pass book. The defendant set up the Statute of Limitations of five years, and *res adjudicata* through chancery proceedings, to which he was not a party, but in which he paid a small portion of his liability. Judgment for plaintiff. Appeal.

Per curiam. 1. This action was brought on such an evidence of indebtedness in writing as would not be barred until after the lapse of ten years. 2. The plaintiff was not a party to the suit and received no benefit from the decree therein. Judgment affirmed.

BUEHLER v GALT (1889) 35 Ill. App. 225.

On check. D & LeC were indebted to the plaintiffs on the firm's acceptance, which was overdue and had been protested. The firm dissolved, and, as part of the agreement of dissolution, D drew his check on defendant as banker payable to the plaintiffs, and placed it in the hands of W as attorney for the firm in dissolution to be transmitted to the plaintiffs in payment of the firm's indebtedness. W had it certified at the defendant's bank, and inclosed it in a letter and deposited the letter in a mail box in Chicago in the presence of D & LeC. The letter, with the check inclosed, was never received by the plaintiffs. Subsequently D produced

the check in question at the bank, and had it canceled and the amount recredited to his account. D drew out the amount of the recredit. Judgment for plaintiffs. Appeal.

Moran, J. 1. The making of a check, and having the same certified by a bank, passes no title to the funds on which the check is drawn, to the person named as payee of the check. 2. The placing of the check by D in the hands of W to be forwarded to the plaintiffs did not constitute a delivery, because W was not the agent of the plaintiffs. 3. The depositing of the check in a mail box, inclosed in a letter addressed to the plaintiffs, did not constitute a delivery, as it was not mailed to them by their direction or in response to their request. 4. The post office regulation, which authorizes the sender to stop the transmission of a letter at any point before it has reached the hands of the person to whom it is addressed, is bound to be noticed judicially. 5. The possession of the check by the drawer raises a presumption that it has not been delivered to the payee, and, unless notice of a different state of facts is brought home to the bankers upon whom it is drawn, he has a right to act upon the presumption and cancel the check upon the drawer's application. Judgment reversed.

DUPREE v SWIGERT (1889) 127 Ill. 494.

Mandamus. In the supreme court against the state auditor to compel him to issue to petitioners a permit to organize a bank in Chicago, under an act approved June 16, 1887. The auditor refused the permit on the ground: 1, That the act did not apply to cities having a population exceeding ten thousand; 2, that the provision of the act concerning stockholders' liability was unconstitutional. The act provided for the organization of banks in cities of not to exceed ten thousand population with a capital stock of not less than \$50,000, and that the shareholders should be "individually responsible, equally and ratably, and not one for the other," for debts and obligations of the bank to the amount of their stock at par value.

Magruder, J. 1. The limitation in the act as to population of towns has reference to the amount of capital stock. Moreover, the restriction is unconstitutional as being applied arbitrarily to persons living in towns of limited size only; and thus, being special legislation, it is to be disregarded without affecting the rest of the act. 2. A creditor may proceed against any shareholder, and the question of contribution is settled afterward. 3. The provision of this act, that a claim against the bank must be apportioned ratably among the stockholders is unconstitutional. Otherwise the act is valid. Writ granted.

Cited: 149 Ill. 387; 171 id. 70; 193 id. 348.

PEOPLE EX REL. HUNT v NATIONAL SAV. BANK (1889) 129 Ill 618.

Quo warranto. Plea, setting out the special act of incorporating the K Banking Company in 1869, and stating that, upon acceptance of said charter, stock to the amount of \$10,000 was subscribed and paid in; that a banking business was thereafter transacted until July, 1874; that in 1885 all the stock that defendant was authorized to issue was paid for and business resumed. Demurrer to plea. Overruled. The act of incorporation provided that the capital stock of said corporation shall be \$50,000," and that the act would be void unless said corporation should organize and proceed to business within two years; and that before said corporation should commence business, "the stockholders shall pay the several amounts subscribed in full," and no increase of said capital stock should be made except on certain conditions. Judgment for defendant. Error.

Magruder, J. Until all the capital stock was subscribed, this company had no authority to commence doing business. Having failed to get more than one-fifth of the required capital subscribed and paid in during the two years after passage of the act, it was unable to proceed to business within that period, and the act in question became void. Judgment reversed.

MADDEROM v HEATH (1890) 35 Ill. App. 588.

On check. The defendants gave their check drawn on S & Co., bankers, to the plaintiffs. They indorsed it to the First National Bank, which sent it the next morning to the clearing house. S was the sole owner of the bank, and had an agreement with the D Bank that the latter should receive and pay checks for him; and that he would call at the bank every day between one and one thirty

p. m., and say which check he wanted paid. The other checks the bank would return to the bank which sent them to the clearing house. S absconded, of which the defendants had immediate knowledge. The D Bank held this check until after two o'clock, at which time the right to return the check had expired. The defendants had more than enough money on deposit with S to pay the check. It did not appear that the D Bank ever presented this check to S's bank or to the receiver or to the plaintiffs. The bank notified the plaintiffs by letter that they held the check and requested payment. Judgment for plaintiffs. Appeal.

Gary, P. J. 1. When notified by the bank that it held the check, it became the defendants' duty to go to the bank and pay the check. 2. It was incumbent upon the bank to return the check to the bank which sent it to the clearing house. 3. The bank took the risk that the bank sending the check had, after the expiration of the time for the return of the check, changed its position so that a subsequent return would work it an injury. Judgment affirmed.

Cited: 73 Ill. App. 45.

CONTINENTAL NAT. BANK v CORNHAUSER (1890) 37 Ill. App. 475.

On check. The plaintiff's agent received from the defendant the check in question in payment of their note. The agent stopped at the bank on which it was drawn and had it certified, and the bank charged it to the account of the defendant. The agent might have received the money had he required it. The next day the bank, being insolvent, did not open its doors for business. The plaintiff contended that the defendant is liable for the residue of the check unpaid from the assets of the bank. Judgment for defendant. Appeal.

Gary, J. 1. Where the payee of a check receives it from the drawer in the same place where the bank on which it is drawn is located, the payee has all the banking hours of the next day in which to present it in order to hold the drawer. 2. In presenting the check on the day received, the plaintiff was bound to take the money or leave it with the bank at its own risk. Judgment affirmed.

Cited: 62 Ill. App. 665; 64 id. 304.

SYKES v PEOPLE (1890) 132 Ill. 32.

Indictment under a statute, against defendant, a public warehouseman, for fraudulently issuing warehouse receipts for goods not actually in store at the time, with intent to defraud "The Merchants Loan and Trust Co.," a corporation. The receipts were issued as collateral security for a loan obtained from the company. The charter of the company, which authorized a corporation to be called "The Merchants Saving, Loan and Trust Co.," was read in evidence, to prove the organization of the company as alleged. Defendant objected to this as a variance. Overruled. The constitution of 1870, provided that no act creating a corporation with banking powers, or amendments thereto, should go into effect unless submitted to the people. The Act of 1872, provided for the change of names of corporations, but was not submitted to the people. In 1881, pursuant to the Act of 1872, the name of the company was changed. The indictment was presented in 1887. In 1888 an act was adopted by the people, confirming changes in the names of corporations made under the Act of 1872, "as if made pursuant to this act." Verdict guilty. Error.

Bailey, J. 1. An act providing a mode for changing the name of a banking corporation is an amendment to the incorporating act. 2. The Act of 1872 can have no application to banking corporations. 3. The Act of 1888 had no retroactive effect and the proceedings validated by it take effect from the date of that act. 4. The difference between the name given by the act of incorporation and the name alleged is a material variance. 5. A corporation cannot, except as authorized by law, change its own name either directly or by user. Judgment reversed.

MCDONALD v FIRST NAT. BANK OF MARQUETTE (1891) 41 Ill. App. 368.

Attachment. The plaintiffs sued out an attachment in aid of an action against defendant, a foreign corporation. The Act of Congress of July 12, 1882, ch. 290, sec. 4, provides that the jurisdiction for suits hereafter brought against any national banking association, except suits between them and the United States, shall be the same, and not other, than the jurisdiction for suits by or against banks not organized under any law of the United States, which do

or might do banking business where such business may be begun. On motion of the defendant, the attachment was quashed. Judgment for defendant. Error.

Gary, J. It is the paramount law of the land that attachments shall not issue from state courts against national banks. The attachment must be quashed. Judgment affirmed.

HORN v THIMING (1891) 41 Ill. App. 525.

Assumpsit for a deposit. The defendant was a banker and the plaintiff deposited money with him. The plaintiff claimed that there was a balance due him of \$200.77. The defendant claimed that he paid \$200 to W for stock in a creamery association bought by the plaintiff. The stock was bought in the defendant's name and the plaintiff refused to take it. The defendant testified that the plaintiff arranged with W to bring the stock to the bank, that W brought it there and received the money. W was not produced as a witness. Judgment for plaintiff. Appeal.

Green, P. J. 1. It was not incumbent on plaintiff to produce W. 2. As the plaintiff had told the defendant that he would not take the stock, he thereby cast upon the latter the burden of proving it was bought for plaintiff and at his request. Judgment affirmed.

PABST BREWING CO. v REEVES, ASSIGNEE (1891) 42 Ill. App. 154.

In insolvency proceedings. On September 4, 1890, W, a banker, was indebted to the plaintiff for over \$3,000 on deposit with W. At the request of the plaintiff, W drew his check on the C National Bank of New York for \$2,000 payable to its cashier. Two days later W made an assignment for the benefit of his creditors. Subsequently the check was presented for payment and refused, W having at the time only \$996.32 on deposit at the C Bank. This money was paid over to W's assignee. The plaintiff petitions the court to compel the assignee to pay over this money to petitioner. Judgment for defendant. Appeal.

Cartwright, J. 1. The check in question was made payable in New York and the law of that state must control. 2. By that law the check did not operate to transfer title to any moneys in the New York bank; but upon refusal to honor the check, or pay the amount on deposit, the recourse of the check holder was against the drawer. 3. Before the presentation of the check, W made an assignment, and the title, not having passed from W, it passed to the assignee. Judgment affirmed.

Cited: 57 Ill. App. 372; 76 id. 365; 89 id. 152.

METROPOLITAN NAT. BANK OF CHICAGO v JONES (1891) 137 Ill. 634.

Assumpsit to recover balance due on check. Defendants, in payment of a debt, gave plaintiff their check on T Bank. Plaintiff had the check certified by C Bank. The next day, T Bank became insolvent, and payment of check was demanded and refused. Check was protested for non-payment. Had plaintiff demanded payment of check on the day it was drawn, it would have been paid, as defendants had sufficient funds on deposit to cover it. Subsequently, plaintiff received dividends with other creditors of T Bank. Judgment for defendants. Appeal.

Bailey, J. 1. As between the bank and the drawer, certification has the same effect as payment. 2. The bank, by certifying the check, becomes the principal and only debtor. Judgment affirmed.

Cited: 149 Ill. 352; 158 id. 539; 171 id. 535; 181 id. 283; 57 Ill. App. 364; 65 id. 487; 69 id. 683; 82 id. 74.

FIRST NAT. BANK OF MONMOUTH v STRANG (1891) 138 Ill. 347.

Trover and conversion, for a special deposit. Plaintiff's testator deposited with M Bank, for safe keeping, United States bonds. H, the cashier, gave a receipt for them, and collected and paid the interest as it accrued on said bonds to testator, or her agents. Thereafter the bank's charter expired and it went into liquidation. It continued to pay testator the quarterly interest. Thereafter, the stockholders organized a new bank, and all the assets of the old company went into possession of the new bank. They obtained a new charter, but the same officers and directors were elected. Thereafter a receiver was appointed for the bank. Plaintiff demanded the return of the bonds, but they were not found among the assets by the receiver. The court admitted in evidence the receipt given by the first bank, and the testi-

mony of H that the bonds were transferred with the other assets to the new corporation. Judgment for plaintiff. Error.

Baker, J. 1. Where the possessor of choses in action transfers them to another, such other takes them charged with all rights and equities of the original owner. 2. The admissions of H are competent evidence upon the principle of priority of title, interest, and possession between the two corporations. Judgment affirmed.

Cited: 179 Ill. 498.

AMERICAN EXCHANGE NAT. BANK v GREGG (1891) 138 Ill. 596.

Assumpsit on check. K & Co. delivered to plaintiff their check on defendant. Demand was made for payment and certification thereof. Both were refused. At the time there appeared on the books to be more than sufficient deposit to the credit of K & Co. to pay the check. Two days before, K & Co. had drawn to E & Son, depositors, a check on defendant which overdrew their account. Defendant accepted the check, stamped and paid it, and placed the amount to the credit of E & Son. Defendant did not then charge the amount to K & Co. The next day defendant charged back the amount to E & Son, but without authority from them. When the check in suit was presented, the bank charged up the check given to E & Son, to K & Co. Judgment for defendant. Appeal.

Craig, J. When a check is deposited, the bank becomes the debtor of the depositor, and the title to the deposit passes to the bank. The obligation of the bank to pay, or its right to refuse payments, will be determined by ascertaining the actual balance of the drawer, regardless of the fact whether the amount deposited or the checks paid have reached the bank ledger or not. Judgment reversed.

Cited: 82 Ill. App. 75.

SCHAFFNER v EHRMAN (1891) 139 Ill. 109.

Action, for wrongfully refusing to pay check. Plaintiff was a depositor in defendant's bank. Defendant's bookkeeper, by mistake, debited plaintiff's account with checks of E. Then defendant dishonored certain checks of plaintiff, as the mistake made plaintiff's credit appear insufficient. Defendant explained matters to the payees. Plaintiff withdrew his account and found that two other checks had been dishonored, but subsequently paid. Plaintiff testified that a former customer, a payee of one of these two checks, although requested to send an agent, as formerly, to solicit orders, had not done so. Judgment for plaintiff for \$450 with costs. Appeal.

Wilkin, J. 1. There were all the elements of legal malice. An intention to injure was unnecessary. 2. The damages were not excessive. Judgment affirmed.

Cited: 67 Ill. App. 584; 72 id. 481; 92 id. 615.

SHACKELFORD v CLARKE (1892) 43 Ill. App. 618.

On a promissory note. Note was given for a loan by plaintiff to defendant. Plaintiff's agent, to make the loan, gave defendant three checks. One check was paid the following day. The other two were not presented for several weeks. One of these payments was refused for want of funds to agent's credit. The jury was instructed that the holder of the check must present the same, at latest, within banking hours of the day following the day of its delivery, and that defendant was guilty of negligence and must bear the loss if there was money in the bank the following day, with which these checks could have been paid. Judgment for plaintiff. Appeal.

Waterman, P. J. If the bank, upon which a check is drawn, remains solvent, ready, able, and willing to pay the check so long as the maker has funds enough to his credit, the holder of the check is under no obligation to present it, at the latest, upon the day of, or the day following its delivery. Judgment reversed.

WILLIAMS v IMPORTERS and TRADERS NAT. BANK (1892) 44 Ill. App. 295.

In insolvency proceedings. The insolvent was a private banker receiving savings deposits. In the ordinary course of business, he guaranteed or indorsed negotiable paper which was discounted by the plaintiff. The Act of June 4, 1879, sec. 4, for the protection of bank depositors, provides that it shall be unlawful for any savings bank, individual or individuals, doing banking business, to assume the payment of, or guarantee the principal or interest for, or on account of, any person

or persons. The plaintiff had obtained dividends from the estate of the insolvent makers. The assignee of the banker contended that they could not file their claims against the insolvent. Judgment for plaintiff. Appeal.

Gary, J. 1. To discount negotiable paper and thus obtain value with profit, was not prohibited by the Act of 1879. The presumption of the law was that the insolvent held the paper for value. 2. The plaintiff is not prevented from proving and taking dividends upon the full amounts here, provided that, from all sources, he gets no more than full payment. Judgment affirmed.

FORT DEARBORN NAT. BANK v BLUMENZWEIG (1892) 46 Ill. App. 297.

On check. The N Co., having an account with the defendant, gave a check to the plaintiff on August 4, which he did not present until August 10. On August 8, the company made a general assignment. On August 10, a note of the company to the defendant for \$5,000 became due, and the defendant on that day, before the check was presented, applied the amount on deposit toward the payment of the note. The plaintiff contended that the check had precedence of the assignment as a claim on the fund; that the assignment on the 8th had precedence of a note due the defendant on the 10th. Judgment for plaintiff. Appeal.

Gary, J. 1. If the company had not made an assignment, the application by the defendant of the money on deposit to its own debt from the company would have been valid against the plaintiff. 2. Without an assignment, the company, before its debt to the bank was due, could withdraw the money. With an assignment, the assignee could do the same. 3. But to a suit commenced after the note was due, the bank had a complete defense, as it had the same rights against the assignee as it would have had against the company, if no assignment had been made. Judgment reversed.

THOMAS v INTERNATIONAL BANK (1892) 46 Ill. App. 461.

On check. The defendant had a deposit with the plaintiff bank and overdraw his account. He pleaded the Statute of Limitations of five years. Judgment for plaintiff. Error.

Gary, J. 1. A check on a bank, where the drawer keeps an account, implies a promise by the drawer to the bank to pay if the bank will honor it, and his account is thereby overdrawn. 2. Checks paid by a bank without funds of the drawer in its possession to meet them are written contracts within the statute, so that ten years is a bar. Judgment affirmed.

MCRORY v CHAMBERS (1892) 48 Ill. App. 445.

Bill to enforce the liability of bank directors. The complainants were the owners of 320 shares of bank stock, and sued for themselves and all the stockholders except the defendants. The defendants, constituting the board of directors, authorized and instructed the president to subscribe for said bank \$500 to be paid to retain a manufacturing company at Charleston. The \$500 was paid over and the sum charged to the expense account. Subsequently, the defendants, as directors, charged up to profit and loss a judgment for over \$200, which the bank was under no obligation to pay. Before bringing the suit, the complainants demanded the bank to bring suit, which it refused to do. Demurrer. Overruled. Appeal.

Per curiam. 1. An individual stockholder may present the cause to the court by a bill in chancery and maintain the suit in behalf of himself and for the benefit of the corporation, making the corporation a party, either complainant or defendant. 2. The directors of a national bank can use the funds and property of the bank only for proper banking purposes. 3. The incidental powers are such as are necessary to the efficient exercise of the expressed powers. A donation of the fund of a bank is prima facie unauthorized. Decree affirmed.

SPRINGFIELD MARINE BANK v MITCHELL (1892) 48 Ill. App. 486.

On check. W purchased two horses for H, and paid for them with a check drawn by H on the defendant. On the face of the check was written "two horses." The plaintiff deposited it in a bank, and it was presented for payment, and payment refused about the hour of H's death. H was largely indebted to the bank

for overdrafts, but the bank had previously honored his checks though he had no funds on deposit. The horses purchased by H from the plaintiff were sold prior to the death of H, and the proceeds deposited in the bank, which applied the money on H's general indebtedness. It was shown that the president of the defendant had agreed with H to pay his checks as a dealer in horses. Judgment for plaintiff. Appeal.

Per curiam. Plaintiff was entitled to the benefit of H's agreement with the bank, whether advised of it or not. Judgment affirmed.

WETHERELL v O'BRIEN (1892) 140 Ill. 146.

Action to recover special deposit. G and plaintiff took a sum of money to the T Bank, owned by R, where G told R that plaintiff wanted to loan some money upon good real estate and to leave it with R, until he so loaned it. The money being handed to R, he made out a deposit ticket and handed money and ticket through the window to the cashier, who then gave plaintiff the usual passbook of the savings department in plaintiff's name. R made no loan, and after four months, assigned for the benefit of creditors to defendant. It was impossible, when the assignment was made, to identify this money, as a separate trust fund, from the other moneys in the bank. Judgment for plaintiff. Appeal.

Magruder, J. 1. There was here no case of bailment or special deposit. 2. The entries in a bank or passbook are admissible in evidence. 3. Where a trustee has converted a trust fund and mingled it with other moneys, so that it cannot be separated from the latter, the beneficial owner occupies the position of a general creditor, and cannot follow the fund into the hands of an assignee for the benefit of creditors. Judgment reversed.

Cited: 141 Ill. 268; 144 id. 511; 157 id. 69, 215; 174 id. 464; 182 id. 355; 196 id. 39; 197 id. 111, 114; 50 Ill. App. 393; 51 id. 185; 54 id. 106; 56 id. 453; 57 id. 110; 74 id. 544; 81 id. 183, 256, 297, 343; 90 id. 248; 97 id. 649; 98 id. 573; 99 id. 555; 101 id. 387.

MUTUAL ACCIDENT ASS'N v JACOBS (1892) 141 Ill. 261.

Action to recover special deposit from an assignee. Plaintiff, to protect K, his surety, gave him a check to the order of K's banking firm, and the money was used in K's banking business. The plaintiff obtained a receipt stating that the money was to be held to indemnify K, in case of any loss or liability under the bond. This receipt was signed "K & Co., Branch; W, manager." K & Co. failed, and defendant was appointed assignee of K. Plaintiff prayed that this money be declared his property and a trust fund in the hands of defendant. Judgment for defendant. Appeal.

Craig, J. The money passed into the bank as a general deposit, and the petitioner occupies the position of a general creditor. Judgment affirmed.

Cited: 157 Ill. 69, 215; 174 id. 465; 182 id. 356; 197 id. 110, 115; 51 Ill. App. 185, 350; 57 id. 110; 73 id. 678; 74 id. 544; 81 id. 257, 297, 353; 90 id. 249; 99 id. 555; 101 id. 387, 389.

TELFORD v PATTON (1892) 144 Ill. 611.

Replevin to recover a certificate of deposit. L, the defendant's intestate, deposited \$2,600 with the bank, receiving the certificate in question made out in the name of L J P, payable to the order of himself in current funds on return of the certificate, one year from date. The plaintiff alleged that the L J P named in the certificate referred to her, and that the bank held it in trust for her. The bank did not know L J P. The certificate remained in the possession of the intestate until his death. Judgment for plaintiff. Appeal.

Magruder, J. 1. The certificate of deposit was in fact and in law a promissory note for the payment of money. 2. A promissory note is not the subject of disposal as a gift either inter vivos or causa mortis unless there is actual delivery. 3. Where a delivery is made to a third party in order that the latter may deliver it to the donee, the gift is not completed until delivery to the donee. By the death of the donor before delivery, the agent's authority is revoked. Judgment reversed.

Cited: 160 Ill. 156, 486; 165 id. 218; 179 id. 141; 68 Ill. App. 176; 75 id. 262, 511; 79 id. 382; 90 id. 254, 255; 99 id. 404.

CHICAGO FIRE PROOFING CO. v PARK NAT. BANK (1892) 145 Ill. 481.

Action, to set aside a judgment after a receiver had taken charge of defendant. A judgment by confession was entered in defendant's name against plaintiff on a promissory note. Plaintiff sought to set this judgment aside on the ground that it should have been entered in the name of the receiver and also on the ground of usury. The usurious transaction complained of was an alleged agreement by defendant's president individually, by which he was to secure a commission above the legal rate on a loan by his bank. Defendant did not enter into this agreement and received no benefit from it. Judgment for defendant. Appeal.

Craig, J. 1. The note might be sued on in the name of defendant or of the receiver, as he might elect. 2. The court did not err in refusing to allow appellants to plead usury. 3. In an application to vacate a judgment and for leave to plead, affidavits filed in support of the motion are to be strictly construed. It is not sufficient to state facts, from which, if proved on a trial, a defense might be inferred. Judgment affirmed.

Cited: 80 Ill. App. 474; 89 Ill. 445; 93 id. 641; 145 id. 487.

NATIONAL SAFE AND LOCK CO. v THE PEOPLE (1893) 50 Ill. App. 336.

Enforcement of lien upon estate of an insolvent. The plaintiff sold K a safe upon the condition that the title should remain in the plaintiff until paid for in full; and that, upon default of payment, the plaintiff might take possession and remove the safe without legal process. Two days before K made an assignment for the benefit of creditors, he gave the plaintiff a check for the balance due on the safe. There was sufficient money in the bank to meet the check, but it was not presented before the assignment was made. The assignee took possession of the money and the safe. The court refused to order either a payment of the balance due, or a sale of the safe to obtain it. Judgment for defendant. Appeal.

Gary, P. J. 1. After the safe went into the possession of the assignee, the plaintiff could not, without the order of the county court, take it from the assignee with or without process. But in the hands of the assignee the safe was subject to whatever claim was valid against the insolvent. 2. A check is, from its delivery to the payee, an assignment of so much of the money in bank; though, as between competing checks, with not enough money to pay all, the banker pays the one first presented. 3. The assignee having the money, which, as between the plaintiff and the insolvent, belonged to the plaintiff, should pay it over to the plaintiff. If the money were gone, the court should have directed the sale of the safe, and payment from the proceeds. Judgment reversed.

Cited: 72 Ill. App. 206.

MARSHALL v FREEMAN (1893) 52 Ill. App. 42.

On check. The defendant gave the plaintiff the check in question in payment for wheat. The plaintiff did not present it for ten days after, when the bank had suspended payment. The defendant had two accounts at the bank, one called the "mill account," on which the check was drawn, and another account. When the check was drawn, the "mill account" was overdrawn and remained so. There was sufficient in the other account to have paid the check. It was shown that the assets of the bank would pay 50 to 60 per cent of its liabilities. Judgment for plaintiff. Appeal.

Pleasants, J. As between the drawer and holder of a check, although the drawer has suffered some loss less than the amount of the check by the laches of the holder, in respect to the time of its presentment, there may be a recovery of the difference between the amount of such loss and that of the check. The drawer is discharged only pro tanto. Judgment affirmed.

UNION NAT. BANK v LOUISVILLE RAILWAY CO. (1893) 145 Ill. 208.

Assumpsit on parol agreement. Plaintiff, a national bank, discounted defendant's note, on which the interest was 8 per cent, at the rate of 6 per cent, with the parol understanding that defendant should secure C as a depositor for plaintiff, or pay an additional 2½ per cent. Defendant took up this note and plaintiff discounted a similar one which defendant paid according to its terms. Defendant failed to get C as a depositor, and plaintiff sued for the 2½ per cent, on the parol agreement. The state law prohibits over 6 per cent, except upon a

written agreement, and provides a penalty, but declares that no corporation may set up the defense of usury. The defense of usury was based on the National Banking Act. The court held that a recovery would necessarily involve the admission of a contemporaneous parol agreement to modify and add to the terms of a written contract. Judgment for defendant. Appeal.

Bailey, C. J. 1. While corporations cannot enforce the forfeitures imposed by our usury law, yet the statutory prohibition against exacting or paying more than the lawful rate of interest applies to them. No agreement between parties to do a thing prohibited by law will be judicially enforced. 2. The agreement to pay the 2½ per cent was usurious and cannot be enforced against the defendant, although a corporation. Judgment affirmed.

Cited: 91 Ill. App. 440; 197 Ill. 354.

GRAY v MERRIAM (1893) 148 Ill. 179.

Action for conversion of bonds. Plaintiff, having an account in defendants' bank, authorized defendants to hold bonds as security for loans. K, defendants' assistant cashier, having access to these bonds, stole them a year later. C, the defendants' chief officer, heard K was speculating, talked with him, but did nothing. K apparently had only his salary, \$500, to live on. About two months before the theft, C again heard anonymously that K was speculating and had another talk with him. Then the books and securities were examined, but not the special deposits where these bonds were. The defendants claimed the instruction to the jury was error. Judgment for plaintiff. Appeal.

Magruder, J. 1. There was such gross negligence as would fasten liability upon a gratuitous bailee, and the verdict of the jury was right independently of any error in the instruction. 2. When securities are deposited with banks, they are liable for any loss occurring through lack of that degree of care which good business men should exercise in keeping property of such value. Judgment affirmed.

Cited: 151 Ill. 119; 165 id. 180; 168 id. 501; 187 id. 241.

ZINNER v NATIONAL BANK OF ILLINOIS (1894) 54 Ill. App. 602.

On check. The defendant drew a check on the banking house of S & Co., which was by them certified while in his hands. He delivered it to the Merchants National Bank in payment of a note. The bank held the guaranty of the plaintiff bank by which it guaranteed the checks of S & Co. and other bankers. The bank sent the check through the clearing house June 3, 1893, to the Merchants National Bank, and it was paid by the plaintiff. S & Co. failed and the check could not be paid, though the defendant had sufficient funds there. Judgment for plaintiff. Appeal.

Gary, J. 1. The stamp put on the check acted as a transfer to the plaintiff. The agreement between the plaintiff and the Merchants Bank affected only the relation of those banks to each other, third parties could derive no benefit or harm from it. 2. An indorsement may be made by any form of words or characters intended so to operate. Judgment affirmed.

FIRST NAT. BANK OF CHICAGO v KELSAY (1894) 54 Ill. App. 660.

On check. C M & Co., transacting business under the name of West Chicago Bank, were customers of defendant, and under the advice of defendant's vice-president closed their doors. There was a credit balance due C M & Co. on the books of the defendant, but defendant held a demand note of the firm for \$5,000. The vice-president had the credit balance put into a certificate of deposit payable to an officer of defendant, and charged it in the account. Another certificate was made which was applied as a credit on the note. The plaintiff held a check of the West Chicago Bank on the defendant which was presented for payment, and payment refused. Judgment for plaintiff. Appeal.

Gary, J. 1. The right to apply the credit balance as payment on the note existed, without reference to the financial condition of the maker. 2. The court erred in not instructing the jury that the defendant had a right to make such appropriation, and moreover had the right to make it without first demanding payment of the note. Judgment reversed.

WORKMAN v DODD (1894) 55 Ill. App. 597.

Assumpsit on open accounts. Certain checks and money were deposited in the S Bank by the plaintiff, to the credit of the defendant. The tickets of deposit were in the usual form. The plaintiff claimed the deposit was a loan to the defendant deposited by his direction. The defendant claimed the checks and moneys were his, which he sent to the bank by the plaintiff. The court charged that the deposit tickets showing deposits of plaintiff to the credit of defendant were prima facie proof that the plaintiff deposited the checks, and plaintiff was entitled to credit therefor, unless the evidence showed that such checks or money were the property of the defendant. Judgment for plaintiff. Appeal.

Boggs, J. The tickets of themselves did not tend to prove that the funds deposited were the property of the plaintiff. Judgment reversed.

SCOTT v BURNHAM (1894) 56 Ill. App. 28.

Action on a bond. Defendant sold his interest in a banking firm, and obligated himself not to engage in the business of banking in that city. At the time he was a member of a firm engaged in selling real estate and loaning money on lands. This business he continued, keeping a deposit in another town for the firm's business and checking against it. But this firm in no way was held out as a banking institution, nor did it receive money on deposit subject to check, nor lend except on land, nor discount commercial paper. Judgment for defendant. Appeal.

Boggs, J. Defendant was not transacting a banking business, nor within the interdiction of the bond. Judgment affirmed.

PYFER v WALES, ADM'R (1894) 56 Ill. App. 446.

Action to recover a deposit. D indorsed to S a certificate of deposit given by plaintiff, and at the same time S gave her a receipt stating that he had received the deposit for safe-keeping. S thereupon deposited the certificate to his own credit with funds of his own. Subsequently he checked against his deposits, leaving less than the amount of the certificate on deposit. Both S and D died. The bank interpleaded the administrators of each of them. A, as administrator of B, also claimed an interest in the fund. But the chancellor found against him, and no exception was taken by him to the report. Judgment for the administrator of S. Appeal.

Lacey, P. J. 1. As no exception was taken by A, the report rejecting his claim is final. 2. Where a depositor holds money in a fiduciary capacity and deposits it with his own money and afterward draws out money by means of checks, it will be presumed that he must have drawn his own funds in preference to the trust money. Judgment reversed.

BANK v CITY OF VANDALIA (1894) 57 Ill. App. 681.

Money had and received. The plaintiff paid certain taxes to the city. The assessment was made after the assessor had returned his books to the county clerk's office, and the plaintiff claims that the assessment was void, as the assessor had no power after he had returned his books; also, that such assessment, having been made after the regular time, the plaintiff was deprived of having it reviewed before the board of review. This action was brought to recover back the taxes so paid as having been paid under legal duress. Judgment for defendant. Appeal.

Sample, J. 1. The assessment, after the return of the books, was at most a mere irregularity. 2. A court of chancery would give plaintiff a right to review where assessment was made after regular time. The evidence does not show legal duress. Judgment affirmed.

SQUIRES v FIRST NAT. BANK (1894) 59 Ill. App. 134.

On a certificate of deposit. The certificate was in the following form: "T. R. Squires has left \$800 to be loaned for his use at not less than 8 per cent interest, payable not to exceed six months, on return of this memorandum. B. T. O. Hubbard, Chr." The above was written on the bank's regular letterhead. The defendant contends that this was the individual transaction of Hubbard, and, if not, that it was ultra vires, and plaintiff cannot recover. Judgment for defendant. Appeal.

Lacey, P. J. 1. This was a transaction of the bank, Hubbard signed as cashier, and the cashier is necessarily the general agent of the bank in dealing with customers in money, notes and bills, the receipt, deposit, transfer and payment of them. 2. Even if ultra vires, the bank, after receiving the money, could refuse to go ahead with the loan, but it could not refuse to repay plaintiff. Judgment reversed.

BANK OF ANTIGO v UNION TRUST CO. (1894) 149 Ill. 343.

Action, on a check. Defendant discounted for W three notes indorsed by W. Two were paid. Defendant sent the third to plaintiff, for collection. Plaintiff, without defendant's knowledge or consent, accepted W's check on defendant and gave up the note to W. Then the maker failed, and defendant, hearing of it, debited W's account with the proceeds of the note. This left W's credit with defendant less than the check, which on presentation defendant dishonored. W sent the note to defendant who returned it. Plaintiff claimed: 1, That defendant could not accept proceeds of the first two notes and rescind as to the third; 2, that the check operated as an assignment of the money to W's credit at the time it was given. Judgment for defendant. Appeal.

Shope, J. 1. The check did not operate as an assignment, except between drawer and drawee, until defendant had notice. 2. The discounting of the notes constituted an apportionable contract. 3. Where the collection agent unauthorizely accepts a check in payment and loss ensues thereby, he must bear it. Judgment affirmed.

Cited: 165 Ill. 547; 171 id. 535; 65 Ill. App. 487; 81 id. 99; 99 id. 621; 101 id. 474.

THE AMERICAN T & S BANK v THE GUEDE & P M CO. (1894) 150 Ill. 336.

Action to compel assignee to surrender check. On the 1st of June, plaintiff mailed B, his banker, a check, indorsed "for deposit with B to credit of plaintiff." B received the check on the 2d, credited plaintiff's account, and forwarded it to drawee "for collection and return" to B. On the 3d, B made a voluntary assignment for the benefit of creditors to defendants, as assignee. On the 5th, payment of check was stopped. On the same day it was presented and protested for non-payment. Judgment for plaintiff. Appeal.

Bailey, J. The transaction was one which, in the absence of fraud, would pass the title of the check irrevocably to B. But the failure, suspension, and voluntary assignment of B, the day after the receipt of the check, is prima facie proof of fraud. Judgment affirmed.

Cited: 163 Ill. 69; 164 id. 504; 165 id. 113; 174 id. 463; 175 id. 434; 73 Ill. App. 678; 100 id. 267.

FIRST NAT. BANK v NORTHWESTERN NAT. BANK (1894) 152 Ill. 296.

Assumpsit. Plaintiff brought this action to recover the value of certified checks, purporting to have been drawn by C on it, and thereafter paid to the defendant. The checks were received by plaintiff in the regular course of business, having been deposited by G, a regular depositor. It was thereafter discovered that the signatures of the maker and the payees were forgeries. Judgment for plaintiff. Appeal.

Baker, J. 1. The drawee of a bank check is conclusively presumed to know the signature of the drawer, and he is therefore estopped to deny the genuineness of the signature on a check he has paid. 2. The drawee, by accepting and paying a bill, does not admit the genuineness of an indorsement. 3. Where a bank pays a check to an indorser, who derives title through a prior forged indorsement, he may recover back the money so paid upon demand within a reasonable time. 4. In certifying checks, the bank simply warrants the genuineness of the signatures of the drawer, and that it has funds sufficient to meet them; it does not warrant the genuineness of the body of the checks or the indorsements. Judgment affirmed.

Cited: 152 Ill. 423; 171 id. 327; 179 id. 153; 182 id. 374; 185 id. 226; 196 id. 450; 84 Ill. App. 182.

SIOUX BANK v DROVERS BANK (1895) 58 Ill. App. 396.

Assumpsit. The plaintiff cashed a check drawn on defendant payable to H Brunson. This check came by mistake into possession of H Brunson who indorsed and presented same to plaintiff, who, before cashing, required a guarantee of the

indorsement by a third party. The maker subsequently stopped payment on check and this suit was brought. The practice act does not permit a signature to be verified unless there be a verified plea. This case was submitted upon stipulated facts. Judgment for defendant. Appeal.

Gray, J. 1. Even identity of name does not excuse dealing with the wrong party. 2. The point that there was no plea verified was waived by stipulation. Judgment affirmed.

ANDERSON v ALTON BANK (1895) 59 Ill. App. 587.

Assumpsit for negligence in making collection. The plaintiff, a banker, sent two checks to defendant for collection, drawn by the makers on a bank at G. The defendant credited plaintiff, and forwarded checks to its St. Louis correspondent. The latter sent them to the drawee who remitted in St. Louis exchange. This draft went to protest and the drawer failed. Plaintiff claims that defendant was negligent in that it had no right to intrust these checks to a sub-agent. Judgment for defendant. Appeal.

Green, J. Where a bill of exchange, payable at a distant place, is deposited for collection, the bank, in which it is deposited, undertakes only to transmit to a responsible and proper agent. Judgment affirmed.

Cited: 78 Ill. App. 343; 84 id. 183.

MERCHANTS NAT. BANK v MAPLE (1895) 65 Ill. App. 484.

Assumpsit on a check. B drew checks in question, dated January 24, and February 5, 1895, payable to plaintiff, aggregating the exact amount of the deposit. When the checks were presented, payment was refused for want of funds. The defendant held a note given by B and H for the sum of \$400 due, dated April 3, 1894, payable ninety days after date, and before either check was presented for payment, it applied the entire deposit in payment of the note. Judgment for plaintiff. Error.

Per curiam. 1. While the note was joint, it was, under our statute, also several. 2. The note could be used as a counterclaim or setoff against the depositor in any suit he might bring to recover his deposit. 3. The bank had the legal right to apply the bank deposit of the drawer to the payment of his note. 4. The plaintiff, not having presented the checks until after the deposit was applied on the payment of the note, was in no better position than the drawer would have been, had he sued to recover the deposit. Judgment reversed.

CHEMICAL NAT. BANK v CITY BANK OF PORTAGE (1895) 156 Ill. 149.

Assumpsit for money had and received. Plaintiff's declaration contained the common counts and a special count on a note signed by B. The note contained the usual right to sell certain stock of defendant put up as collateral. B was defendant's cashier. He had agreed with its president and assistant cashier to borrow money for defendant on this note, and procured the money from plaintiff, and gave it to defendant. The stock pledged by B was stock in defendant bank which defendant bank had purchased in violation of the National Banking Law. Judgment for plaintiff. Error.

Craig, J. 1. If defendant is not liable on the note, indebitatus assumpsit lies where one has obtained money which, in equity and good conscience, he ought not to be permitted to retain. 2. Granting the stock was bought by defendant, there was nothing illegal in this transaction. Judgment affirmed.

COMMERCIAL NAT. BANK v HARTFORD DEPOSIT CO. (1895) 156 Ill. 522.

On a lease. Defendant national bank went into possession of plaintiff's premises, under a five years lease. The first instalment, due upon possession, was not paid. Nine days later the bank became insolvent and a receiver, also made defendant, was appointed. He paid the rent due to date and gave the lessor notice that the lease was terminated. The National Banking Act provides that a claim, to be entitled to be proven and paid by dividends, out of the assets of a national banking association in the hands of a receiver, must have been an existing demand, at the date of the suspension of the association. Defendant claimed that the lease was terminated by the notice and that the corporation was dis-

solved by the appointment of the receiver. Judgment for plaintiff against the bank only. Appeal.

Craig, C. J. 1. Receiver was clothed with no power to do any act which would impair the obligation of the contract between the parties. 2. The appointment of a receiver is not a dissolution of the corporation. 3. This claim was an existing demand at the time the bank suspended. 4. Receiver was not a necessary party to this action. Judgment affirmed.

Cited: 178 Ill. 95.

BAYOR v AMERICAN TRUST & SAV. BANK (1895) 157 Ill. 62.

To recover special deposit. Plaintiff received from C his check on S Bank. Plaintiff presented the check to bankers, who gave her a certificate of deposit. She drew out small sums from time to time which were indorsed on the back of certificate. At the time last amount was drawn, it was claimed that teller had agreed to put the money away in a separate package and keep it for her. This was never done. The bankers subsequently made an assignment for benefit of creditors to defendant. Judgment for defendant. Appeal.

Baker, J. Where a definite trust fund has been mixed with other funds, so as to render identification impossible, the cestui que trust, in the event of the insolvency of the trustee, is remitted to the position and rights of a general creditor. Judgment affirmed.

Cited: 174 Ill. 465; 182 id. 356, 357; 197 id. 115; 73 Ill. App. 678; 81 id. 257, 297, 353; 90 id. 249; 99 id. 555.

CLEMMER v DROVERS NAT. BANK (1895) 157 Ill. 206.

Bill to enforce trust. H & Son, commission merchants, sold cattle shipped to them by complainants. For each sale, H & Son received from the purchaser a stock ticket, stating the weight and the amount to be paid. The ticket stated that it was for deposit in defendant. In accordance with the custom between H & Son and defendant, these tickets were handed to the bank for collection. Money so collected was placed to credit of H & Son, who checked out a portion thereof. Defendant knew that this money was proceeds of consignments, but it applied the balance to the credit of H & Son in payment of a debt due from them to it. H & Son subsequently became insolvent. Decree for plaintiff in circuit court. Reversed. Appeal.

Carter, J. 1. Bank was bound to know that it had no right to apply these moneys in payment of its own demands against the commission merchants. 2. It must be presumed that factors checked out their own money to others and not that which did not belong to them. Decree reversed.

Cited: 164 Ill. 210; 174 id. 206; 177 id. 301; 181 id. 311; 183 id. 277; 76 Ill. App. 484; 92 id. 613, 616.

WATERLOO MILLING CO. v KUENSTER (1895) 158 Ill. 259.

Assumpsit for money collected as agents. Plaintiffs sent draft on W to defendant for collection. Defendant transmitted the draft to its correspondent bank at W. Draft was paid to W Bank, but before proceeds were remitted to defendant, W Bank failed. The money thus collected passed into hands of receiver, and was never received by plaintiffs or defendant. Before insolvency, W Bank remitted to defendant two drafts on A Bank. Defendant, having no notice of pending failure, paid the drafts to plaintiff. Defendant subsequently proved its claim for the drafts so paid before receiver of W Bank, and received dividends. It claims, by way of setoff, the difference between amount of dividends so received and face of drafts. Judgment for defendants. Appeal.

Bailey, J. 1. Where a draft upon a non-resident drawee is deposited with a local bank for collection, the bank fully discharges its duty by transmitting the draft, in due season, to a suitable agent at the place of residence of the drawee, with necessary instructions. 2. Such collecting agent becomes the agent of the holder of the draft and not of the bank, with which it is deposited for collection. 3. The defendant, until the money so paid was refunded to it, was entitled to hold the drafts and collect in its own name. Judgment affirmed.

Cited: 78 Ill. App. 343; 187 Ill. 225. Affd.: 58 Ill. App. 61.

VOLTZ v NATIONAL BANK OF ILLINOIS (1895) 158 Ill. 532.

Assumpsit on check against makers. F Bank and plaintiff bank were members of the clearing house. S & Co., private bankers, were not members. By an agreement between them, S & Co.'s checks were cleared by the plaintiff, which also guaranteed such checks. F Bank received for collection a draft on defendants, by them accepted. Defendants, depositors with S & Co., drew a check on them to cover draft. Check was certified and delivered to F Bank in settlement. S & Co. made a general assignment for the benefit of creditors the same day. Payment of the check was consequently refused. Plaintiff paid the amount of the check to F Bank, on cashier's check, and the check in suit was indorsed, without recourse, to plaintiff. Banking act forbids national banks to allow their obligations to exceed the amount of their capital stock actually paid in and plaintiff claimed that defendant's contract of guaranty was void as being within this prohibition. Judgment for plaintiff. Appeal.

Baker, J. 1. This acceptance of assignment and issuing cashier's check was not the act of an agent, but a guarantor. 2. The doctrine of ultra vires is not an available defense. 3. Where one guarantees payment of a note or check, and, on default of the principal debtor, pays it to the holder, the law implies a promise to repay on the part of the persons primarily liable, and the guarantor will be subrogated to the rights of the holder to whom he makes payment. Judgment affirmed.

GLOBE SAV. BANK v KAROLY CONSTITUTION CO. (1896) 64 Ill. App. 225.

Assumpsit, on checks. B received, as the proceeds of notes of defendant discounted by a third party, the check of the third party payable to himself. The defendant was present when the notes were discounted and the checks given to B. The name B was an assumed one. B indorsed the check and delivered it to defendant, who deposited it with the plaintiff. The drawee paid the checks to plaintiff, but afterward, when it learned that the name B was a fictitious one, it demanded and received the money back from plaintiff on the ground that the indorsement of B was a forgery, and plaintiff brought this action to recover of defendant. Judgment for plaintiff. Appeal.

Waterman, J. The defendant might permit the checks to go to any one whom it pleased, and having placed them in possession and control of B, whether that be his true or false name, made his indorsement a genuine one by the right man. Judgment reversed.

JACOBSON v BANK OF COMMERCE (1896) 66 Ill. App. 470.

Assumpsit, on a check. On July 28, 1892, the bank had, to the credit of S, \$546.85. The day before S had given the check in question to the plaintiff for \$252.36, and the same was presented and payment refused. On July 28, the defendant had refused to pay S's check to the amount of \$455. The holder of a check for \$375, presented on July 28, sued the bank, and the action is pending. The bank had charged to S a note not due, and of greater amount than the balance to his credit, and the checks were presented after the charge. Judgment for defendant. Error.

Gary, J. 1. The check operated as a transfer of so much of the funds on deposit, independent of the will or act of the bank. 2. As between check holders, the one who presents his check is entitled to priority, if the bank had no notice of any prior check outstanding. 3. The check for \$375 had priority, over the plaintiff's check. 4. The bank was not required to pay anything unless it had the funds to pay in full. Judgment affirmed.

COMMERCIAL NAT. BANK v LINCOLN FUEL CO. (1896) 67 Ill. App. 166.

Assumpsit on a check. C drew the check in question upon the defendant payable to the order of the plaintiff, in settlement of an account and delivered it to G & Co., agents for the plaintiff. G & Co. indorsed the check as agents, deposited it to their credit in the Oakland Bank, and the check was paid by the drawee through the clearing house. G & Co. became insolvent, and C produced the check on a demand for payment of the account. Judgment for plaintiff. Appeal.

Shepard, P. J. 1. The payment of the check by the bank, and charging the amount to the drawer's account, constituted sufficient proof of an acceptance of the check

by the bank. 2. If the drawee pays a check upon an indorsement that is not genuine, or is not authorized, it does so at its peril. Judgment affirmed.

Cited: 99 Ill. App. 112.

PARK NAT. BANK OF CHICAGO v NIBLACK (1896) 67 Ill. App. 583.

Assumpsit on a check. The plaintiff held the check in question drawn by parties who were indebted to the defendant on demand notes for more than the amount of their deposit. Before the check was presented, the bank failed, and the comptroller of the currency took possession. Judgment for plaintiff. Appeal.

Gary, J. The failure of the bank ended the exercise of volition by the officers of the bank, stopped payment of all checks, matured all demand notes held by the bank, and applied to the payment of such notes all balances on the books of the bank standing to the credit of the makers of the notes. Judgment reversed.

GILLIAM v MERCHANTS NAT. BANK (1896) 70 Ill. App. 592.

On check. S and W drew the check in question on the defendant bank in favor of the plaintiff. The check was presented for payment on January 2, which was refused because S and W had no funds. It was again presented on January 3, and payment refused for the same reason. On January 8, S and W made a deposit of \$8,000 which was mostly paid out by check, when, on January 10, S and W made an assignment. On January 15, the plaintiff presented the check again to the bank, and payment was refused. Judgment for defendant. Appeal.

Harker, P. J. 1. When the payment of a check is refused, because the drawer has no funds, there is no presumption that the check remains outstanding for payment. There is no duty imposed on the bank to retain from any future deposit an amount sufficient to pay them. 2. Plaintiff must prove that when the check was presented there were funds to meet it. Judgment affirmed.

ABT v AMERICAN TRUST AND SAV. BANK (1896) 159 Ill. 467.

Petition to compel payment of drafts. The petitioners purchased certain drafts of S & Co. at Chicago, which the latter had drawn in their favor on a New York bank. The petitioners forwarded these drafts to various persons in the course of business. Before they were presented for payment S & Co. made an assignment to the defendant. The drawee refused to honor the drafts, and the petitioners were compelled to make payment themselves. The deposit of S & Co. with the drawee, which came into the hands of the defendant, was sufficient to pay the drafts. The defendant claims that the contract is to be governed by the law of New York which holds that a check drawn for value on a bank did not operate as an assignment pro tanto, of the funds of the depositor in deposit on such bank in favor of the holder of the check. Judgment for petitioners. Reversed at appellate court. Appeal.

Carter, J. 1. It must be presumed that the parties contracted with reference to the laws of the State of New York. 2. The payment of the funds by the New York bank, to the assignee in this state, would give the petitioners no right to the funds, which they did not have before such payment. Judgment affirmed.

Cited: 181 Ill. 282; 75 Ill. App. 51; 83 id. 272.

MCCORMICK v MARKET NAT. BANK OF CHICAGO (1896) 162 Ill. 100.

For rent. A certificate for the organization of the defendant was sent to the comptroller of the currency. A lease was thereafter made between the plaintiff and defendant for a banking office. The president and cashier took possession of the premises and paid the rent. The defendant was never authorized by the comptroller of the currency to commence the business of banking. The officers of the defendant thereafter informed the plaintiff that it had no power to enter into said lease and offered to surrender it, but plaintiff refused to accept. The organizers of the defendant thereupon executed a certificate revoking their articles of association and transmitted it to the comptroller of the currency. Sec. 5190 U. S. R. S. provides that the usual business of each banking association shall be transacted at an office located in the place specified in its organization certificate. Sec. 5136 provides that no association shall transact any business except such as is incidental and necessarily preliminary to its organization until authorized by the comptroller of the currency. Judgment for plaintiff. Appeal.

Per curiam. 1. The leasing of rooms as a banking office was not "necessarily preliminary" to its organization. 2. A national bank, under sec. 5190, is not compelled to designate an office, street, or number, and during the entire time of its existence do business at such locality. 3. The proceeding was neither within the express or implied scope of its powers. 4. The contract having been partially executed, the plaintiff was entitled to payment for the benefit received by the defendant. Judgment affirmed.

Cited: 73 Ill. App. 103.

MEADOWCROFT v THE PEOPLE (1896) 163 Ill. 56.

Indictment for receiving deposits after insolvency. The defendants were bankers and were charged with feloniously receiving from C, who was not indebted to them, a deposit, "being then and there insolvent, whereby the deposit so made was lost." The indictment did not charge fraudulent intent. The money was deposited on June 3, 1893. On June 5 the doors were closed, and the defendants never resumed business. Act of June 4, 1879, provides that any person doing a banking business, who shall receive from any person not indebted to him any money when he is insolvent, whereby the deposit shall be lost, shall be deemed guilty of embezzlement. The failure of the banker within thirty days after receiving the deposit shall be prima facie evidence of an intent to defraud. The verdict of the jury was that the defendants were guilty of embezzlement as charged, and fixed the punishment by a fine and imprisonment. Verdict guilty. Appeal.

Baker, J. 1. The right to engage in banking may be restrained by the sovereign authority and may be regulated by legislation. 2. The rules of evidence pertain to the remedy, and are subject to modification and control by the legislature. 3. A banker is bound to know that he is solvent. 4. The words "prima facie" evidence imply that the fraudulent intent may be rebutted by any competent testimony. 5. It is sufficient to charge the offense in the terms used in creating and defining it. 6. When a banker suspends payment and discontinues banking operations, he waives the necessity for a demand on the part of his depositors. 7. "Loss" of the entire deposit is not necessary in order to constitute the offense of embezzlement within the meaning of this statute. Judgment affirmed.

Cited: 173 Ill. 36; 176 id. 446; 191 id. 276; 75 Ill. App. 172; 88 id. 129; 91 id. 294; 92 id. 404.

HENDERSON LOAN ASS'N v THE PEOPLE (1896) 163 Ill. 196.

Quo warranto to dissolve a corporation. The defendant's charter, granted in 1867, authorized it to engage in a general banking business, except that it could not issue bills. It was also authorized to carry on a real estate business. The charter especially provided that it should be subject to the provisions of any banking laws thereafter passed. The defendant conducted a general banking business, and for a period of fifteen years did no business. It then began to carry on a real estate business. The Banking Act of 1887 provided that all corporations with banking powers should be subject to its provisions, and prohibited such corporation from engaging in a real estate business. Judgment for relator. Appeal.

Craig, J. 1. This was a corporation with banking powers within the meaning of the Act of 1887. 2. A corporation may be dissolved by a forfeiture of its charter, through abuse or neglect of its franchises, as for conditions broken. Judgment affirmed.

WADSWORTH v LAURIE (1896) 164 Ill. 42.

To enforce liability of stockholders in an unincorporated bank. An attachment was issued against one of the defendants for fraudulently disposing of his effects, so as to hinder and delay creditors. Defendants pleaded in abatement non-joinder, and averred that various parties, who had signed the articles of association, were liable, and should have been joined. All of the then present stockholders were joined, except one whose stock was held in trust and the trustee was made a defendant. A judge in vacation, without authority, at the instance of the managing partners, had appointed a receiver. This act was alleged as fraudulent, and as ground for attachment. A deed of trust was also alleged as a ground of fraud, as against creditors. The evidence did not show that it was made in bad faith. On the question of non-joinder, plaintiffs were allowed, against objection, to introduce a bill in equity filed by them for a receiver for the purpose of showing who were

stockholders. Judgment for plaintiffs on main issue. Judgment for defendant on attachment. Appeal.

Per curiam. 1. Those who remained as stockholders could not compel the creditors to join, as codefendants, former stockholders. 2. Where stock stands in the name of a trustee, it is sufficient to make the trustee defendant, and the real owner need not be joined. 3. The bill in equity was proper. 4. The fact that a judge signed the order in vacation and at an unusual hour is no ground for assigning fraud, although the act was improper. Judgment affirmed.

Cited: 74 Ill. App. 585; 90 id. 370; 93 id. 180; 190 Ill. 418.

NORTHWESTERN IRON CO. v NATIONAL BANK (1897) 70 Ill. App. 245.

Assumpsit on a check. B, bookkeeper of defendant, had drawn the check in question on S & Co. for the exact amount of a draft; they had it certified, and between 2 and 2.15 p. m. on June 2 presented it to the plaintiff in payment of a draft held by it drawn on the defendant. The plaintiff stamped the draft paid, and B deposited \$700 with S & Co. for the defendant. There were sufficient funds to the credit of the defendant to pay the check. S & Co. paid all checks up to the close of business on June 2, and made an assignment on June 3. No notice of the non-payment of the check was given to the defendant until more than a month after. The defendant refused to pay the check. Judgment for plaintiff. Appeal.

Waterman, J. Where a payee, to whom a check is delivered by the drawer, receives it in the place where the bank on which it is drawn is located, he may preserve recourse against the drawer by presenting it for payment at any time before the close of banking hours on next day, and if in the meantime the bank fails, the loss will be the drawer's; and in this respect there is no distinction between a certified and an uncertified check. Judgment affirmed.

GREENEBAUM v AMERICAN TRUST AND SAV. BANK, ASSIGNEE (1897) 70 Ill. App. 407.

Assumpsit on promissory note. The defendant had the note in question discounted by S & Co., bankers, with whom he had a deposit account. S & Co. became insolvent, and B, the surviving partner, made an assignment to the plaintiff. The defendant proved that his firm had, for a long time prior to the assignment, an account with S & Co., upon which he drew checks; and, at the date of the assignment, there was a credit balance due the firm; that thereafter, at the maturity of the note, defendant's firm drew a check for the amount of the deposit and demanded payment of the plaintiff and B; and in default tendered the check, together with the difference between the check and note, in payment of the note. The tender was refused. The court excluded this evidence and directed the jury to find for the plaintiff. Judgment for plaintiff. Appeal.

Sears, J. 1. A partnership credit cannot be set off as against the debt of an individual partner. 2. A debtor of an insolvent bank, which has made an assignment for the benefit of creditors, cannot set off against his debt to the bank a check drawn in his favor by a depositor of the bank and not presented for payment until after the assignment. 3. The privity of the bank begins, as to such transferee, only upon presentation by him of the check. Judgment affirmed.

Cited: 76 Ill. App. 365; 99 id. 468.

McLAUGHLIN v FIRST NAT. BANK OF PANAMA (1897) 71 Ill. App. 329.

To recover the balance of a deposit. The plaintiffs had an account with the defendant bank for several years. The transactions for each year amounted to several thousand dollars. The defendant furnished the plaintiffs with a passbook which was frequently returned by them to the bank to be balanced. No question was raised by them as to the correctness of the entries of the debits and credits in this passbook. Plaintiffs claimed that the defendant was indebted to them for over \$2,000 for money deposited by them and not placed to their credit. Judgment for defendant. Appeal.

Glenn, J. 1. The plaintiffs' silence as to the entries in the passbook amounted to an admission of their correctness, and it so stands until overcome by the evidence. 2. When the evidence is conflicting, the verdict of the jury on the finding of the trial court is conclusive on all questions of fact unless against the weight of the evidence, or the result of passion or prejudice. Judgment affirmed.

STRAUSS v AM. EXCHANGE NAT. BANK (1897) 72 Ill. App. 314.

In insolvency proceedings. S & Co. were bankers in Chicago, and the defendant was their New York depository. The N Bank at Chicago, cleared for S & Co. S & Co., on June 1, made their draft addressed to the defendant and payable to H, cashier of the N Bank. The draft was cashed by the latter bank. The N Bank indorsed the draft to the M Bank of New York for collection for its account and forwarded it. On the same day S & Co. sent to defendant items for collection for over \$61,000. On June 2, H, learning that S of S & Co. had disappeared, telegraphed the M Bank to have the check certified the next day at the opening of the defendant bank, which was done. On June 3, S & Co. made an assignment. The defendant bank had no notice of the assignment. The draft was paid through the New York clearing house on June 5. The plaintiffs, creditors of S & Co. claimed that, as the contract was a New York contract, which did not give a lien, the defendant had no right to pay the draft. Judgment for defendant. Error.

Windes, J. 1. Under the law of Illinois, the presentation and certification of the draft operated as an assignment to the payee of the funds to the amount of the draft. 2. In the absence of any proof of what the law of New York is, the court must presume that it is the same as the law of Illinois. 3. The certification of the draft before notice of the insolvency of the drawer made the defendant liable to pay the amount. Judgment reversed.

DOPPELT v NATIONAL BANK OF THE REPUBLIC (1897) 74 Ill. App. 429.

On checks. On February 10 the plaintiff deposited with K, a banker, the checks in question for over \$1,500, indorsed in blank, who deposited them with the defendant, indorsed "for collection to the credit of K." The plaintiff received credit for the check and drew against them for \$500. K was credited with the amount of the checks by the defendant. On February 14, K made an assignment owing the plaintiff over \$1,000. K's account with the defendant bank was overdrawn when he failed. Judgment for defendant. Appeal.

Adams, P. J. 1. The checks having been indorsed in blank and credited as cash, became the property of the banker, and he could legally transfer them to the defendant or any other bona fide creditor. 2. The plaintiff having drawn against such credit, after it was credited to him as cash, cannot follow the paper or its proceeds into the hands of third parties, who received it in good faith in the usual course of business. 3. The relation of debtor and creditor was established between the defendant and K as to the amount of the checks, and the defendant had undoubted right to apply the amount of the checks to any then existing indebtedness. Judgment affirmed.

FARMERS & MERCHANTS STATE BANK v WILSON (1897) 75 Ill. App. 251.

Action on certificate of deposit. P had a certificate of deposit issued by defendant made payable to certain relatives. This he kept in his possession and never delivered it to payees. After P's death, and after the certificate had matured, the payees wrongfully obtained possession of the certificate and indorsed it to plaintiff. The defendant offered to prove that plaintiff was a holder without consideration. The court held such evidence to be inadmissible and directed judgment for plaintiff. Appeal.

Shepard, P. J. The certificate was the property of P, and the question as to whether plaintiff was a bona fide holder for value should have been submitted to the jury. Judgment reversed.

McNULTA v CORN BELT BANK (1897) 164 Ill. 427.

Assumpsit. Plaintiff was president of defendant, whose charter gave the directors power to fix the salaries of officers. The directors fixed the salary of plaintiff at \$1,000 per year, and further agreed to increase the capital stock, and to give plaintiff 2½ per cent of the par value of all stock issued, in consideration of his acceptance of the office, plaintiff in turn agreeing to purchase all the stock issued, when the directors should find suitable purchasers from him. This resolution was ratified at a meeting of the stockholders, all stockholders at the meeting being merely nominal owners of the stock, the amount paid therefor having been withdrawn immediately after it was counted by the auditor. The Banking Act provided that the capital stock could be increased only by a two-thirds vote of the

stockholders whose stock was "fully paid" and "dedicated to the business." Plaintiff sued for the amount of the bonus upon stock not yet issued. Defendant pleaded in setoff the amount already paid to plaintiff under the agreement. A by-law provided that all stock was issued and transferred upon condition that the holder would ratify all votes of directors to increase the capital stock. Judgment for defendant, in the original action, and for plaintiff on the setoff. Appeal.

Magruder, C. J. 1. A provision empowering directors to fix salaries does not authorize a contract for a bonus. 2. Where the statute provides that the capital stock can be increased only by the stockholders, the directors cannot, by contract with another, compel stockholders to consent to an increase. 3. A contract in contravention of a statute is illegal, and the parties thereto, being in *pari delicto*, the court will aid neither. 4. Only bona fide stockholders can ratify an unauthorized act of the directors. 5. The right of a stockholder to transfer his stock cannot be restrained by a by-law making such sale subject to the consent of the directors. Judgment affirmed.

Cited: 169 Ill. 322; 181 id. 49, 624; 186 id. 198; 199 id. 31; 92 Ill. App. 535, 536; 102 Ill. App. 156, 158.

NATIONAL BANK OF AMERICA v NATIONAL BANK OF ILLINOIS (1897)
164 Ill. 503.

On check against the drawee. A customer of the defendant drew a check against his deposit. The payee indorsed it to a third party, from whom the plaintiff was a purchaser for value. The defendant, acting on the instructions of the drawer, refused to pay the check when it was presented. The drawee had sufficient funds on deposit to pay the check. The court refused to allow the defendant to prove that there was originally no consideration for the check. Verdict directed. Judgment for plaintiff. Appeal.

Wilkin, J. 1. The making and delivering of a check upon a fund deposited in a bank is an assignment *pro tanto* of such fund. After demand the holder has a direct cause of action against the bank, if it had at the time sufficient funds of the drawer in its hands, and refused to make payment. 2. The fact that there was no consideration for the check could not affect the legal right of the holder thereof, who had no notice of the want of consideration. Judgment affirmed.

AMERICAN EXCHANGE NAT. BANK v LORETTA MINING COMPANY
(1897) 165 Ill. 103.

To recover a deposit. The plaintiff owned a mine at B, of which D was general agent. The plaintiff sent to the defendant a draft which was to be transmitted to the M Bank at B for the use of D. Plaintiff telegraphed to the M Bank that it had deposited the draft to D's credit. On receipt of the draft, the M Bank credited D with the amount of the draft on its books, and charged it to the defendant's account. The M Bank was indebted to the defendant which acted as its correspondent. Defendant never transmitted the draft to the M Bank, but credited it on its general account. The M Bank did not know in what manner plaintiff had made the deposit. It was notified by the defendant of the credit given it. The M Bank was declared insolvent and a receiver was appointed. Judgment for defendant. Reversed at appellate court. Appeal.

Magruder, C. J. 1. The defendant was a special depository of the fund, and took the money with notice that it was charged with a use, and under obligations to perform strictly according to instructions. 2. When the purpose of the deposit became incapable of execution, the defendant could use it for no other purpose and became liable to repay it to the plaintiff. 3. A deposit due the M Bank as trustee cannot be offset against its principal debt to the defendant. A deposit, kept separate and not fully received before formal insolvency, is recoverable by the depositor. 4. No force or effect can be given to bookkeeping entries, which are merely conditional, and which the bank is not precluded from canceling prior to the actual receipt of the money indicated by them. Judgment affirmed.

Cited: 174 Ill. 463.

FIRST NAT. BANK OF CHICAGO v PEASE (1897) 168 Ill. 40.

To recover amount of a forged check. A, falsely representing himself to be the agent of B, received from plaintiff a deed to which he forged B's acknowledgment. He then returned the deed to the plaintiff, who in good faith gave him a check

on the defendant payable to B. A forged B's indorsement and the check was duly paid by the defendant. B knew nothing whatever of the transaction, and never executed the deed or received the check. Judgment for plaintiff. Appeal.

Phillips, C. J. 1. Where a bank pays a check on a forged indorsement, it is liable to the drawer, if the payee has never received the check. Judgment affirmed.

BANK OF MINNEAPOLIS v GRIFFIN (1897) 168 Ill. 314.

Where an offer of reward is made by a bank president for information leading to the arrest of a defaulting teller, the act will be presumed to have been authorized by the corporate body, in the absence of any contrary provision in the by-laws.

Cited: 173 Ill. 216; 174 id. 225.

NIBLACK v PARK NAT. BANK OF CHICAGO (1897) 169 Ill. 517.

On check against the drawee. C, a depositor of the defendant, drew a check on it payable to the plaintiff. C's account was large enough to meet the check, but the defendant held his demand note. The comptroller of currency took possession of the defendant's assets, and caused it to suspend payment. On the same day a notary public presented the check for payment. Finding its doors closed, he made a demand on the defendant's president at another place, and subsequently protested it. Defendant claims a lien on the deposit to the amount of A's note. Judgment for defendant. Appeal.

Wilkin, J. 1. The drawing and the delivery of a check upon a fund in a bank is an assignment to the holder of the check of so much of the funds as the check calls for. 2. The bank's lien does not extend to money on deposit when checks are presented to third persons, who are holders in the regular course of business. 3. The fact that the comptroller took charge of the bank did not make any change in the relation of the parties. Judgment reversed.

Cited: 181 Ill. 283, 284; 184 id. 152; 80 Ill. App. 155; 90 id. 94.

CHEMICAL NAT. BANK v WORLD'S COLUMBIAN EXP. (1897) 170 Ill. 82.

For breach of contract. The plaintiff granted to the defendant the exclusive privilege of doing a banking business within its grounds, and provided it with a building for that purpose. The defendant agreed to pay for these privileges in instalments. The defendant went into possession and paid its first instalment. The plaintiff deposited large sums of money with the defendant. Subsequently the defendant became insolvent. The plaintiff filed its claim with the receiver for the amount of its deposit. This claim was disputed by the receiver, but was finally allowed less the amount of the instalment paid by the defendant. The plaintiff took possession of the premises which had been occupied by the defendant, but did not otherwise repudiate the contract. It accepted from the receiver dividends on the proportion of its claim which he allowed. Judgment for plaintiff. Error.

Phillips, C. J. 1. The plaintiff was not estopped by anything it had done from the recovery it secured. 2. Upon the insolvency of the bank being declared, its capacity to do business was at an end, and the contractual relation between the parties ceased, except for purposes of an action for damages for breach of contract. 3. The plaintiff had a right to take possession of the premises after a total breach by the bank of its contract. Judgment affirmed.

LANTERMAN v TRAVOUS (1898) 73 Ill. App. 670.

In insolvency proceedings. On December 11, the plaintiff deposited a check on the Bank of E, with P & Son, bankers. She received \$3,767 in money, and the balance of \$2,450 was credited to her. A passbook was given showing this balance to her credit. On December 12, an adjustment of checks was made by P & Son, with the E Bank. On December 14, P & Son made an assignment to defendant for the benefit of their creditors. The Act of June 4, 1879, makes it prima facie evidence of an intent to defraud, for any bank to receive deposits within thirty days before failure. The plaintiff filed her claim to be preferred and paid in full. Judgment for defendant. Appeal.

Worthington, J. 1. The relation between the bank and its depositors is that of debtor and creditor. 2. The offense is complete within the terms of the statute whenever deposits are received by an insolvent bank. 3. Trust funds wrongfully converted may be pursued only when the property into which they were converted can be identified. Judgment affirmed.

ROUSE v CALVIN (1898) 76 Ill. App. 362.

Interpleader. The plaintiff gave a check to the C Co. to pay for merchandise ordered. The C Co. did not ship the goods but deposited the check to its credit in its bank. Prior to this the C Co. had given its check to the defendant for an amount which was slightly in excess of its balance, plus the check of plaintiff. Before defendant had presented her check, the C Co. went into the hands of a receiver. The plaintiff claims the balance in bank due C Co. on ground that it never delivered the goods ordered. The defendant claims her check operated as an assignment to her of whatever balance there was. The receiver claims that the balance is due him in that the order appointing receiver operated to transfer all assets of C Co. then existing to him. The bank filed a bill of interpleader to have determined the rights of the claimants. Decree for defendant. Appeal. Receiver not joining.

Sears, J. 1. Plaintiff is not entitled to the fund, for the payment by him to the C Co. is not shown to have been obtained by fraud and cannot be rescinded merely by reason of the subsequent receivership. 2. Defendant is not entitled to the fund, for her check was for a sum larger than the balance, and was not presented on time. 3. The receiver was entitled to the fund, but having failed to join in the appeal, the decree must be affirmed. Decree affirmed.

ARNOLD v SEIFERT (1898) 76 Ill. App. 666.

Action to recover deposit. The plaintiff deposited money with defendant bankers. There was a condition requiring sixty days' notice of withdrawal, at election of the bank. Plaintiff demanded her deposit at the time bank failed, but did not receive it. Nothing was said about the sixty days' notice. The bank pleads this action was prematurely brought, as sixty days' notice was not given. Judgment for plaintiff. Appeal.

Horton, J. This suit was not prematurely brought, as defendant failed to exercise the right to sixty days' notice. Judgment affirmed.

CARLINVILLE NAT. BANK v WILSON (1898) 78 Ill. App. 339.

Money had and received. The defendant deposited with plaintiff a check for collection and credit. This check was credited to defendant, and he subsequently withdrew all his balance which included the amount of the check. The check was forwarded by plaintiff to its St. Louis correspondent, who transmitted it to its Chicago correspondent, who presented it to drawee, who remitted to Chicago bank by its draft on a St. Louis bank. This draft went to protest and drawer failed. The plaintiff, having had to make good the amount of the check, brings this action against defendant, who pleads that plaintiff was negligent in employing a sub-agent. Judgment for defendant. Appeal.

Burroughs, J. Where a check is deposited for collection drawn on a distant point, the depositor knows that in the usual course of collection a sub-agent will necessarily be employed, and its assent to the employment of such sub-agent is implied. Judgment reversed.

SLAUGHTER v FAY (1898) 80 Ill. App. 105.

Money had and received. The defendant left A in charge of his business with power of attorney to draw and indorse checks. The plaintiff was a banker and broker, and had had dealings with the defendant, in which A took an active part. While defendant was away, A negotiated for the sale or loan of shares of stock in the E company. A forged an indorsement on the certificates of stock, and turned them over to the plaintiff, and was given checks payable to the order of defendant. These checks were indorsed by A, and deposited in defendant's bank to his credit, and later drawn out and appropriated by A to his own use. The stock certificates were surrendered to the company and new ones issued to the plaintiff. When defendant discovered the fraud of A, he brought suit for the recovery of the shares from the company and recovered. The plaintiff reimbursed the company and by this action sought to recover the amount of the checks issued payable to defendant's order and given for the stock. Defendant contended that, as he did not receive the ultimate benefit of these checks, plaintiff could not recover. Verdict directed and judgment for defendant. Appeal.

Horton, J. 1. Bank checks operate as an assignment to the payee of so much of the drawer's money, then in the hands of the bank, as may be named in the

checks. 2. In so far as the drawer of the checks is concerned, it makes no difference whether the money is obtained by the affirmative act of the payee personally, or by another who is by the payee duly authorized. 3. If the indorsements were sufficient to effect a transfer of the money from the bank of plaintiff to the credit of defendant in his bank, they are sufficient to protect plaintiff as against the claim of defendant. 4. The defendant ought not to be permitted to repudiate the sale of stock by A to plaintiff, and at the same time to retain the proceeds of such sale. 5. The fact that defendant did not have plaintiff's money in his possession and control when this suit was brought, because after it came into his possession and control it was drawn out by A acting under a power of attorney, of whose existence plaintiff was ignorant, is no defense to this action. Judgment reversed.

AUTEN v CRAHAN (1898) 81 Ill. App. 502.

Garnishment proceedings. On September 11, the defendants issued to S, a debtor of plaintiff, a certificate of deposit payable to his order. On September 15 these proceedings were commenced. The defendants were served as garnishees, and a judgment was obtained against them. The defendants appealed to the circuit court, where the following facts were agreed on: When the attachment was sued out, S held the certificate, but shortly after indorsed it to W, who presented it at the E Bank where it was cashed. The bank forwarded it to the M Bank and received credit for it. The M Bank forwarded it to the defendants, garnishees, and charged it to their account. The defendants paid it on September 28, and credited the M Bank with the full amount. No demand was made on defendants. Judgment for plaintiff. Appeal.

Crabtree, J. 1. The certificate of deposit was a negotiable instrument. 2. It was not due until demand made, or until a sufficient time had elapsed to raise a presumption that the paper was past due in view of the manner in which the business of the bank was ordinarily transacted. The instrument was not due. 3. The indorsees took it for value and were not charged with notice. Judgment reversed.

DILLAWAY v NORTHWESTERN NAT. BANK (1898) 82 Ill. App. 71.

Assumpsit on a certified check. G drew a check for \$500 on the defendant bank to the order of R. The payee indorsed it to the plaintiff. At plaintiff's request defendant certified it, ignorant of the fact that the drawer did not have sufficient funds on deposit. Subsequently defendant obtained temporary possession of the check and canceled the certification. Judgment for defendant. Appeal.

Seats, J. Where a bank through mistake certifies a check for an amount greater than the drawer has on deposit, it may on discovering the mistake, and after the certified check has been delivered to the holder, and upon again getting temporary possession of it, cancel the certification, no rights of other parties having intervened, and the holder having in no way changed his situation or rights between the certification and the cancellation. 2. The balance of the deposit in bank being less than the amount of the check, the check does not operate to entitle the payee as against the bank to such smaller sum. Judgment affirmed.

AMERICAN TRUST AND SAV. BANK v CROWE (1898) 82 Ill. App. 537.

Assumpsit on a certified check. L drew a check on his account with the defendant in favor of G. By means of fraudulent statements, P got G to indorse and deliver the check to him. P brought the check to the plaintiff after having it certified and obtained cash for it. Payment on the check had been ordered stopped and the defendant refused to honor it. The plaintiff was a corporation engaged in the restaurant business. Among other defenses, defendant contended that the cashing of the check was ultra vires, it appearing that it was not received in the ordinary course of business. Judgment for plaintiff. Appeal.

Adams, J. 1. If P procured the check from the payee by means of false statements of which the plaintiff knew nothing, it constitutes no defense on the part of the defendant. 2. It is manifest from certification of the check that defendant, when it certified it, had sufficient funds of the drawer to pay it, and the transfer of the check to plaintiff carried with it, as against defendant, title to the amount named in the check. 3. That the cashing of the check by the plaintiff was ultra vires cannot avail defendant. Judgment affirmed.

CLARK v CHICAGO TITLE AND TRUST CO., REC'R (1898) 85 Ill. App. 293.

Intervention in insolvency proceedings. The petitioner was a depositor in the G Savings Bank just previous to its failure. According to the rules of the bank, it could require sixty days' notice of withdrawal. The notice was given on February 2, and on April 3, about five minutes before closing, plaintiff called and received the cashier's check for \$3,000 payable to the plaintiff's order. The check was on the same day deposited in another bank and was subsequently thrown out, the savings bank having gone into the hands of a receiver. The plaintiff filed his petition for a decree that the cashier's check assigned to him a special fund, and the defendant took the assets subject to his rights. Judgment for defendant. Appeal.

Freeman, J. 1. The presentation for payment of a check fixes the rights of the parties, and the bank has no right thereafter to pay other checks or demands and return dishonored the check so presented. 2. The drawing of the cashier's check, even if it changed the form of indebtedness, did not change the fact. The payee was entitled to the money before the check was drawn, and he or the holder was entitled to it afterward in the same manner and to the same extent. 3. Plaintiff was not entitled to a preference. Judgment affirmed.

GAGE HOTEL CO. v UNION NAT. BANK (1898) 171 Ill. 531.

On a check against the drawee. A drew his check payable to B on the defendant. Plaintiff purchased the check of B. At the time the check was drawn, A had not sufficient funds to pay it, but he subsequently made a deposit. A directed the defendant not to pay the check. When the check was presented, A had sufficient funds on deposit to pay it, but the defendant refused to honor it. Judgment for defendant. Appeal.

Cartwright, J. 1. When the check of a depositor is presented to a banker, if the deposit is sufficient to pay the check, it is an absolute appropriation of the amount of the check to the holder. 2. By giving the check, the depositor assumed the obligation that the funds should be there; and he cannot stop payment after it has become the property of a bona fide holder. 3. When a bank accepts an account, there is an agreement with the whole world that whosoever becomes the owner of the depositor's check shall, on presentation thereof, become the owner and entitled to receive the amount specified in the check. Judgment reversed.

Cited: 181 Ill. 282; 184 id. 152; 80 Ill. App. 155, 158; 85 id. 216; 89 id. 151; 90 id. 93; 98 id. 456.

FIRST NAT. BANK OF SPRINGFIELD v GATTON (1898) 172 Ill. 625.

Assumpsit for money had and received. The plaintiff sold a carload of cattle shipped by J G, as her agent to the S Co. The proceeds of the sale were sent by the company by mistake, without any authority from the plaintiff, to the defendant to be placed to the credit of J G. The defendant applied part of this money on an old indebtedness held by it against J G, and the balance was applied to an indebtedness due from J G and K. When the plaintiff learned that the money had been sent to the defendant, she made a demand for payment to her, which was refused. Judgment for plaintiff. Appeal.

Craig, J. 1. The money was paid to the defendant on a mistake of facts. The money belonged to the plaintiff and not to J G. It is inequitable that the defendant should retain the money and apply it to an old indebtedness of J G. 2. Under such circumstances, the action of assumpsit for money had and received will lie though no privity of contract exists. Judgment affirmed.

BROWN v THE PEOPLE (1898) 173 Ill. 34.

Indictment for embezzlement. The defendants were charged as bankers with feloniously receiving the sum of \$380.50 in current money of the United States on deposit from K. The defendants at the time of receiving the deposit were insolvent. The Act of June 4, 1879, provided that if any banker shall receive from any person not indebted to said banker any money, when, at the time of receiving such deposit, said banker is insolvent, whereby the deposit so made shall be lost to the depositor, said banker, so receiving it, shall be deemed guilty of embezzlement, and on conviction thereof shall be fined in a sum double the amount of the sum so embezzled. Verdict of guilty. Error.

Per curiam. 1. In indictments for larceny or for embezzlement constituting larceny under the statute, and punishable as such, it is necessary to allege and prove

the value of the property. 2. Where any part of the punishment depends on the value of the property, the allegation that it was a certain number of dollars in money is not sufficient. Judgment reversed.

LANTERMAN v TRAUVOS (1898) 174 Ill. 459.

Petition to be made a preferred creditor. Petitioner deposited with P & Son, bankers, a check for \$2,478 on the E Bank, and received a small part in cash, the balance of about \$1,000 being placed to her credit, and a passbook given her. The next day the check, with others, was duly presented to the E Bank. The accounts between the two banks were settled and the balance found due paid to P & Son. Two days later, P & Son made an assignment, and this petition was filed against their assignees, to have petitioner's claim given a preference over those of other creditors on the ground that the bank was insolvent when the deposit was made. Petition denied. Appeal.

Carter, C. J. The proceeds of petitioner's check cannot be traced against other checks which went in at the same time. In this respect her equity is no greater than that of any other creditor. Judgment affirmed.

DOPPELT v NATIONAL BANK OF REPUBLIC (1898) 175 Ill. 432.

To recover proceeds of checks. Plaintiff deposited two checks, payable to his order and indorsed by him in blank, with his bankers, K & Co. The latter gave him credit for the full amount, and forwarded the checks to defendant indorsed, "For collection to the credit of K & Co." The checks were presented and paid. Thereafter K & Co. made an assignment for creditors. When plaintiff made the deposit his account was overdrawn. He drew out other moneys, still leaving a balance in his favor at the time of the failure. This action was brought to recover this balance on the ground of insolvency of K & Co., when the deposit was made, and that defendant was his agent in making the collection. Evidence was offered to show that defendant held collateral of K & Co. to secure their indebtedness. Excluded. Judgment for defendant. Appeal.

Carter, C. J. 1. The indorsement of the checks in blank transferred a good title thereto. In the absence of evidence that defendant knew of the equities existing between plaintiff and K & Co., they were not bound thereby. 2. The evidence as to collateral held by defendant was properly rejected. Judgment affirmed.

ARNOLD v HART (1898) 176 Ill. 442.

Assumpsit for a deposit. In 1892, defendants entered into partnership to do a general banking business under the firm name of H P Bank, A Bros., B & Co., proprietors. In November, 1895, the firm was dissolved, and defendants, H and B, continued the business. They agreed to give notice to the creditors of the partnership and pay all its liabilities. On January 1, 1895, the plaintiff opened a savings account with the original firm, and received a passbook with the name of H P Bank, A Bros., B & Co., bankers, on it. H and B made an assignment in August, 1896. Under the condition of the deposit, the bank had a right to demand sixty days' notice before withdrawals. No notice of the dissolution was sent to the plaintiff. The defendants contended that the action was prematurely brought, because no demand was made on the bank. The passbook was put in evidence showing the dealings and items of deposit. Judgment for plaintiff. Appeal.

Wilkin, J. 1. The law presumes that plaintiff relied upon the financial ability and integrity of each ostensible partner, and, as to him, the original partnership continued until he had knowledge or notice of a change in the same. 2. By closing the doors of the bank and proclaiming its financial inability to continue operations, they thereby waived the right to insist on a demand. 3. Estoppel in pais need not be pleaded. 4. It was not error to admit the passbook in evidence. Judgment affirmed.

Cited: 85 Ill. App. 537, 540; 91 id. 294, 295; 94 id. 120.

SCHOONMAKER v GILMORE (1899) 84 Ill. App. 17.

Assumpsit on check. W and F drew the check in question on the defendant to the order of the plaintiff. Plaintiff presented the check to the defendant and payment was refused, because W and F had no funds in the bank. The defendant had

frequently allowed W and F to overdraw their account in paying for stock. There was no agreement shown that such a course would be followed. Judgment for plaintiff. Appeal.

Crabtree, P. J. There was no evidence that plaintiff had any knowledge as to the former course of dealing, nor that she was misled thereby, nor that she relied on the credit or responsibility of the defendant. Judgment reversed.

HARRINGTON v FIRST NAT. BANK (1899) 85 Ill. App. 212.

Garnishment proceedings. The plaintiff drew two checks on the defendant, payable to the orders of N and T, respectively. N and T presented the checks and payment was refused for want of funds. Afterward T left the checks, indorsed, with the teller with whom they remained until after the bank was served with garnishee process. After the checks were presented, the bank received several sums to the credit of the plaintiff, and had a balance to his credit when the process was served. After these proceedings by R were commenced, N and T both served a written notice on the bank that they held it responsible for the payment of the checks out of the moneys deposited by the plaintiff. N and T interpleaded. N and T agreed to surrender their checks and share pro rata in the deposit. Judgment for interpleaders. Appeal by R.

Dibell, J. 1. These checks operated as an assignment to the payees, not only of funds then in bank, but also of funds of the drawers which should thereafter be received. 2. A bank is not obliged to make a partial payment upon a check; but if the check holder will surrender the check for the less amount in the bank, the rule is satisfied. 3. The garnisheeing creditor stood in the shoes of his debtor. 4. The presence of the check in the cashier's hands was a continuous presentation for payment. 5. Such payments, when made, prevailed over the prior garnishee summons. 6. Checks drawn before service of the garnishee summons, though not paid until afterward, were entitled to preference. Judgment affirmed.

McCLURE v OSBORNE (1899) 86 Ill. App. 465.

Assumpsit on a promissory note. The plaintiff sent the note for collection to the defendant bankers, who acknowledged a receipt of it. Subsequently the maker paid the note. The defendant denied collecting it or ever receiving it for collection. Defendant offered to prove that the person to whom the debtor paid the note, said, he was an agent for plaintiff, excluded. Judgment for plaintiff. Appeal.

Harker, J. 1. When a banker receives a note for collection, he is bound to return it or to account for the amount of the proceeds. 2. The authority of an agent cannot be established by his unsworn statement. Until his prima facie authority is shown by other evidence, his declarations are inadmissible. Judgment affirmed.

CHICAGO TITLE AND TRUST CO., REC'R, v HOUSEHOLD GUEST CO. (1899) 88 Ill. App. 126.

In dissolution proceedings. The plaintiff filed its intervening petition to recover from the defendant, as receiver of the bank, the proceeds of four checks which, with other checks, postal orders, and currency, the plaintiff deposited with the bank on April 3, the last business day preceding its failure. The petition alleged that the insolvency of the bank was fraudulently concealed, and that the checks were not collected but came into the hands of, and were collected by, the defendant. The account of the plaintiff was a commercial deposit account subject to be drawn against. The deposits were entered in a passbook, on which was printed that checks on the bank would be credited conditionally. If not found good at the close of business, they would be charged back to depositors. The bank, in receiving checks and drafts on deposit for collection, acted only as the agent of the depositor. The master found that the checks were not commingled with the general funds of the bank, and that the plaintiff was entitled to the proceeds of the checks. Other checks, a part of the same deposit, were mingled with the general funds. Judgment for plaintiff. Appeal.

Freeman, J. 1. The fact of failure to resume business the next day after the receipt of the deposit tends to show insolvency, and of this the bank is presumed to have had knowledge. 2. The checks were the property of the petitioner when

they passed into the hands of the receiver. The money which they represented had not become a part of the general assets of the bank. 3. The receipt of the deposit was *prima facie* evidence of intent to defraud. The mingling of part of the deposit was also *prima facie* evidence of such intent. Judgment affirmed.

ARNOLD v EGER (1899) 89 Ill. App. 312.

To recover deposits. The defendants were co-partners doing a banking business. They received a deposit from the plaintiff and issued to him a bank book. Subsequently the partnership was dissolved. After dissolution, defendants accepted a deposit from the plaintiff, and, by its clerk, credited it in his passbook. The court allowed the plaintiff to put his passbook in evidence. The passbook provided for payment of interest. Judgment for plaintiff. Appeal.

Sears, J. 1. The plaintiff cannot be charged with notice of the dissolution. 2. The plaintiff received the passbook of the defendants, and all the entries were made by their clerks, which is sufficient to justify its admission in evidence. 3. Interest was properly allowed. Judgment affirmed.

BANK OF COMMERCE v FRANKLIN (1899) 90 Ill. App. 91.

Garnishment proceedings. F was a depositor of the defendant. He was indebted to it on promissory notes. Plaintiff obtained a judgment against F, and served the defendant as garnishee. The only sum standing to F's credit with the defendant was the balance of a special deposit. This deposit was made for a special enterprise, and could only be drawn against by F for that purpose. His checks against it were subject to approval of the defendant. Defendant agreed to postpone its claim for payment out of that fund, so long as F devoted it to the special enterprise. Judgment for plaintiff. Appeal.

Freeman, J. 1. In garnishment proceedings, the creditor can only recover of the person garnished when the judgment debtor, in whose name the suit is instituted, can recover. 2. The bank's liability to the depositor was limited to the special agreement between them. 3. The rights of a garnisher are not fixed by the service of the garnishment summons. They are subject to the adjustment of mutual demands between the garnishee and the judgment debtor. Judgment reversed.

DRAKE v SHERMAN (1899) 179 Ill. 362.

Bill to enjoin collection of notes. In March, plaintiffs executed to defendants, a firm of bankers, a contract whereby they agreed to pay any loss defendants might sustain through overdrafts of M, or money advanced or paid out by them on his checks or drafts. When this paper was signed on March 11, 1893, the account of M was overdrawn \$3,493.24, but this was not known to plaintiffs. M was a grain dealer, and continued to buy and sell grain until his failure in October, drawing and depositing checks almost daily. The overdraft at the time of the failure was \$5,272.95, including the overdraft existing when the contract was signed. Without knowing of this original overdraft, plaintiffs, after the failure, gave defendants four judgment notes for \$5,272.95, which included interest wrongfully charged. One of these notes was paid in full, another in part. Judgment by default was entered by defendants against plaintiffs on the others, before plaintiffs discovered the facts in regard to the original overdraft. Decree for plaintiffs relieving them from the payment of the original overdraft and interest. Appeal.

Craig, J. 1. Interest was not allowable. 2. The parties contemplated that the money placed in the bank, from proceeds of grain sold, was intended to apply in payment of checks drawn from day to day, and did not extinguish the original overdraft. The contract meant that defendants should be liable for future transactions, and nothing more. 3. Defendants were entitled to have the deposits, made after March 11, 1893, applied on transactions after that date. This is not a case where the doctrine of application of payments should apply. Decree affirmed.

WYMAN v FORT DEARBORN NAT. BANK (1899) 181 Ill. 279.

The H Bank drew its check upon defendant for \$10,000 in favor of plaintiff. At the time defendant had on deposit, to the credit, of the H bank, \$20,523.67, and it held a certificate of deposit from the H Bank for \$25,000, which was secured by collaterals for \$30,000. The H Bank owed defendant

\$648.89. The H Bank failed, and on the same day defendant transferred the account on deposit with it to itself, and credited its certificate of deposit with that amount, debiting the H Bank with the same sum, and leaving a balance due defendant of \$2,321.39. The check drawn in favor of plaintiff was presented to the defendant and refused. It was contended that, by drawing and delivering the check against the deposit account of defendant, the H Bank assigned to the plaintiff from that deposit an amount sufficient to pay the check, and that plaintiff was entitled to subrogation. Decree for defendant. Appeal.

Phillips, J. 1. The check of a depositor upon his banker, delivered to another for value, transfers to that other the title to so much of the deposit as the check calls for. 2. The bank had the right, before presentation or notice of the check, to apply the deposit in payment of the indebtedness pro tanto arising out of the certificate. 3. The check holder had such an equitable interest in that fund, by reason of its assignment by the check, that he is entitled to be subrogated to the extent of his check, with interest from the time it was presented to the fund, to be derived from the sale of the collateral securities held by the Dearborn Bank. Decree reversed.

METROPOLITAN NAT. BANK v MERCHANTS NAT. BANK (1899) 182 Ill. 367.

Action on forged draft. The F Bank issued its draft for \$35.00 to the order of H and sent it to plaintiff. The draft was raised to \$3,500. Thus raised, it was certified and accepted by plaintiff and deposited by H in the A Bank, and by it indorsed and delivered to the defendant. It was afterward paid by said plaintiff in the usual course of business. Demand was made for payment of the \$3,500 and refused. Defendant had not paid over the proceeds to the A Bank, but had simply credited it with the amount collected. Judgment for plaintiff. Appeal.

Phillips, J. 1. Money paid by a bank on a forged draft may be recovered back in an action for money had and received. 2. The fact that the bank had certified it after the change was made, is not conclusive against the bank, nor does it preclude it from showing the fact of such alteration, nor prevent a recovery from the party who received the check on the faith and credit of such certification. 3. The indorsement "for deposit" is an authority to the bank to collect and to use the check in the manner most advantageous to their business, and they may have it certified. 4. The legal construction of the contract of certification cannot be enlarged by local usage, or by the understanding of bankers. 5. The indorsement was not a restricted one showing the agency or deposit by collection. 6. The mere passing of the money in account with the principal is not equivalent to a payment of the money to the principal. 7. No tender of the draft was necessary after demand and refusal of payment, whether plaintiff credited the correct amount before or after suit could make no difference. Judgment affirmed.

WHITE v MEADOWCROFT (1900) 91 Ill. App. 293.

To recover a deposit. The defendant, a banker, accepted a deposit from the plaintiff after his banking house had made an insolvent assignment. The receiver went into possession, and the bank did not again open its doors. This suit was not brought until after the lapse of five years from the date of the deposit. The Illinois Statute of Limitations provides that contract actions must be brought within five years from the time they accrue. Judgment for defendant. Appeal.

Windes, J. 1. When a banker suspends payment and closes the doors against depositors and creditors, and discontinues banking operations, he waives the necessity for notice or demand on the part of his depositors. By closing its doors and ceasing the banking business, a bank in effect says it will not pay. 2. The appointment of a receiver does not in any way effect the running of the Statute of Limitations. Judgment affirmed.

WRIGHT v MCCARTHY (1900) 92 Ill. App. 120.

Garnishment proceedings. The plaintiff recovered a judgment against the defendant. B gave the defendant his check which he caused to be certified and indorsed to W. Later, in the same day, all the parties were served in garnishment proceedings. Subsequently, W demanded payment of the drawer, but it refused to pay because of these proceedings. Revised Statute of Illinois, ch. 62, sec. 15, provides that the maker of a negotiable instrument cannot be held liable as a garnishee before the maturity thereof. Judgment for plaintiff. Appeal.

Horton, J. 1. A bank check is a negotiable instrument, and is not due until payment is demanded. 2. The holder, by taking the certification of the check from the bank instead of requiring payment, discharges the drawer, and the check then circulates as the representative of so much cash in bank, payable on demand, to the holder. Judgment reversed.

HANNA v DROVERS NAT. BANK (1900) 92 Ill. App. 611.

Slander of credit. The plaintiffs, commission merchants, were customers of the defendant. The plaintiffs deposited funds with the defendant, which were subsequently adjudicated to belong to their consignors, and it was decreed that the defendant hold the funds in trust for the consignors. Plaintiffs drew checks against the fund, which the defendant refused to honor. The holders of these checks were enjoined from proceeding against the defendant on them. Subsequently, the plaintiffs demanded orally the payment of the funds to them, which was refused. Judgment for defendant. Appeal.

Shepard, J. 1. There had been a complete adjudication as to the fund in the bank, and no wrong was done the plaintiffs by the bank's refusal to pay the same to the check holders. 2. A refusal to pay a depositor himself upon his own demand does not constitute publishing the discredit of the depositor, so as to entitle him to sustain an action for slandering his credit. Judgment affirmed.

Affd.: 104 Ill. 252.

SINCLAIR v GOODELL (1900) 93 Ill. App. 592.

Assumpsit on checks. Defendants were private bankers. Plaintiff employed D as traveling salesman to take orders and collect its bills. He had no authority to indorse checks or to collect them. He received four checks drawn on defendants to plaintiff's order, indorsed them, and received the money on them from the defendants. He did not turn over the money to the plaintiff. Plaintiff contended that D had no authority to reindorse their name to the checks. Defendants proved that D had indorsed 33 other checks of plaintiff on defendants prior to the checks in suit, but plaintiff had no knowledge of that fact. Judgment for defendants. Appeal.

Dibell, J. 1. A bank, at its peril, pays checks drawn upon it to any other person than the person to whose order they are made. 2. An authority to receive checks in lieu of cash in payment of bills placed in the hands of an agent for collection, does not authorize him to indorse and collect the checks. 3. Mere possession of an unindorsed check by an agent gives him no authority to receive payment. Defendant was not liable by reason of the indorsement of the 33 checks by D. Judgment reversed.

FIRST NAT. BANK v KEITH (1900) 183 Ill. 475.

Assumpsit on bank check. The city of DuQu owed H \$4,000 under contract for a reservoir, and issued its warrant on its treasurer for that amount payable out of its water-works fund. The treasurer did not keep the moneys of the city in separate funds, but had on deposit in the defendant double the amount of the warrant. The deposit contained only moneys derived from the sale of the water-works bonds of the city. The treasurer directed H to the defendant for payment, which was refused. H then indorsed the check and delivered it to the treasurer who gave his check on the defendant for the same amount, and it was assigned by H to the plaintiff. Payment was again refused. Judgment for plaintiff. Appeal.

Carter, J. 1. As the bonds would be payable from funds derived from taxation, the fund in question might lawfully be applied to the payment of the demand sued for. 2. The acceptance of the check and surrender of the warrant was in effect an assignment to the payee of so much of the fund as the check called for, which the defendant must be held to have agreed to pay upon presentation, if sufficient funds remained on deposit. 3. The payee stands in as safe a position as his assignee, and the maker cannot undo the transaction by notifying the bank not to pay. Judgment affirmed.

Cited: 99 Ill. App. 331.

WARMAN v FIRST NAT. BANK (1900) 185 Ill. 60.

On promissory note. The defendant set up a failure of consideration between himself and the payee, who was a depositor with the plaintiff, and alleged that the plaintiff received the note after maturity and without consideration, and was

not an innocent holder for value. The plea was verified by an agent of the defendant. The notes were introduced in evidence without proof of their execution. The defendant showed that the notes had been discounted by the payee, and that the payee was merely credited with their amount. Judgment for plaintiff. Appeal.

Wilkin, J. 1. The affidavit, necessary to put a party on proof of the execution on an instrument sued on, must, if to a plea, be the affidavit of the defendant. 2. The fact that the plaintiff was in possession of the notes indorsed by the payee, was sufficient prima facie proof that it acquired them bona fide for value in the usual course of business before maturity, and without notice. 3. A bank does not become a purchaser of negotiable paper by discounting the same for one not indebted to it at the time by merely placing the amount which the assignor is to receive to his credit by way of deposit, and therefore could not claim the protection of being an innocent holder for value. 4. Defendants could not claim that the bank did not become a purchaser of the notes without proving the state of the account between the bank and payee at the time of the discount, and the burden of proof was not on plaintiff to show this fact. Judgment affirmed.

CLARK v CHICAGO TITLE AND TRUST CO. (1900) 186 Ill. 440.

Intervening petition in insolvency proceedings to establish title to certain funds in the hands of the receiver of the insolvent bank. Complainant had deposited with the G Bank over \$3,000. Shortly before closing on Saturday, he, received a cashier's check for \$3,000 payable to his order. The check was deposited in another bank, but on the following Monday was thrown out by the clearing house, the G Bank in the meantime having passed into the hands of defendants as receivers. Plaintiff contended that, by giving the check, the bank had passed to him title to \$3,000 of its assets. Judgment for defendant. Appeal.

Wilkin, J. A cashier's check, unlike a check drawn by a depositor upon his banker, does not operate to pass title to the amount thereof; it is merely evidence of an existing indebtedness, and changes the nature of the indebtedness in no way. Judgment affirmed.

WILSON v CARLINVILLE NAT. BANK (1900) 187 Ill. 222.

Assumpsit. Defendant deposited a check on B Bank with plaintiff, and was allowed to draw against the deposit as cash. The last of a series of banks, through which the check was forwarded for collection sent it direct to B Bank, which was the only bank in the town in which it was located. Its draft, issued in payment of the check, was dishonored owing to the failure of B Bank. Plaintiff brought suit to recover money paid out on defendant's checks. Judgment for plaintiff. Appeal.

Boggs, C. J. 1. Where a bank receives a check for collection and uses reasonable care in the selection of its correspondent, the latter becomes the agent of the original depositor. 2. Where the drawee bank is the only bank in the locality, it is not negligence per se for a bank, acting as collecting agent, to select a correspondent who will send directly or indirectly to the drawee bank for collection. Judgment affirmed.

Cited: 93 Ill. App. 674.

AMERICAN EXCHANGE NAT. BANK v THUEMMLER (1900) 94 Ill. App. 622.

Assumpsit. Plaintiff, the payee of a draft, indorsed it in blank and delivered it to M Bank for collection only. M Bank sent it to defendant "for collection and credit." Defendant did not credit M Bank with the amount of the draft until actual collection. M Bank was then insolvent and indebted to defendant for overdrafts, to the reduction of which indebtedness the amount of the draft was applied. The evidence showed that overdrafts greatly exceeding the amount of the draft had been allowed M Bank by defendant, and that defendant held securities of large face value as collateral. The court refused to direct a verdict for defendant. Judgment for plaintiff. Appeal.

Freeman, J. 1. Though a bank be apparently authorized to collect and credit the amount of a draft, it cannot claim the rights of a creditor until actual credit has been given; until that time, it is merely an agent for collection. 2. Though the facts be such that a bank crediting the amount of a draft to its depositor would be protected as against the real owner of the draft, this credit, to be effective, must be given before the insolvency of the depositor. It is too late, after such

insolvency, to change the relation from agency to that of creditor and debtor. 3. It is for the jury to determine whether overdrafts were allowed on the faith of the collection of the draft. Judgment affirmed.

Reversed, 195 Ill. 90.

BAILEY v FARMERS NAT. BANK (1901) 97 Ill. App. 66.

Debt on a replevin bond. Defendant executed the bond as surety. Defense: Ultra vires. The replication denied that the bond was ultra vires and set up that defendant was estopped to deny its power to execute such bond, in that plaintiff, relying on the validity of the bond, had delivered goods to the plaintiff in the replevin action. Defendant was organized under the National Banking Act of 1864, giving it power generally to conduct a banking business. To the replication defendant demurred. Sustained. Judgment for defendant. Appeal.

Burroughs, P. J. 1. United States statutes relative to national banks constitute the measure of the authority of such corporations. 2. The statutes do not give a national bank authority to execute a replevin bond. 3. A national bank is not estopped to set up the defense of ultra vires even as against one who has been injured by relying on the validity of the ultra vires act. Judgment affirmed.

BROWN v SCHINTZ (1901) 98 Ill. App. 452.

To foreclose mechanics' liens. Defendant B was the owner of the premises affected, and defendant S the holder of a trust deed securing payment of a building loan to be made by S to B. The only payment by S on account of the loan, was by check, S having at that time more than enough on deposit to meet the check. B accepted the check in payment, but the drawee bank refused to honor it because of S's insolvency. This refusal by the bank was conceded to be proper. Defendant S prayed foreclosure of the trust deed. The receiver of the property was, by order consented to by all parties, permitted to borrow \$600 on his certificate, declared to be a first lien on the property. He executed a mortgage instead of a certificate. Decree dismissing the original action, declaring the receiver's mortgage to be a first lien, and establishing the lien of S's trust deed for the amount secured thereby. Appeal by defendant B. The transcript on appeal did not cover everything in the record, but stated the facts material to the issues involved. The certificate of evidence certified only what the evidence tended to show.

Shepard, J. 1. If a transcript of a record on appeal fairly presents all facts material to the points involved, it is enough. 2. When legal questions alone are involved, a certificate, stating that the evidence tended to support the issues, is sufficient. 3. The acceptance of a check in payment of a debt operates pro tanto as a discharge of the debt, and the debt is not revived by the subsequent dishonor of the check. 4. One who is not injured thereby cannot complain that a decree does not give all the relief asked. 5. The power to mortgage is in principle the same as the power to issue receiver's certificates and make them first liens; and the execution of such a mortgage is sufficient compliance with an order permitting a certificate to be issued. Decree affirmed.

Cited: 98 Ill. App. 460.

WATSON v FAGNER (1901) 99 Ill. App. 364.

Assumpsit. Plaintiff was a depositor with defendant, a banker. Defendant loaned plaintiff's money to W Bros., debtors of defendant, who were subsequently adjudged bankrupts. The testimony was conflicting as to whether defendant promised to loan only to responsible parties, and to collect for plaintiff. The court charged that, where one is agent to loan money and loans to his own debtor, without disclosing the fact to his principal, and the money so loaned is not securely invested, the principal may repudiate the loan, and hold the agent responsible. Judgment for plaintiff. Error.

Harker, P. J. 1. One who is agent to loan money is liable only for failure to exercise good faith and reasonable diligence. 2. An agent to loan is not guilty of negligence per se in loaning to his debtor without the knowledge of his principal. Judgment reversed.

NELSON v LEITER (1901) 190 Ill. 414.

Attachment. The action was brought under a statute authorizing the issuance of the writ against a debtor who, within two years, had conveyed his property

with intent to hinder and delay his creditors. Defendant, being in a precarious financial condition, had conveyed lots to W, the real consideration being the agreement of W to receive the title as trustee to secure an indebtedness to the I Bank. W made a declaration of trust to the bank. The claim of the bank was for money loaned, and exceeded one-tenth of its paid-in capital. An Act of June 16, 1887, provided that a liability to a bank for money loaned to one person, firm, or company should not exceed one-tenth of its paid-in capital. The question as to whether the conveyance was fraudulent was left to the jury; and the court refused to charge that, even though defendant had other motives, plaintiff must recover if one of defendant's motives was to hinder and delay other creditors than I Bank. Judgment for defendant. Appeal.

Boggs, J. 1. Under the Attachment Act, actual fraudulent intent must be proved to entitle a creditor to the writ; the fact that a conveyance is constructively fraudulent in law is not enough. 2. Such actual fraud is a question for the jury. 3. A debtor who acts in good faith may make a preference even though it will operate to hinder and delay other creditors. 4. The Statute of June 16, 1887, does not render non-collectible a debt exceeding one-tenth of the capital stock. Judgment affirmed.

INDIANA

THE STATE BANK v THE STATE (1823) 1 Blackf. 267.

Quo warranto to dissolve a banking corporation. In the session of 1821, on charges that the bank had violated its charter, the legislature passed an act directing the governor to appoint an agent to bring this action. The information charged the defendants with owing more than double the amount of money deposited, contrary to the charter, and that the bank issued paper knowing it could not redeem. The Act of 1814 provided that defendants' corporation should not be dissolved, previous to the expiration of its charter in 1835, until all its debts were paid. The jury found the defendants guilty, and judgment was rendered that the privileges and franchises of said defendants be seized into the hands and custody of the state, together with their goods, chattels, rights and credits, lands and tenements. Motion in arrest of judgment. Overruled. Error.

Holman, J. 1. The Act of 1814 did not perpetuate the charter of the bank so as to prevent its forfeiture by quo warranto; it was intended rather to protect the creditors of the bank. 2. The proceeding of quo warranto is criminal in form only, and hence may be used in a case like this. 3. By the dissolution of the corporation, its being is completely lost, and it may be dissolved for misusing or abusing its franchise. If the corporation is dissolved by judgment, the judgment must be regularly entered and have its full effect before the dissolution takes place; and it is not until then that the property can be said to be without an owner. 4. The constitutional provision that private property shall not be taken without just compensation, does not prevent the forfeiture of a bank's charter, even though it affects bank stock held by individuals. Judgment affirmed that the privileges and franchises of defendants be seized into the custody of the state, and reversed as to balance.

Cited: 7 Ind. 425; 12 id. 287; 16 id. 51; 61 id. 411; 153 id. 486; 155 id. 456, 461.

LAGOW v BADOLLET (1826) 1 Blackf. 416.

Bill to establish a lien. The S Co., by defendant L, its attorney in fact, gave defendant F an agreement for a deed to a piece of land, and machinery for \$7,000 on time, reserving a lien on the machinery, and assigned the company's interest in it to the State Bank of Indiana in payment for a debt. It assigned the same to complainants in trust for the United States. M afterward obtained judgment against the S Co., procured levy and sale of the lot. L purchased. Defendants claimed superior equity, and that the express lien destroyed the implied vendor's lien; that the bank was prohibited from dealing in land. F claimed superior equity to L. Decree for complainant. L appealed.

Scott, J. 1. The charter restriction has no application to taking land in payment for a debt previously contracted, which could not be collected in the ordinary way. 2. There was a vendor's lien on the land. 3. It was not waived or destroyed

by expressly reserving a lien on the machinery. 4. The lien was assignable. 5. The judicial sale was subject to the lien. 6. The surplus, after satisfying complainants, belongs to F. Decree affirmed in all except the last particular.

Cited: 7 Blackf. 230; 33 Ind. 4; 62 id. 206; 82 id. 530; 145 id. 340.

JOHN v THE FARMERS AND MECHANICS BANK (1830) 2 Blackf. 367.

Debt on promissory note. Defendants gave their promissory note to plaintiffs. At maturity the plaintiffs made a demand for payment on the makers. Plea in abatement, that before the issuing of the writ, the plaintiffs had ceased to be, and were not, in fact, a corporation at the time the same was issued; the said corporation having long ceased to exercise its franchises; also that the note declared on was entitled to three days of grace. Demurrer. Sustained. Judgment for plaintiffs. Appeal.

Holman, J. 1. The facts that lead to the legal conclusion that the corporation is dissolved, must be pleaded. 2. Defendants' plea shows no more than a misuser or non-user of the franchises, which has never been considered such a dissolution as could be taken advantage of in a collateral way. 3. The note is not embraced within the provisions of the Act of 1830 and is not entitled to days of grace. 4. Nor is it a paper in which the corporation is prohibited by its charter from holding an interest. Judgment affirmed.

Cited: 4 Ind. 339; 8 id. 393; 10 id. 48, 565; 16 id. 51, 456; 34 id. 509; 90 id. 556; 99 id. 250.

COFFIN v ANDERSON (1837) 4 Blackf. 395.

Trover for bank bills. Defendant pleaded general issue and three special pleas. 1. That, as cashier of a bank, he received the notes on special deposit from F. 2. Property in his bank. 3. Property in another bank. Demurrer to special pleas. Sustained. Defendant claimed that the money had been procured by forgery; that plaintiff had taken it with knowledge. The bills had been taken from the plaintiff by one F (who had arrested plaintiff) and deposited in the bank of which defendant was cashier, and on claim of other banks after the arrest of plaintiff he refused to deliver it. F was called by defendant, plaintiff introduced impeaching, contrary statements, and defendant offered to prove statements to other parties like those first introduced. Evidence excluded. The court instructed that if the cashier of a bank received the money on special deposit, it, if any one, was liable, and not he, if it were a bank transaction; but if the money were plaintiff's, and defendant knew that the money had been taken from plaintiff against his consent, defendant was a wrongdoer and liable; that, if plaintiff came bona fide by the notes without notice of the forgery, he was entitled to hold them; that if the notes or any of them were obtained by means of a forgery with his knowledge, plaintiff had no title and could not recover. Judgment for plaintiff. Error.

Blackford, J. 1. The gist of trover is conversion and no special plea is good unless it confesses and avoid the conversion. 2. A refusal, based on a denial of plaintiff's title, is evidence of conversion. 3. After the impeaching statements, the corroborative ones were proper, and it was error to exclude them. 4. A special deposit does not change the title and trover may lie. 5. In such a case an agent may be liable in tort. 6. Defendant could question the title under the issue. 7. The instruction as to plaintiff's title omitted the element of due caution or laches, and there being some circumstances of suspicion, the jury should have been instructed as to the plaintiff's duty of due care and caution. 8. Trover will lie for specific bank notes if the identification is sufficient. Judgment reversed.

Cited: 6 Blackf. 309; 4 Ind. 223, 316; 10 id. 327; 17 id. 518; 18 id. 407; 28 id. 286; 38 id. 41; 55 id. 172; 79 id. 468; 92 id. 398; 100 id. 530; 102 id. 500; 103 id. 563; 130 id. 95; 133 id. 407; 144 id. 683.

COLEMAN v SPENCER (1839) 5 Blackf. 197.

Trial of the right of property to bank stock. M subscribed for 17 shares of stock in a bank, and being unable to pay the first instalment October 31, surrendered it to claimant, who, the same day, paid the instalment due. October 27, respondent procured an execution against M which was levied on the stock, and M thereafter made a regular assignment to claimant, who had the stock transferred to himself on the books of the bank. By statute stock may be transferred on the books of the bank to be kept for that purpose and not otherwise. It had transfer book until November 25. Judgment for claimant. Appeal.

Dewey, J. 1. The right of a subscriber is nothing more than the privilege of becoming a stockholder. 2. The subscriber could not assign his inchoate right. 3. The stock acquired by the payment of the instalment was his property. 4. The assignment could be made only on the books. 5. Before that was done, the lien of the judgment attached. Judgment reversed.

Cited: 12 Ind. 196.

TYSON v STATE BANK OF INDIANA (1842) 6 Blackf. 225.

On bill of exchange. Defendant bank and D drew the bill in question on B, at seventy days, payable to the order of K L & Co. The payees indorsed the bill to the plaintiff, who, before it became due, delivered it to defendant at its branch at Lafayette for collection. The bank failed to present the bill to B, either for acceptance or payment. Plaintiff claimed that through defendant's negligence, he has wholly lost the amount of the bill. General demurrer. Sustained. Judgment for defendant. Error.

Sullivan, J. 1. The defendant was bound to a faithful discharge of its duty, and is responsible to the plaintiff for all damages arising from its neglect. 2. The court erred in sustaining the demurrer to the declaration. Judgment reversed.

Cited: 21 Ind. 7; 63 id. 362.

THE STATE BANK v BRACKENRIDGE (1845) 7 Blackf. 395.

Trover. Plea: Not guilty. Defendant was collector of Allen County, and, as such collector, had in his possession the duplicate of the assessment of taxes in that county, with the proper precept commanding him to collect them. A tax of \$12 was assessed against plaintiff, a bank, on a tract of land which it had taken in payment of a debt; and also a tax of \$80 on lots in the town of Fort Wayne, which were exempt from taxation. A box of coin was taken by defendant for the taxes. Judgment for defendant. Error.

Blackford, J. 1. The tribunal, from which the duplicate issued, had but a limited jurisdiction and its determination relative to the assessment of these lands to which its jurisdiction did not extend, was coram non judice. It was shown on the face of the duplicate that the property belonged to the bank and was exempt from the assessment. 2. The real estate of the bank being a part of its capital stock, is exempt from taxation. Judgment reversed.

Cited: 11 Ind. 140.

SPARKS v STATE BANK (1845) 7 Blackf. 469.

Foreclosure of mortgage on real estate, given to plaintiff bank to secure a note. An engine was attached to a building on the premises by braces, which could be removed without injury to the building. One of the defendants held a subsequent mortgage, taken with knowledge of the first, but recorded first. A judgment had been obtained by one of the defendants against the mortgagor after the date of plaintiff's mortgage, and before it was recorded. Plaintiff's mortgage was executed to it in its corporate name. Defendants claimed that the mortgage was void because it was not received by the bank through the agency of one of its branches; that it had no authority to hold real estate; that the engine was personal property and did not pass with real estate; that the mortgage to one of them having been recorded first took precedence; and that the judgment obtained by one of defendants took precedence of the mortgage. Plaintiff's charter gave it a right to hold real estate mortgaged to it for security. Decree for foreclosure, including engine. Error.

Blackford, J. 1. The mortgage, appearing on its face to be executed to plaintiff in its corporate capacity, is presumed to be legally executed. If not taken as required by its charter, the defendants must show it. 2. Plaintiff had authority to hold real estate. 3. The engine was a fixture and part of the real estate. 4. Defendant's mortgage is subject to plaintiff's, although recorded first. 5. Plaintiff's mortgage has precedence of a judgment obtained after it was given, but before it was recorded. Decree affirmed.

Cited: 4 Ind. 101; 63 id. 543; 78 id. 51.

SHERRY v DENN (1847) 8 Blackf. 542.

Ejectment. Judgments were rendered in favor of the plaintiff bank against defendants, and executions having been levied on the defendants' land, the sheriff sold

the land to the plaintiff, for the use of its branch at Lafayette. The sheriff's deed was from the sheriff of Tippecanoe to the State Bank of Indiana for the use of the branch at Lafayette. Plaintiff offered in evidence a deed from J R and wife to S; also a bill of exchange drawn by S. The S family consisted of defendant H and his sons, the judgment debtors, who lived on this land. Defendant H contended that the sale of this land was irregular, and it could not be sold without the consent of the United States, and that plaintiff had no title. The charter gave the bank power to purchase land at sales for debts due it. Judgment for plaintiff. Error.

Smith, J. 1. An execution debtor cannot set up an outstanding title in a third person against a purchaser at a sale under execution; neither can a person who comes into possession under the debtor without title or collusively. 2. By the sale under the execution, the purchaser became substituted in the place of the execution defendant; and if he had shown that the latter was in possession only under color of title, that was sufficient. 3. It was not the intention of the legislature to compel the bank to stand by and see the debtor's property sacrificed for less than its value and thereby lose its debt. Judgment affirmed.

Cited: 6 Ind. 236; 13 id. 47; 78 id. 22; 150 id. 603.

THE MADISON INS. CO. v. FORSYTHE (1851) 2 Ind. 483.

Debt on a promissory note against the maker. The plaintiff discounted for the defendant a bill of exchange, paying him in notes of one, two, five, and ten dollars each, signed, "King, Modburn & Co." The bill of exchange was drawn for the purpose of procuring a loan to the defendant by the plaintiff, and the notes were given instead of money and for the purpose of being put into circulation. The defendant afterward satisfied the bill of exchange by giving the note on which this suit was brought. The defense was that the issuing of the notes was prohibited by statute, and that the consideration for the note was illegal. Judgment for defendant. Error.

Smith, J. The court was right in deciding that the notes in question were of the character forbidden by the Statute of February 1840, making the issue of small bills or notes other than bank bills intended to be used as a circulating medium illegal, and the contract was therefore void. Judgment affirmed.

Cited: 10 Ind. 445; 145 id. 511.

SKINNER v DENNING (1851) 2 Ind. 558.

To restrain the collection of a judgment. Complainants borrowed \$500 of the bank, for which they gave their notes, with complainant D as surety. The defendant, as receiver of the bank, recovered a judgment for \$300 against complainants S and D. Complainant W became replevin bail upon the same. The Constitution of Michigan provided that the legislature should pass no act of incorporation unless with the assent of two-thirds of each house. In March, 1837, the legislature passed a general banking law and an amendment thereto, without the necessary two-thirds vote. The H bank was incorporated under these legislative enactments. The complainants contended the bank was illegally organized, and the bills borrowed were void. Decree for complainants. Appeal.

Perkins, J. A court of chancery will not relieve against a judgment contrary to equity, where a defense existed which might have been set up at law, unless the failure to do so was unmixed with fault and negligence on the part of the defendant to such judgment. If the law under which the bank was organized was unconstitutional, the notes issued were void. The defendants could show its unconstitutionality by introducing the journals of the legislature in evidence. Decree reversed.

Cited: 9 Ind. 285; 12 id. 45; 13 id. 111; 22 id. 4; 30 id. 521; 53 id. 219.

THE STATE BANK v COQUILLARD (1855) 6 Ind. 232.

Bill to set aside a transfer of land. The finance committee of defendant bank, of which complainant was a member, purchased four drafts of \$2,500 each, drawn on a banking company in New York. These drafts were protested at maturity for non-payment. Complainant, in order to complete the erection of a flouring mill, sold the defendant \$21,000 worth of good promissory notes for \$20,000, and agreed to convey certain land in St. Joseph and Lake counties for one-half of the net proceeds of the four drafts. The notes were selected by the committee appointed by the defendant, and the \$20,000 was paid the complainant in ten equal

monthly payments. The complainant conveyed the land to the defendant. The complainant contended that the contract for the \$20,000 was usurious and void. Decree for complainant. Appeal.

Davison, J. 1. The notes assigned to the bank had a real existence prior to the contract. 2. There is nothing in the record from which it can be inferred that the parties intended a loan of money; and there being no loan, there could be no usury in the transaction. 3. The law has deprived the bank of making any such contract for the purchase of real estate, and the deeds made pursuant to it must be considered absolutely void. Decree reversed.

Cited: 7 Ind. 78; 13 id. 569; 15 id. 55; 144 id. 187; 152 id. 21.

WRIGHT v FIELD (1856) 7 Ind. 376.

To recover the amount of a deposit. The plaintiff brought suit against the Wabash Valley Bank and the stockholders thereof jointly. Defendants demurred on the ground that a joint suit could not be maintained, at least in the first instance. Sec. 25 of the general banking law provided that every shareholder in any such association should be individually liable for any contract, debt, or engagement of said association to an amount over and above his stock, equal to the amount of his shares of such stock. Judgment for plaintiff. Appeal.

Perkins, J. It is not necessary to join the bank and stockholders in the same suit; but it is not error to make such a joinder. Judgment affirmed.

Cited: 9 Ind. 575.

RYAN v VANLANDINGHAM (1856) 7 Ind. 416.

On promissory notes. Plaintiff, as assignee of the Illinois Bank, sued the defendant on notes payable to the president of that bank. The bank was incorporated under the act passed by the territorial legislature in 1816, and its charter expired in 1837. An act passed in 1835 continued its charter for twenty years. In 1843, an act was passed putting the bank in liquidation. The bank assigned the choses in action of the branch at S to plaintiff and another. The latter died before the commencement of the suit. The Constitution of Illinois provided that "there shall be no other banks in this state but those already provided for by law, except a state bank and its branches," etc. The rate of interest provided for in the notes, had been reduced by an act of legislature. Defendant demurred. Judgment for defendant. Appeal.

Goodkins, J. 1. As the State Constitution of Illinois clearly recognized the legal existence of the corporation, the defendant, having contracted with it as such can not be allowed to deny it. 2. The stipulation for interest was within the provisions of the charter, and the contract is valid. 3. The assignment, independent of the statute, created a common law right, which the creditors of the corporation had a right to have enforced for their benefit, whether by both assignees or by the survivor of them. Judgment reversed.

Cited: 8 Ind. 393; 10 id. 49, 565; 40 id. 260; 94 id. 524; 136 id. 511; 155 id. 461.

WRIGHT v DEFREES (1856) 8 Ind. 298.

Bill for an injunction and to declare a legislative act unconstitutional on the ground that an act was passed by the last legislature through corruption, establishing a bank with branches; that the said act was unconstitutional and void because it excepted from taxation, for municipal purposes, the capital stock, and limited its branches in the discretion of the commissioners, thereby conferring a privilege on a class of citizens. There was no allegation that complainant had been injured. Defendants demurred. Judgment for defendants. Appeal.

Goodkins, J. 1. The powers of the departments of the state being exclusive in respect to the duties assigned to each, and being absolutely independent of each other, we cannot inquire into the motives of the legislature. 2. The ground of complaint is defective in not showing that complainant was injured. 3. Sec. 45 of the bank's charter does not authorize a suspension of specie payment within the meaning of the constitution. Admitting that parts of the act are not constitutional, that would furnish no ground for declaring the whole act void and enjoining proceedings under it. Judgment affirmed.

Cited: 11 Ind. 431, 432, 435; 16 id. 68; 97 id. 377; 118 id. 85, 122, 355, 386, 441; 121 id. 32; 130 id. 442; 131 id. 478; 136 id. 585; 149 id. 665.

RATHBONE v SANDERS (1857) 9 Ind. 217.

On promissory note. The defendant gave the note in question to the C Co., payable in six months. Before the note fell due, the C Co. delivered it, indorsed in blank, to the M and T Bank for collection. Before maturity the M and T Bank, by its cashier, indorsed the note "Pay G. W. Rathbone, Esq., cashier or order, Charles Conahan." The note, so indorsed, was forwarded to the branch bank, of which plaintiff was cashier; without notice that the M and T Bank was not the owner. Before the note fell due, the M and T Bank failed. Defendant refused to pay the note on the ground that the note belonged to the C Co. Plaintiff replied that the two banks had acted as each other's agent in collecting notes; that it was the custom of the banks not to return money collected at once, but to enter it on the books as a credit; and that when the M and T Bank failed, there was a balance due the Evansville Bank of \$14,000. Defendant demurred. Judgment for defendant. Appeal.

Perkins, J. 1. Where two banks have mutual dealings in which they credit each other on their books for the proceeds of all paper remitted for collection, there is a lien for a general balance of account upon the paper thus transmitted, no matter who may be its real owner. 2. Where a principal permits an agent to hold himself out as the principal, he cannot complain that third persons, who dealt with the agent bona fide, as principal, hold him liable as principal. Judgment reversed.

Cited: 66 Ind. 247.

DAVIS v McALPINE (1858) 10 Ind. 137.

On promissory note made by the defendant, payable to the assignor of the plaintiff, or his order, at the C Bank. Plea: That the bank named was not a bank within the meaning of the Code of 1852, which provided that "notes payable to order or bearer in a bank in this state" should be negotiable. Demurrer to the answer. Sustained. Judgment for plaintiff. Appeal.

Perkins, J. 1. A note payable "at" a bank is payable "in" the bank to the holder or agent. 2. The term "bank," as used in the Code of 1852, does not necessarily refer to a chartered institution, though including such, and though used in the state constitution simply in reference to such. Charters are not requisite to banks of deposit and discount. Judgment affirmed.

Cited: 12 Ind. 426; 13 id. 483; 16 id. 266; 19 id. 110; 45 id. 126; 53 id. 440.

GRISWOLD v DUNN (1858) 10 Ind. 269.

Action by the state for the benefit of the president of a bank against a state auditor and his sureties on the official bond. The complaint alleged that the defendant had converted to his own use bonds deposited by the bank as security for redemption of its notes; but there was no averment that the bank had retired its circulation or that it had not been redeemed by the defendant. The general banking law provides that the stocks deposited as security for redemption of circulation shall be held for that purpose till accomplished. Demurrer sustained because the bank was not shown in the complaint to have been injured, or to have any direct pecuniary interest in the suit. Judgment for defendant. Appeal.

Perkins, J. The bank cannot sue to recover the bonds or their value without showing that the object of their deposit has been accomplished. If the bonds have been converted, the remedy upon the auditor's bond is for the benefit of creditors of the bank, and, so long as it has creditors, the bank cannot sue for the stock, nor proceed to recover upon the official's bond for its own use. Judgment affirmed.

Cited: 15 Ind. 30.

COFFIN v HENSHAW (1858) 10 Ind. 277.

Where a party acting in a fiduciary capacity sends a draft to a bank to be deposited to his credit, and he thereafter agrees with a third person that the same shall be transferred to his credit, and this agreement is communicated by the third party to the bank, without the depositor's knowledge or consent, the bank will be held liable to the depositor for the amount of the draft.

STATE BANK OF INDIANA v CITY OF NEW ALBANY (1858) 11 Ind. 139.

Injunction to restrain defendant from collecting a tax levied upon the capital stock of the branch of the State Bank. Demurrer. The bank was chartered

with a provision (sec. 15) in its charter that its capital stock should be subject to taxation for state and county purposes, and that its real estate and other property, situated in any city, should be taxable for municipal purposes, but not the capital stock of said bank or its branches. It was contended that the latter clause was unconstitutional. Injunction refused and complaint dismissed. Appeal.

Perkins, J. The unqualified grant of power in a constitution to a legislature to charter a bank carries with it the power to fix the conditions under which the corporation shall exist. While the grant of power was not wholly unqualified, yet none of the limitations contained in this, or in other provisions of the constitution, prohibits the exemption of the capital stock of this bank from taxation by corporations for corporate purposes, and the clause is constitutional. Judgment reversed. Injunction granted.

Cited: 14 Ind. 28, 201; 15 id. 152; 23 id. 317; 24 id. 31; 27 id. 229, 333; 37 id. 227; 40 id. 493; 47 id. 158; 48 id. 573; 137 id. 561; 142 id. 186; 145 id. 459; 147 id. 492; 152 id. 16; 156 id. 699.

STATE BANK OF INDIANA v HOLLAND (1858) 11 Ind. 150.

On a bill of exchange, drawn by defendant to be discounted by the acceptor generally. The Act of 1843, prior to which plaintiff bank discounted it, provided that no appraisement was necessary before a sale, when plaintiff discounted a bill to be discounted in it. After judgment plaintiff moved for an order authorizing a levy without appraisement, Overruled. Exception.

Worden, J. As the bill was not drawn with the intention of having plaintiff discount it, the statute does not apply. Judgment affirmed.

MCCULLOCH v THE STATE (1853) 11 Ind. 424.

Quo warranto. The information alleged that the defendant was the president of a banking association incorporated under the laws of the state; that the law of incorporation was null and void, in that it was passed without a majority of either house, and put into operation by irregular and fraudulent means. The evidence established that the citizens were prevented, by the agents of the association, from subscribing to the stock, and that the agents and their confederates got it all; that certain members of the legislature were entered upon the journals of the legislature as having voted for the bill, when they were not present; that the fraud practised in establishing the bank was known to the directors. Judgment for defendant. Appeal.

Davison, J. 1. As the required amount of stock was taken, the state has no right to complain. 2. The corporation could have no control over the acts of its agents, as they acted in advance of its incorporation. 3. The house keeping the journal is the only tribunal by which it can be corrected, and, until so corrected, is conclusive of the facts it contains. 4. An act of the legislature may be void in part and valid in part, and the void part may be stricken out without affecting the validity of the act. Judgment affirmed.

Cited: 16 Ind. 48, 68; 149 id. 665.

BROWN v KILLIAN (1885) 11 Ind. 449.

Bill to enforce liability of stockholders on notes issued by the C Bank. Plea: That the bank was an illegal institution and its issues void. The bank was organized to do a general banking business, including issuance of notes to circulate as money. Notes were issued payable to bearer, and similar in appearance to bank notes; but no securities were filed with the state auditor, and the organization was not intended to be in pursuance of any statute law. Judgment for plaintiff. Appeal.

Perkins, J. Whether or not a common-law right in private bankers, to issue bills or notes to circulate as money, ever existed in this country, it is clear that under the present constitution of this state no bank of issue can be established here except a state bank, or a free or private bank, pursuant to the provisions of the general banking law. Accordingly, the bank in question is an illegal institution, and therefore its issues are void and cannot be made the foundation of an action. Consideration given for the bills may be recovered back, but no suit on them is maintainable. Judgment reversed.

Cited: 13 Ind. 111; 15 id. 29; 16 id. 279; 18 id. 53; 23 id. 452; 28 id. 532; 104 id. 172.

HELM v SWIGGETT (1859) 12 Ind. 194.

Damages for refusal to transfer stock. The plaintiff was the second assignee of R, owner of certain stock of a bank of which the defendant was president. A certificate was assigned to the plaintiff with a power of attorney authorizing the bank to transfer the stock. The bank refused because B, the intermediate owner, received the stock for an illegal consideration and was a debtor to it. Judgment for plaintiff. Appeal.

Perkins, J. 1. An action for damages lies for refusing to permit a transfer of stock. 2. The bank had no lien upon the stock for the debt of B, as he was not a stockholder. Ownership of stock in a bank does not constitute a stockholder. It required a transfer of the stock to him upon the books of the bank. 3. Since R was not indebted to the bank, it cannot complain of the consideration. Judgment confirmed.

Cited: 16 Ind. 434; 83 id. 179; 141 id. 450.

WILSON v TESSON (1859) 12 Ind. 285.

Assumpsit against a bank, organized under the Act of 1852, and against the defendant as a stockholder therein, to recover a debt contracted by the bank in the course of banking business in 1857. Answer, that the bank had never complied with the requirements of the Act of 1855, regulating general banking. The bank defaulted. Demurrer to the answer sustained. Judgment for plaintiff. Appeal.

Perkins, J. The Act of 1852 reserved power in the legislature for its alteration and repeal. In 1855 the legislature amended it by substituting an entirely new statute which allowed banks existing under the former act an election to cease business, or comply with the requirements of the new act, but suspended their power to act meantime. The defendant bank, having failed to make such compliance, had no power to do a general banking business. It was not necessary that a forfeiture be judicially declared, since an unconditional right of legislative repeal was reserved. The stockholders are not liable upon this contract which the bank officers had no power to make. Judgment reversed.

Cited: 22 Ind. 481; 24 id. 9.

CONWELL v HILL (1860) 14 Ind. 131.

On bank notes. The plaintiff as holder of the circulating notes of a bank, of which defendant was president, presented them for payment, which was refused, and the notes were protested. A copy of the certificate of protest was attached to the complaint. The auditor of state converted the effects of the bank into money, and, having apportioned the proceeds to the circulating notes of the bank, found the same would pay 87 per cent dividend. The plaintiff deposited the notes held by him with the auditor and received the dividend of 87 per cent; this left a balance of 13 per cent to recover which this suit was instituted. Neither the note nor a copy was filed with the complaint. Demurrer on the ground, that the act under which the bank was incorporated does not contemplate a proceeding of this nature, but rather one by the auditor. It was contended that the complaint was defective in that it failed to allege a final dividend. Overruled. Judgment for plaintiff. Appeal.

Davison, J. 1. The issuing of the note and the receiving of it by the holder as money, is, in effect, a contract between him and the bank that it will pay on demand. 2. The auditor has no power to sue the bank for a balance due the noteholder. The noteholder may sue the bank, or resort to the trust funds in the hands of auditor for payment. 3. That the plaintiff has shown the amount paid on the notes is sufficient. 4. This cause of demurrer is well taken. There was error in not filing copies of the notes sued on. Judgment reversed.

Cited: 14 Ind. 286.

EWING v ROBESON (1860) 15 Ind. 26.

To recover personal property owned by the plaintiff through purchase from the president of the L Bank. The defendant, as county treasurer, seized the articles for taxes due by the bank. The answer averred that the bank was organized under the Act of 1852, and was legally assessed on the duplicate for 1855 for the amount of \$557.20 for state and other taxes; that the bank was the owner of the property named in the complaint; that the duplicate containing the assessment was delivered to him in due form of law; and that the property was seized for these taxes. The

reply set forth that when the tax was levied, there was a large amount of interest due and unpaid upon the bonds of the bank in the hands of the state auditor, sufficient to pay the taxes. Demurrer to reply. Sustained. It was contended that a legal corporation should be proved; that the legality of the assessment should be established; and that the tax duplicate was a written instrument under the statute. (1 R. S. p. 129.) Verdict for plaintiff as to all the property, except one safe. Appeal.

Perkins, J. 1. It was only necessary to show that the bank had assumed to organize under the general act. It would be estopped to deny the regularity of its organization. 2. The duplicate was the defendant's authority, and if legal on its face, is sufficient to enable him to hold the property. Tax duplicates are not to be regarded as written instruments within the meaning of the statute. 3. The act does not appropriate the interest in the hands of the auditor absolutely to the payment of taxes, and is only a cumulative remedy. The act did not operate to repeal the general law. 4. The collector could seize the property sold for payment of the tax. Judgment affirmed.

Cited: 16 Ind. 278; 39 id. 176; 68 id. 505; 95 id. 247; 109 id. 14.

CONWELL v TOWN OF CONNERSVILLE (1860) 15 Ind. 150.

To recover a tax against the defendant, as president of the Bank of C. The trustees of the plaintiff designated the property to be taxed within that town as "all real estate and all bank stocks." The bank's real estate and its capital stock were first assessed to the various owners thereof, but by order of the trustees was charged to the bank instead of the stockholders. The bank paid the tax on its real estate, but refused to pay the tax upon the capital stock. The defendant contended that the individual stockholders were liable for that tax. Judgment for plaintiff. Appeal.

Davison, J. 1. The stock was the property of the stockholders, and subject to execution for their individual liabilities. There is no legitimate rule of taxation that would authorize the assessment of this tax against the bank. 2. Corporation stocks, as other personal property, are taxable under our statutes to the respective owners in the counties in which they severally reside. Judgment reversed.

Cited: 17 Ind. 51; 22 id. 205; 23 id. 335; 59 id. 477; 79 id. 353; 140 id. 319.

TOWN OF CONNERSVILLE v BANK OF THE STATE (1861) 16 Ind. 105.

In an action on town orders, where a setoff is claimed for taxes assessed upon the money and notes of the bank on hand, and its charter provides that the capital stock shall not be taxable for municipal purposes, the court decided that the notes and money were part of its capital stock and hence exempt from taxation.

Cited: 17 Ind. 51; 27 id. 332.

BANK OF INDIANA v LOCKWOOD (1861) 16 Ind. 306.

On bank notes. The plaintiff alleged a due presentation at a branch of the defendant bank, and a refusal to pay. The notes were for \$5 each. The answer stated that, when the notes were presented, the defendant was ready and willing to redeem same, and offered and tendered the plaintiff the sum of five dollars on each of said notes, in the current silver coin of the United States. The plaintiff replied to the answer. The defendant demurred to the replication. Overruled. Exception. Judgment for plaintiff. Appeal.

Worden, J. 1. A bad replication is good enough for a bad answer. 2. A tender averred to have been made "in the silver coin of the United States" or "current silver coin of the United States" is not sufficient. Judgment affirmed.

Cited: 25 Ind. 136.

BANK OF SALEM v CALDWELL (1861) 16 Ind. 469.

Where the charter of a bank expired just previous to the completion of a contract for the sale of land, and an assignee was appointed with a power to transfer and assign, the court held that the right to make good the tender by a delivery of the deed passed to the assignee.

Cited: 20 Ind. 295

GENTRY v ALEXANDER (1861) 16 Ind. 471.

Where a stockholder was also a judgment creditor of a banking corporation, and the constitution provided for individual liability of stockholders of banks to the extent of their respective shares, the court held, that the stockholder would nevertheless be liable to the creditors to the amount of his stock, and that there was no consideration for his agreement to credit the amount on his judgment.

JONES v HAWKINS (1861) 17 Ind. 550.

Assumpsit for interest due on notes. Pleas: That plaintiff and another not joined as a party held the notes as security for a liability not yet matured; and setoff, in that defendant, before he knew of the assignment of these notes by the payee to the plaintiff, had become the owner of a promissory note made by the payee and indorsed to defendant by the cashier of C Bank, which he was entitled to have set off against the claim sued on. Plaintiff contended that the indorsement was not averred to have been signed by the president and cashier of the bank. Judgment for plaintiff. Appeal.

Perkins, J. 1. That the plaintiff holds the notes as collateral security only, is no defense, for such a holder may sue on a claim so held, and hold the money collected in place of the note. Payment of the note to such a holder, when due, would discharge defendant from the debt. 2. The answer is bad, as it does not aver the other party's interest existed at the time of the suit. 3. The objection to the plea of setoff was not valid, for an indorsement of this kind is not a contract within the meaning of the banking law, which requires contracts to be signed by the president and cashier. 4. The defendant is entitled to a setoff. Judgment reversed.

Cited: 21 Ind. 92; 22 id. 83; 33 id. 235; 49 id. 440; 50 id. 275.

ALLISON v HUBBELL (1861) 17 Ind. 559.

On bill of exchange. Plaintiff, as indorsee, sued the president of the bank by which the bill was drawn. The bill was signed by a preceding president and accepted by the drawee; the protest was given in evidence. The defendant contended: 1, That the village of G, in which the bank was located, had less than one thousand inhabitants; 2, that the instrument sued on was not the bill of the bank; and, 3, that the bank received no consideration for it, but that it was drawn by the president for the accommodation of the drawee, and plaintiff became the holder before maturity. Judgment for plaintiff. Appeal.

Hanna, J. 1. Although the banking law of 1855 requires the location of a bank to be a place of not less than a thousand inhabitants, yet a failure to comply with this cannot be set up as a defense to this action. 2. The same law requires contracts made by a bank organized thereunder, and bills and notes issued by it for circulation as money, to be signed by the president and cashier. This bill of exchange is not within that provision, but was an act in the ordinary course of the banking business in which either the president or cashier is authorized to bind the bank. 3. There is a presumption from the face of the bill that it was the bill of the bank and for its benefit, and the evidence of the cashier that it was a transaction not known on the bank's books is not sufficient to rebut the presumption. 4. The blank indorsement of the payee, followed by a special indorsement to a person other than plaintiff, and the fact that the plaintiff was not known in the chain of title, or as a holder before maturity, excludes a mere presumption that he acquired title before that time. Judgment reversed.

Cited: 21 Ind. 92; 22 id. 83; 40 id. 260; 50 id. 107.

HERRON v VANCE (1861) 17 Ind. 595.

Bill against stockholders to enforce contribution. The plaintiff, as receiver, alleged that defendants had never paid in the amount subscribed for the stock held by them; that the bank had become insolvent, and its securities sold by the state auditor to pay its circulation; that its debts amounted to \$15,000, and prayed that defendants pay the amount due on their stock and an additional amount equal to their holdings. Demurrer for want of capacity in plaintiff to sue; for defect of parties defendant; and for failure to state a cause of action. Demurrer. Sustained. Appeal.

Hanna, J. 1. Without an averment showing the plaintiff's authority to sue, the

action should be in the corporate name. 2. Since the debts stated are less than the amount due on the stock, there is no necessity for a resort to any sum beyond that. 3. The liability of these stockholders is not joint but several, and they should be sued separately on their stock subscriptions; yet, if plaintiff had been duly authorized by an order of the proper court to proceed thus, all the stockholders might be made parties, so as to adjust the whole matter. The suit should have been founded upon the articles of association required by the statute, with proper averments of the liability of each person who signed the same. Judgment affirmed.

Cited: 20 Ind. 500; 22 id. 355; 96 id. 73; 128 id. 224; 134 id. 673.

BOONE CO. BANK v WALLACE (1862) 18 Ind. 82.

Replevin. The cashier of the plaintiff, having been left in charge of the bank, told one of the directors that he had used all the coin in redeeming paper and was going to another town to procure more. He went to a city some distance away, apparently intending to leave the state. He was arrested and a considerable sum of money was found on his person and taken from him by defendant, as sheriff of the county. In this action to recover the coin from the defendant, the testimony of third persons as to statements made by the cashier, that the money belonged to the bank, was excluded. Judgment for defendant. Appeal.

Perkins, J. The act by which the cashier was deprived of and defendant invested with possession of this money, was legitimately admissible as evidence; consequently the declarations accompanying and explaining it were admissible as part of the *res gestæ*, and as declarations of the person in possession at the time, through whom defendant claimed title. Judgment reversed.

Cited: 21 Ind. 45; 56 id. 446; 71 id. 92; 96 id. 105; 104 id. 353.

SMITH v STATE BANK (1862) 18 Ind. 327.

On bills of exchange. Pleas: 1, That the board of directors of the plaintiff bank was not legally constituted, one of the directors being also president and so ineligible; 2, that the bank had not taken out brokers' license; 3, usury; 4, that the bills were not discounted by a quorum of the directors pursuant to the requirements of the charter. Demurrers to the first, second, and fourth sustained. Judgment for plaintiff on the issue of fact on the third. Appeal.

Perkins, J. 1. The acting board of directors, having come into office through the forms of law, were officers *de facto*, and if illegally elected should have been ousted by *quo warranto*. 2. The charter is a license to the bank to discount paper. 3. Usury is no bar to the action as to the principal sum loaned, or paid. 4. The charter provision as to action by a quorum of the directors is directory and for the security of stockholders and billholders; disregard of it may hazard the bank's franchises, but is no defense to debtors sued on their obligations. Answer, denying plaintiff is party in interest, should show who is the proper party. Judgment affirmed.

Cited: 20 Ind. 532; 21 id. 93; 150 id. 430.

REYNOLDS v STATE BANK (1862) 18 Ind. 467.

Assumpsit upon notes or bills issued by a branch of the Bank of the State. Plaintiff, within banking hours, presented notes to a branch of the Bank of the State, but it refused redemption in coin, and offered plaintiff United States Treasury notes, issued under acts of Congress and declared legal tender. The charter of the bank required payment of its bills or notes in gold or silver, upon demand within banking hours. Judgment for defendant. Appeal.

Perkins, J. 1. The United States Constitution forbids the states to make anything but gold and silver coin a legal tender; the state constitution provides that all bills or notes, issued as money, shall be redeemable in gold or silver. 2. The state cannot release the bank from compliance with the state constitution; but the United States can do so, by making treasury notes legal tender. 3. The legal tender act of Congress we hold valid. 4. The bank's charter means only that the bank shall not refuse to redeem her bills in what Congress shall constitutionally make legal tender money. Judgment affirmed.

Cited: 22 Ind. 310; 46 id. 410.

BANK OF THE STATE v WHEELER (1863) 21 Ind. 90.

Assumpsit against indorser of a bill of exchange. The bank defended on the ground that the indorsement was made by the cashier, for the accommodation of other parties, without authority from the bank. Judgment for plaintiff. Appeal.

Perkins, J. 1. The bank was liable upon the indorsement of the cashier, if the purchase of the plaintiff was bona fide. 2. The evidence supports the finding of the court below as to the bona fides of the transaction. Judgment affirmed.

Cited: 54 Ind. 267.

CITY OF MADISON v WHITNEY (1863) 21 Ind. 261.

Injunction to restrain the collection of taxes assessed on the capital stock of the Bank of Indiana. The grounds of the suit were that the stock of the bank should be assessed to the individual owners, and not to the corporation. A perpetual injunction was granted. Judgment for plaintiff. Appeal.

Worden, J. The proper mode for the assessment of municipal taxes under the charter of the city of Madison, on bank stock, is to assess it against the individual stockholder, and not against the corporation. Judgment affirmed.

DE PAUW v CITY OF NEW ALBANY (1864) 22 Ind. 204.

To restrain collection of taxes. The plaintiff owned certain shares of bank stock which were non-taxable by the city. On March 11, 1861, an act of the legislature gave the city power to tax such stock. The plaintiff resists the collection on the ground that as, under the Act of March, 1857, the city had no power to levy the tax on the first day of the year, it could not collect for that year under an act subsequently passed. Defendant demurred. Sustained. Appeal.

Hanna, J. 1. The right of the state to tax is not founded upon contract. 2. The legislative power governs the manner in which a citizen shall contribute to the public demands, and it was the apparent intention that this statute should operate for the current year. 3. The latest law would repeal the former law in so far as they conflicted. Judgment affirmed.

Cited: 48 Ind. 569; 59 id. 477; 64 id. 13; 79 id. 353; 108 id. 541.

WHITNEY v CITY OF MADISON (1864) 23 Ind. 331.

Bill to enjoin assessment and collection of taxes for municipal purposes. The plaintiff and others, under the general banking law of the state, were doing a banking business. The whole capital of the bank, at the time of assessing the tax in question, was invested in bonds of the United States, issued and sold for the purpose of carrying on the then existing war. All of the bonds were issued subsequent to the Act of Congress of February 25, 1862. The plaintiff alleged that they were not subject to taxation. Demurrer. Sustained. Appeal.

Gregory, J. 1. A tax assessed on the capital stock of a corporation is a tax on the property of which the capital is composed. 2. The bonds of the United States, to raise and borrow money to carry on the war, are not subject to taxation under the laws of a state. 3. The actual value of stock is the criterion for taxation. The court erred in sustaining the demurrer. Judgment reversed.

Cited: 27 Ind. 340.

JAMES' ADM'R v ROGERS (1864) 23 Ind. 451.

Where a private individual issued certain notes in the similitude of bank notes, and circulated them as money, the court decided that the constitutional limitation of the power to issue bills did not apply, when the notes were simply issued by a private individual in his own name, and that the paper was nothing more than promissory notes.

CUNNINGHAM v CLARK (1865) 24 Ind. 7.

Conversion for a safe. Plea: That the state had no property in it. The Bank of the Capitol, a free bank, failed to comply with the Act of 1855, giving it until 1857 to settle its affairs. In 1857, the bank gave the property to the state in payment of a debt. By general laws, banks had three years after expiration of their charters for suing and being sued. The plaintiff, as receiver of the bank, sued the officers of the state for the property. Judgment for plaintiff. Appeal.

Gregory, J. 1. The charter of the Bank of the Capitol did not expire within the meaning of the general laws until March 1, 1857, and the bank had three years from that time to sue. 2. Title to the safe was in the state. Judgment reversed. Cited: 26 Ind. 219; 28 id. 513; 136 id. 550.

STURGIS v ROGERS (1866) 26 Ind. 1.

On bond. The plaintiff commenced an attachment suit against E and S, and garnisheed "B as president" of a bank. Judgment in attachment was against "B, president." The appeal bond sued on, recited that the judgment was against B, individually. A statute authorized a suit against a bank to be brought against its president. By the code, a mere clerical error was not detrimental. Judgment for plaintiff. Appeal.

Frazer, J. 1. Judgment against "B, president" of the bank in a suit against "B as president" is a mere clerical error. 2. The president was the proper person to appear and answer. 3. Recital in the bond that the judgment was against B, individually, did not affect the validity of the bond. The statute was intended to cure defective bonds. Judgment affirmed.

Cited: 28 Ind. 217; 41 id. 535; 42 id. 522; 59 id. 335; 88 id. 352.

WRIGHT v ROGERS (1866) 26 Ind. 218.

Motion to set aside an execution on a judgment rendered in favor of the bank, in the name of its president, on the ground that the bank was organized under the Act of March 28, 1852, and had not complied with the requirements of the Act of March 3, 1855, sec. 48. The claim on which the judgment was obtained was assigned to W before March 1, 1857. The suit was prosecuted by the bank for W's benefit, as assignee. The president thereafter died. The state had taken no proceedings to wind up the affairs of the bank. The Act of 1855 provided that every banking association might have until March 1, 1857, to wind up and accept the provisions of this act. Motion overruled. Appeal.

Gregory, C. J. 1. In the absence of any proceedings by the state, the bank had until March 1, 1857, to wind up its business, including the power to assign its choses in action to its creditors in payment of a debt. 2. The president's death did not abate the action. Judgment affirmed.

CRAFT v TUTTLE (1866) 27 Ind. 332.

To collect a tax levied on the shares of a stockholder in a national bank, by a city, for municipal purposes. The plaintiff, as treasurer, brought the action. By statute, the capital stock of state banks was not subject to a municipal tax. Congress made stockholders' interests in a national bank taxable, but only allowed it when state banks could be taxed. Judgment for defendant. Appeal.

Frazer, J. A tax for municipal purposes cannot be imposed on the shares of stock in a national bank. Judgment affirmed.

Cited: 40 Ind. 493.

WRIGHT v STILZ (1866) 27 Ind. 338.

Action to collect a tax. The defendant was a stockholder in a national bank. A tax was levied on his shares of stock for state and county purposes. The plaintiff, as auditor, proceeded to collect the tax. Congress made shares of stock taxable at the same rate as that imposed on state banks, if the latter were taxable. Shares of stock in a state bank were not taxable for state and county purposes. Judgment for defendant. Appeal.

Frazer, J. The shares of stock in a national bank cannot be taxed for state and county purposes. Judgment affirmed.

Cited: 37 Ind. 228.

BANK OF STATE v BURTON (1867) 27 Ind. 426.

To recover special deposit. The plaintiff deposited certain specie with defendant payable in like coin on demand. This specie defendant sold at a premium. Defendant tendered treasury notes equal to face value of coin. Plaintiff sued for market value of specie. Judgment for plaintiff. Appeal.

Frazer, J. Where a bailee of specific coin to be redelivered in specie, sells the

coin for a premium, and fails to redeliver on demand, he is liable for full value of the deposit. Judgment affirmed.

Cited: 27 Ind. 442.

CONWELL v PATTISON (1867) 28 Ind. 509.

On bill of exchange. Plea: Non-existence of the bank. The bank failed to pay its circulation in coin before the Act of March 1, 1855, which made such failure a forfeiture of its charter. By general law the bank had three years after dissolution for collecting its claims. Suit was not commenced until 1866. Judgment for defendant. Appeal.

Elliott, J. The corporation ceased to exist for any purpose on March 1, 1858. Judgment affirmed.

Cited: 136 Ind. 550.

WHITNEY v RAGSDALE, TREAS. (1870) 33 Ind. 107.

To restrain the collection of a tax. Plaintiff's shares in the capital stock of a national bank were assessed for the year 1867 under the Act of March 1, 1867. The defendant, the treasurer, proceeded to collect it. Prior to that time all property had been assessed as of January 1, each year. Judgment for defendant. Appeal.

Ray, J. 1. The Act of March 1, 1867, authorized the collection of a tax on the shares of the capital stock of a national bank for the entire year 1867. 2. The fact that, in listing the stock, the act provides the stockholder shall be represented by an officer of the bank, does not render the act in conflict with the constitution; nor does it render it ineffectual in the case of national banks. 3. National bank stock shall be taxed at the place where the bank is located. Judgment affirmed.

Cited: 33 Ind. 112; 48 id. 569; 114 id. 370; 141 id. 682.

ROOT v ERDELMEYER (1871) 37 Ind. 225.

For injunction. Plaintiff sought to restrain defendants from the collection of three items of taxes assessed against shares of stock in a national bank of Indianapolis: 1, For schoolhouse purposes in that city; 2, for C township; 3, for aid, by way of donation, from the township to a railroad company. Plaintiff relied upon a provision in an Act of March 15, 1867, that "nothing in this, or any other act, shall be so construed as to authorize the taxation of stock in any national bank for municipal purposes." Demurrer to complaint. Sustained. Judgment affirmed at general term. Appeal.

Worden, C. J. The township schoolhouse, and the tax levied for railroad purposes, are in no sense levied for municipal purposes within the meaning of the law. Judgment affirmed.

Cited: 39 Ind. 64; 155 id. 197, 208.

DANIELS v STRADER (1872) 39 Ind. 63.

Where the officers of a national bank sought to restrain the collection of a special school tax levied upon their stock, the court held, that the tax was valid, and was not illegal, as being levied for municipal purposes.

McEWEN v DAVIS (1872) 39 Ind. 109.

Upon an account. The complaint alleged that S, a partner of the plaintiff, deposited with defendants in his own name money of the partnership, part of which was afterward paid out upon S's check; that, at S's death, a balance remained in defendants' hands which the plaintiff demanded should be applied to payment of a note of the firm, but that defendants refused to pay the balance to the plaintiff upon his check or order. It was not alleged that plaintiff ever demanded the money, or offered to give defendants a receipt or other evidence of payment for the money demanded, or that the payment made upon S's check was with notice of the partnership interest. Demurrer. Overruled. Appeal.

Downey, J. 1. A bank is protected from liability for money paid to a depositor, or upon his checks, without knowledge of the interest of another in the money. 2. While a bank may pay money upon the oral order of a depositor, it is not bound to do so, but may demand some written evidence of the order and payment. 3. This written evidence of payment should be pleaded. Judgment reversed.

Cited: 52 Ind. 407; 103 id. 563.

CITY OF EVANSVILLE v BAYARD (1872) 39 Ind. 450.

For injunction. Plaintiff, a resident in defendant city and an owner of stock in a national bank there, sought to restrain the collection of a tax levied in behalf of the city upon said stock. The charter of the city authorized it to levy taxes upon all money or capital within said city, subject to taxation for county purposes. The charter of the State Bank of Indiana exempted its capital stock from taxation for municipal purposes. The act of Congress forbade the assessment of stock in national banks at a rate exceeding that imposed upon stock of banks organized under state authority. The Act of March 15, 1867, expressly prohibited taxation, for municipal purposes, of stock in national banks; but that act was entitled, "An act to provide for the assessment and collection of taxes on the shares of stock owned in banks and banking associations doing business in this state," and it was contended that, as the prohibition was not embraced in this title, it was unconstitutional and void. Perpetual injunction granted. Appeal.

Downey, J. 1. The title of the Act of 1867 is sufficiently broad to cover the prohibition referred to. 2. The legislation referred to was intended to, and did, so modify the charter of defendant city that it now stands in this respect on an equality with the other cities of the state. 3. It is the shares of the capital stock which the legislation above referred to exempts from municipal taxation. Judgment affirmed.

Cited: 78 Ind. 265; 111 id. 156; 130 id. 443.

WILEY v STARBUCK (1873) 44 Ind. 298.

On promissory note, against the maker and sureties. The note was payable to a bank and was indorsed to the plaintiff, who was president of the bank. It contained a clause authorizing any attorney to appear and confess judgment if not paid at maturity. Pleas: 1, That the note included interest charges for several renewals, at the rate of 12 per cent; and, 2, that, being usurious, it was void as to sureties. Judgment for plaintiff, without attorney's fees. Appeal.

Buskirk, J. 1. Where a national bank knowingly takes more than the legal rate of interest, the entire interest is forfeited; and where the person has paid such bank more than the legal rate, he can recover in an action of debt twice the amount of interest thus paid; but he is driven to his action, and cannot recoup the same in the action by the bank. 2. The reservation of more than legal interest does not invalidate the note, and the act of Congress makes no distinction between the liability of principal and surety. 3. The court erred in not allowing the plaintiff reasonable attorney's fees. Judgment reversed.

Cited: 51 Ind. 125.

CITY OF RICHMOND v SCOTT (1874) 48 Ind. 568.

To restrain the collection of a tax. On April 1, 1873, the defendant levied a tax for municipal purposes on plaintiff's shares in a national bank. The complaint alleged: 1, That the bank was organized March 1, 1873, and that plaintiff then became the owner of the stock; 2, that the bank was organized in March, 1872, and the plaintiff then became the owner. Congress made shares in a national bank assessable at the same rate as that imposed upon other capital in the state. By the constitution, the general assembly had power to provide a uniform rate of taxation. A state statute of 1872, made all property assessable on April 1 of each year. The Statute of March 4, 1873, made bank shares taxable for municipal purposes. Plaintiff contended that, as he was not the owner of the stock on January 1, 1873, he could not be assessed for that year; that the law was unconstitutional; and national bank shares were not taxable. Demurrer. Overruled. Judgment for plaintiff. Error.

Worden, J. 1. Shares in a national bank are taxable for municipal purposes. 2. Complainant, being the owner of the stock on April 1, 1873, was liable to be taxed thereon for that entire year for municipal purposes. 3. The Statute of March 4, 1873, is constitutional. Judgment reversed.

Cited: 48 Ind. 600; 85 id. 346; 102 id. 314.

NATIONAL STATE BANK OF LAFAYETTE v RINGEL (1875) 51 Ind. 393.

On a certificate of deposit. The certificate, payable in current funds, to the order of plaintiff, was lost before having been indorsed. Motion to require plaintiff to file a bond of indemnity. Overruled. Judgment for plaintiff. Error.

Downey, J. The instrument not being negotiable as an inland bill of exchange, the payee could recover thereon, without giving a bond to indemnify the bank against a claim which might be set up by some other party. Judgment affirmed. Cited: 107 Ind. 104.

BROWN v McELROY (1876) 52 Ind. 404.

On certificate of deposit. The certificate was given by the F Bank to the defendant, and assigned by him to the plaintiff. There was no proof of a demand for payment by the plaintiff, and a refusal by the bank. The plaintiff contended that he was entitled to recover, without any proof of a demand of payment, and of a refusal of payment. Judgment for plaintiff. Motion for new trial. Overruled. Error.

Buskirk, J. It was necessary for the plaintiff to present the certificate to the bank, as a condition precedent to suit. Judgment reversed.

Cited: 87 Ind. 239; 107 id. 104.

WILSON v DAWSON (1876) 52 Ind. 513.

On a note and to foreclose a mortgage. Defense by the surety that after the maturity of the notes the plaintiffs failed to apply a deposit, made by the principal, to the payment of the notes. Reply, general denial and that the deposit was made for a particular purpose, known to the bank, and not for the payment of the notes. Demurrer to reply. Sustained. Judgment for defendant. Error.

Downey, C. J. 1. Funds deposited in a bank for a special purpose known to the bank, cannot be withheld from that purpose, to the end that they may be set off by the bank against a debt due to it from the depositor. 2. The deposit of the money is the consideration for the agreement of the bank to apply it to a particular purpose. 3. The new matter was not properly admissible under the general denial in the reply. 4. It is immaterial that the surety was not a party to the special agreement. Judgment reversed.

WEYER v SECOND NAT. BANK (1877) 57 Ind. 198.

On bank shares. Plaintiff alleged that W, as executor of S, sold stock in the defendant bank at private sale to C, transferring it in blank; that W did not get authority from the court to sell the stock; the defendant, by vote of its board of directors, transferred the stock to C, but did not issue a new certificate. That W converted the proceeds of the sale to his own use; that W was a director and had voted on the transfer of the stock, and had since become insolvent. W was removed as executor and plaintiff became executor of S. The plaintiff prayed that the transfer be declared void and that the defendant be compelled to retransfer the stock to S's estate. The U. S. R. S., p. 999, sec. 5139, incorporating defendant, provides that shares in the bank were personal property, and transferable on the books of the bank in the manner prescribed in the by-laws or articles of association. Demurrer. Sustained. Judgment for defendant. Error.

Hock, J. 1. The shares of bank stock were personal property. 2. The common law, except in so far as it conflicts with the constitutions of the United States and this state, is the law of this state. 3. The power of executors and administrators is limited by legislative enactment. 4. Sec. 60, of Act of June 17, 1852, is mandatory, and an administrator or executor cannot sell decedent's personal property at a private sale except by order of the court. 5. The stock was transferable only on the books of the bank, and a blank indorsement by the executor would not pass title. 6. The defendant had notice that the executor could not make a valid transfer of the stock. 7. The bank had no right to permit a transfer of the stock by any person other than the stockholder, except on proof of authority. Judgment reversed.

Cited: 70 Ind. 448; 86 id. 241; 89 id. 308; 95 id. 50; 109 id. 311; 119 id. 385; 128 id. 456; 154 id. 409.

POLLARD, ADM'R, v BOWEN (1877) 57 Ind. 232.

On check. B sued L & Co. on their failure to pay a check for \$1,172.50 payable to B. Upon death of B, while suit was pending, plaintiff was appointed administrator, and substituted as plaintiff. Complaint was in two paragraphs: The first alleged due presentment and its dishonor; the second alleged a verbal agreement between plaintiff and defendant, that plaintiff would not present the draft for payment until fall or later, and that, in pursuance of the terms of the

agreement, plaintiff did not present the draft until the following January, 1870. Demurrer to both paragraphs of the complaint. Sustained. Appeal.

Niblack, J. 1. The protest for non-payment, if filed with the complaint, and referred to as a part of it, is not properly a part of the record, and the matters stated in it cannot be used to supply omissions in the complaint. The protest is not a written instrument or a copy of one, within the meaning of sec. 78, code of civil procedure. 2. Protest of a check is not necessary in case of its non-payment, and would not constitute the foundation of the action. 3. The duty of demand and notice, in order to hold an indorser, is not a part of the contract, but a step in the legal remedy, that may be waived at any time. Reversed as to second paragraph.

Cited: 60 Ind. 126, 222, 598; 61 id. 9; 86 id. 254; 130 id. 509.

SCOTT v SHIRK (1877) 60 Ind. 160.

On promissory note. Plaintiff, cashier of a bank, sued on a note made by defendant and M, payable at a bank. The defendant alleged that M was the principal, and the defendant and G sureties, which fact was known to the payee; that notice of non-payment was not given to the sureties; that M had large sums on deposit with the bank; that M was served with process, and judgment was taken against him and execution issued to the sheriff, who was directed by the sureties to levy on certain property of M, and that plaintiff directed the sheriff to hold the execution. Demurrer. Sustained. Judgment for plaintiff. Error.

Niblack, J. 1. The bank had no power to transfer money deposited by M to the payment of the note without his consent, and their failure to do so cannot be set up as a defense to the note. 2. Even if the averments of the answer could be made sufficient, it does not allege that the property so directed to be levied upon was subject to execution. 3. Neither protest nor notice of non-payment is necessary. Judgment affirmed.

Cited: 97 Ind. 213; 116 id. 97; 125 id. 588.

HENSHAW v ROOT (1877) 60 Ind. 220.

On check. The defendant gave a check payable to plaintiff, who presented it for payment. Plaintiff was informed by the payee that there were not sufficient funds to meet it. He requested plaintiff to send it for collection through another bank, saying that by the time it was presented again it would be honored. Plaintiff did so, but payee in meantime had failed. Notice of non-payment was, after a slight delay, sent. Defendant claims that the action should have been brought on the original debt, not on the check; that the delay in giving notice of non-payment released the maker. Judgment for plaintiff. Appeal.

Niblack, J. 1. A dishonored check is as properly the foundation of an action as a dishonored bill of exchange. 2. Mere delay in giving notice of non-payment, provided it is given before suit brought, does not discharge drawer, unless damage results from such delay; and then only to the extent of the damage sustained. 3. A protest of a check is not required; an averment of notice of non-payment is sufficient. Judgment affirmed.

Cited: 85 Ind. 529; 100 id. 519; 107 id. 169; 122 id. 538; 150 id. 308.

CHAPMAN v McCREA (1878) 63 Ind. 360.

Damages. Plaintiff sent defendant a promissory note to collect. The defendant, for a reasonable compensation, agreed to collect it. The note was not paid at maturity, and the defendant failed to protest it, or to notify the indorser. The makers are insolvent, and the note was still unpaid and in the hands of defendant. Demurrer. Sustained. Appeal.

Biddle, J. The defendant is liable for whatever damages the plaintiff has sustained. Judgment reversed.

ALBERT v THE STATE (1879) 65 Ind. 413.

Quo warranto under statute to procure winding up of the affairs of a bank and the appointment of a receiver. Plaintiffs became owners of stock in the bank in good faith after its organization. The incorporators had pretended that the bank was legally organized, and was the owner of real and personal property to a considerable amount, and had carried on banking business for many years; that

it had been decided to wind up the bank's affairs and the defendants, as its officers, received the proceeds of its property, but that no payment had been made plaintiffs, and no settlement of the bank's affairs effected; that plaintiffs recently discovered that the bank had never been legally organized. Defendants demurred, and, upon overruling of demurrer, pleaded Statute of Limitations. Demurrer to plea sustained. Judgment for plaintiffs. Appeal.

Howk, J. The Practice Act provides for such a proceeding as this, where any association or number of persons shall act within this state as a corporation, without being legally incorporated, and that the information may be filed by any person on his own relation when he claims an interest in the corporation. This complaint sets up a case within these provisions; it was not necessary to allege any demand previously made upon defendants, or that there was any property of the bank left to be distributed, beyond the allegation that property had been received by defendants as officers of the bank. The Statute of Limitations is no defense because the relation between the parties was that of trustee and cestuis que trust. The rulings upon both demurrers were correct. Judgment affirmed.

Cited: 67 Ind. 512; 70 id. 196; 74 id. 294; 78 id. 486; 87 id. 176; 107 id. 359; 113 id. 92; 118 id. 231; 134 id. 308; 138 id. 82; 149 id. 461, 462.

LOCKE v MERCHANTS NAT. BANK (1879) 66 Ind. 353.

Case for damages. The complaint alleged that D made a note payable to F in thirty days at the C Bank; that it was indorsed before maturity to plaintiff bank which transmitted it to said C Bank, owned by defendants, for demand, protest, and notice, but that said C Bank neglected to give notice of non-payment to the indorser of the note, and that the indorser, though solvent, refuses to pay the note. Demurrer. Overruled. Pleas: General denial, and that D went into voluntary bankruptcy and made a composition with his creditors, no discharge being granted, and that plaintiff did not file said claim nor take the benefit of the composition. Defendant moved for judgment on the pleadings. Overruled. A special verdict was returned, and defendants moved for a venire de novo, because it did not embrace a finding that defendants placed the note and notice of non-payment in a properly sealed envelope in the post office for transmission to plaintiff. Overruled. Judgment for plaintiff. Appeal.

Perkins, J. 1. The complaint was sufficient on general demurrer. 2. Defendants were not entitled to judgment on the pleadings; the plea as to the bankruptcy and composition was available only in mitigation of damages if at all. 3. Whether defendants gave plaintiff due notice of dishonor was a material issue; it is only necessary that the bank, in such a case, notify the party from whom it received the paper, and mailing a letter properly addressed is sufficient, though it be not received; the jury did not find the fact of due notice given or otherwise, nor facts from which the court could pass upon it as a question of law; therefore the special verdict was not sufficient to enable the court to render judgment on it, and a venire de novo should have been granted. Judgment reversed.

Cited: 69 Ind. 484; 70 id. 407; 76 id. 579; 85 id. 436; 89 id. 232, 245; 96 id. 516; 101 id. 584; 107 id. 392; 123 id. 333; 124 id. 451; 131 id. 325; 135 id. 415; 141 id. 549; 144 id. 606; 155 id. 675.

PARKE v ROSER (1879) 67 Ind. 500.

On check. Plaintiffs sued for money paid by mistake to defendants on an altered check. The answer alleged that the holder of the check presented it to defendants, after the bank of plaintiff's had closed, and requested them to cash it; that they thereupon took it to the plaintiffs who told them that they would pay the check during banking hours; that the defendants then paid the check, and took an assignment of it from the holder; that they afterward received payment of the check from the plaintiffs; and that they had no suspicion that the check had been raised. Demurrer to answer. Overruled. Exception. Judgment for defendants. Error.

Scott, J. If the plaintiffs had certified the check, and afterward paid it, before discovering it to be an altered or raised check, they could have recovered the money from the party to whom they paid it. Their oral promise was of no more binding effect than their written certification. Judgment reversed.

FLETCHER v PIERSON (1879) 69 Ind. 281.

On check. The check was made in 1873 by defendant. Ten days thereafter plaintiff became the owner by indorsement. He mislaid the check and did not find it for four years, when it was at once presented. Payment was refused because defendant had no funds with payee. The defendant demurred on ground that there was no allegation that defendant was ever notified of dishonor, and that he was discharged by delay in presenting the checks and giving notice of non-payment. Sustained. Judgment for defendant. Appeal.

Scott, J. 1. The defendant caused the dishonor of the check by his own act in withdrawing the funds left to meet it, and therefore was not entitled to notice of non-payment. 2. The defendant is not discharged from liability by failure of plaintiff to present check in a reasonable time. Judgment reversed.

Cited: 122 Ind. 558.

NATIONAL BANK OF ROCKVILLE v SECOND NAT. BANK (1880) 69 Ind. 479.

On check. The defendant was sued as drawee. The complaint contained no averment of acceptance by the defendant. The check had been placed by the defendant's cashier on the canceling fork by mistake, but the error was corrected. There was a discrepancy between the amount indicated in the body of the check and that indicated on the margin. Demurrer to complaint. Sustained. Judgment for defendant. Appeal.

Biddle, C. J. 1. The drawee was not liable until it accepted the check. 2. Placing the check on the canceling fork did not amount to an acceptance. 3. The words in the body of a check control marginal figures. Judgment affirmed.

Cited: 100 Ind. 520; 141 id. 379.

HEATH v SECOND NAT. BANK (1880) 70 Ind. 106.

To recover realty. H sued plaintiff on a note and mortgage, and made defendant a party, as a junior incumbrancer. The property was sold under a decree of foreclosure, and defendant, second lienor, bought it in, and received a deed thereto from the sheriff. Plaintiff claimed that the defendant had no power to purchase the property. The U. S. R. S. provide that a national bank may purchase real estate mortgaged to it in good faith as security for debts previously contracted, and such as it shall purchase at sales under mortgages held by the bank. Judgment for defendant. Appeal.

Scott, J. Under the provisions of the statute, the defendant had the power to purchase the property. Judgment affirmed.

Cited: 90 Ind. 335.

MANNS v BROOKVILLE NAT. BANK (1881) 73 Ind. 243.

To establish a lien. The plaintiff alleged that he obtained judgment against L and had execution levied against ten shares of the stock of the bank owned by L; that the bank would not permit an inspection of their books, but averred that the stock had been mortgaged to R and the mortgage foreclosed. R appeared and averred that L owed him a sum of money, and as security executed a mortgage on the stock prior to the time the plaintiff obtained his judgment, which mortgage had been foreclosed. The plaintiff demurred. Overruled. Appeal.

Elliott, J. 1. The stock was the subject of mortgage and the mortgage executed to the defendant was a valid lien. 2. Judgment creditors have a right only to such interest as the debtor had in the property when the lien attached. When plaintiff's lien attached, the execution debtor had only a mere equity of redemption. Judgment affirmed.

Cited: 76 Ind. 23; 95 id. 87, 207; 99 id. 89; 112 id. 482; 114 id. 535.

ROMINGER v KEYES (1881) 73 Ind. 375.

On promissory note. The note was for \$400, payable four months after date, at the Indiana Banking Company of Indianapolis, Indiana. Defendants answered that the note was void for want of consideration, and that the bank was not a corporation organized under the laws of any state, or any act of Congress. Demurrer to answer. Sustained. Judgment for plaintiff. Appeal.

Worden, J. None but notes payable in a bank in this state are put on the footing of bills of exchange and governed by the law merchant. The statute (sec.

6, 1 R. S., 1876, p. 636) provides that "notes payable to order, or bearer, in a bank in the state, shall be negotiable as inland bills of exchange." The note by its terms does not come within the terms of the statute, and is not governed by the law merchant. Judgment reversed.

Cited: 91 Ind. 94.

NAVE v HADLEY (1881) 74 Ind. 155.

On promissory note. The defendant gave a promissory note payable to H, one of the plaintiffs, as cashier. H, with others, were co-partners in the banking business. The suit was by all the co-partners. Defendant demurred, on the ground that complaint failed to show a cause of action in all the plaintiffs, inasmuch as the note was payable only to H, describing him as cashier. Overruled. Appeal.

Elliott, J. 1. A note payable to the cashier of a bank is to be deemed payable to the bank. 2. The bank may sue thereon. Judgment affirmed.

Cited: 81 Ind. 151; 82 id. 420; 83 id. 190; 87 id. 204; 90 id. 558; 91 id. 231; 93 id. 209; 100 id. 340; 101 id. 197; 120 id. 342; 125 id. 538; 130 id. 367; 137 id. 284; 150 id. 314, 341.

THE SECOND NAT. BANK OF LAFAYETTE v HILL (1881) 76 Ind. 223.

On promissory note. H gave the note to plaintiffs for a loan. Thereafter he deposited large sums with plaintiffs, sufficient to pay the note, and did not check against the deposit until after the maturity of the note. Defendants set up that plaintiffs knew that they signed the note as sureties; that prior to maturity H directed plaintiffs to pay the note out of his deposits; that plaintiffs failed so to apply any of the funds, but, long subsequent to the maturity of the note, suffered H to check out the deposit. They claim that they are thereby discharged. Demurrer. Overruled. Judgment for defendants. Appeal.

Morris, C. 1. While the plaintiffs might have applied the deposit to the payment of the note without the authorization of H, they did not hold the funds in trust for the defendants. 2. The act of making the deposit was authority to the bank to apply the deposit to the payment of the note. Judgment reversed.

FIRST NAT. BANK v FIRST NAT. BANK (1881) 76 Ind. 561.

Money had and received. Plaintiff received a check drawn on the R Bank, payable to the order of its cashier, who, on same day, indorsed it "for collection" for account of plaintiff, and sent it to the C Bank. The C Bank placed the drafts on their "Collection Register," in which only such checks were entered, and no credit given. Thereafter the bank indorsed the check "Pay J. F. Reeves, Cashier, for collection for C Bank" and sent it by mail, stating that it was for collection and credit to cashier of R Bank. The same day the C Bank failed. The check was received by the defendant, and presented to the R Bank, which paid it, and credited the amount on its books to C Bank, which was largely indebted to the defendant on other transactions. Before presentment and collection, the defendant's cashier had notice through the newspapers of the failure of the C Bank. Plaintiff demanded of the defendant the amount of said check, which was refused. Judgment for defendant. Appeal.

Worden, J. 1. This notice was sufficient to put the defendant on its guard and require it to regulate its action with a view to the rights of the plaintiff. 2. The insolvency of the C Bank operated as a revocation of the authority to mingle the fund with the general fund of the bank. 3. The defendant had no better right to the specific fund than its principal had. 4. If commercial paper is deposited in bank for collection and is by the bank transmitted to another bank, the bank or agent actually making the collection is directed by the owner of the paper to pay the amount, less charges and expenses, to him. 5. The indorsement of the check did not vest the title nor give any right to the proceeds. 6. The transaction did not make the bank the debtor of plaintiff before collection, nor did it deprive plaintiff of his right to the proceeds of check. Judgment reversed.

Cited: 153 Ind. 54.

TURNER v FIRST NAT. BANK (1881) 78 Ind. 19.

Ejectment. Plaintiff claimed title through a sheriff's sale on a judgment, on a debt to it, in a suit in which the state on the relation of R, as guardian, was

plaintiff, and the defendants were T and others. Defendants offered to prove title in a third party by assignment, and also that the plaintiff was prohibited by the National Bank Act from taking deed to the land. Judgment for plaintiff. Appeal.

Niblack, J. Proof of an outstanding title in a third person will ordinarily defeat an action for the recovery of real estate, but in an action by a purchaser at a sheriff's sale, against the execution defendant, the latter is not, as a general rule, permitted to set up a title in a third person, as against the purchaser's rights to recover. Judgment affirmed.

Cited: 80 Ind. 191; 81 id. 211; 82 id. 17, 369; 89 id. 234; 90 id. 504; 120 id. 19; 130 id. 189; 139 id. 197; 144 id. 221.

DUTCH v BOYD (1881) 81 Ind. 146.

To foreclose mortgage. The mortgage executed in Indiana described the parties as residents of Boone County, Indiana. The property was described as "East half of the Northwest quarter of section thirty-five, township twenty north, of range two west." Defendant contended that the description did not show in what county and state the land, intended to be mortgaged, was situated. Plaintiff claimed that the names of the county and state were descriptive of the land; that the county and state, as there inserted, are descriptive of the situs, and it appearing in the certificate of acknowledgment, that the mortgage was executed in the state and between residents of the state, the presumption was that the description was for lands in the state. The mortgage was made to B, cashier of the F Bank. Judgment for plaintiff. Appeal.

Woods, J. 1. A similar presumption should apply to a deed or mortgage, made in the form prescribed by the law of the state, and which shows within itself that it was executed in the state, between parties residents in the state, and contains nothing to indicate that land outside of the state was intended. 2. Paper made payable or indorsed to a cashier of a bank is, in legal effect, payable to the bank itself. 3. The suit might appropriately have been brought in the name of the bank. 4. The description in the mortgage was properly corrected. Judgment affirmed.

Cited: 82 Ind. 220; 83 id. 521; 86 id. 87; 87 id. 204; 99 id. 115; 101 id. 7; 115 id. 531; 116 id. 385; 121 id. 458; 122 id. 561 146 id. 329.

BUNDY v TOWN OF MONTICELLO (1882) 84 Ind. 119.

For deposit. W had on deposit in the Bank of M, of which he had been president, a sum of money. This money was the proceeds of bonds of plaintiff sold for its benefit. The bank failed and defendant became receiver, on resignation of L, former receiver. W drew the fund and redeposited it in the name "J. C. Wilson, trustee." W was indebted to the bank, as president, in several thousand dollars. He gave an order to the receiver to apply said fund to any of his indebtedness to the bank. Plaintiff contended that the funds of the bank should be paid to it, and not to the receiver. Judgment for plaintiff. Appeal.

Best, C. Unless the word "trustee" may be regarded, as a mere "descriptio personæ," and rejected as a nullity, there was plain and actual notice of the existence of a trust. The word "trustee" in a check or account imports the existence of a trust, and gives notice to all into whose hands the instrument comes. Judgment affirmed.

LOFTIN v CITIZENS NAT. BANK (1882) 85 Ind. 341.

Injunction to restrain the sale of certain real estate for taxes. It was contended by the plaintiff that the assessors of the township, wherein a national bank is situated, in assessing the value of the capital stock of the bank, should exclude the real estate taken by the bank in payment of debts, and thereafter, as a part of a complete assessment of the property of the township, assess the real estate, as such, against the bank. The answer alleged that the real estate was not included in the assessment of the stock. Demurrer. Sustained. Appeal.

Woods, C. J. The real estate belonging to a bank organized under the laws of the state, must be assessed as such in the county, township, or city, where it is. If sec. 64 of the statute is to be construed as standing by itself, and as the sole law of the state for the assessment of the capital stock of national banks, and if, in itself, it means the entire property, real and personal, should be considered in estimating and assessing the capital stock, the real estate of the bank was properly

assessed as such. The court erred in sustaining the demurrer. Judgment reversed.
Cited: 102 Ind. 314; 155 id. 609.

NAVE v FIRST NAT. BANK (1882) 87 Ind. 204.

A promissory note payable to the cashier of a bank as such is payable to the bank, and the bank may sue as payee. The indorsement of a complaint on the return day by the plaintiff's attorneys is sufficient.
Cited: 155 Ind. 587.

GREGG v UNION COUNTY NATIONAL BANK (1882) 87 Ind. 238.

On a certificate of deposit. On August 20, 1873, the defendant executed to R and W a certificate of deposit. On August 25, 1873, defendant paid to them the amount of the certificate, but failed to take it up. On September 23, 1879, R and W indorsed the certificate to the plaintiff, who purchased for value, and without notice of payment. On September 30, 1879, the plaintiff presented the certificate to the defendant and payment was refused. Judgment for defendant. Motion for a new trial. Denied. Error.

Black, C. A certificate of deposit cannot be regarded as a continuing security so as to prevent its being treated as overdue, and the consequent letting in of equities existing between the original parties, unless it be presented within a reasonable time. There was an unreasonable delay. Judgment affirmed.

Cited: 107 Ind. 104; 123 id. 43; 124 id. 85.

KOONS v FIRST NAT. BANK OF JEFFERSONVILLE (1883) 89 Ind. 178.

Bill to quiet title to certificate of stock. The plaintiff owned 35 shares of the capital stock of the defendant, standing in his name on the books of the bank, and being liable to the defendant as surety on a note, he transferred to the bank sixteen and two-thirds shares of the stock. Defendant H, the teller of the bank, and in charge of the transfer book, filled up a blank certificate and bill of sale of the stock to a blank assignee, allowing the bank to fill in such name as desired. The blank was afterward filled in with the name of H, and was altered by adding eighteen and one-third more shares of stock, and the words "thirty-five," thereby making it to convey the whole thirty-five shares of stock. H transferred the certificate and transfer of stock to defendant M. Demurrer. Overruled as to the bank and M. Sustained as to H. Judgment for plaintiff subject to rights of H as pledgee. Appeal.

Morris, C. The possession of the certificate for the stock neither gave H the possession of the stock nor the right to its possession. The transfer of the stock on the book of the banks could alone do this. Judgment modified, by striking out the provision as to the rights of H.

Cited: 119 Ind. 385.

THE STATE v FIRST NAT. BANK OF JEFFERSONVILLE (1883) 89 Ind. 302.

Mandamus. E R obtained judgment against defendant K, and issued execution to the sheriff, who levied on ten shares of stock of the defendant, the property of K. The sheriff sold the stock to the relator and issued a certificate, and demanded access to the books of the bank for the purpose of transferring the stock to the purchaser, which was refused. By the R. S., the sheriff may levy and sell shares of stock in any corporation or company in the county where the office and books showing the shares of stock and stockholders are kept; and he shall have access to the books of any corporation in his county for the purpose of making the levy. If refused access, the court shall enforce the right. Motion to quash the writ overruled. Demurrer. Sustained. Appeal.

Morris, C. A delivery to the pledgee of the thing pledged is essential to the contract, and, until that act is performed, the special property that the pledgee is entitled to hold, does not rest in him. Incorporeal property, being incapable of manual delivery, cannot be pledged without a written transfer of the title. The statute by implication makes it the duty of the bank officers to allow the sheriff to have access to the books. Judgment reversed.

Cited: 115 Ind. 343; 119 id. 384.

HOLMES v BOYD, CASHIER (1883) 90 Ind. 332.

To foreclose mortgage. January 1, 1869, H gave his note for \$3,000, payable to R on January 1, 1870. H and wife, on January 5, 1869, to secure pay-

ment of the note, executed a mortgage on their real estate. December 12, 1877, H and wife executed a mortgage on the same lands to plaintiff, to secure a prior debt of \$7,000 to the I Bank. To protect itself it purchased the senior mortgage on November 30, 1878, taking an assignment thereof. H and wife and D, claiming some interest, demurred separately. Complaint held sufficient as to them. D Y, assignee in bankruptcy of H, defaulted. H and Mrs. D answered separately. Mrs. D pleaded in abatement, that prior to January 1, 1878, she became the owner of the land, and that on January 5, 1878, she and her husband agreed with R, who then owned the note, that she would pay the interest due on the first of that month and interest at 10 per cent for the year 1878, to be paid January 1, 1879, and interest at 8 per cent for 1879, payable January 1, 1880, in consideration of which R agreed to extend payment of principal to January 1, 1880. She paid \$300 as agreed, taking R's receipt which contained his promise to extend the time to 1880, if the interest for 1878 and 1879 was paid when due. She further alleged that plaintiff purchased with a full knowledge of the facts. Judgment for plaintiff. Appeal.

Niblack, C. J. 1. These assignments made Boyd a trustee of an express trust, hence he was authorized to sue without joining the bank. 2. No restriction is imposed on a banking association in taking a mortgage to secure a debt previously contracted. 3. A contract for forbearance must have some new consideration. 4. Neither the payment of interest already accrued, nor a promise to pay such interest as thereafter may lawfully accrue on a note, will afford a sufficient consideration for an agreement to extend the term of payment of the note. Judgment affirmed.

Cited: 103 Ind. 182; 148 id. 115.

HARRISON v WRIGHT (1884) 100 Ind. 515.

To settle ownership of fund. Plaintiff, as receiver of a bank, sued to determine the rights of the check holders. The bank before failing, gave checks signed by its cashier and drawn on another bank. They were in the form of banker's checks and were not drawn on any particular fund. The payees accepted the checks, some paying cash and some by check. The bank checks were dishonored. No fraud was shown. Judgment, that those who had paid cash, should be paid in full, and those who had paid by check, should share pro rata with other creditors. Appeal.

Zollars, C. J. 1. The checks were banker's checks and not bills of exchange. 2. A check in the ordinary form upon the drawer's banker, without words of transfer, and drawn upon no particular fund, does not of itself operate as an assignment of a fund in the hands of the drawee, or of the drawer's chose in action against the drawee. Judgment giving a preference reversed. Judgment refusing a preference affirmed.

Cited: 114 Ind. 239; 116 id. 494; 123 id. 81; 145 id. 505; 146 id. 366; 153 id. 52.

McLAIN v WALLACE (1885) 103 Ind. 562.

For deposit. Petitioner, a county clerk, deposited the public money in the bank. The deposits were in the petitioner's name as clerk and were general deposits. The bank failed and defendant was appointed receiver. Demurrer. Sustained. Judgment for defendant. Appeal.

Bicknell, C. C. 1. Upon a general deposit, the money becomes the property of the bank, and the depositor's claim is merely for a like amount. The rule that trust property can be followed as long as it can be traced, is not applicable to a general deposit in a bank. 2. The addition of the word "clerk" to the name of a general deposit does not make the deposit a special one or change the liability of the bank. Judgment affirmed.

Cited: 108 Ind. 280, 505; 116 id. 494.

RYAN v RAY (1885) 105 Ind. 101.

For fraud. The action was by plaintiff on behalf of herself and other depositors to recover from trustees of savings bank, by reason of misconduct. In 1878, before this proceeding was begun, the auditor of the state instituted proceedings against the bank, on the ground of insolvency, and a receiver was appointed. The questions presented are as follows: 1. Can any person other than the auditor of state,

under any circumstances, maintain an action against the officers and trustees of a savings bank for a violation of their statutory duties? 2. If the plaintiffs might maintain the present action, can they maintain it where the auditor of state has now pending an action against the trustees of the bank in another court, and when such other court has a receiver in charge of the assets of the bank? Demurrer to complaint. Sustained. Appeal.

Mitchell, J. The mode of winding up the affairs of savings banks, and enforcing the liability of their trustees for misconduct, is prescribed in sec. 2757, and that mode excludes all others. The auditor alone is authorized to maintain an action against officers and trustees of savings banks for the violation of their statutory duties. Judgment affirmed.

Cited: 146 Ind. 625; 153 id. 104.

WASSON, TREAS., v FIRST NAT. BANK (1886) 107 Ind. 206.

To set aside tax on national bank stock. The state tax law of 1881 allowed taxpayers to deduct their debts from the assessed value of a class of credits which constituted a material portion of the moneyed capital of the state in the hands of its citizens. It denied to the owners of national bank stock the right to deduct their debts from the assessed value of the stock. The stockholders of the plaintiff contended that the state law was inoperative in that it contained a discrimination against holders of national bank stock. Sec. 5219, U. S. R. S., provides for the taxation of the shares of a national bank under state laws, subject to the following restriction: The taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of the individual citizens of the state. Judgment for plaintiff. Appeal.

Zollars, J. 1. All credits are moneyed capital in the sense in which that term is used in the act. 2. Holders of national bank stock are entitled to the same deductions as other taxpayers. Judgment affirmed.

Cited: 108 Ind. 356; 111 id. 41, 243; 112 id. 458; 114 id. 370; 147 id. 466, 700; 150 id. 233.

FLETCHER v SHARPE (1886) 108 Ind. 276.

To recover trust funds. Plaintiffs, administrators, by intervening petition pending a receivership of defendants, bankers, sued to recover trust funds, alleging that, at the time of receiving such funds, the defendants had full notice that it belonged to the estate of decedent, and that the same was placed in their custody by the petitioners in their trust capacity, and that the funds were so received by the defendants. It was admitted that defendants F and S had notice of the character of the funds when the first deposit was made, and an ordinary bank account of debit and credit was kept. Judgment for defendant. Appeal.

Mitchell, J. When deposits are received, unless they are special deposits, they belong to the bank as a part of its general funds, and the relation of debtor and creditor arises between the bank and the depositor, whether the deposit is of trust moneys or not, provided the act of depositing is not a misappropriation of the fund. The debt of the bank is of the same character as the debt to any other depositor, and must be paid in the same proportion. Judgment affirmed.

Cited: 119 Ind. 596; 149 id. 547.

CITY OF INDIANAPOLIS v VAJEN (1887) 111 Ind. 240.

Action to recover taxes. Plaintiff was the owner of certain shares of stock in a national bank. He was indebted to an amount in excess of the value of the stock. He gave notice to the city assessor of this indebtedness, and demanded the right to deduct the same from the value of the stock, which was refused. Plaintiff was assessed on account of the stock, without any deduction for his debts. He paid the assessment under protest. The court stated as conclusions of law that the payment was voluntary, but that plaintiff was entitled to recover the amount he had paid. Exception to the first conclusion of law by the plaintiff, and to the second by the defendant. Judgment for plaintiff. Error and cross error.

Mitchell, J. The rule of voluntary payments does not apply in cases where a positive statute makes it the duty of a municipal corporation to refund to the taxpayer money collected for taxes erroneously assessed. The defendant's stock being erroneously assessed, the case comes within sec. 3157, R. S. 1881, which requires taxes erroneously assessed and collected to be refunded. In making

payment of taxes, the holder of national bank stock may deduct the amount of his bona fide debts. Judgment affirmed.

Cited: 112 Ind. 350; 117 id. 413; 121 id. 189; 137 id. 32; 152 id. 448.

McCANN v FIRST NAT. BANK (1887) 112 Ind. 354.

For distribution. The bill was to compel the defendant to distribute money realized from the collection of suspended bills and notes. The plaintiff was a stockholder in the defendant. Among its assets were \$71,000 in bills and notes of the O Co., which were not well secured, and the capital of the bank had become impaired. The stockholders voted to reduce the capital of the bank from \$300,000 to \$225,000. The bank afterward realized about \$75,000 from certain collaterals which had been pledged as security for the bills and notes above mentioned, which it treated as assets. The plaintiff had surrendered an amount of his capital stock proportioned to the reduction of the bank's capital. Judgment for defendant. Appeal.

Mitchell, C. J. Having received the whole consideration upon which the surrender was made, plaintiff cannot recover more, simply because the bank succeeded in realizing upon the suspended bills and notes. Judgment affirmed.

Cited: 112 Ind. 600; 131 id. 95.

LAMB v MORRIS (1888) 118 Ind. 179.

On promissory note. A bank loaned to A a certain sum on his note, with defendant as indorser. The note was not paid at maturity, and defendant requested the bank to charge the amount of the note to his account. It was understood that the note should be collected by the bank for defendant's account. The bank afterward failed, and the note came into the hands of the plaintiff as receiver, who collected from the maker nearly the whole amount. Defendant filed an intervening petition and asked that the plaintiff, as receiver, be ordered to pay the money collected on the note to him. Judgment for defendant. Reversed at general term. Appeal.

Mitchell, J. 1. In the absence of a contract giving it the right to do so, the bank could not have applied the money due the defendant, as a depositor, to the payment of the note upon which he was surety. 2. There was an equitable satisfaction of the note. Receivers and assignees take the property, which comes into their hands as such, subject to all legal and equitable claims of others. Judgment affirmed.

Cited: 125 Ind. 585; 147 id. 90; 149 id. 547, 549.

WASSON v LAMB (1889) 120 Ind. 514.

To enforce lien for taxes. Plaintiff was county treasurer. He delivered to H, a member of a private banking firm, for deposit in H's Bank, certain receipts for taxes due from H and the bank. H credited the amount of the receipts on the plaintiff's passbook, but five days elapsed before the amount was actually credited on the books of the bank. The bank failed, and defendant was sued as assignee. If the amount of the tax receipts was considered as having been deposited on the day the credit was given, plaintiff had drawn out more than he deposited since that date; if not considered as deposited until credited on the books of the bank, no part had been drawn out. Judgment for defendant. Decree enjoining the plaintiff from asserting his lien for taxes. Appeal.

Mitchell, J. When the plaintiff transferred the tax receipts to the bank and received credit, it was the same as if he had deposited cash; and having checked out a sum after the credit was given, which included the amount of the tax receipts, he is not in a situation to say the taxes were not paid. Judgment affirmed.

Cited: 153 Ind. 52.

CULVER, ADM'R, v MARKS (1889) 122 Ind. 554.

On bank checks, given by C, decedent, to plaintiff. The declaration, to excuse presentation of the checks to the bank, alleged that C did not have money enough in the bank to pay them; and as to one of the checks C requested plaintiff not to present it, as he did not have deposits to meet it. Defendant demurred to complaint. Overruled. Defendant contended that the allegation that the checks were drawn on the "First National Bank of Lafayette, Indiana," was not proved.

The checks read "Lafayette, Ind. (date), First National Bank, pay to M." There was evidence that there was a First National Bank at Lafayette. Evidence offered by defendant, to show that the bank would have paid the checks if presented, whether the drawer had funds there or not, was excluded. Defendant objected to the books of the bank to show C's account, and to the evidence of an expert who had examined the books. Judgment for plaintiff. Appeal.

Olds, J. If the maker of a bank check has no funds in the bank upon which it is drawn at the date of the check, it is not necessary for the holder to present it. The presumption is that the checks in suit were drawn upon the "First National Bank of Lafayette, Indiana," although this does not appear in the body of the check. The evidence offered to show that the bank would have paid the checks had they been presented, whether C had funds or not, was properly excluded. The books of the bank were proper evidence to show C's account, and an expert who had examined them was a competent witness. Judgment affirmed.

Cited: 137 Ind. 97; 141 id. 278.

BORN v THE FIRST NAT. BANK OF INDIANAPOLIS (1889) 123 Ind. 78.

On certified check. The bank which certified it had suspended. Defendant was indebted to the plaintiff. After twelve o'clock on a certain day, he delivered to it a certified check on the R Bank, where he had funds. The R Bank suspended before the business hour of the day after the check was delivered to plaintiff, and it was returned unpaid. The defendant contended that there was a novation. Judgment for plaintiff. Appeal.

Elliott, J. 1. The certification fixes the liability of the bank, but it does not change the situation of the party who takes the check, nor does it make the check money. There was no substituting of one debtor for another. The delivery of the check was a conditional payment. The release of the debtor was dependent on the condition that the check be honored. Judgment affirmed.

COMMISSIONERS OF MORGAN CO. v FIRST NAT. BANK (1890) 25 Ind. App. 94.

To recover taxes. Plaintiffs, shareholders of a national bank, were assessed and paid a tax on the par value of their shares of stock, without any deduction for value of real estate. The bank itself was also assessed, and paid taxes on its real estate in the county where it was located. U. S. R. S. authorizes the state to assess national bank stock, and bank real estate is to be assessed the same as other real estate. The law provides that real estate shall be assessed in the place where situated, and to the owner, if known. Shares of bank stock are to be assessed to holder. The value of real estate owned by bank shall be deducted from valuation of capital stock. Judgment for plaintiffs. Appeal.

Robinson, C. J. 1. The legislative intent was not to include real estate in the valuation of the capital stock of a national bank, and thus to exempt such real estate from taxation as such. 2. There was double taxation; but that portion which was wrongful and illegal was what the stockholders at the place where bank is located paid on the land, not what the bank paid. Judgment reversed.

BEDFORD BANK v ACOAM (1890) 125 Ind. 584.

To recover deposit. On May 8, 1888, the plaintiff had a sum of money on general deposit in the defendant bank. On that day the defendant received a note indorsed to it for collection, payable by the plaintiff to S & Co. at the bank. The defendant claimed a setoff of the said note made by plaintiff to S & Co. Judgment for plaintiff. Appeal.

Mitchell, J. The money deposited became at once the property of the bank; and unless it was deposited for a specific purpose or there was an existing agreement to the contrary, the bank had the right to apply a sufficient amount to the payment of any debt due from the depositor of the bank. One who has drawn a note payable at a bank must have done so for some purpose, and he cannot be heard to say after his banker has paid it that the payment was unauthorized. In such a case the banker who has paid the note is entitled to hold it as equitable owner or purchaser, and to set it off on a suit to recover a balance due the depositor on general account. Judgment reversed.

WALLACE v EXCHANGE BANK OF SPENCER (1890) 126 Ind. 265.

On a cashier's bond. The bond was executed by the defendant W, and his sureties, to secure the faithful performance by W of his duties as cashier. The by-laws of the defendant provided that an "Exchange Committee" be organized to be composed of the president, cashier, and a designated director, and that the cashier should not make loans in excess of a certain amount without the approval of the said committee or one member thereof besides himself. The cashier fraudulently invested large sums of money belonging to the bank in illegitimate transactions. Judgment for plaintiff. Appeal.

Berkshire, J. 1. The failure of the bank to name a director for the committee did not deprive the committee of its powers. The two had power to act. 2. The sureties were liable for fraudulent transactions whereby large sums of money, belonging to the bank, were invested in illegitimate transactions. Increasing the cashier's duties will not relieve the sureties, if the new duties be along the same line as the old. Judgment affirmed.

Cited: 136 Ind. 475; 140 id. 649; 144 id. 297.

BANK OF NOBLESVILLE v HARRISON (1890) 127 Ind. 128.

Money had and received. The plaintiff brought an action against defendant to recover the proceeds of a check given for wheat sold by her husband acting as her authorized agent. The check was payable to bearer, and was delivered to F with directions to present it to the defendant for payment. The defendant received the check, cashed it, and deposited the amount to the credit of plaintiff's husband, and claimed the proceeds on account of his note long overdue. Judgment for plaintiff. Appeal.

Berkshire, J. The attempted application of the proceeds of the check to the note of the plaintiff's husband, held by the defendant, was a useless performance, unless the money which it represented was due to him. The proceeds of the check belonged to Mrs. Harrison; and, having failed to pay the same on demand, the bank became liable to her in an action for money had and received. Judgment affirmed.

SMALL, REC'R, v THE CITY (1890) 128 Ind. 231.

To enjoin the collection of certain taxes. The City Bank of L had a capital of \$100,000 divided into 1,000 shares of \$100 each. In April, 1883, D F owned 787 shares and H F 60 shares. Between April and June, the bank was assessed the entire amount of its capital stock at its full face value. In July, 1884, the city clerk changed the tax duplicate of 1883, by writing therein "transferred to stockholders," July, 1884, and adding \$6,000 to the property of H F and \$78,700 to the taxable property of D F. The city of L claimed that the tax was a legal and valid lien against the real estate owned by D F and H F. Demurrer. Judgment for defendant. Appeal.

Olds, C. J. The property was assessed and a valuation put upon it by the proper officer, and an entry made of the assessment upon the tax duplicate; and the fact that the assessment was made in the name of the bank instead of the individual stockholders, will not invalidate the lien or relieve the stockholders from the payment of the tax. Judgment affirmed.

Cited: 129 Ind. 72; 135 id. 599.

BRIGHTON v WHITE (1890) 128 Ind. 320.

On a promissory note. The defendant executed and issued the note to the C Bank and it was indorsed to plaintiff by the bank. The defendant alleged in his answer that the bank was a bank of "deposit and discount organized under the laws of Indiana"; that the note was assigned to the plaintiff after the bank was insolvent; and that its officers and the plaintiff had knowledge that it was given as collateral security for a debt, and for the purpose of giving him a fraudulent and secret preference. The general statute of the state, under which banks of deposit and discount are organized, provides that assignments or transfers made by an insolvent bank with a view of a preference of one creditor to another shall be utterly void. Demurrer. Judgment for plaintiff. Appeal.

Elliott, J. 1. As we have only one general statute providing for the organization of banks of discount and deposit, the presumption is that the bank, as it was one of discount and deposit, was organized under that statute. 2. The statute means

that there shall be no preference of creditors, and that all transfers for the purpose of creating a preference shall be absolutely ineffective. No title can pass. 3. It is quite clear that a plaintiff cannot maintain a suit upon an instrument to which a positive statute forbids him from acquiring title. Judgment reversed.

Cited: 157 Ind. 132.

OFFUTT v RUCKER (1891) 2 Ind. App. 350.

On check. The defendant drew his check to the order of plaintiff on the R bank on the agreement that the same should be placed in the hands of S, and by him delivered to the plaintiff in the event that she should deliver possession of a certain dwelling house to defendant. Plaintiff delivered possession of the house, and S delivered the check to plaintiff. Plaintiff indorsed it and presented it to the bank, which refused payment, and notice was given to defendant. There was no averment that the defendant had no funds in the bank. Demurrer. Judgment for plaintiff. Appeal.

Reinhard, J. 1. Such a check, without words of transfer, does not operate as an equitable assignment, pro tanto, of the funds on deposit to the credit of the drawer. The averment contended for was therefore unnecessary. 2. A failure of the holder to give notice will not discharge the drawer from liability unless damage shall result. 3. The drawer of the check is stopped from denying that the payee was the real party in interest. Judgment affirmed.

Cited: 7 Ind. App. 381.

PAYNE v THE ALBANY CITY BANK (1891) 3 Ind. App. 214.

On bill of exchange. The plaintiffs drew a draft to their order on the N Bank, and directed it to C, to pay to the cashier of defendant, for collection, and sent it to defendant, requesting it to discount the same. Defendant was requested to present the draft for acceptance, and deliver it to drawee with the bill of lading attached thereto. This was done. The plaintiffs discounted the draft before maturity, and sent defendants a check for the same. The N Bank refused payment. The defendants contended that no title vested in the plaintiffs, as the indorsement was only for collection. Demurrer. Overruled. Judgment for plaintiffs. Appeal.

Robinson, J. 1. The drawer of a bill of exchange is liable to the payee or his indorsee as one of the principal parties to the paper, on the failure of the drawee or the acceptor to pay the bill at maturity. 2. Under sec. 5516, R. S., 1881, suit may be brought against any or all of the parties liable. Judgment affirmed.

Cited: 10 Ind. App. 508.

THE FIRST NAT. BANK v FIRST NAT. BANK (1891) 4 Ind. App. 355.

Money had and received. Plaintiff paid to defendant a certain warrant supposed to have been issued by J, a school trustee, when in fact it was a forgery. J had instructed the defendant to pay any warrants drawn by him as trustee. The warrant was indorsed in blank, and was discounted by defendant, and by it sent to its correspondent indorsed "for collection," and was paid by the plaintiff. Notice of the forgery was given immediately, which was twenty days after payment of the check. Demurrer. Judgment for plaintiff. Appeal.

New, J. 1. The indorsement on the instrument would tend to divert the attention of the plaintiff from inquiry. 2. What is a reasonable time depends upon the circumstances of the case. Mere space of time is not important unless it clearly appears that the holder will be put to more liability, trouble, and expense by a restitution then, than if notice had been received earlier. Judgment reversed.

Cited: 9 Ind. App. 185.

McCANN v FIRST NAT. BANK (1891) 131 Ind. 95.

Action to recover proceeds of securities. Defendant held certain collateral for a loan made to a debtor who had become insolvent. To avoid an assessment and to remedy the impairment of the capital stock, the stockholders, under sec. 5143, U. S. R. S., reduced the capital stock of the bank from \$300,000 to \$225,000, and voted to take the depreciated collateral from the assets of the bank, and place them in the hands of trustees for the benefit of the stockholders. The plaintiff was named as a trustee. The officers of the bank, however, retained the securities and afterward realized on them to an amount in excess of the indebtedness. This

suit was to recover the amount realized by the bank. Judgment for defendant. Appeal.

McBride, J. The assets of a bank are held in trust: 1, For the payment of its indebtedness; 2, for distribution of any surplus to the stockholders. There can be no voluntary withdrawal of assets of a bank, where the effect of such withdrawal is to impair the capital stock. The capital stock in the present case, representing the actual value of the remaining assets, would result in a still further impairment of the capital. Judgment affirmed.

THE MERIDIAN NAT. BANK v THE FIRST NAT. BANK (1893) 7 Ind. App. 322.

On a certified check. M stole cattle from R and sold them to S G & Co. He received from them a check on the defendant payable to "A. C. Smith," a fictitious name given by M, who presented the check and the cashier certified it. He sold the check to plaintiff, indorsing it "A. C. Smith." S G & Co countermanded payment of the check. Plaintiff contended: 1, That the signature of the maker was genuine; 2, that the bank had money of the maker and must retain it to pay the check; 3, that the holder was the payee, and entitled to receive the money. Defendant contended that the indorsement was invalid, the check being paid to a fictitious person. Judgment for plaintiff. Appeal.

Gavin, J. 1. The certification of a check in the hands of the payee releases the drawer from further liability, and creates a direct liability from the bank. As between the bank and the drawer, it operates as a payment. After certification, it has passed beyond the control of the drawer. 2. A bona fide assignee, by indorsement for value, takes such paper, freed from any equities existing between the original parties. An action may be maintained upon an instrument by a name other than a party's right one. Judgment affirmed.

FIRST NAT. BANK v BREMER (1893) 7 Ind. App. 685.

On certificates of deposit. The plaintiff deposited with the defendant certain money, receiving from the defendant three certificates of deposit. The certificates were stolen and his name forged to the indorsement. In the regular course of business they passed through the S Bank and F Bank, and were paid by the defendant. Plaintiff notified defendant as soon as he discovered the theft, and demanded payment of the certificates, which was refused. Defendant contended on demurrer that plaintiff ought to rely upon the bank who first cashed the certificates; that plaintiff was negligent in his notice and making demand for payment. Overruled. Judgment for plaintiff. Appeal.

Davis, J. 1. The obligation of the bank to its customer cannot be changed without some affirmative act or negligent conduct of the depositor. 2. A bank is not authorized, as against a customer and depositor, to pay the money due such depositor on certificates issued by it, which have been stolen and bear the signature of the payee, in reliance solely on the indorsements of other banks that have prior thereto accepted and paid the certificates. Judgment affirmed.

INDIANA NAT. BANK v FIRST NAT. BANK (1894) 9 Ind. App. 185.

To recover money paid on a forged order. B, a customer of the plaintiff, was accustomed to draw orders on it which it had instructions to pay. An order, purporting to be signed by B, was purchased by the defendant, who indorsed it to plaintiff "for collection." The plaintiff was misled by the defendant's indorsement, and did not scrutinize the payee's. The order was paid by the plaintiff to the defendant. The plaintiff's amended complaint set forth that it was prevented from giving the defendant immediate notice of the forgery, by reason of the payee's removal to another state. The answer of defendant was then amended and plaintiff's demurrer thereto sustained, on the ground that it failed to show that the payee was within reach of process, at a reasonable time after the forgery. Judgment for plaintiff. Appeal.

Gair, J. Where the holder of a forged order, to whom payment has been made, aided in preventing the discovery of the forgery, he must restore the money. The amendment to the answer does not free it from the original infirmities. Judgment affirmed.

THE STATE v ARNOLD (1894) 140 Ind. 628.

Indictment for receiving deposits in an insolvent bank. The defendants were private bankers and were indicted for receiving a deposit when they knew that their bank was insolvent. The Act of March 9, 1891, p. 395, entitled "An act concerning bank officers, brokers, etc., receiving deposits after insolvency," provided for the punishment of officers of incorporated banks and private bankers. Defendants moved to quash the indictment on the ground that the act, so far as it related to private bankers, was unconstitutional, for the reason that the title did not embrace private bankers. (Ind. Const., art. 4, sec. 19.) Indictment quashed. Appeal.

Dailey, J. 1. The title to the act is comprehensive enough omitting the "etc." to express the subject of the act; and in the use of the words "bank officers" in the title, there was sufficient indication of the legislative intent to embrace in its provisions all persons officiating in a banking establishment, or place doing a banking business. 2. If the title fairly gives such notice so as to reasonably lead to an inquiry into the body of a bill, it is all that is necessary. Judgment reversed.

Cited: 157 Ind. 327.

BEDFORD BELT RAILWAY CO. v BURKE (1895) 13 Ind. App. 35.

Assumpsit. Plaintiff performed work and furnished materials for the defendant, worth \$906.39. He gave a receipt for \$579.50 to W, treasurer of defendant, and president of the B Bank. Plaintiff kept an account with the bank and drew the balance called for by the receipt to pay his laborers, receiving nothing from the defendant. Without his knowledge or consent, W credited plaintiff on the books with the amount of the receipt. Defendant pleaded payment. Judgment for plaintiff. Appeal.

Gavin, J. The simple act of the bank in voluntarily placing to the plaintiff's credit on its books the amount of its receipt without his knowledge and consent, could not operate as a payment. The plaintiff had the right to demand the money, or something which he agreed to accept as money. Payment of the debt could not operate as such unless ratified by defendant. Judgment affirmed.

WINDSTANLEY v SECOND NAT. BANK (1895) 13 Ind. App. 544.

Money had and received. The plaintiff sent to the defendants several claims for collection. Defendants collected all of them and remitted them by three drafts on the C Bank, less the exchange. When they drew the drafts, they had no funds in the C Bank. The drafts were not paid, the defendants having failed the day after, P being appointed assignee. The court stated as conclusions of law, that the plaintiff was entitled to recover as against the assignee, and that the claim was preferred. Judgment for plaintiff. Appeal.

Lotz, J. Trust property may be followed by the beneficiary so long as its identity can be traced. It must be made to appear that the trust property is actually represented in the assets. Judgment reversed.

SNODGRASS v SWEETSER (1896) 15 Ind. App. 682.

On a forged check. The plaintiff was a banker. Defendant kept her account with them. It was her custom to sign checks in blank and leave them with her agent, "S," to be signed and used by him in the purchase of grain, he having authority to fill in the name of the payee and amount. The plaintiff understood this arrangement. S signed several checks and left them with his clerk in an unlocked desk. One of the checks was abstracted and the amount inserted, and the name of L filled in. L indorsed it and collected the money. The defendant contended that the check, being a forgery, plaintiff should bear the loss. Plaintiff contended that defendant was guilty of negligence. Judgment for plaintiff. Appeal.

Ross, J. 1. The payment of a forged check must be borne by the party paying it. 2. But when the party disavowing the obligation has been guilty of negligence, which is the immediate and direct cause of misleading the payor into paying it, he must reimburse him. 3. A banker is bound to see that the signature is genuine, but he is not bound to know that the customer wrote the check. Judgment affirmed.

HAMILTON v TONER (1896) 17 Ind. App. 389.

Damages for deceit. T deposited with defendant, a banker, a certain sum of money. He died, leaving the plaintiff as his sole heir at law. Defendant asked

plaintiff how deceased had left his affairs, for the purpose of ascertaining whether plaintiff had any knowledge of the deposit. Defendant demanded of plaintiff the payment of a claim in his favor against plaintiff as sole heir at law. She paid the claim and defendant converted the money to his own use. Plaintiff demanded payment of the deposit, and received it without interest. This action was brought for damages for the amount of interest. Demurrer. Judgment for plaintiff. Appeal.

Comstock, C. J. 1. There is no evidence that defendant knew that plaintiff did not have the bank book, and knew of the deposit. Under the circumstances, his acceptance of the check, and his silence as to the deposit in his bank, was not fraud. 2. By depositing the money, the relation of debtor and creditor was created. A banker is not bound to seek his depositor; he is not bound to pay on an oral order. Judgment reversed.

THE STATE v BEACH (1896) 147 Ind. 74.

Indictment for embezzlement for fraudulent receipt of a deposit. The second section of the Act of 1891, p. 395, declares that the failure of the bank within thirty days after the deposit is made, shall be prima facie evidence of an intent to defraud. The defendant was the proprietor of a bank. When the deposit was made, the bank was insolvent and the depositor, by reason of such insolvency, was unable to obtain his money. The depositor held a certificate of deposit for \$1,500, dated March 16, 1893. Six months after that date, he withdrew \$500 and gave the bank his note for the \$500 which had not matured when the bank made an assignment. The defendant contended: 1, That the second section of the act was unconstitutional because it deprived him of the presumption of innocence; 2, that it could not be known whether the money was lost to the depositor before the assignment of the bank was settled by the court; 3, that the depositor was indebted to the bank, and therefore this action could not be maintained. The court instructed the jury to return the verdict of not guilty. Appeal.

Monks, J. 1. The offense charged being a statutory one, it is sufficient to charge the offense in the language of the statute. 2. The legislature had the right to declare what shall be presumptive or prima facie evidence. The second section of the act is not unconstitutional. 3. It is sufficient to establish that the deposit was lost to the depositor, to prove that when the deposit was made, the bank was insolvent, and that the depositor was deprived of the same by reason of the insolvency of the bank. 4. The depositor was not indebted to the bank within the meaning of the act, for the note had not matured. 5. A deed of appraisement and proof of deposit are admissible as evidence in such a prosecution as this. Appeal sustained.

Cited: 145 Ind. 466; 147 id. 219; 154 id. 610, 614; 157 id. 234.

RUNNER v DWIGGINS (1896) 147 Ind. 238.

Action against defendant as stockholder in Commercial Bank. The bank was insolvent and plaintiff brought this suit, as assignee, upon the statutory liability of defendant under sec. 2933, Burns, Revised Statutes, 1894 (2696 R. S., 1881), which provides that stockholders in banks shall be individually responsible to an amount over and above their stock, equal to the par value of their shares, for all debts of the bank. Demurrer upon the ground that the plaintiff had no legal capacity to sue. Sustained. Judgment for defendant. Appeal.

Jordan, C. J. The liability provided by the statute against the stockholders is not an asset of the bank, and therefore does not pass to the assignee. Judgment affirmed.

Cited: 149 Ind. 61.

COX v HAYES (1897) 18 Ind. App. 220.

On check. Plaintiff was treasurer of Jay County and collector of taxes, and the defendant was indebted to the county for taxes. He paid plaintiff a certain amount in cash on the bill, and a check drawn by N B on the P Bank, payable to plaintiff, for the difference; and, to accommodate the plaintiff, defendant took it. N B had no money in the bank, which fact plaintiff did not know. When apprised of it by the cashier, plaintiff requested him to take the check and credit plaintiff's account until next day, when he would come in with the cash and take it up. The next day, having deposited the amount of the check in cash and received the check, he offered it to the defendant and demanded that he pay it, which he refused. Demurrer. Judgment for plaintiff. Appeal.

Black, J. The burden was on the defendant to overcome the presumption that the delivery and acceptance of the check constituted merely a conditional payment. The facts did not indicate payment. The bank gave temporary credit to plaintiff, and it was at no time honored by the bank. It was proper for plaintiff to treat the check as a mere nullity, and bring his action on the original indebtedness. Judgment affirmed.

TULLEY v CITIZENS STATE BANK (1897) 18 Ind. App. 240.

Replevin. Plea: Payment. Defendant executed to H, president of plaintiff, a chattel mortgage on certain goods to indemnify him as surety for defendant on two notes. The mortgage was assigned to plaintiff, but not recorded. One of the notes was due and unpaid. Various sums were paid to H, exceeding the amount due on the notes. Demurrer. Judgment for plaintiff. Appeal.

Comstock, J. 1. There having been a special verdict, the overruling of the demurrer was harmless. 2. The burden was upon the defendant to prove circumstances which made the payment to an officer of the bank, under the law, payment to the bank. 3. Neither the consent of Hadley, nor the knowledge of the cashier would bind the bank. Money paid to one who is president of a bank, without reference to the place or circumstances under which it is paid, and from which the bank does not receive or derive any benefit, is not a payment which would bind the bank. 4. The failure to record the assignment did not avoid it. The acknowledgment was only necessary to entitle it to be recorded. Judgment affirmed.

Cited: 19 Ind. App. 596.

AURORA NAT. BANK v DILS (1897) 18 Ind. App. 319.

On a check. The plaintiff, as agent of R & Co., which had branches in C and in L, kept individual and separate accounts for each branch with the defendant. He had to his individual credit \$302.50. Plaintiff received a check for \$300 from R & Co. to his order on the C Bank. He indorsed it to defendant, giving him credit as agent of the L branch, and presented the check to the C Bank, which refused payment. Prior thereto plaintiff had drawn a check for \$300 against the proceeds of the firm's check and signed it "H. H. Dils, agent," and wrote across the face of it, "Lawb House." The defendant charged on their books \$302.50 to plaintiff's individual account. Plaintiff had no knowledge that the firm had no funds in the C Bank. The defendant paid out the amount of the plaintiff's check, as agent, before the receipt of the protested check. Judgment for plaintiff. Appeal.

Black, J. 1. The indorsement of a check is a distinct contract. 2. The contractual undertaking by an indorsement cannot be disputed, but it may be shown that it was entered into without sufficient consideration, or that the consideration has failed. 3. Where a general depositor becomes indebted to the bank and the debt is due and payable, the bank, by virtue of its lien or right of setoff, may apply the debtor's deposit to the payment of the debt. 4. The obligation of the bank to a general depositor is to pay upon proper demand, and is entitled to a written evidence of payment. 5. The indorsement by the agent was the indorsement of the principal. Judgment reversed.

CITIZENS NAT. BANK v THIRD NAT. BANK (1897) 19 Ind. App. 69.

Action for damages. The plaintiff was the indorsee of a sight draft drawn by S on R & Co. of L, payable to his own order. The indorsement was in payment of an antecedent indebtedness. Plaintiff forwarded it to the defendant at L for collection. Defendant held the draft from June 29 to August 6, without presenting it to R & Co. On August 6, R & Co. failed, and payment of the draft was refused. Defendant had no knowledge of the failure of R & Co. Defendant then sent notices of protest to plaintiff and the drawer. Defendant failed to present the draft to S, who "remained in reputable credit and continued to do business up to August 7." After protest and return of draft, the drawer was insolvent. It had been the custom for defendant to hold R & Co.'s drafts from four to thirty days. Defendant contended that the complaint was insufficient. Demurrer to answer. Sustained. Judgment for plaintiff. Appeal.

Comstock, J. 1. The indorsee was not bound to inquire whether the drawer had the right to draw. 2. When the collection agent and the drawee are residents of the same town, the presentment for payment should be not later than the day after the draft is received. 3. Usage can only regulate the manner of the performance of required acts; it cannot excuse non-performance. 4. Even if the

indorsee knows at the time that there are no funds, or reasonable ground on the part of the drawer to believe that the draft would be accepted or paid, he has the right to presume that such provision of the funds will be made. 5. The allegation in the complaint was sufficient to warrant the conclusion that the drawer was solvent and able to pay the draft. 6. The payment of an antecedent debt is sufficient to make the indorsee of a draft a bona fide purchaser. 7. Ignorance of the insolvent condition of the drawee does not excuse the defendant. Judgment affirmed.

WHEATLEY v KUTZ (1897) 19 Ind. App. 293.

Money had and received. Defendant deposited with the plaintiff a sum of money, taking a bank book and check book. He agreed to deposit further sums, representing that he was to buy grain and do all business through the defendant. He instructed him that H was his authorized agent, and all checks drawn by H were to be paid. It was arranged between H and the defendant that R should draw the checks, and R was so authorized. Overdrafts signed by both H and R were paid by plaintiff. The complaint counted only on the checks of H. Defendant contended that the amounts of the check drawn by R could not be recovered. Judgment for plaintiff. Appeal.

Black, J. The authority to do this part of the business through the assistance of R was expressly conferred on H by his principal, the defendant. The party who relied upon the act of the subagent was requested to do so by the agent. The theory of the complaint was sustained. Judgment affirmed.

HAWKINS, REC'R, v FOURTH NAT. BANK (1897) 150 Ind. 117.

On promissory note and to enforce a lien. I Bank held three notes of M Co., secured by notes taken by the company as collateral. It was agreed that such collateral might be changed by substitution. I Bank sold one note to K Bank. To avoid indorsement and reporting the discount to the comptroller, I Bank got the company to make a new note, of same date, payable to itself. It was agreed that it should be secured in the same way as the first note, and was sold to K Bank, which knew the transaction was to avoid indorsement by I Bank. I Bank sold and indorsed another of the three notes to plaintiff. When it matured a part of it was paid, and the balance renewed by note to I Bank, and indorsed to plaintiff. I Bank failed and defendant H, as receiver, obtained the security. The M Co. had kept its collateral good. It was contended by defendant H that the sale of the note to K Bank by the cashier was without authority, and did not bind the I Bank; that there was fraud in the sale, in that the parties concealed the insolvency of the bank from the comptroller. The court found that K Bank and plaintiff each had a lien upon the collateral notes; that the lien of K Bank was superior to plaintiff's. Judgment accordingly. Appeal.

Monks, J. 1. Security being the mere incident of indebtedness, an assignment of the debt passes the title in the pledge to the assignee of the debt. 2. The right to substitute other collateral does not affect this rule. 3. The directors had authority to authorize the cashier to sell the note, and where it is shown that he has sold it, the sale will be presumed to have been authorized or ratified. Fraud is a question of fact, and must be found as a fact, and not left to be inferred as matter of law. 4. The cashier, having sold a particular note, and the proceeds having been retained by the bank, it and its receiver are estopped from denying the authority of the cashier to make such sale. Judgment affirmed.

IRWIN v REEVES PULLEY CO. (1898) 20 Ind. App. 101.

On draft for negligence in collection. Plaintiff was a customer of defendant. Plaintiff was paid no interest on its deposits, and in consideration defendant agreed to make collections for it without compensation. The draft in suit was a foreign one, which plaintiff knew could only be collected by defendant through a subagent. Defendant sent it in due course to its regular correspondent for collection. Proceeds of drafts were lost through negligence of this subagent. Demurrer overruled. Exception.

Henley, J. 1. When the business intrusted to an agent is to be performed at a distance or requires the delegation of the agent's authority to a subagent, the original agent is not liable for the error or misconduct of the subagent, if he has

used due care in his selection. 2. Agents are not presumed to do their work without consideration. Judgment reversed.

UNION SAV. BANK AND TRUST CO. v LOUNGE CO. (1898) 20 Ind. App. 325.

In attachment and garnishment. The C Bank of Ohio failed, and the U Co. and C were appointed trustees. The plaintiff attached a sum of money belonging to the C Bank in the I Bank. The U Co. and C were made defendants. They answered that they were co-trustees appointed by the court of Ohio; that the assignment was acknowledged and filed for record before a notary for Hamilton County, Ohio; and that they were the assignees of the sum of money which was held in trust for them by the I Bank, and were entitled to have possession and control thereof. Demurrer. Sustained. Appeal.

Robinson, J. 1. As the assignment under the Ohio law was complete, it passed the title to the assignor's property to the assignees. 2. As there is no statute in this state prescribing the rights and duties of foreign assignees, the assignment, valid by the laws of Ohio, by comity, passed the title to the defendants before this attachment was levied. Judgment reversed.

Cited: 25 Ind. App. 561.

CARTER v MARTIN (1899) 22 Ind. App. 445.

Action to foreclose mechanics' lien. Defendant contracted with McC to erect a building, payments to be made as the work progressed, McC to furnish bonds against mechanics' liens. Plaintiff agreed with McC to furnish the necessary lumber, a payment therefor to be made out of the first money received on the contract. McC received the first instalment and deposited the check with plaintiff, receiving a receipt to the effect that the deposit was subject to McC's order. The amount was more than sufficient to pay for the materials. Plaintiff paid out several amounts on McC's order, and upon a settlement the balance remaining was insufficient to pay plaintiff's claim. The court found that there was a balance due plaintiff, and he was entitled to a decree of foreclosure to satisfy the lien. Exception. Judgment for plaintiff. Appeal.

Henley, J. 1. When the plaintiffs received the money under an agreement to pay it out on McC's order, they lost all control over it except to pay it out, as agreed. 2. Plaintiffs had power to waive their right to appropriate the deposit to the payment of McC's indebtedness to them. 3. The plaintiff can recover even though there was a breach of the contract, as he was not a party thereto. Judgment affirmed.

UNION NAT. BANK v CITIZENS BANK (1899) 153 Ind. 44.

Submitted for opinion. The plaintiff sent a note to the defendant for collection. The maker of the note was a depositor with the defendant, and the defendant had in its possession more than sufficient to pay the note. The maker drew a check on this account in favor of the defendant, and took up the note. The defendant drew its sight draft on the M Bank in favor of the plaintiff for the amount. The M Bank had sufficient of the defendant's funds to pay the draft. The plaintiff took the draft and sent it through its correspondent for presentation to the M Bank. Payment on the draft was refused at the M Bank because they had received notice of the defendant's failure. The money held by the M Bank was turned over to defendant's receiver. All the transactions had been conducted in the usual course of business. Judgment for defendant. Appeal.

Jordan, C. J. 1. The collecting bank, in the absence of any arrangement to the contrary, becomes the owner of the money collected, and the relation of debtor and creditor is created between the parties, and not the relation of trustee and cestui que trust. 2. The plaintiff is not entitled to preference over the general creditors. Judgment affirmed.

Cited: 157 Ind. 140.

NEAL v FIRST NAT. BANK (1900) 26 Ind. App. 503.

Action on a check. The plaintiff was a depositor of defendant. He had been in the habit of having his wife draw and sign his checks. He was furnished by defendant with statements of his account, to which he never objected, although several checks charged up had been forged by his wife. His wife subsequently drew several checks without plaintiff's knowledge, which the bank paid, thereby leaving but a small balance. He drew a check on defendant for a larger amount than

he had in the bank, on which payment was refused. He contended that the defendant was liable for the checks drawn by his wife. Defendant contended that plaintiff was negligent in not notifying defendant of want of authority of plaintiff's wife to sign the checks. Judgment for defendant. Appeal.

Henley, C. J. If the depositor's laches or negligence is the cause of the bank paying the checks out of his account, which it would not have paid had it been in possession of the facts known to him, and which he negligently failed to put in possession of the bank, the loss must fall upon the depositor. Judgment affirmed.

STATE v WINSTANDLEY (1900) 154 Ind. 443.

Indictment for embezzlement. Sec. 6598, Horner, 1897, provides: "If any officer of any bank shall fraudulently receive money on deposit from any person not indebted to said bank at the time when said bank is insolvent, whereby the deposit is lost to the depositor, the officer so receiving such deposit shall be deemed guilty of embezzlement." The indictment charged the defendants that they "each, then and there, well knowing the insolvency of said bank, did unlawfully, feloniously, wilfully, and fraudulently receive and take from A" certain money "as a deposit with said bank, the said A not being indebted to said bank, whereby the said sum was lost to said A." Defendant moved to quash the indictment. Indictment quashed. Appeal.

Baker, J. 1. There is no averment that the money was received by the defendants in their official capacity, and this renders the indictment defective in substance. 2. Rules of pleading applicable to embezzlement are controlling in a case under this statute. Judgment affirmed.

Cited: 154 Ind. 694; 155 id. 292, 306.

FIRST NAT. BANK v TURNER (1900) 154 Ind. 456.

Injunction. The plaintiff sought to restrain the defendant from attaching its property to collect a tax assessed on its shares of stock. The plaintiff alleged that, in so far as the assessment had not already been paid, it was void, as the defendant had refused to permit a deduction of the debts of the individual stockholders, over and above their other assets, from the assessed value of the shares. The state statute provides that the individual taxpayer may deduct his bona fide indebtedness from his credits consisting of annuities, bonds, notes secured by mortgage, other notes, accounts, and other amounts due him, except for money on deposit. The constitution made a uniform and equal rate of assessment and taxation necessary. Sec. 6328, Horner, 1897, provides that the true cash value of bank shares shall be determined by deducting the bona fide indebtedness of the bank from its credits, as in the case of individuals. Demurrer. Sustained. Judgment for defendant. Appeal.

Baker, J. 1. Under our statute the shares in national and in state banks are not credits from which debts of shareholders can be deducted. 2. The shares of a national bank do not represent the assets of the bank, but rather the difference between the value of its property and its liabilities. Judgment affirmed.

THE STATE v CADWALLADER (1900) 154 Ind. 607.

Indictment for embezzlement. The defendant was indicted under sec. 2031 Burns, 1894, which provides: If any officer of a bank shall fraudulently receive money on deposit from any person not indebted to the bank at a time when the bank is insolvent, whereby the deposit is lost to the depositor, the officer shall be deemed guilty of embezzlement. The court instructed the jury that it must be established by the state, beyond a reasonable doubt, that the depositor was not indebted to the bank nor to a bank officer, and also that the defendant knew that the bank was insolvent. And further, that, if from negligence or any other reason, the defendant did not know that it was insolvent, he could not be criminally responsible for such negligence. Verdict and judgment for defendant. Appeal.

Jordan, J. 1. An indebtedness to an officer of the bank is no defense under the statute. 2. The knowledge of the accused as to the insolvency of the bank was not an essential fact of the offense, requiring it to be pleaded and proved on the trial. 3. It is the imperative duty of bank officers, when they receive deposits from the bank's patrons, to know that the bank is solvent, if, by the exercise of reasonable diligence, such fact could have been ascertained. Judgment reversed.

Cited: 157 Ind. 267.

MEYER v INDIANA NAT. BANK (1901) 27 Ind. App. 354.

On a check. H represented to plaintiff that his name was D, and that he owned certain real estate, and thereby secured a loan, giving a note and mortgage under the assumed name of D. The check was made out under that name on defendant's bank, and he indorsed it and presented it for payment, being identified as H, an old resident in the city. He again indorsed as H and secured the money, it being charged to plaintiff. Later, D, the real owner of the real estate described in the mortgage made by H, discovered the lien thereon, and repudiated the whole transaction. Plaintiff contended that the check was intended to be paid to D, and having been paid by defendant to the wrong person, it must make the loss good. Judgment for defendant. Appeal.

Roby, J. The defendant had no option except to pay the check to H, the intended payee. He obtained the check by gross fraud, but he had the right to payment as between himself and the bank, it having no notice of, or any part in, the fraud, or the transaction in which it was practiced. Judgment affirmed.

FIRST NAT. BANK v ARNOLD (1901) 156 Ind. 487.

On promissory notes against indorser and makers. The defendant bank was the indorser on certain notes payable to plaintiff, made by the other defendants, who were the president, vice-president, and cashier of defendant bank. The defendant bank maintains that the president had no authority to indorse the bank's name on the note. The court refused to permit the cashier of plaintiff to testify that the president of defendant bank had told him the proceeds of these notes were for benefit of defendant bank, and that the loan was all right. The court admitted testimony as to a conversation between officers of defendant bank, explanatory of the reasons for signing and indorsing these notes, none of the plaintiff's officers being present. Judgment for defendant bank, and against the other defendants. Appeal.

Dowling, C. J. 1. The defendant bank had power to borrow money, and the plaintiff had a right to assume that, as three of the makers of the note were the principal officers of the bank, the indorsement of the bank was duly authorized. 2. The testimony between cashier of plaintiff and president of defendant was competent, as the plaintiff had a right to inquire fully as to the circumstance surrounding the indorsement. 3. The testimony as to the conversation between the officers of the defendant bank was incompetent; as none of the officers of plaintiff was present, it was not part of the *res gestæ*. 4. It was not error to admit testimony of the custom of banks in that vicinity to borrow money without authority. Judgment reversed.

Cited: 157 Ind. 140.

HARRIS v RANDOLPH COUNTY BANK (1901) 157 Ind. 120.

On promissory note and to foreclose a mortgage. The note was executed to the C Bank, and a mortgage on real estate was executed by defendant to secure payment of the note. The receiver of the C Bank, who claims to hold liens on the mortgaged premises, was also made a party defendant. The complaint alleged that the plaintiff bank loaned to the C Bank the sum of \$5,000; that the note and mortgage were indorsed to the plaintiff by the president of the C Bank as collateral security for the loan; that the plaintiff also received from the C Bank, as evidence of the loan, a certificate of deposit indorsed by its president. The receiver demurred, on the ground that the complaint did not contain facts sufficient to constitute a cause of action against him. Overruled. Judgment for plaintiff. Appeal.

Jordan, J. 1. As the directors of the C Bank possessed the power to authorize the president to assign the note and mortgage, such assignment will be presumed to be binding on the bank, until it is shown that the same was not authorized by its directors. 2. A bank may borrow money and secure the payment by collateral, and the fact that the bank is insolvent at the time the loan is obtained does not prevent the bank from negotiating the loan and securing payment of the same, unless forbidden by statute. 3. The plea of wrongful possession of the note sounds in tort and cannot be pleaded by way of setoff. Judgment affirmed.

Cited: 157 Ind. 279.

 CODDINGTON v CANADAY (1901) 157 Ind. 243.

Damages for negligence. The action was by the receiver of the W Bank against its directors for damages resulting from negligence in the management of the financial affairs of the bank. The complaint alleged that the directors took real estate at excessive estimates and carried it on the books at such valuations; that they published false statements of the bank's financial condition, based on these estimates, thereby deceiving the public as to its solvency; that the directors took from the bank worthless notes at their face value, and carried the item on the books of the bank at such face value; that the directors failed to hold regular monthly meetings, but suffered the business of the bank to go by default, in consequence of which the bank became insolvent. Answer, general denial. Demurrer. Sustained. Judgment for plaintiff. Appeal.

Dowling, J. 1. The directors are liable to account for all the property which has been intrusted to them. They are responsible for losses occurring through gross inattention to the business of the bank or a wilful violation of their duties. They may be sued by a receiver for gross negligence, even though the stockholders are the only persons to whom damages could be distributed, that is, where there are no creditors. 2. The claims against the delinquent directors constitute a part of the property of the bank and are to be treated as debts due it. Their collection may be enforced by a receiver who is authorized to sue for the sum due from such agents. 3. The jurisdiction of the circuit court covers all actions for damages arising out of neglect of official duty, misfeasance, or malfeasance in office, or breach of trust. 4. Where the plaintiff is unable to make the complaint definite because of the very negligence on the part of the defendant of which he is complaining, the court will not sustain a motion to make the complaint more definite. 5. The order appointing the receiver is sufficient to give him authority to bring this suit. Judgment affirmed.

INDIAN TERRITORY

 GREEN v PURCELL NAT. BANK (1896) 1 Ind. Ter. 270.

Action for amount of a forged check. The plaintiff deposited the check, drawn on another bank, with the defendant for collection. He did not know it was forged. The defendant collected the amount and paid it to the plaintiff. When the forgery was discovered the defendant refunded the amount to the drawee. No notice was given by the defendant to the plaintiff that the check had been forged, but it took from funds in its possession belonging to the plaintiff enough to pay the check. Judgment for defendant. Appeal.

Springer, C. J. 1. The forgery was a fact of which the plaintiff was obliged to take notice. He stood in the forger's shoes, and, however innocent he may have been, having received the check, he acquired no better title than the forger. 2. Any funds of his which thereafter came into the possession of the defendant could be lawfully applied to the reimbursement of the bank for the amount advanced upon the check. Judgment affirmed.

IOWA

 THE MINERS BANK v UNITED STATES (1846) 1 Mor. 635.

Information in the nature of a quo warranto. Defendants pleaded the act of incorporation, the 23d section of which provided that, if the defendants abused or misused its privileges, the legislature might annul, vacate, or make void its charter. The replication set forth a subsequent act of the legislature repealing the charter. Rejoinder that this act was passed without notice and without evidence of abuse or misuse. Demurrer. Decree for plaintiff. Error.

Per curiam. A public corporation is always under the control of the legislature. The right of repeal is unquestionable where such right is stipulated for in the charter itself. Decree affirmed.

MINERS BANK OF DUBUQUE v UNITED STATES (1848) 1 Greene 553.

Information in the nature of quo warranto. The act incorporating defendant, provided (sec. 23) that if it should abuse or misuse its privileges, the territorial legislature should have the power to annul the charter. Defendant pleaded the act of incorporation. The replication set up the statute repealing the charter. Rejoinder, that the repealing law was enacted without a failure of the defendant to go into operation and without its having misused or abused its privileges. Demurrer to rejoinder sustained. Judgment for plaintiff. Error.

Hastings, C. J. 1. The reasonable construction of this clause (sec. 23) is, that the legislature reserved to itself the power of inquiring into and finding the facts which the act of incorporation declares shall exist before the right of repeal shall be exercised. 2. The act repealing the charter is valid. Judgment affirmed.

Cited: 60 Ia. 626.

DOUGHERTY v HUGHES (1851) 3 Greene 92

Bill to redeem land against sheriff and sureties. Plaintiff, a subsequent judgment creditor, having bought an intermediate judgment creditor's certificate of sale, gave to S, the sheriff, a certificate of deposit for the amount required to redeem the land of H, the judgment debtor. S then gave plaintiff a certificate of redemption. The judgment dismissed the bill, but ordered S to refund. Error.

Kinney, J. This redemption so-called was not in money, nor its equivalent. There was no redemption. Judgment affirmed.

Cited: 18 Ia. 541, 543.

TRUSTEES OF MINERS BANK v THOMAS (1854) 4 Greene 336.

Action for attorney's services. Defendants, under an act of the legislature repealing the charter of the M Bank, were appointed trustees to settle the affairs of the bank. Its officers refused to hand over the assets. The district attorney sued them, pleading, on his own relation, an information in the nature of a quo warranto. Plaintiff, his successor, refused to continue the suit, but agreed, if paid a reasonable amount out of the bank's assets, to act, and did act. The court instructed the jury that trustees had authority and power to agree that plaintiff be so paid to continue this suit. Judgment for plaintiff. Error.

Hall, J. The instructions are clearly erroneous. The power conferred upon the trustees was simply ministerial. The legislative act repealing the charter and authorizing the appointment of trustees making all the proceedings ex parte is the exercise of power that approaches the very verge of constitutional limits. The courts will not extend the power conferred by that act by implication. Judgment reversed.

JOHNSON v BARNEY & CO. (1855) 1 Ia. 531.

On certificate of deposit issued by defendants, bankers. In exchange of bills of a bank about to suspend, a debtor to plaintiff fraudulently obtained the certificate and indorsed it to plaintiff to collect and place to his credit. The bills were dishonored when presented. The evidence showed that the debtor did not receive the certificate in security for any antecedent indebtedness created at the time of the transfer. The defendants set up that there was a failure of consideration, and that plaintiff was not a bona fide holder. The court refused to charge: 1, That the exchange, being larger than usual, showed that the defendants bought the bills at their own risk; 2, that the fact that the bank suspended payment was not evidence that the bills were valueless; 3, that defendants must prove the notes were worthless; 4, that if there is no evidence of the present condition of the bank, further than to say it is insolvent and has a large amount due it, the jury must find the notes were of some value. Exceptions. Judgment for defendants. Appeal.

Wright, C. J. 1. The rights of the holder of a negotiable instrument are the same whether the debt for which it was transferred was pre-existing or was contracted at the time of the transfer. 2. Plaintiff was merely a collection agent, and was bound by any defense against his debtor. 3. The instruction in regard to charging an unusual amount for exchange should have been given. 4. The instructions in regard to the suspension of the bank, being evidence of the value of the bills, should have been given. Judgment reversed.

Cited: 12 Ia. 476; 89 id. 460.

TOWN OF MCGREGOR v MCGREGOR BRANCH BANK (1861) 12 Ia. 79.

Action against bank for taxes. Plaintiff, a duly incorporated town, levied a tax for corporation purposes on defendant, a corporation doing business in the town. Some of defendant's stockholders did not reside in the town. Defendant contended that under sec. 460 of the code, providing that all personal property is to be listed and assessed in that county where the owner resides, not the bank, but the individual stockholders are liable. Judgment for plaintiff. Appeal.

Baldwin, J. 1. This provision relates alone to taxes for state and county purposes. 2. The capital stock of a bank is under the control of the corporation. 3. Since this corporation is located in the town and receiving all the advantages therefrom, it is liable for its proportion of the taxes necessary to carry on the city government. Judgment affirmed.

Cited: 23 Ia. 150.

TAYLOR v COOK (1863) 14 Ia. 501.

Action upon bank notes. Plaintiff, owning notes of the F Bank, presented them to C, one of the defendants, for payment. C was a partner in each of the firms of C & S; C, S & D; and C, S & P. The three firms were in different towns but kept a standing advertisement in the town of D, stating that they were the proprietors of the F Bank; were individually responsible for its issues; and would redeem its notes. The notes were sent indiscriminately to these banking firms to circulate. When the demand was made, C & S was closed. Defendants' offer to show plaintiff bought the notes at a discount was overruled. Demand was made upon C. Judgment for plaintiff. Appeal by three defendants.

Lowe, J. 1. The testimony was properly excluded. 2. These several banking houses in their capacity of partnership become each a member of a new firm. 3. If a demand was necessary, the one upon C was sufficient to hold defendants liable. Judgment affirmed.

Cited: 16 Ia. 170; 22 id. 392; 59 id. 13.

ALLEN v PEGRAM (1864) 16 Ia. 163.

Action for breach of contract to redeem certain issues of a bank. The N Bank was organized under an act of the legislature of the Territory of Nebraska in 1856. This act was never confirmed or approved by Congress. Congress, in 1836, had enacted that no legislative act of any territory incorporating any bank should have any force until approved and confirmed by Congress. Plaintiff became owner of the charter and stock, and, as president, signed certain bank issues of notes. Then he sold out to defendant, giving a corporation deed to certain real and personal property. Defendant agreed to redeem the bank issues signed by plaintiff as president. Defendant set up: 1, Want of consideration; 2, illegality of consideration. Judgment for defendant. Appeal.

Dillon, J. 1. Possession of real property was sufficient consideration. 2. Although the issue of bills was without authority of law, plaintiff, who was then personally liable, might legally contract to have them redeemed. Judgment reversed.

Cited: 16 Ia. 432; 18 id. 208; 28 id. 79; 32 id. 178; 34 id. 168; 36 id. 558; 41 id. 614; 45 id. 664; 102 id. 232; 104 id. 389; 107 id. 741; 108 id. 360, 363.

HUBBARD v BOARD OF SUPERVISORS.
DAVENPORT NAT. BANK v SCOTT COUNTY } (1867) 23 Ia. 130.
NATIONAL BANK v YOUNG.

Bill to restrain the collection of a state tax on the capital of national banks on the ground that the tax was not authorized under the Act of Congress of June 3, 1864, sec. 41. The three cases were from different counties. In the first and third case the relief was granted; in the second, it was denied. On appeal they were heard together.

Wright, J. If a state law provides for the taxation of the capital but not the shares of its own banks, and then provides for the taxation of the shares of the national banks, it fails to conform to the Act of Congress of 1864, and is invalid. By our laws the shareholders of state banks are not taxed upon their shares of

stock, and it follows that shares in national banks in this state cannot be taxed. The first and third cases are affirmed, the second one reversed.

Cited: 24 Ia. 34; 25 id. 312; 27 id. 352; 29 id. 311; 32 id. 465; 68 id. 340; 74 id. 183; 96 id. 243.

NATIONAL STATE BANK v YOUNG (1868) 25 Ia. 311.

Injunction to restrain the collection of a tax assessed on the personal property of a national bank. The defendant contended that while the capital of a national bank was not subject to taxation as such, yet personal property held by the bank, such as safes, cash on hand, and due from other banks, bills discounted, was liable to taxation as like property held by other corporations or citizens. Plaintiff's cashier, upon the assessor's application, made a sworn statement from which the assessment was made. Decree for plaintiff. Appeal.

Beck, J. 1. No tax can be collected by a state, county, or municipality from a bank organized under the Act of Congress of June 3, 1864, except by assessment on their shares and their real estate. 2. The plaintiff was not estopped by the cashier's statement to question the assessment. Decree affirmed.

Cited: 86 Ia. 31.

ROBERTS v AUSTIN (1868) 26 Ia. 315.

Action to recover a bank deposit. M was a private banker who sold drafts on defendants, also bankers, with whom he had a deposit. After selling drafts to the intervening creditors M failed. Defendants refused to pay the deposit to either M's assignee, the plaintiff, or the creditors, until their rights had been determined. Judgment for plaintiff. Appeal.

Cole, J. The holders of the checks were entitled to the deposits. Judgment reversed.

Cited: 52 Ia. 72; 58 id. 416; 63 id. 596; 69 id. 152; 71 id. 39; 73 id. 57; 78 id. 431; 79 id. 276, 336; 87 id. 198; 99 id. 208; 112 id. 748.

TURNER v FIRST NAT. BANK (1869) 26 Ia. 562.

Action to recover the value of United States bonds left with the defendant as a special deposit. The petition alleged the deposit of the bonds, and that the defendant bank agreed to keep them safely and return them on demand; that the plaintiff received the interest on the coupons from the cashier every six months up to and including January, 1868; the failure of the defendant bank; the appointment of defendant S by the comptroller as receiver; the demand of S for the return of the bonds and his refusal to deliver them. Demurrer: 1, That it appeared that no conversion, except in the alternative, was alleged; 2, improper joinder of causes, tort and contract; 3, improper joinder of parties, the bank, and the receiver. Defendants contended that plaintiff's claim was not a debt within the Act of Congress, providing that the receiver collect the assets and pay all debts. Demurrer. Overruled. Appeal.

Cole, J. 1. The remedy for alternative allegations is by motion and not by demurrer. 2. Under sec. 2,844 of the Revision, causes of action of whatever kind may be joined, provided they are between the same parties in the same right and have the same venue. 3. A defendant who is properly joined as a party defendant cannot demur because others are improperly made defendants. The receiver is a proper party, as he represents an interest adverse to the plaintiff. The bank is also a proper party. 4. Plaintiff's claim was a debt within the meaning of this act. Judgment affirmed.

Cited: 41 Ia. 455; 63 id. 683; 86 id. 204; 108 id. 430.

DOWNS v YOUNKIN, DAVENPORT v CITY OF DAVENPORT, GIFFORD v CITY OF DAVENPORT, MORSEMAN v YOUNKIN,	} (1869) 27 Ia. 350
---	---------------------

Action to determine the validity of a tax on shares of stock of a national bank. Defendants, the taxing body, levied a tax on plaintiff's stock in a national bank. Congress gave the state legislature the power to determine the manner of taxing such stock. Ch. 153, Laws of 1863, provided that such shares should be included in the personal property of the holder at the same rate as other moneyed capital, and repealed all previous acts. It was passed by a vote of two-thirds

of each branch of the legislature as required by the constitution, and the tax was levied according to its terms. Plaintiff contended that sec. 1598 of the R. S. providing for a tax upon the capital and not on the shares of a bank had not been repealed. Judgments for plaintiffs in the first two cases and for defendants in the others. Appeal.

Wright, J. 1. Shares of stock in national banks are liable to taxation in the manner prescribed by the state legislature. 2. The repealing law was properly passed and was valid. Judgments as to the first two cases reversed, and affirmed as to the others.

Cited: 74 Ia. 183.

LAUMAN v COUNTY OF DES MOINES (1870) 29 Ia. 310.

Action to recover money paid for taxes. Defendant levied and collected a tax on the stock held by plaintiff in a national bank. An amended answer was filed. Defendant had no authority to levy the tax and the plaintiff paid it under protest. The money had been distributed. Demurrer to amended answer. Sustained. Judgment for plaintiff. Appeal.

Wright, J. 1. The amended answer was a substitute for the original and was the only one to be considered. 2. An illegal tax paid under protest can be recovered, even though distributed. Judgment affirmed.

Cited: 39 Ia. 548; 40 id. 103; 42 id. 417; 46 id. 328; 48 id. 510; 51 id. 524; 53 id. 489; 56 id. 22; 58 id. 292; 64 id. 216; 69 id. 141; 107 id. 650.

FRENCH v GIFFORD (1870) 30 Ia. 148.

Application for receiver and injunction. The petition alleged that the president and vice-president, and a majority of the shareholders and officials of the Davenport Savings Institution had conspired to defraud the petitioners, and insisted upon re-electing said president and vice-president, thus enabling them to cover up their frauds; and that if notice of this application was given to defendants, the books, records and papers of the bank would be so falsified or spirited away that petitioners could not ascertain said frauds. Receiver appointed without notice and injunction enjoining defendants from holding an election granted. Order overruling motion to dissolve the injunction and to vacate order appointing receiver. Appeal.

Day, J. 1. The petition does not conform to the rule that where a receiver is appointed without notice, the particular facts and circumstances which render such a proceeding proper should be set forth in the petition. 2. An injunction restraining the officers from a continuation or repetition of the conduct complained of, or an order compelling them to account for any losses sustained by their malfeasance would have furnished adequate relief. 3. The injunction simply prevents the stockholders from expressing their preference as to the board of control without any attendant benefits. Order reversed.

Cited: 32 Ia. 522; 35 id. 80; 57 id. 142; 59 id. 311; 95 id. 393; 101 id. 322.

FIRST NAT. BANK v HERSHIRE (1870) 31 Ia. 18.

Replevin for bank bills. The defendant, a county treasurer, seized a package of United States and national bank bills, the property of the plaintiff, for the payment of taxes upon the shares of stockholders, whereupon the plaintiff brought this action. Judgment for plaintiff. Appeal.

Day, C. J. An assessment against a shareholder does not authorize the seizure of the property of the bank. Judgment affirmed.

LEACH v HALE (1870) 31 Ia. 69.

Debt. The plaintiff deposited in the First National Bank of Keokuk certain United States bonds to be converted into another class of United States bonds without charge. Plaintiff afterwards demanded the return of one or the other class of bonds, but the bank refused to deliver. It contends that the bonds never formed part of the assets of the bank nor were ever appropriated or converted to its own use; that the transaction amounted to a bailment and not to an indebtedness or promise to pay money; and that the transaction was not within the range of banking business as authorized by the act of Congress under which the bank existed. The certificate or receipt showing the deposit did not have a stamp. Judgment for plaintiff. Appeal.

Beck, J. 1. As no agreement was made for compensation to the bank, its liability is not different from the case of deposits of money securities or commercial paper within the limits of its general business. 2. This transaction was within the scope of the powers of the bank to do a general banking business, as conferred by the act of Congress authorizing the creation of these banks. 3. The deposit could be shown by other evidence than the certificate. Judgment affirmed.

Cited: 72 Ia. 231.

HALE v WALKER (1871) 31 Ia. 344.

Action to charge the defendant as a stockholder. The First National Bank of Keokuk was insolvent, and refused to pay its circulating notes. The defendant, on the books of the bank, at the time of failure, was the absolute owner of stock of the bank. Answer: That the stock was held as collateral security. General demurrer. Sustained. Judgment for plaintiff. Appeal.

Day, C. J. It is not necessary to inquire into the equities that may exist between the stockholder and some third person; the plaintiff need not look beyond the legal title to the stock. Judgment affirmed.

Cited: 77 Ia. 34; 51 id. 425; 96 id. 151.

HERSHIRE v FIRST NAT. BANK OF IOWA CITY (1872) 35 Ia. 272.

Action to recover taxes due on shares of capital stock of a national bank, owned by non-resident persons. Plaintiff was a county officer. Demurrer to petition on the ground that defendant cannot be made to pay this tax unless it has dividends or property of such shareholders, and there is no averment to that effect in the petition; that sec. 2 of ch. 153, laws of 1858, provides that banking associations shall list their shares and give the name of each person owning shares and the amounts owned by each, and that each banking association shall be liable to pay the same as agent of its shareholders, and shall retain enough out of any dividends belonging to any shareholder, to pay any taxes levied upon his shares. Judgment for defendant. Appeal.

Cole, J. To make the bank liable under the statute, it must be shown that the bank now has or has had dividends or other money or property belonging to the delinquent shareholder. The bank is not liable for tax due from shareholders, simply because they are holders of shares in the capital stock of such bank. Judgment affirmed.

Cited: 93 Ia. 123; 96 id. 242; 110 id. 542.

SPAFFORD v FIRST NAT. BANK OF TAMA CITY (1873) 37 Ia. 181.

Injunction to restrain the foreclosure of a chattel mortgage given by plaintiff to defendant, a national bank, to secure a previously contracted debt. Plaintiff contended that defendant, being a national bank, had no power to take a chattel mortgage. Motion for Judgment for plaintiff. Denied. Appeal.

Cole, J. Conceding that subdiv. 2 of sec. 28 of the National Bank Act, allowing banks to hold mortgages by way of security for debts previously contracted, applied only to real estate, yet there being no express prohibition, we hold the mortgage valid, and that the bank's authority exists under the implied power to protect itself from loss, save its property and securities from sacrifice, and successfully to execute the purposes of its creation. Judgment affirmed.

MOUNT v FIRST NAT. BANK OF MT. PLEASANT (1873) 37 Ia. 457.

Action to recover damages for negligently failing to protest a note and thus releasing the indorser. The bank received the note from the holder for protest, and there being another man in the vicinity of the same name, notice was given to him instead of to the indorser. Plaintiff had not informed defendants where the indorser lived. Judgment for defendant. Appeal.

Day, J. The finding of the jury that there was no negligence should not be disturbed on these facts. The finding of a jury, unless clearly unsupported by the evidence, will not be disturbed by this court. Judgment affirmed.

Cited: 107 Ia. 545.

BRANCH v TOWN OF MARANGO (1876) 43 Ia. 600.

To equalize assessment of taxes. Plaintiff, a banker, was assessed for \$4,000 on account of moneys and credits by the town assessors. The board of equalization, being the town council, increased it to \$10,000. The latter amount was fixed upon to include average deposits of customers with plaintiff. The circuit court reduced the amount to that fixed by the assessors. Judgment for plaintiff. Appeal.

Rothrock, J. 1. Only the plaintiff's own money and credit should be taxed to him, and the deposits, which are taxable to depositors, should not be included. 2. If it be held that plaintiff was owner of the deposits, he is debtor to the depositors for the whole amount, and entitled to deduct the same. Judgment affirmed.

SANBORN v SMITH (1876) 44 Ia. 152.

On certificate of deposit. On September 9, 1874, the defendants issued to the plaintiff a certificate of deposit for \$200, payable on September 9, 1875, on the return of the certificate properly indorsed. Defendants were then doing business in A, Cass County, Iowa. Defendant S appeared and moved to change the place of trial to Fremont County, on the grounds that the defendants as a firm had no place of business in Cass County; that the other defendants reside out of the state; that he resided in Fremont County and service had been on him in that county. Sec. 2581 of the code provided: When by its terms a written contract is to be performed in any particular, action for breach thereof may be brought in the county wherein such place is situated. Motion granted.

Day, J. 1. The fair and reasonable construction of the writing sued on is that by its terms it provides for payment in A. 2. If the writing was to be returned for payment to the bank, it was by its terms made payable there, and the action was properly commenced in Cass County. Order reversed.

FARMERS AND MERCHANTS BANK v WASSON (1878) 48 Ia. 336.

Action on promissory note against Wilson, in which process of garnishment was served upon defendant. Defendant was president of the plaintiff. Wilson was indebted both to plaintiff and to the defendant personally. Wilson owned fifty shares of the bank stock and transferred it to defendant in payment of his debt. The cashier of plaintiff knew of the transfer and made no objection. On judgment being obtained by plaintiff against Wilson, it was attempted to reach by garnishee process the stock transferred to defendant. Judgment for plaintiff. Appeal.

Beck, J. No circumstances are exhibited which justify the conclusion that defendant practiced any fraud or concealment whereby plaintiff was induced to give credit to Wilson or to refrain from an attempt to seize the stock. No principle of equity required defendant to refrain from taking the stock in satisfaction of Wilson's debt to him, on the ground that he was an officer of plaintiff. Judgment reversed.

Cited: 70 Ia. 702; 97 id. 210.

NATIONAL BANK OF WINTERSET v EYRE (1879) 52 Ia. 114.

Action on promissory note given in renewal of one usurious and covering the usurious interest. Plea: Usury. Reply: Plaintiff was not subject to the Iowa laws of usury, but only to those of the United States, which the courts of Iowa have no jurisdiction to enforce. Judgment for plaintiff. Appeal.

Adams, J. 1. A borrower of money from a national bank at a usurious rate of interest, when sued in a state court to recover interest, may maintain the plea of usury as a defense in the state court, relying on the National Bank Law forbidding usury. 2. The note was tainted with usury. Judgment reversed.

Cited: 100 Ia. 616; 106 id. 349.

FIRST NAT. BANK OF WATERLOO v ELMORE (1879) 52 Ia. 541.

Petition in equity. Plaintiff obtained a mortgage on a mill, and on the water power and realty connected therewith, as security for a loan to defendants. Subsequently, defendants gave other mortgages on the mill building and the machinery. Mechanics' liens were obtained prior and subsequent to the plaintiff's mortgage on the machinery and for repairs on the mill at the instance of the defendants,

and also for repairs on the water power. Defendants contended that the bank was not authorized to accept the mortgage. One of the mortgagees purchased the legal title to the mortgaged property, but there was no evidence that he intended a merger. Plaintiff contended that his mortgage attached to the building as well as the realty, and took precedence over the prior liens on the building alone. The building could easily be removed. Decree, that the whole property be sold and the proceeds apportioned between the mortgage and the liens, according to their respective values. Appeal.

Day, J. 1. An individual cannot set up that a mortgage made by a national bank is ultra vires and void. 2. An intention to merge the legal and equitable title will not be presumed. 3. The liens issued on the building prior to the mortgage attached first. 4. The liens could only be satisfied by removing or selling the building. Decree reversed.

Cited: 53 Ia. 180, 697; 60 id. 151; 61 id. 515; 69 id. 759; 71 id. 614; 113 id. 282.

FIRST NAT. BANK OF DAVENPORT v PRICE (1879) 52 Ia. 570.

Action on a draft. Plaintiff sent defendant for collection a draft which recited that it bore interest after maturity. There was no clause that it was payable on demand, and no time of maturity was mentioned. Defendant obtained an acceptance and advised plaintiff. Plaintiff directed defendant to protest the draft and sent the fees. Demurrer. Sustained. Judgment for plaintiff. Appeal.

Day, J. 1. The draft was payable on demand. 2. The fact that the draft bore interest after maturity did not show that it was not payable on demand. 3. Payment of the protest fees was not a ratification of the defendant's act in obtaining the acceptance of the draft. Judgment affirmed.

HADDOCK v CITIZENS NAT. BANK (1880) 53 Ia. 542.

Action for damages for failing to protest a certificate of deposit on the proper day, for non-payment. Plaintiff, the indorsee of the certificate, sent it to the defendant bank for collection, which protested it for non-payment on the day of maturity. The indorser was discharged because the instrument was entitled to grace, and the protest was made prematurely. Defendant relied on a custom among the banks of the place to treat such certificates as payable without grace. Judgment for defendant. Appeal.

SeEVERS, J. Defendant, having acted as a prudent banker ordinarily would under the same circumstances, cannot be held guilty of negligence. Judgment affirmed.

ARMSTRONG v NATIONAL BANK OF WINTERSET (1880) 53 Ia. 752.

Action to recover a deposit. Plaintiff borrowed money of a firm in Chicago, and deposited it with defendant, a local bank. By mistake the Chicago bank, in which the money was deposited for transmission, directed that the deposit be credited to G instead of the plaintiff. Defendant refused to honor plaintiff's check after it had been notified of the mistake, and applied the deposit toward the note it held against G. Plaintiff proved the manner of transmitting funds by deposits in Chicago banks; plaintiff's negotiations for the loan; and that the initials on the letter in regard to the deposit referred to the firm making the loan. Defendant contended that it should not pay over the money because the Chicago bank transmitting the funds had never changed the order placing the funds to G's credit. Judgment for plaintiff. Appeal.

Rothrock, J. 1. The deposit belonged to the plaintiff. 2. The evidence was proper. 3. The transmitting bank had no beneficial interest in the money. Judgment affirmed.

GERMAN-AMERICAN SAV. BANK v CITY OF BURLINGTON (1880) 54 Ia. 609.

To equalize taxation. The assessors of the city assessed plaintiff for \$30,000 on paid-up capital, most of which was invested in non-taxable bonds of the United States. Application was made to a board of equalization of the city council of defendant to correct it. Application was overruled, and the plaintiff took the action to the circuit court by appeal. The court found that the bonds were not taxable, and that plaintiff's taxable assets at the date of assessment were \$14,000. Judgment for plaintiff. Appeal.

Day, J. That portion of paid-up capital stock of plaintiff which was invested in United States Government bonds was not subject to taxation. Judgment affirmed.

Cited: 74 Ia. 126; 95 id. 117; 114 id. 108, 732.

GUELICH v NATIONAL STATE BANK OF BURLINGTON (1881) 56 Ia. 434.

Action to recover the proceeds of a bill of exchange. The bill was deposited with defendant, a bank, for collection and sent to its correspondent in the city in which the bill was payable. The correspondent bank failed to present the bill for payment or to protest it. Judgment for plaintiff. Appeal.

Beck, J. The correspondent bank became plaintiff's agent, and was alone liable for the negligence. Judgment reversed.

Cited: 63 Ia. 474; 73 id. 60; 107 id. 545.

KINSER v FARMERS NAT. BANK OF CENTERVILLE (1882) 58 Ia. 728.

Action for a penalty. Defenses: General denial, and Statute of Limitation. Defendant loaned money to the plaintiff, one of its depositors. When the settlement was made, the amount of deposits, with the interest thereon, was deducted from the amount of the loans with the same usurious rate of interest, and notes were given for the balance. Renewal notes were given from time to time. There was no evidence that the payments on the notes were to be applied, first, to the interest, and then to the principal. The suit was removed from the county in which defendant was located. Defendant contended that the court was without jurisdiction. Congress gave state courts in the district in which a bank was located jurisdiction in actions where they had similar jurisdiction. The court found, that the burden of proving that the application of payment was made without consent, rested on the plaintiff. Judgment for plaintiff for the penalty for part of the usurious interest taken during the two preceding years. Cross appeals.

Adams, J. 1. The change of place of trial was properly allowed and the court had jurisdiction. 2. The payments were to be applied pro rata to the principal and interest due at the time, unless there was an agreement to apply it to the interest first; the burden of proving such an agreement is on defendant. 3. The usurious transaction must be held to have occurred when the interest was paid. 4. In the absence of an agreement, payment is applied to the interest first. Judgment affirmed as to the defendant, and reversed as to the plaintiff.

Cited: 66 Ia. 757; 64 id. 242.

COUNTY OF DES MOINES v HINCKLEY } (1883) 62 Ia. 637.
SIGLER v COUNTY OF DES MOINES }

Interpleader proceedings. Defendants H and N contracted to erect a building for the County of Des Moines, and, as security for future advances, gave the S Bank an order on the county. Notice was given the auditor. The bank drew out all the money then due, and deposited it to the credit of H and N, who drew on the fund in favor of some creditors, indorsed, "To be paid as soon as we settle with the County." The bank accepted the checks "payable whenever we have funds properly applicable to this check." Other creditors, among whom was B & Co., thereupon brought suits and garnisheed the bank and county; while others procured orders from H and N, and assigned the amount due thereon. The bank demanded payment of the balance due on the contract, but the county refused to pay, because S claimed a lien on this fund under an assignment of orders, given by H and N to K for a portion of the profits of the work. The creditors contended that the lien of S was subordinate, as profits were not payable until after they were paid. The bank and county, being satisfied with the disposition of their claims, withdrew from the proceeding. The court decreed: 1, That S was not entitled to any part of the fund; 2, that the check holders were not entitled to priority over other creditors; and, 3, that part of B & Co.'s claim was subordinate to other creditors, as it obtained no lien on the fund by its garnishment proceedings. From this decree B & Co. and the other creditors appeal.

Seevers, J. 1. The checks were not negotiable, but they were drawn on a particular fund, and parol evidence was admissible to explain the indorsement thereon. 2. The order in favor of the bank created an equitable assignment of the fund as security for future advances. 3. The acceptance of the checks operated as an equi-

table assignment of sufficient of the fund to pay them, and the bank became the agent of the payees to collect. 4. The bank was the equitable custodian of the funds. 5. B & Co. obtained a lien on the fund by the garnishment proceeding against the bank, and no part of its claim was junior to the other creditors. 6. The claim of S for profits was subordinate to that of the other creditors. Judgment modified.

Cited: 75 Ia. 157, 453; 78 id. 431; 79 id. 431.

ALLEN v CLAYTON (1884) 63 Ia. 11.

Bill to enforce the liability of stockholders. The bank was incorporated in 1871 as a bank of discount and deposit, and did not issue bills to circulate as money. The bank became insolvent and made an assignment. The plaintiffs claimed that the defendants were individually liable to them as creditors of the bank. Sec. 9, art. 8, of the constitution provides that every stockholder in a banking corporation shall be individually responsible and liable to its creditors over and above the amount of stock by him held to an amount equal to his shares so held for all the liabilities accruing while he remains such stockholder. Demurrer, on the ground that sec. 9, art. 8, of the constitution, refers to banks of issue only. Overruled. Decree for plaintiffs. Appeal.

Seevers, J. To arrive at the meaning of the words "banking corporations" in sec. 9, the sections preceding and following it, which have reference to the same subject matter, must be considered. These sections refer to these banks with power to issue bills to circulate as money, and in accordance with the acknowledged rules of construction the words used in sec. 9 must mean the same class of corporations. Page 280, of the revision of 1860, clearly recognizes the existence of banking corporations having the power only of discount and deposit. The words "banking corporations" did not mean those of discount and deposit. Judgment reversed.

Cited: 103 Ia. 556; 110 id. 639, 641.

THE BRITISH & AMERICAN MORTGAGE CO. v TIBBALLS (1884) 63 Ia. 468.

On promissory note. The plaintiff made a loan to defendants, T and E, for which they gave their note secured by a mortgage on a farm. Afterward defendant M purchased the farm and assumed the payment of the mortgage. Before the note fell due, plaintiff sent it with a formal release of the mortgage to the bank. The note and mortgage were presented to M for payment, and three days later he called at the bank and paid the full amount due in four demand certificates of deposit issued by the bank. The bank made no remittance of the proceeds, and the following week it suspended payment. It was customary for banks to receive their certificates of deposit in payment of claims in the hands of the bank for collection. Judgment for defendants. Appeal.

Rothrock, C. J. 1. It was not necessary to prove the custom or bring notice of it home to the plaintiff. 2. The surrender of the certificates operated as payment. Judgment affirmed.

Cited: 105 Ia. 354.

DAVENPORT NAT. BANK v BOARD OF EQUALIZATION (1884) 64 Ia. 140.

To cancel an assessment for taxes. The defendant board made an assessment on the bank shares of the plaintiff on the valuation of its capital and surplus. The plaintiff contended that the assessment was a discrimination in favor of savings banks, in that under the savings banks statute the shares are not taxable, but merely the paid up capital; while under the code national bank shares are taxable. U. S. R. S., sec. 5219, provides that the taxation of national bank shares shall not be at a greater rate than is assessed upon moneyed capital in the hands of individual citizens. The statutes, as to savings banks, provide that the paid-up capital of all savings banks shall be subject to the same rate of taxation and rule of valuation as other taxable property. The defendant contended that the paid-up capital was taxable to the bank, that the shares were taxable to the shareholders, and that there was no discrimination. Judgment for defendant. Appeal.

Adams, J. 1. The taxation of shares is not, within the meaning of the statute, assessed at a greater rate than other moneyed capital. 2. The words "paid-up capital" mean that there shall be subject to taxation all moneys and moneyed

assets resulting from payment made on subscriptions, and payments made on other obligations where such payments are set apart and reserved as capital. Judgment affirmed.

Cited: 96 Ia. 243.

HENCKLE v TOWN OF KEOTA	}	(1886) 68 Ia. 334.
WILSON v THE SAME		
TABMAN v THE SAME		
RITCHEY v THE SAME		

Certiorari to review an assessment for taxes. The plaintiffs, bank stockholders, were severally assessed for the year 1883, but declined to list the shares owned by them for the purpose of assessment. The board of equalization met and directed the assessor to ascertain the names of the owners of the stock residing in the town and the amount owned by each. The plaintiff H appeared at the meeting of the board as a stockholder and officer of the bank, and requested an adjournment. None of the other plaintiffs appeared. No notice of the meeting was sent to the plaintiffs, but notices were posted that the assessment had been made. Sec. 801 of the code provides that all property, both real and personal, not exempt by statute, is subject to taxation. Sec. 813, that the stock of corporations and companies shall be assessed at their full value. Sec. 812, as amended, provides that all taxable property shall be taxed each year, except money and credits of associations organized under the general incorporation law for the purpose of transacting a banking business. In every such instance the average value of the money and credits under the control of the person making the list shall be listed for taxation. McClain's Code, 202, provides, that before any assessments shall be raised, a list shall be posted up in two specified places, and the board adjourn for a week. Defendants contend, ch. 109, laws of 1880, providing for notice, is unconstitutional because the title fails to express the subject matter of the act. Judgment for plaintiffs. Appeal.

Seevers, J. 1. Taxation is the rule, and exemption therefrom constitutes the exception. 2. Bank shares are property, and should be taxed to their owners. 3. Before the board of equalization can increase the assessment, it must give the notice required by the statute. 4. For the purposes of this case the act must be deemed constitutional. Judgment affirmed, except as to plaintiff H, which is reversed.

Cited: 75 Ia. 355; 77 id. 497, 498; 78 id. 455; 86 id. 32; 107 id. 116; 108 id. 367; 109 id. 499.

CAMPBELL v CITY OF CENTERVILLE (1886) 69 Ia. 439.

To set aside an assessment. The plaintiff was a banker, and the capital employed in his business was \$50,000, consisting of \$35,000 of United States bonds and treasury notes, not taxable, and \$2,000 of real estate taxed as such, leaving \$13,000 taxable capital. His deposits and bills payable exceeded cash and bills receivable \$3,000, leaving \$10,000 taxable. The board of equalization increased the plaintiff's assessment from \$5,000 to \$15,000, and the court fixed it at \$9,750. Judgment for defendant. Appeal.

Beck, J. In order to ascertain the amount to be assessed, the deposits and bills payable, and the non-taxable bonds and notes, should be deducted from the moneys and credits. Judgment affirmed.

Cited: 112 Ia. 106.

IDE, EX'R v BREMER COUNTY BANK (1887) 73 Ia. 58.

For interest on a certificate of deposit. The plaintiff left with the defendant a certificate of deposit for collection, due on demand, and obtained a receipt stating the amount would be collected when due. No instructions were given as to time of collection. The defendant, on the same day, forwarded the certificate, to be collected when due, to its Chicago correspondent, a solvent national bank, which collected it. The money was remitted to the defendant and paid to the plaintiff. Judgment for defendant. Appeal.

Beck, J. 1. In the absence of any instructions to or agreement by defendant requiring it to hold the paper, the presumption arises that it was the purpose of the plaintiff to press its immediate collection. 2. The correspondent was not guilty of negligence or violation of instructions, for the collection was made in accordance with the directions given by defendant. Judgment affirmed.

BREMER COUNTY BANK v MORES (1887) 73 Ia. 289.

To recover on overdrafts. The plaintiff agreed to furnish the defendant money for his creamery business, and the defendant opened an account with it. The defendant and another gave the plaintiff a promissory note as collateral security for the account. The defendant notified the plaintiff that it must not allow his account to be overdrawn. This creamery was conducted by the defendant and the person who had signed the note. This person was authorized to draw, and did draw checks against this account which was overdrawn. The account was balanced monthly and reported to the defendant. The checks were surrendered to the defendant, and the balance assented to by him. Judgment for plaintiff. Appeal.

Beck, J. 1. If the checks were drawn by authority in the prosecution of the business with which the defendant was connected, and he availed himself of the benefit of such checks, he cannot refuse to account for them, even though they exceeded the limit prescribed in his notice to the plaintiff. 2. The plaintiff was not required to inquire what disposition was made of the money received thereon. 3. The agreement to furnish money need not be proved, since the action is brought on the account. The agreement was a mere inducement. Judgment affirmed.

FOX v THE DAVENPORT NAT. BANK (1887) 73 Ia. 649.

On draft. The plaintiff drew the draft in question on C, on October 20, and sent it to defendant for collection. The draft was accepted and became payable on October 25. It was not paid when due, of which defendant gave the plaintiff no notice until November 30. The acceptor failed on December 1. The plaintiff contended that the acceptor was solvent up to December 1, and the defendant was negligent, whereby the balance due on the draft was lost. Judgment for plaintiff. Appeal.

SeEVERS, J. The court erred in instructing the jury that the defendant was presumptively liable. In order to recover substantial damages, the plaintiff was required to show that he had suffered such damages by the negligence of the defendant. Judgment reversed.

HUMMEL v BANK OF MONROE } (1888) 75 Ia. 689.
MULLENS v THE SAME. }

Damages for fraud. The cashier of the defendant bank induced the plaintiff, by fraudulent representations, to execute to him a promissory note for \$5,000, which the cashier sold to an innocent purchaser, receiving in payment a draft on a Chicago bank. The cashier indorsed this draft to the defendant and collected the money. The draft was collected by the bank, and the plaintiff had to pay the note when it fell due. Demurrer. Sustained. Appeal.

Reed, J. 1. If the defendant had had actual notice, when it took the draft, of the facts known to the cashier, it would have been chargeable. It cannot be charged with constructive notice of the facts, because communicating them to the bank would have defeated his object. 2. The failure of plaintiff to inform the defendant of the fraud at the time of its perpetration released the bank from liability on the proceeds of the draft, especially since it does not appear that they are now in the defendant's hands. 3. The fact that the checks were non-negotiable raises no presumption against their payment. Judgment affirmed.

Cited: 90 Ia. 557; 93 id. 395; 107 id. 513.

LINDLEY v FIRST NAT. BANK OF WATERLOO (1889) 76 Ia. 629.

On Draft. B telegraphed the defendant, where he had a deposit, to transmit by telegraph \$2,000 to the plaintiff at Los Angeles. The next day the defendant's cashier telegraphed to the plaintiff that it would pay B's draft on it for \$2,000. B drew his draft in question for \$2,000 with exchange on New York. The draft was subsequently presented and the defendant refused to accept. Demurrer on the ground that the draft drawn, including two dollars exchange, was different from the one the defendant agreed to pay. Judgment for defendant. Appeal.

Reed, C. J. The defendant's liability, if any, is created by his contract, and it is impossible that it should be bound by conditions or stipulations to which it never gave its consent. The bill of exchange had to conform to the terms of the offer. Judgment affirmed.

Cited: 106 Ia. 280.

KNAPP & CO. v COWELL (1889) 77 Ia. 528.

To recover amount due on an overdraft. The defendant was indebted to the plaintiffs on a promissory note. He deposited with them \$1,000 on May 31, 1881, and claimed that he made a further deposit of \$200. At the request of the defendant, the plaintiffs applied \$177.75 of the deposit on the note. The defendant denied making any such request. The jury found that the defendant was not entitled to recover on his counterclaim, as he did not deposit the \$200, and that the plaintiffs did not, at the request and by direction of defendant, apply \$177.75 in payment of the balance due on note. Judgment for defendant. Appeal.

Rothrock, J. It was wholly immaterial whether the defendant expressly requested the application or not. If the defendant was indebted to the plaintiffs on the note, and the plaintiffs applied one debt in liquidation of the other, the defendant had no right to complain and repudiate the application of the money, because he did not request it. Judgment reversed.

Cited: 109 Ia. 156.

FREEMAN v THE CITIZENS NAT. BANK (1889) 78 Ia. 150.

Damages for negligence. The plaintiffs sent certain drafts drawn on P to the defendant for collection, with instructions to wire them if not paid and await reply. On January 27, the defendant telegraphed the plaintiffs that it had six unpaid drafts of P. On January 28, the plaintiff wrote to the defendant asking if all their drafts on P were accepted. On January 28, the defendant received information which induced it to bring suit by attachment the next day against P on a note which it had discounted for him. On January 29, it wrote the plaintiffs that an attachment had been commenced against P, and that the drafts were returned. The bank's attachment suit and the suit next in priority exhausted all of P's property. Plaintiff contended: 1, That defendant should have brought suit immediately, and, 2, that defendant's lien should not have priority over defendants. Judgment for defendant. Appeal.

Beck, J. 1. A bank may discount paper and retain the right to hold collections against the maker of the paper without surrendering its rights of priority gained by diligence. 2. The defendant undertook no other duty than the collection of the drafts and to obey instructions pertaining thereto. Judgment affirmed.

THE STATE v CADWELL (1890) 79 Ia. 432.

Indictment for receiving deposits while insolvent. Defendants were bankers operating a bank at C and one at B. Through the cashier at C they received a deposit and issued a certificate. Five months later they made an assignment of all their property, except their homesteads. The statute made it a felony for a banker to accept or receive money on deposit when insolvent. An expert accountant, who had examined the books, gave his opinion as to the solvency of the bank at different times. The deed of assignment was admitted in evidence. Evidence as to the condition of both banks was received. Defendants contended that they were not liable, because they did not personally receive the deposit, and that this was not a deposit within the statute, but rather a loan. Defendants offered to prove the value of their homesteads. Refused. The court instructed that the deposit must have been made with the defendants' knowledge. Judgment for plaintiff. Appeal.

Granger, J. 1. The defendants were guilty for receipt of the deposit by their cashier. 2. It is unnecessary to aver agency in the indictment, and proof of defendants' receipt of the money through the cashier may be made. 3. The opinion of the accountant was proper. 4. The evidence of the value of the homesteads was properly rejected. 5. The deed of assignment was competent evidence. 6. It was proper to receive evidence as to the condition of both banks. 7. It was a deposit within the statute. 8. A bank is insolvent when it has insufficient assets to pay its liabilities within a reasonable time. The instruction was proper. Judgment affirmed.

Cited: 100 Ia. 199; 101 id. 185; 102 id. 202; 103 id. 114; 111 id. 131.

RICHARDS v OSCEOLA BANK (1890) 79 Ia. 707.

On bond. The defendant bank was selected by the county as a depository for county moneys. It gave the bond in question with C and C as sureties. The bank suspended payment owing the county on deposit account over \$4,000. The

receiver of the bank intervened. The sureties, defendants, alleged that before the receiver was appointed, the bank gave the plaintiff, the county treasurer, further security in notes, stocks, and other securities, and they were entitled to the avails of these securities. Judgment was entered against the bank and the defendants. The court ordered the receiver to turn over the collateral to the clerk of the court for collection, and that the cause be continued as to the same. The case was transferred to the equity docket, and defendant C, vice-president of the bank, filed a cross bill, setting up the title of the bank to real estate, that the judgment was a lien upon it, and praying that, until the judgment was enforced against the real estate and the notes collected, it be not enforced against him. Judgment for plaintiff. Appeal.

Beck, J. 1. If the vice-president had authority to give the bond security, he was authorized to give the collateral. 2. The county treasurer having power to secure from the bank the money due, he would also have power to accept the security. 3. The notes given to plaintiff as collateral security must be used in the payment of the judgment against defendants. 4. The defendants, as to other assets of the bank, have no priority over the other creditors. 5. The judgment obtained against the bank cannot be enforced against the real estate of the bank so as to protect the defendants. Judgment reversed.

HALE v RICHARDS (1890) 80 Ia. 164.

Action to restrain defendant from enforcing a judgment against the homestead of plaintiff. Defendant R was the president of the O bank, and kept a deposit account with it. Plaintiff was also a treasurer of a school district, and had a deposit account of school funds as his own, of which the defendant had knowledge. Plaintiff's homestead had been paid for by drafts on his account in excess of his deposits, but afterward his deposits, together with the school funds, made a balance to his credit. Afterward he became indebted to the bank, and gave his note to it. This note was prosecuted to judgment. For satisfaction of the judgment defendant wished to sell plaintiff's homestead. The defendant contended that this note was given for the purchase money of the homestead. Decree granted. Appeal.

Beck, J. The plaintiff had no property in the school money, and should not be entitled to its benefits. The defendant, having encouraged the plaintiff in making the overdrafts on the school funds, cannot now base a claim for relief on plaintiff's violation of the law. The parties are in *pari delicto*. Defendant cannot invoke that violation of the law as a ground for remedy against the debtor. Decree affirmed.

INDEPENDENT DIST. BOYER v KING (1890) 80 Ia. 497.

Action to recover moneys deposited. W, treasurer of the plaintiff school district, deposited school funds with a bank owned by defendant's assignor. The bank became insolvent, and its property was assigned to defendant for benefit of creditors. The deposit was contrary to law. The bank knew this deposit was of public funds. These funds had been placed with other funds of the bank, and were not kept intact. Decree for plaintiff. Appeal.

Robinson, J. The money so deposited became a trust fund. The mingling of this fund with the moneys of the bank does not prevent the enforcement of the trust. The bank, having knowledge of all the facts, could acquire no title to the money adverse to plaintiff. Decree affirmed.

Cited: 80 Ia. 507; 81 id. 495; 84 id. 232; 85 id. 63; 88 id. 200; 96 id. 275; 97 id. 575; 101 id. 491, 537; 102 id. 205; 107 id. 56, 225, 630; 110 id. 65; 111 id. 135.

BUNTON v KING (1890) 80 Ia. 506.

Action to recover money deposited. W deposited funds of the town of J with a bank owned by defendant's assignor. The bank becoming insolvent, an assignment was made for the benefit of creditors. The bank knew these deposits of W were of public funds. Decree for plaintiff. Appeal.

Beck, J. This money so deposited constituted a trust fund. The money must be returned before the payment of any claims of creditors. Decree affirmed.

NURSE v SATTERLEE, ASSIGNEE (1890) 81 Ia. 491.

Action to recover proceeds of a draft collected. Plaintiff left a letter of credit with D Bank for collection only. After collection, defendant became insolvent and made an assignment for benefit of creditors. Plaintiff had been notified of the collection of the draft. He filed his claim with D's assignee for allowance as a creditor of the bank. Judgment for plaintiff for amount of letter of credit. Appeal.

Rothrock, C. J. The money so collected by the D Bank became a trust fund. The relationship of plaintiff and the bank was that of principal and agent, and remained so after collection. The relation of debtor and creditor never existed. Plaintiff did not waive his rights by filing a claim with defendant. Judgment affirmed.

Cited: 95 Ia. 294; 105 id. 305; 111 id. 135.

FIRST NAT. BANK v CITY COUNCIL OF ALBIA (1892) 86 Ia. 28.

Action to compel the reduction of a tax assessment. Plaintiff bank has a capital stock of \$50,000, with \$13,500 of this capital invested in real estate. The shareholders were taxed for the full amount of their stock, no deduction being allowed for real estate. Plaintiffs, L and D, showed debts greater than the amount of their holdings, but no deduction therefore was allowed. Sec. 814 of the state code entitles a taxpayer to deduct from the taxable list of his personal property all debts owing by him in good faith. Judgment for defendant. Appeal.

Kinne, J. 1. To tax the plaintiff bank's real estate and shares of stock to the respective holder would be a double taxation which is unconstitutional. The actual value of the stock, diminished by the proportionate value of the real estate owned by the bank, furnishes the proper sum upon which to assess the tax. 2. The stock held by L and D were credits under sec. 814 of the code, and they are entitled to deduct their indebtedness from the amount of their holdings. Judgment reversed.

Cited: 92 Ia. 43; 96 id. 242; 102 id. 4.

FARMERS AND TRADERS BANK v HANEY (1892) 87 Ia. 101.

Action on promissory notes, and for the foreclosure of a mortgage given to secure the notes. Defendant S Bank is a judgment creditor of defendant H, who is indebted to the plaintiff in the amount of the notes. H, before giving plaintiff this mortgage, had executed a deed of conveyance of this land to his children jointly. This instrument H sent by A to his attorney S for examination. S advised against the conveyance, and carried it back to H, who thereupon ordered it destroyed. Defendant bank had levied on 15 shares of stock in the plaintiff bank, which stood in the name of H. Plaintiff's by-laws provided that shares of stock could be transferred only on the books of the bank on surrender of certificate and payment of all liabilities; they also provided that no transfer could be made where the holder was liable as principal debtor or otherwise. Judgment for plaintiff. Appeal.

Rothrock, J. 1. There was no delivery of the deed in the absence of an intent, which in this case is wanting. 2. The contract between the bank and H, by which the bank had a lien on the stock, was not void, as to attaching creditors, and the bank's lien is prior to the creditor's lien, especially when the creditor had notice of the lien. Judgment affirmed.

Cited: 92 Ia. 153; 97 id. 210, 669; 103 id. 440.

TAYLOR v LOVETT (1893) 87 Ia. 177.

To establish the ownership of stock. The parties to the action were owners of the stock of the D Bank. It was organized as a banking institution, but was not incorporated, and had all the elements of a partnership. S was a member of the bank, but sold his stock. Both parties claim the purchase of it. S offered the shares to plaintiff, but the money was advanced by defendant L, cashier of bank. At the time of the transaction, L demanded one-half of the stock because of the loan. Plaintiff offered one-third. L did not make this demand for the bank. However, there was no adjustment reached. Evidence went to show that there was a rule of the bank that it should have an option on all stock to be sold. Decree awarded two-thirds of the stock to the plaintiff and one-third to defendants. Appeal.

Rothrock, J. 1. Defendants were not governed by the principle that one mem-

ber cannot use the property of the firm for his own benefit. 2. Plaintiff's transaction with the bank was purely a personal one and a legitimate one. 3. It was a loan of money with the privilege of L accepting one-third of the stock. 4. The right to claim that the purchase was made for the bank, was waived. 5. The duty to make reports was waived. Decree affirmed.

MAHASKA COUNTY STATE BANK v CRIST (1893) 87 Ia. 415.

On promissory note against drawers and indorsers. The note was in payment for a stallion, and was coupled with a contract to take him on trial and to make monthly reports. The reports were not made, but when the makers offered to return him, the vendors demanded and received the information which the reports would have given. Defendant, drawers, delivered the note to S and W, who indorsed it to plaintiff as collateral for a loan. Plaintiff, according to a custom, allowed S and W to check on payments made on the collateral, other collateral being deposited. Defendant drawer alleges failure of consideration and knowledge of the defense by plaintiff. The court charged that the holder of the note indorsed by the payee is presumptively a bona fide holder, and that, if the evidence showed that the plaintiff received the note in good faith, and before maturity, as collateral security for a loan to the payee, which was still unpaid, plaintiff would be entitled to a verdict. Judgment for defendant. Appeal.

Robinson, C. J. The last instruction did not place the burden upon the plaintiff of proving that it was a holder in good faith and for value. The fact that credit was given to S and W on account for collateral notes paid, instead of indorsing the payments on their indebtedness to the plaintiff, did not change the character of the collateral notes, nor release the money received thereon from the liability for the payment of the debt for which the collaterals were deposited. Judgment reversed.

SHAW v JACOBS (1893) 89 Ia. 713.

Action to recover the amount of a check payable to bearer. Defense, failure of consideration. Plaintiffs were bankers and indorsees of a check given by defendant in payment for hogs. The payees indorsed the check to the plaintiffs and received a credit for its amount. Defendant, the maker, stopped the payment on the check. The check was presented and protested. The payees refused to take it up until an attempt to collect it by suit had been made. Defendant contended that the indorsement to the plaintiffs was merely for the purpose of collection. The payees did not deny in writing under oath that it was not their indorsement. There was evidence that there were dead hogs where the ones sold were kept, but there was no evidence that the hogs were infected when sold, or whether the hogs died before or after the purchase, or that the vendors knew that the hogs sold were diseased. Judgment for plaintiffs. Appeal.

Robinson, C. J. 1. The indorsement transferred title to the plaintiffs for all purposes. The giving of the check to plaintiff was presumptively intended as a payment. 2. The genuineness of the signature was admitted. 3. There was no evidence of fraud in the sale of the hogs. Judgment affirmed.

Cited: 95 Ia. 480.

IOWA STATE SAV. BANK v BLACK (1894) 91 Ia. 490.

Case. Defendant was cashier of plaintiff. G was president and also a shareholder in the B Co. G sold his holdings in the B Co. at the agreed price of \$11,000, which was paid by defendant giving G credit on the bank's books for \$11,000. The stock he put in the cash drawer and marked it "cash item," \$14,380. The defendant, the cashier, appropriated the difference, \$3,380. The "cash item" was carried to the teller's cash book. Defendant claimed the transaction a private one and that he was therefore entitled to the \$3,380. The cashier of the bank was instructed by the court to explain the term "cash item." Books of the plaintiff were introduced as evidence. The court used the terms "acquiescence," "ratification," and "adoption" without giving a definition of each. The court also refused to allow the defendant to show a custom of the bank to loan money to defendant. Judgment for plaintiff for \$2,133.88. Appeal.

Granger, C. J. 1. The term "cash item" is not a matter of common understanding, and without such explanation the book, as evidence, would be valueless. 2. If a book is introduced contrary to a provision of the code, objection should

be made at the time. 3. Such acts must be expressly ratified, and the burden of proof is on defendant to show ratification. 4. The terms "acquiescence" and others were properly admitted. 5. The statute law forbids the bank loaning to its officers. To allow such a custom would be to defeat the entire purpose of the law. Judgment affirmed.

Cited: 107 Ia. 236.

FARMERS AND TRADERS NAT. BANK v HOFFMAN (1894) 93 Ia. 119.

Action to enjoin the collection of certain taxes. Defendant was a county treasurer. The tax assessor assessed plaintiff for the number of shares of stock issued. The tax appeared on the books as against the bank, and not against the respective shareholders. The plaintiff became insolvent shortly after the assessment was made. Sec. 819 provides that banks shall be liable for taxes only as agent of the stockholders, and that such stock cannot be assessed as the bank's personal property, without mentioning the holders. The bank paid the assessment several years without objection. Decree for plaintiff. Appeal.

Rothrock, J. The bank, not having any money of the shareholders, is relieved from liability to defendant. The only obligation of the bank was to pay such money or property which could fairly be held to be the property of the shareholders. There was no estoppel. The burden of proof was on defendant. Decree affirmed.

Cited: 96 Ia. 242.

FINDLEY v RICHARDS (1894) 93 Ia. 789.

Action to recover money had and received. Plaintiff was receiver of the O Bank. Defendant R had been a customer of the bank, but on November 8, he closed his account. C, vice-president of the bank, was thereafter indebted to R on a large amount of paper. On November 11, C sent defendant a draft for \$1,500, with which amount the bank charged defendant as borrower. Defendant R had discounted a number of notes for the bank before he closed his account. After this \$1,500 transaction, the bank would credit R with the amounts of these several notes. The jury found the transaction was one between defendant R and the bank. Judgment for plaintiff for \$977.45. Appeal.

Deemer, J. The defendant's knowledge of this charge being on bank's books, and his acquiescence therein, is the same as if he had been present and seen the entry made. Plaintiff is entitled to the amount of this \$1,500, less the amounts of the several notes which were discounted. Judgment modified and affirmed.

SYLVESTER v HENRICH (1895) 93 Ia. 489.

Action to reach property in hands of a bank. Defendants H and T were merchants. H ordered goods from plaintiff and referred plaintiff, regarding their credit, to defendant bank. Defendant answered plaintiff's letter of inquiry, saying the firm had a good business; that its members were competent; and that they would anticipate no trouble in defendants H and T, paying plaintiff's bill. At this time H and T were largely indebted to defendant bank, and had, for more than a year, overdrawn their account. Before this, the bank had taken a chattel mortgage on the firm's chattels, which had never been recorded. Ten days after defendant firm received plaintiff's goods, they became insolvent. Firm then sold its stock to B, and his notes for the purchase price were turned over to the bank to reduce firm's debt to them and, with consent of both members of the firm, to pay the private debts of T. Petitions dismissed. Decree for defendants. Appeal.

Deemer, J. 1. The question of deceit based on bank's letter to plaintiff is a question of law. 2. To recover damages for deceit, scienter must be proved. 3. The bank claiming nothing under the mortgages, it will hold B's notes, notwithstanding its failure to sell them. 4. The mere fact that the final result of the firm's business was disastrous is not sufficient to prove knowledge of falsity of the statements. The failure to record the mortgages gave no right of recovery. There was no estoppel. The liquidation of a private debt of T created no liability. Decree affirmed.

Cited: 113 Ia. 467.

CHURCH v JOHNSON BROS. (1895) 93 Ia. 544.

Action to recover commission on sale of lands. Defendants were real estate dealers and were also owners of defendant bank. Plaintiffs made a contract with

J Bros. by which they were to receive commissions for all lands sold to customers furnished by plaintiffs. All negotiations were carried on at the bank. By the laws of S. Dakota, banks were prohibited from dealing in real estate. Judgment for plaintiffs. Appeal.

Granger, J. A person, dealing as did the plaintiffs, would understand he was dealing with the bank. The bank, having made a contract, and availed itself of its benefits, is estopped to deny its authority to enter into such a contract. Judgment affirmed.

OTTUMWA SAV. BANK v CITY OF OTTUMWA (1895) 95 Ia. 176.

Action for the correction of an assessment of personal property. Plaintiff, in December, purchased United States bonds for the sum of \$28,400. These bonds it retained until the June following. The tax assessor in March left the amount of these bonds out of the taxable property of plaintiff. In May, the board of equalization included all capital of plaintiff. Decree for plaintiff. Appeal.

Robinson, J. 1. As the bonds were non-taxable, they were properly deducted by the assessor. 2. The statement of the appellants, showing for the first time that the plaintiff has assets which were not included in the first assessment, cannot be considered by this court. It is a well-established rule of practice that questions of fact must be presented for the consideration of the trial court before they can be reviewed in this court. Judgment affirmed.

DICKERSON v CASS COUNTY BANK (1895) 95 Ia. 392.

Motion to set aside an order appointing a receiver of defendant. The petition was filed by a stockholder. The bank was heavily indebted, its assets largely scattered, and it was unable to meet the claims of its creditors. Sec. 2903 of the state code provides that when a party shows a probable right or interest which is endangered, equity may appoint a receiver upon a stockholder's petition. Sec. 1572, ch. 6, title 20, of the code, enables the state auditor to have receivers appointed. Sec. 1, ch. 208, laws 1880, subjects a stockholder to liability to an amount equal to his stock, in case the assets are found insufficient to pay the debts. The receiver was appointed and qualified in December, 1893. The motion was made by intervening creditors. The interveners acquiesced in said appointment up to May, 1894. Motion denied. Appeal.

Given, C. J. Under sec. 2903 of the code, the circuit court had jurisdiction to appoint receiver on stockholder's petition. The special provisions of sec. 1572, ch. 6, title 20, do not exclude such right. The insolvent condition of the bank entitled petitioner to the granting of his order under sec. 1, ch. 208, laws of 1880. The acquiescence of the plaintiffs in the receiver's appointment will not now allow them to question the legality of said appointment. Order affirmed.

Cited: 109 Ia. 54.

PRIMGHAR STATE BANK v RERICK (1895) 96 Ia. 238.

Action to enjoin the collection of taxes and to recover taxes paid. Plaintiff's stock was all owned by individuals. The taxes on these shares were assessed in plaintiff's name and paid by plaintiff. Sec. 1, ch. 39, acts of the 23d Assembly, provides that the shares of capital stock of state banks shall be assessed to the bank, and they are absolutely liable whether they have dividends of the holders or not. Secs. 818, 819, provide that national bank stock shall be assessed as the personal property of the holders, and the bank will only be liable where they hold dividends of said holder and to amount of such holdings. Art. 3, Sec. 30, of the constitution prohibits the passage of any special law for the assessment and collection of taxes. Judgment for defendants. Appeal.

Robinson, J. The special provisions of the legislature are in harmony with the provisions of the constitution. It is sufficient when it is general and uniform as to all persons in a like situation. The fact that national banks and state banks transact similar kinds of business does not mean that they must be taxed according to the same plan. Judgment affirmed.

DES MOINES NAT. BANK v WARREN COUNTY BANK (1896) 97 Ia. 204.

Action on promissory note and to foreclose a lien on stock of defendant. C borrowed money from plaintiff and gave his note for the amount. To secure the

payment of the loan, C transferred a certificate of thirty shares of defendant bank stock. One of defendant's by-laws provided that the bank should have a lien on all stock for any indebtedness of a stockholder. Sec. 1076 of the code provides that a copy of the by-laws must be posted in the principal places of business. C had actual knowledge of the by-law, and at the time of this transfer was deeply indebted to defendant bank. Plaintiff had no knowledge of the by-laws of the bank which were never posted or placed in any conspicuous place. This transfer of stock had never been consented to. Decree for plaintiff. Appeal.

Robinson, J. 1. The plaintiff took the stock free from any lien. Secret liens are not favored by law. 2. Having neglected to give notice of a right to a lien in the manner pointed out by the statute, defendant shall not now be allowed to enforce it against a good-faith purchaser. Decree affirmed.

Cited: 97 Ia. 669; 105 id. 448; 110 id. 273.

STATE v YETZER (1896) 97 Ia. 423.

Indictment for fraudulent banking. Defendant was president of the defunct Bank of C. Defendant, having knowledge of the insolvency, permitted deposits to be made, although the moneys were not received personally by defendant. Secs. 1824, 1825, provide that if any bank shall receive any deposit when insolvent, any officer knowing of such insolvency, who knowingly permits of any such deposit, shall be guilty of fraudulent banking. Defendant desired the presence of P for the purpose of contradicting the state's witnesses. P was without the state. Defendant contended that the trial could not proceed without the personal presence of this witness. Verdict of guilty. Appeal.

Granger, J. The defendant, having knowledge of the bank's condition, is guilty of the offense described in secs. 1824, 1825, of the code, though he did not personally receive the money in deposit. The provision of the constitution in regard to compulsory process of a witness does not apply to witnesses without the state. Judgment affirmed.

Cited: 98 Ia. 460; 101 id. 397, 434; 103 id. 116; 110 id. 665.

IOWA STATE SAV. BANK v BURLINGTON (1896) 98 Ia. 737.

For the correction of a tax assessment. Plaintiff had a capital stock of \$100,000. At the time of the tax assessment, it had a surplus of \$112,331.39, which was undistributed profits; \$48,313.93 of this was invested in real estate. The plaintiff was then assessed for \$60,000, being the remainder of these surplus moneys. Ch. 60, sec. 28, of the acts of the 15th Assembly provided that "the paid-up capital of all savings banks" shall be subject to taxation. Sec. 1291 of the code provides that any person making up a list of personal property to be assessed is entitled to deduct from the gross amount all debts in good faith owing by him. Judgment canceling assessment. Appeal.

Robinson, J. This assessment was properly made. So long as the profits are used as a part of the working capital, and are not set apart for the use of the individual stockholders, they should be treated as a part of the capital, and taxed with it. Judgment reversed.

Cited: 95 Ia. 179; 96 id. 244.

THE STATE v FIELDS (1896) 98 Ia. 748.

Indictment charging defendant, president of B National Bank, with receiving money deposits when he knew the bank was insolvent. The indictment was founded on ch. 153, secs. 1 and 2 of the acts of the 18th General Assembly, which made it a felony for "any officer" of a bank to receive a deposit with knowledge that the bank was insolvent. Demurrer to indictment. Sustained. Judgment for defendant. Appeal.

Rothrock, J. The statute under which the indictment was found is applicable to officers of state and national banks. This statute does not interfere with the business operations of a national bank, and cannot be construed as incapacitating the bank from any duty to the government. Judgment reversed.

Cited: 106 Ia. 413; 113 id. 520, 521.

THOMAS v EXCHANGE BANK (1896) 99 Ia. 202.

Action on checks. P, under name of E Bank, defendant, had been doing a banking business with C National Bank. He borrowed \$1,000 from C Bank, giving his note which was renewed to June, when he gave the last note. M was surety on this note, the money on which was deposited with defendant. In August, P sold to plaintiff Thomas a check on C Bank for \$1,000, and one to plaintiff M for \$195, on the same day making a general assignment for creditors to plaintiff. C Bank, learning of the assignment, refused to pay plaintiff's checks, holding his balance to offset his note on which M was surety. P had been insolvent thirty days prior to giving plaintiff checks. Statute says assignee's claim is subject to defenses existing before notice of assignment. Plaintiff Thomas, as assignee of the E Bank, was made a party defendant. C Bank answered and cross-petitioned, setting up note given it by P, and claiming right to set off that note against deposit; that M demanded C Bank pay note out of deposit before holding him. Judgment for defendant C Bank. Appeal.

Deemer, J. 1. The surety had a right to demand of the C National Bank that it resort to the funds in its hands belonging to P. 2. If a debtor be insolvent, a bank may offset, as against a debt not due, any sum which it may be owing to the debtor, unless impressed with a trust. 3. The holders of the drafts have no greater rights than P would have had, had he been attempting to collect the deposit. Judgment affirmed.

Cited: 112 Ia. 748.

FIRST NAT. BANK v FELT (1897) 100 Ia. 680.

Action on notes. W Bros. owed plaintiff more than 10 per cent of its capital stock, including notes on which was due \$1,106. Defendant alleged that the controller had objected to this large indebtedness of W Bros., so defendant, as accommodation to plaintiff, executed his note for that amount, the plaintiff understanding that he incurred no liability thereby. The other note sued upon was made under the same circumstances. Plaintiff demurred. Overruled. Plaintiff then pleaded that W Bros. were insolvent, and that defendants note was given in lieu of W Bros.' indebtedness to plaintiff. On the face of the note, it appeared it was given on account of W Bros.' indebtedness. A statute provided that want of consideration may be shown as defense. The trial was by the court without a jury. Judgment for plaintiff for costs. Appeal by plaintiff.

Kinne, C. J. 1. The defendant may plead and prove want of consideration for the notes, which were without consideration. 2. The defendant's notes did not satisfy any part of the debt of W Bros. The judgment of the trial court stands as the verdict of a jury, and will not be interfered with by us, unless palpably against the weight of evidence. Judgment affirmed.

Cited: 104 Ia. 561; 109 id. 187.

GERMAN SAV. BANK v CITIZENS NAT. BANK (1897) 101 Ia. 530.

Action for money paid on forged check. McL gave plaintiff an application for a loan on I's property, purporting to be signed by I, also a mortgage, apparently signed by I; and a note for \$8,000, also bearing I's name. Plaintiff drew its check for \$8,000 payable to I and sent the same to McL, who presented it to the C Bank, the intervener. On the check was I's name as indorser, together with McL's name. The C Bank subsequently cashed it, indorsed it for collection, and sent it to the defendant. The latter charged the check to plaintiff's deposit. C Bank intervened. Judgment for plaintiff. Appeal.

Kinne, C. J. 1. When plaintiff deposited its \$8,000 with defendant C Bank, it parted with the ownership of the money, and defendant C Bank became plaintiff's debtor. In paying the money to intervener on a forged indorsement, it paid its own money. 2. If McL was acting as plaintiff's agent, he could not bind his principal by making a forged indorsement on the check of the payees named. 3. Plaintiff owed no duty to defendant or intervener, as to genuineness of indorsement of I. 4. Where one is deprived of the use of money wrongfully paid out, interest is recoverable. Judgment affirmed.

Cited: 103 Ia. 319; 111 id. 183, 212, 214; 113 id. 744.

DE SELLEM v IOWA CITY BANK (1897) 101 Ia. 566.

On promissory note against drawers and indorsers. Plaintiff is receiver of the I C National Bank. By agreement, the I C National Bank was to succeed to the

business of defendant, and there was a verbal agreement that the assets of defendant were to be transferred to the I C National Bank, and the payment guaranteed by defendant. C & Sons, being indebted to defendant, made the note in question, which was taken by the national bank in settlement of the business of defendant, to which a credit was given, and the indebtedness of C & Son on the books of defendant satisfied. Judgment for plaintiff. Appeal.

Granger, J. In view of these acts, a judgment against the defendant as guarantor of the note on the ground that the note was originally given to the state bank and transferred to the national bank, pursuant to the agreement, will not be disturbed. Judgment affirmed.

BENNETT STATE BANK v SCHLOESSER (1897) 101 Ia. 571.

Action on notes. Defendant gave notes to W for a horse, but, upon finding the animal not sound, as W had represented him, he returned the horse, W promising to give up the notes. Plaintiff claims it purchased these notes. Defendant set up fraud as defense to notes, and evidence thereof was admitted. Plaintiff's cashier testified that the bank officers had no knowledge of defenses. Evidence was injected by plaintiff of an issue not presented by the pleadings, and in charging the jury the court treated it as though the matter was in issue. Judgment for defendant. Appeal.

Kinne, C. J. 1. Defendant was properly permitted to introduce evidence tending to sustain the allegations of the answer. 2. The burden was on the plaintiff to show that none of its officers had notice of defenses to notes. This duty it did not discharge by showing that one of its officers had no such notice, thus leaving it a question for the jury. Having been responsible for introducing the evidence into the case, plaintiff cannot now be heard to complain that the court erred in treating the matter as in issue. Judgment affirmed.

Cited: 105 Ia. 552.

LATIMER v CITIZENS STATE BANK (1897) 102 Ia. 162.

Action by creditors to enforce payment for stock. B Bank drew its draft in favor of plaintiffs, on V Bank of Iowa. On presentation, payment was refused, and B Bank notified. B Bank was insolvent. Defendant, a resident of Iowa, owned shares in B Bank, but had paid only 50 per cent. A statute of South Dakota, the state of the B Bank's incorporation, provided that each stockholder should be liable for debts of the corporation to the extent of the amount that is unpaid on the stock held by him. The Dakota statute did not provide a special remedy nor create an exclusive statutory liability. Judgment for plaintiffs. Appeal.

Given, J. 1. The liability of these stockholders arises out of their contractual relations to the corporation and to its creditors, and that liability may be enforced in a court of Iowa against persons of whom it has jurisdiction. 2. The B Bank being insolvent, the plaintiffs are not required to exhaust their remedy against it, before pursuing their remedy against the stockholders. Judgment affirmed.

STATE OF IOWA v EIFERT (1897) 102 Ia. 188.

Indictment for fraudulent banking. Defendant's bank was insolvent. While absent, his son received from M a deposit. Defendant wired son not to accept any deposits, but on his return failed to refund the deposit to M, putting it with the assets of the bank. Indictment charged him with being guilty of fraudulent banking, in receiving from M a deposit, but failed to state in so many words, who owned the money M deposited. Statutes made it criminal for any officer of an insolvent bank to knowingly receive deposits. M testified on trial as to his going away and sending word to his son not to receive deposits. On cross-examination, over his objection, he testified about learning of the deposit on his return. Judgment for plaintiff. Appeal.

Kinne, J. 1. The indictment fairly charges that M was the injured party. 2. Any line of cross-examination which tended to contradict defendant's testimony in chief, was proper. 3. After coming into possession of all the facts, the principal may so ratify the act theretofore done, as to make it binding upon himself and the basis of a criminal liability. When the defendant, after knowledge of the facts, failed to return the money to M, he knowingly received the deposit. Judgment affirmed.

Cited: 104 Ia. 693.

FIRST NAT. BANK v BOOTH (1897) 102 Ia. 333.

Action on three notes. Defendant was indebted to plaintiff on two notes of \$1,000 each, on account of the N Works, and in a further sum, on account of the same concern. An officer of the plaintiff asked defendant how much he would become obligated for on account of the N Works, to which he replied not more than \$2,500. The officer went away returning shortly with a note for that amount, which defendant accepted, mentioning the two \$1,000 drafts which the officer promised to take care of. Defendant claimed the one for \$2,500 canceled the others, setting up an oral agreement. Defendant testified that a certain interview left him with the impression that the officer distinctly understood for what he intended to make himself responsible. Judgment for plaintiff for \$2,500, for defendant on others. Plaintiff appeals.

Given, J. 1. Taking the evidence introduced by the defendant as true, it does not tend to establish the alleged agreement. 2. The testimony complained of was the statement of a conclusion and not a fact, and should have been excluded. Judgment reversed.

STATE OF IOWA v BOOMER (1897) 103 Ia. 106.

Indictment for fraudulent banking. Defendant and B engaged in the banking business under name of the W Bank. B moved away, and defendant transferred most of his banking business to F Bank, but W Bank continued to receive occasional deposits. W Bank received \$200 in money from R, giving him a certificate of deposit. One week later, W Bank failed, defendant having transferred his property to secure debts. Indictment charged that defendant was engaged in banking, was insolvent, and knowingly received deposit from R of "lawful money of the U. S.," but failed to state that R owned the money he deposited. Ch. 153, sec. 1, prohibits insolvent banks from receiving moneys for deposit. Sec. 2 makes officer so receiving it guilty of felony. Employees of bank testified against defendant as to his solvency. They were permitted to testify as to the contents of the books of the bank. The books were in the possession of defendant, but he did not produce them. The state was permitted to introduce the clerk of the district court, who testified to his position and identified papers then introduced in evidence. Defendant claims he did not receive sufficient notice as required by law of an intention to examine the witness with reference to the papers introduced. The notice did not state what was expected to be proved. Judgment for plaintiff. Appeal.

Robinson, J. 1. The indictment was designed to include any money which was lawfully circulated in the United States, and hence the words "of the U. S." may be rejected as surplusage. 2. There was no variance in proof prejudicial to defendant. 3. The witnesses became familiar with the contents of the books in question with the knowledge and consent of the defendant, and proof of the information they obtained is as competent for the state, in the absence of the books, as would be proof of declarations the defendant had made. 4. Witnesses understanding banking and bank books, and knowing the value of property owned by defendant, could testify to his solvency. 5. Notice of what is expected to be proved by documentary evidence is not required. Judgment affirmed.

BROWN v BRADFORD (1897) 103 Ia. 378.

Suit to set aside conveyance. Plaintiff is L's assignee. L, with others, incorporated B Bank, of which defendant is receiver. L took 300 shares in exchange for the bank building which he had owned. The auditor claimed there had been an impairment of the capital, whereupon L delivered to the bank a deed of certain real estate, to be paid for by the bank out of undivided profits. It was agreed between L and bank that at any time before this real estate was paid for by the bank, it would reconvey it to him upon his request, and that L would repurchase at agreed price on request of cashier. L was to have use of the real estate conveyed to the bank by him. On August 29, L wrote across the face of this agreement, "canceled." Attorney-general brought action to wind up bank. L made an assignment. Judgment for defendant. Appeal.

Deemer, J. 1. The transaction was not ultra vires, and if it were, we doubt whether L or his representative could take advantage of it. 2. The conveyance as to the bank and depositors was absolute; as to stockholders, it was a loan. No fraud was intended. 3. The conveyance was a mortgage until the release on August 29. Judgment affirmed.

Cited: 105 Ia. 390.

STATE OF IOWA v UNION STOCK YARDS STATE BANK (1897) 103 Ia. 549.

Action by attorney-general to wind up bank and distribute assets. Defendant became insolvent. Receiver was appointed who made an ex parte application for an order for an assessment, which was granted with authority to collect same. Intervener herein is a stockholder who, on notice of the assessment and demand for payment, presented her petition of intervention, claiming that the court had no jurisdiction; that the assessment was premature; and that the act creating the liability was void. She asks that the order for assessment be set aside. Acts of 18th General Assembly, sec. 1, ch. 208, provides that shareholders shall be liable for an amount equal to their shares. Sec. 2, provides that if such liability be inadequate, it shall be distributed pro rata among creditors. Sec. 5 provides that no act creating banks shall take effect till the same has been submitted to people. Demurrer to intervener's petition. Sustained. Appeal.

Granger, J. 1. The court may determine, prima facie, the extent of the fund necessary to discharge the liability of the stockholders under the act, and authorize the collection of the same, when in a suit, to enforce such payment, the stockholders may contest their liability unaffected by such determination. 2. The liability for payment depends on the fact of the insolvency of the bank. 3. Sec. 5, with other sections, has reference only to banks of issue. 4. The assessment is not invalid because of want of authority for a receiver in case of a valid assessment, to collect and distribute the fund under orders of the court. Judgment affirmed.

EXCHANGE BANK OF LEON v GARDNER (1897) 104 Ia. 176.

Action for accounting and to recover amount of poor investments made by defendant as cashier of plaintiff. Defendant and others started to incorporate plaintiff bank, but eventually ran it as a co-partnership, doing business for a while according to by-laws, but subsequently defendant having almost entire charge. In good faith, he bought some notes which proved almost valueless, in the purchase of which he did not exercise the greatest care, although he made some inquiries. The books of the bank were always open to inspection, and the affairs examined twice a year, but no report was required of defendant. Judgment for defendant. Appeal.

Robinson, J. It was the duty of defendant to act with entire honesty in transacting all business of the bank, and to exercise as high a degree of care and skill as is generally exercised by business men in the management of such business; but he was not liable for honest errors in judgment, nor for the failure to take the utmost precaution possible in making the investments for the bank. Judgment affirmed.

METROPOLITAN NAT. BANK v COMMERCIAL STATE BANK (1898)
104 Ia. 682.

Action on note. Defendant B gave his note to B Bank, which indorsed and transferred it to plaintiff, as security for loan it made to B bank. In a suit to declare the B Bank insolvent, S B, clerk of the court, was appointed receiver. He executed a bond for the amount fixed by court, which was approved by himself, a clerk, and by the court. Plaintiff sent to defendant B's note for collection. B then sold some property and deposited certain notes, the proceeds of sales, in defendant, which paid out most of the proceeds on B's checks. After this action was begun, S B, as receiver of B Bank, paid plaintiff amount due on B's note. S B then asked to be substituted as party plaintiff. Defendant claimed S B was not receiver, being clerk of the court, and was not authorized to occupy both positions; also, that he could not approve his own bond; that, if he was receiver, his acts as clerk were void. A witness testified that he heard T, cashier of defendant, say that he felt he was somewhat negligent in the matter of this note. Objection. Overruled. Judgment for plaintiff. Appeal.

Robinson, J. 1. Defendant cannot be heard to complain of the appointment of the receiver. 2. The approval by the court of the bond given by the receiver, was an adjudication that the bond was sufficient. 3. In what B did as clerk after he qualified as receiver, he acted as clerk de facto, and third persons dealing with him had the right to rely upon his acts so performed as being legal. 4. T was the bank's agent. He was not authorized to confess liability on the part of the bank. His opinion as to what constituted negligence, was inadmissible. 5. An exception to the erroneous admission of evidence is not waived by the failure to object to introduction of evidence of the same kind. Judgment reversed.

BROOKE v KING (1898) 104 Ia. 713.

Action for preference. Petition alleged De W operated a private bank. Plaintiff owned land and had charge of other land as agent. In 1890, De W collected rents of land, as plaintiff's agent, to amount of \$900, of which only \$500 was ever paid over by him. In 1891, De W, as plaintiff's agent, sold land for \$14,000, receiving \$4,000 cash, balance in annual payments of \$2,000 each. Of the \$4,000, \$800 remained in the hands of De W. In 1892, De W received a payment of \$2,000, and in 1893 another, which he failed to give plaintiff. Judgment for plaintiff. Appeal.

Granger, J. There should be a preference of the claims over general creditors for all moneys actually paid to De W, and by him retained. When trust money was paid into the bank for deposit without authority, it was impressed with a trust character. As to the \$4,000 payment, the failure to show that there were funds of the debtor to be applied in payment, the right to a preference does not exist. Judgment modified and affirmed.

111 Ia. 607 (same case).

HAMLIN v SIMPSON (1898) 105 Ia. 125.

On check. Defendant gave his checks for about \$1,000 on C Bank to plaintiff, December 13, to pay for live stock. Plaintiff never presented these checks and on December 27 the C Bank failed. Plaintiff claims that defendant had no funds in the bank on which to draw at time of giving checks. December 16 defendant deposited over \$1,000 in C Bank, and during all this time he had a special deposit of \$2,000. Defendant testified that cashier of C Bank told him previously that he might check against this special deposit. When C Bank failed, defendant had nearly \$3,000 on deposit, while, if these checks had been presented and paid, this loss would not have been so great. Judgment for defendant. Appeal.

Waterman, J. 1. Failure to make timely demand and give proper notice will release defendant, if he has been damaged by such default. 2. If the drawer of check has reason to think his check will be honored, though he may have no credit balance on the books of the bank, his act in drawing it will not be fraud, and he will be in a position to insist on prompt presentment, demand, and notice. 3. The burden of proof is on plaintiff to show defendant was not injured. Judgment affirmed.

JONES v CHESEBROUGH (1898) 105 Ia. 303.

Action to establish preference. N & N made an assignment to plaintiff who deposited trust funds with B & Co., bankers. This deposit B & Co. knew to be trust fund, but mingled it with their other cash. B & Co. then made an assignment to defendant, at which time plaintiff's deposit could not be traced into any specific property, and assets of B & Co. were less than liabilities. Judgment for plaintiff. Appeal.

Granger, J. When trust money has been received, it is not material whether it is preserved in the form of money or other property; but to establish a preference it must appear, by presumption of law or otherwise, that it has been preserved in the hands of the assignee, as an increase of assets in his hands, from which it may be taken without impairment of the rights of creditors. Judgment reversed.

Cited: 111 Ia. 132, 136.

BANK OF MONTREAL v INGERSON (1898) 105 Ia. 349.

Action against surety on notes. Plaintiff received the notes from S Bank as security for certificates of deposit. An action was begun on each note against the two makers and defendant I, but I alone was served. Actions were consolidated. Defendant objects on ground that actions were not between same parties. Both notes were payable at S Bank. Defendant and maker went to S Bank one evening, defendant proposing that the amount necessary to pay the notes be charged to him in the morning. He had sufficient deposit to make the payments. President of S Bank replied that the notes were in C, but would be sent for and the amount charged to defendant, and notes canceled. Defendant gave no check. Next day S Bank failed before entries were made. Defendant claims this transaction paid the notes. Judgment for defendant. Appeal.

Robinson, J. 1. To set out in a petition the name of a person as defendant is not enough to make him a party; the service of notice or an appearance is

necessary. 2. The S Bank had no right to accept in payment of the notes a claim against itself. 3. The specifying in a bill or note of a place for its payment, does not alone create an agency in the person who does business at the designated place to receive money for the holder of the paper. Judgment reversed. Cited: 109 Ia. 423.

BENTON COUNTY SAV. BANK v BODDICKER (1898) 105 Ia. 548.

Action against sureties on bond. M & Sons, owing plaintiff \$6,000, gave plaintiff the bond on which defendants were sureties. Plaintiff sued M & Sons on notes, and recovered judgment. Defendants now claim that they signed the bond on express condition that before it should be delivered, it should be signed by three other good men in good financial standing. Defendants alleged that they applied to plaintiff for information about M & Sons, and relying on plaintiff's answers, which plaintiff knew were false, failed to take steps to protect themselves. The court charged that the burden was on the defendants to show that plaintiff had notice of the condition on which bond was signed. The amount of the bond was for an amount greater than plaintiff was authorized by law to lend. After the bond was given, the time of payment of some of the indebtedness was extended and new indebtedness contracted. The bond in terms covered existing indebtedness and that to be thereafter contracted, though it was a condition of the bond that the firm pay plaintiffs the full amount of their indebtedness. Judgment for plaintiff. Appeal.

Robinson, J. 1. Plaintiff may recover, if it can show that it received the bond in good faith for sufficient consideration, without notice of condition. 2. The creditor, in dealing with the surety, is bound to observe the utmost good faith, otherwise the surety will be discharged. 3. The court erred in its charge. Knowledge of such facts as would have caused a person of reasonable prudence to investigate whether the delivery was authorized, would have been sufficient to charge plaintiff with notice that the bond was illegal. 4. The prohibition of the statute is a rule for the government of the bank and does not make the loan void. 5. Construed together, the terms were sufficiently broad to include renewals of existing debts as well as those which should otherwise accrue. Judgment reversed.

LEACH v HILL (1898) 106 Ia. 171.

Assumpsit. E and S agreed that S should purchase stock and pay for it by checks to be drawn on the E Bank or on defendant, its cashier. These checks were to be treated as checks of E and paid in accordance with this agreement. Seventy days before the presentation of the check in question, defendant informed plaintiff, cashier of A Bank, "It will be O K to cash checks of S to the amount of stock he gets." S purchased stock from J H and gave him the check in question. J H indorsed it, and presented it to the A Bank which paid it. The E Bank refused payment. S had no funds on deposit, but E had enough. Sec. 2544 of the code provides that a trustee of an express trust may sue in his own name without joining with him the party for whose benefit the suit is prosecuted. Judgment for plaintiff. Appeal.

Given, J. 1. Under sec. 2544, plaintiff may sue in his own name. 2. E's obligation passed with the transfer of the check to plaintiff, who can sue E thereon. 3. Since the checks were in effect the checks of E, the verbal acceptance of defendant was valid. 4. In view of the nature of the business, this check was drawn within a reasonable time. Judgment affirmed.

PARDOE v IOWA STATE NAT. BANK (1898) 106 Ia. 345.

To recover money paid as usurious interest. Sec. 5198, U. S. R. S., provides that the person by whom usurious interest has been paid, or his legal representatives, may recover back in an action of debt twice the amount paid from the person receiving it. Plaintiff, as trustee and administrator of G's estate, purchased a mortgage with funds procured by the note in question, as security for which the mortgage was assigned. This note bore interest at a usurious rate and fell due August 1, 1892. When it was discounted, the discount was deducted, and on August 1, it was received and interest paid on the face amount at the highest legal rate. Subsequently, renewal notes were given and payments were made out of the moneys of the estate and for its benefit. The heirs of G have assigned all rights of action against defendant for the usurious interest to plaintiff. Judgment for plaintiff for interest on notes other than the above. Plaintiff appeals.

Robinson, J. 1. The first note was usurious, and the usury was carried into the renewal notes. 2. The note of August 1, 1892, was usurious, because it was computed on the amount loaned, and also on a sum illegally added thereto as usurious interest. 3. As plaintiff is not the principal debtor and what interest he paid was paid as agent, the interest in controversy was not paid by plaintiff within the meaning of the statute. 4. A debtor who has paid usurious interest, cannot transfer his claim by ordinary sale or assignment. Judgment affirmed.

TALBOT v FIRST NAT. BANK OF SIOUX CITY (1898) 106 Ia. 361.

To recover usurious interest. The action was under sec. 5198, U. S. R. S. Where usury has been charged, this section allows a recovery of twice the amount paid in an action brought within two years. Defendant charged plaintiff's account with interest at an illegal rate, included in certain notes, which it held. Defendant alleged a custom which permitted it. In March, 1890, plaintiff executed certain bonds to a trustee secured by mortgage. To cancel his notes, plaintiff gave them to defendant in June, 1890. Trustee foreclosed the mortgage for defendant, and plaintiff set up the usury in the notes. The court ordered the excessive interest deducted from the amount due on the bonds. The sale of the land left a large balance due on the bonds. This action was begun March 8, 1895. Judgment for defendant. Appeal.

Given, J. 1. The charge cannot be legalized by a custom of the banks as to the manner of computing interest. 2. If the delivery of the bonds was a payment, the action is barred by the Statute of Limitations. Judgment affirmed.

WILLETT v FARMERS SAV. BANK (1898) 107 Ia. 69.

Assumpsit. Plaintiff engaged defendant to furnish a clerk for a public sale, who should keep an account of the sales and take notes with good security, for purchases made. Defendant, by its agent, attended the sale and accepted one note, on which a fictitious name was forged as surety. The note was not paid. Defendant was authorized to exercise only the usual powers conferred on savings banks by the laws of Iowa. Demurrer. Sustained. Appeal.

Given, J. 1. The alleged agreement is not within the powers conferred, and is contrary to the spirit and purpose of the statute authorizing savings banks. Judgment affirmed.

FIRST NAT. BANK OF MARSHALLTOWN v MARSHALLTOWN STATE BANK (1899) 107 Ia. 327.

Action to recover the amount paid on a check. B was indebted to H and gave a check payable to S & H, on plaintiff bank, to S, who represented himself as H's partner. There was no such firm as S & H. S indorsed the check in the payee's name, and it was collected through defendant from C & Co., a bank in a neighboring city. After paying the check and learning of the fraud, plaintiff demanded repayment by defendant. H had no knowledge of the transaction. Plaintiff contended that defendant was liable for the negligence of C & Co. for cashing the check, and that S's indorsement was a forgery. Judgment for defendant. Appeal.

Waterman, J. 1. Defendant was not liable for the negligence of the bank, which first cashed the check. 2. As between a bona fide holder not guilty of negligence, and the drawee of a check, payment by the latter cannot be recovered. 3. Whether the indorsement was a forgery, was immaterial. Judgment affirmed.

Cited: 111 Ia. 215.

FIRST NAT. BANK OF MANNING v GERMAN BANK OF CARROLL CO. (1899) 107 Ia. 543.

For negligence in protest of draft. Defendant received for collection an inland draft owned by plaintiff. On presentation and refusal of payment, defendant placed it in the hands of a notary, A, with directions to protest it for non-payment. A made no inquiry for the residence of F, the maker, who lived near the bank, but forwarded notice to him with those sent to other indorsers, to the correspondent from which it received the draft. Plaintiff was denied recovery against F. The Iowa statutes recognize the giving of notice of dishonor as part of the duty of a

notary. Formal protest was not required in the case of an inland bill. Judgment for defendant. Appeal.

Ladd, J. The bank acted prudently in intrusting to a public officer the doing of that which was incumbent upon an officer of the law to do. Judgment affirmed.

SMITH v DES MOINES NAT. BANK (1899) 107 Ia. 620.

To establish a trust in funds in the hands of defendant. The L I Co. invested funds of plaintiff in bond and mortgage, secured by fire insurance policy. The mortgaged premises burned down and the insurance company gave a draft in payment to the L I Co. The L I Co. deposited it with defendant, which placed the amount thereon collected to credit of the L I Co. The L I Co. had no authority to receive the check, but plaintiff ratified its conduct in receiving it. Defendant knew that part of the L I Co.'s deposit belonged to other persons, but did not know what part, or that any belonged to plaintiff. Defendant owned a note of the L I Co., and when it fell due, paid it out of the L I Co.'s deposit. The L I Co. took back the note. Decree for plaintiff. Appeal.

Deemer, J. 1. If the L I Co. received the money wrongfully, it became a trust ex maleficio. 2. Ratification is equal to prior authority and need not be specially pleaded. 3. As the money was applied to the debt of the ostensible owner, without knowledge of the plaintiff's rights, plaintiff cannot recover. Decree reversed.

UBBINGA v FARMERS SAV. BANK (1899) 108 Ia. 221.

Contract to purchase promissory notes. Defendant had power to purchase, sell, or make loans on commercial paper. It agreed in writing to purchase from plaintiff four notes of \$300 each. Plaintiff contended that, by mistake, the contract failed to state that the face value of the notes was to be paid. Defendant contended that the purchase created a debt and that it had no power to incur such indebtedness. Judgment for plaintiff. Appeal.

Granger, J. 1. The agreement was to pay the face value of the notes. 2. The bank had power to purchase the notes. Judgment affirmed.

THILMANY v IOWA PAPER BAG CO. (1899) 108 Ia. 333.

Action to recover the price of a quantity of paper. Defendants were a paper bag company, and a national bank was guarantor of payment of the company's purchase from the plaintiff. The bag company defaulted, and the bank pleaded that there was no consideration, and that the guaranty was ultra vires. The bank, without consideration, gave plaintiff a written guaranty that the bag company would fulfill the contract. The court refused to allow the letter containing the guaranty to be put in evidence. There was no transfer of any property in connection with the making of the guaranty. Judgment for bank. Appeal.

Deemer, J. 1. The guaranty was without consideration and was ultra vires. 2. The letter was not admissible. Judgment affirmed.

Cited: 108 Ia. 358.

STEINKE v YETZER (1899) 108 Ia. 512.

Bill, by depositors in an insolvent bank, to compel the sale of real estate, and to have the proceeds applied to the payment of debts of the bank. Defendant Y, president of the C Bank, and largely indebted to it, conveyed land to it, stating in the deed that it was to secure all depositors, and to be used in paying all its debts. He informed the public of the conveyance. The bank conveyed by quitclaim to Y and he executed three mortgages thereon, and then conveyed the title to the bank, subject to the mortgages. All of the money raised on the mortgages was received and used by the bank. A month later the bank failed and was then removed as trustee under the Y deed, and the plaintiff, S, appointed. The several mortgagees set up their claims as first liens, and by cross bills sought to foreclose the same. A and B were also made defendants, and set up the fact by answer and cross bill, that they were judgment creditors of Y, in judgments obtained after the conveyance, and claimed prior right in the real estate. The court, by decree, established the respective rights of the mortgagees to first liens, and, subject thereto, confirmed the right of S as trustee, and authorized him to sell the same for the benefit of creditors of the bank. Plaintiffs and A and B appealed.

Waterman, J. 1. The conveyance of Y to the bank for the purpose expressed

in the deed, and his making known to the public that he had so conveyed, shows that he intended to vest in the trustee the power to execute the trust. 2. No particular form of words is necessary to create a power to sell. Such power exists whenever it is apparent that it is necessary to carry out the purpose of the grantor. 3. The mortgages were not void because of informality in the proceedings. 4. The bank received the proceeds, and that was a ratification of the act and cured defects in the conveyance, which was by quitclaim instead of by deed of trust. 5. The judgment creditors obtained their judgments after the conveyance to the bank, and defendant Y had a right to prefer other creditors to them. Decree affirmed.

LEE v MARION SAV. BANK (1899) 108 Ia. 716.

Bill to cancel notes and mortgage, and for an accounting. L, to defraud creditors, made shipments of goods in the name of S, president of defendant. The proceeds were deposited in the bank to L's credit. Afterward L gave a note to the bank for \$2,000, and gave a mortgage on real estate, and one on personal property, to secure it. No money was paid L, but the amount was placed to his credit. The same day he gave his check for the amount, and took a certificate of deposit payable to T, who kept it six months, and delivered it to S. L gave another note for \$3,500, and the certificate was attached as collateral. After L died, plaintiff, his mother, was appointed administratrix. S and plaintiff knew the facts. Declarations of S, while he was not transacting business of the bank, were admitted. Decree against the bank and S for the value of the chattels sold by the bank, and that the \$2,000 note and mortgage were fraudulent as against creditors. Appeal.

Given, J. 1. The knowledge of S that L desired to prevent his shipments from seizure, did not deprive him of the right, in good faith, of securing his bank for advances. 2. The placing of the certificate of deposit in the hands of T showed an intent to hinder and delay the creditors. 3. The knowledge of S, as president, was that of the bank: A bank is bound by the acts of its president in dealing with third persons. The \$2,000 must be regarded as given in fraud of creditors. Declarations of S, not made in the transaction of bank business, are not to be considered. 5. Knowledge of the plaintiff of a fraudulent intent on the part of her son in executing the mortgage cannot estop her from asserting the fraud, when she is acting for the estate. Decree reversed as to S, and affirmed as to the bank.

Cited: 111 Ia. 175.

WILLIAMS v LEWIS INVESTMENT CO. (1900) 110 Ia. 635.

To enforce stockholders' liability. The petition alleged that the defendants were a company and its stockholders, authorized to make investments, discount notes and receive deposits; that the general banking law made stockholders in banking companies liable to twice the amount of their stock, for the company's debts; that defendant company became insolvent after issuing its bonds, some of which plaintiff held. Demurrer. Sustained. Defendants contended that the company did not come within the general banking law. Judgment for defendants. Appeal.

Sherwin, J. The receipt of deposits did not constitute the defendant company a banking institution, and the stockholders are therefore not liable. Judgment affirmed.

BRADLEY v CHESEBROUGH (1900) 111 Ia. 126.

To impress a trust on certain funds. B, a member of the firm of B & Co., received funds as executor of H, and deposited them in the B & Co. Bank. B & Co. made an assignment to defendant for the benefit of creditors. The trust funds had been mingled with other money and used in the general business, and there was no showing that the assets of the estate were increased from its use. Plaintiff succeeded B, as representative of H's estate. Decree for defendant. Appeal.

Deemer, J. To obtain the right to a preference, it must be shown by presumption of law or otherwise that the funds have been preserved in the hands of the assignee, as an increase of the assets of the estate, from which it may be taken without impairment of the rights of general creditors. Decree affirmed.

CITIZENS NAT. BANK v CITY NAT. BANK (1900) 111 Ia. 211.

On check by drawee against indorsee. The G Bank drew on plaintiff payable to J. M forged J's indorsement, indorsed the check himself, and presented it to

defendant. Defendant paid the check and forwarded it to the plaintiff for collection, account of defendant, and plaintiff paid it. G Bank, on discovery of the forgery, sued plaintiff, and defendant was notified to intervene and defend and did so, but without being a party to that suit. In that action judgment was awarded against this plaintiff, but no judgment was entered against defendant. Each party now contends that this was a complete adjudication of the liability of the defendant. Judgment for plaintiff. Appeal by the intervener.

Ladd, J. 1. Although an intervener may appear and defend, it does not follow that judgment may be entered against him. 2. As defendant was not a party to first suit, no judgment could have been entered against it. The doctrine of res adjudicata has no application. The drawee was not chargeable with knowledge of any other signature than that of the drawer. Defendant acquired no title to the check. No reason appears for not permitting plaintiff to maintain this action. 3. A drawee bank is not required, before paying a check, to first present it to the drawer for certification or payment. Judgment affirmed.

TALBOT v SIOUX NAT. BANK (1900) 111 Ia. 583.

To recover usury. The action is brought under sec. 5198 of the U. S. R. S., which provides for the recovery of twice the amount of illegal interest paid, in an action begun within two years from the occurrence of the usurious transaction. The petition alleges the happening of the usurious transaction complained of, more than five years from the beginning of this action. Demurrer. Sustained. Judgment for defendant. Appeal.

Sherwin, J. The plaintiff's cause of action was barred and the demurrer for that reason was properly sustained. Judgment affirmed.

MERENESS v FIRST NAT. BANK OF CHARLES CITY (1900) 112 Ia. 11.

To recover deposits. Plaintiff alleged that his testator made a deposit with defendant in 1881, for which he received a certificate of deposit since lost; that plaintiff demanded the money in 1889, and was falsely informed by defendant's cashier, that there was no money due; and that plaintiff only discovered the fraud a few months from the time of beginning this action. Demurrer sustained. Judgment dismissing plaintiff's petition. Appeal.

Ladd, J. 1. Where a person deposits money in a bank in the usual course of business, he loans it to the bank which becomes his debtor to the amount of the deposit, and not his bailee. 2. The Statute of Limitations runs from the date of the certificate. 3. Deception by the party liable will not stop the statute. 4. Demand was not necessary to set the statute running. The running of the statute was not stopped by the death of M. Judgment affirmed.

STATE EXCHANGE BANK v PARKERSBURG (1900) 112 Ia. 104.

To review a tax assessment. Sec. 1322 of the code provides that shares of stock in state banks shall be taxed to them. The board of review taxed plaintiff on a certain sum which plaintiff claims is deposits. At the time of the organization of the bank, the stockholders orally agreed to deposit amounts equal to the amount of their holdings. These deposits could not be withdrawn and were to go to purchasers of stock. The certificates issued for them were indorsed non-negotiable. These are the deposits which have been taxed. Order granted confirming the action of the board of review. Appeal.

Waterman, J. The certificates of deposit are in no sense different from stock certificates. This money must be treated as surplus capital. Order affirmed.

BARDSLEY v GERMAN-AMERICAN BANK (1901) 113 Ia. 216.

Suit to cancel a mortgage. B and his wife executed the mortgage in controversy to defendant. Plaintiff's allegation was that the bank, at the time the mortgage was executed, was a co-partnership composed of C and H, and that H was cashier; that the mortgage was to secure a loan by the bank, and that H took the acknowledgment. Partnership was denied, but the fact that H was cashier was admitted. Defendant's position was proved. Suit dismissed. Appeal.

Deemer, J. 1. The defendant made the loan, and the mortgage was for its benefit. 2. The mere fact that one is an officer of a corporation or an agent of a

co-partnership, or that the money was borrowed to pay the cashier's claim, does not disqualify him from taking the acknowledgment of an instrument made to his principal. H, though cashier, could take the acknowledgment of the mortgage in controversy. Decree affirmed.

STATE v EASTON (1901) 113 Ia. 516.

Indictment for receiving deposits while insolvent. Motion to set aside the indictment and demurrer. Overruled. Defendant was the president and general manager of a national bank. A state statute made it a felony for state and savings banks officers to receive deposits, knowing the bank was insolvent. The testimony showed that the defendant had knowledge of the bank's insolvency when he received a deposit. Before the grand jury, a juror, sworn on oath administered by another juror, testified in regard to facts that were not disputed. It was not proved that certain exhibits, which were not returned with the indictment, were before the grand jury. Defendant contended that the state statute did not apply to national banks; that the testimony of the grand juror was improper; that the indictment was double; that the indictment was indefinite in not stating whether the bank was a corporation or firm; that the bank's book and the receiver's testimony as to the value of the assets at the time of the deposit was improper. Judgment for plaintiff. Appeal.

Given, C. J. 1. The bank was insolvent and defendant had knowledge of it. The statute applied to national as well as state banks. There was no error as to the testimony and evidence received by the grand jury. 2. The indictment was not double and was definite. The bank books were properly received in evidence. 3. The receiver's testimony as to the value of the assets was proper. Judgment affirmed.

COLE v CHARLES CITY NAT. BANK (1901) 114 Ia. 632.

Action on a note. Plaintiff was erecting a building for C C College, and was a large depositor in defendant. Plaintiff executed a note to the defendant and received credit therefor in his passbook. He saw the entry made, but did not observe that it was on the wrong side of the book, although it was on a page where the account had been settled and canceled. C C College deposited in defendant a sum which was due plaintiff on his contract, the sum being of the same amount as the note. Plaintiff did not know of this deposit, and was told by the president of defendant that no such payment had been made. In settling with defendant, plaintiff did not receive one of the amounts, and did not discover the mistake until six years after. He brought this action, four months after discovery. Sec. 3448 of the code provides, in an action for fraud or mistake, that the action shall not be deemed to have accrued until the fraud or mistake is discovered. There was no necessity to tender the receipt or check to maintain the action. Defendant pleaded the Statute of Limitations. Verdict directed. Judgment for defendant. Appeal.

Waterman, J. 1. The action comes within the statute, which provides that in an action for relief on the ground of fraud or mistake, the cause of action shall not be deemed to have accrued until such fraud or mistake is discovered by the party aggrieved. 2. There was willful concealment of one of these deposits. Judgment reversed.

PERCIVAL v STRATTMAN (1901) 84 N. W. (Ia.) 929.

Action on a check. Plaintiff, having received a check from B on the defendant's arm, indorsed it in blank, gave it to his father with instructions to obtain the cash on it, and remit it to a creditor of plaintiff. On presenting the check, defendant deducted an existing indebtedness of the father, supposing it was his check, and paid the balance. Plaintiff did not learn of the transaction until several days after. Defendant contended that the check was sold to plaintiff's father. Judgment for plaintiff. Appeal.

Ladd, J. 1. The defendant was merely the drawee, whose duty it was to pay. The father was agent for the plaintiff to collect. 2. The defendant parted with nothing, and was in the same position after paying this balance. Under such circumstances, the agent's indebtedness cannot be deducted or applied on a check or draft as against the claim of the principal. 3. Notice was immaterial. Judgment affirmed.

KANSAS

SCOTT v SMITH (1864) 2 Kan. 438.

For deposit. Plaintiffs, general depositors in the defendants' bank, alleged there was a balance due them, and that defendants refused to pay it. Defendants averred that the balance had been levied on by a sheriff under an execution against plaintiffs, and offered the return as proof. It was ruled out. Defendants then offered to prove that the money, mentioned in the return, was the money owing to plaintiffs, and that defendants paid it to the sheriff in part liquidation of a judgment on which execution had been issued and placed in the sheriff's hands; this evidence also was rejected. Defendants then asked leave to so amend their answer as to show the above facts. Refused. Judgment for plaintiffs. Error.

Kingman, J. 1. There was no specific money in the hands of the defendants of which plaintiffs were the owners, and on which a levy could be made. The evidence offered was therefore inadmissible. 2. The amendment changed the defense substantially and was properly rejected under sec. 475 of the code. Judgment affirmed.

MALONEY v CLARK (1870) 6 Kan. 82.

Damages for negligence. The plaintiff sent drafts to C for the benefit of C's principal, a person who falsely pretended to be plaintiff's brother, and was known to C by the brother's name. C delivered the drafts. Defendants knew C. C identified the impostor to them as the person to whom the drafts were payable. Defendants purchased them from him in the ordinary course of their business as bankers. The plaintiff sued them for the value of the drafts, contending that defendants, as bankers, were bound to exercise extraordinary diligence in ascertaining the identity of the person entitled to receive the money. Judgment for defendants. Error.

Safford, J. For the purpose of delivery, C was the plaintiff's agent. The mistake, however induced, was the mistake of the plaintiff. In no view of the case ought he to be allowed to recover his loss from the defendants. Judgment affirmed.

Cited: 35 Kan. 370.

FIRST NAT. BANK v TAPPAN (1870) 6 Kan. 456.

For deposit. Two bills of exchange, drawn by the same person, for the same amounts, payable at defendant bank, and purporting to have been accepted by plaintiffs, T & W, co-partners, were placed in circulation. The acceptance on one was forged. The forged bill was received by the defendant before maturity. T being notified, and supposing it to be the genuine bill, directed defendant to pay it out of the firm's deposits standing in T's name. W returned from abroad after the genuine bill fell due, found that it had been presented and protested, and instructed the defendant to pay it. He was then informed of the other bill, and, supposing it to have been accepted during his absence by his partner, said it was "all right." Four months after payment, plaintiffs found it to be a forgery, tendered it to defendant, and demanded the money paid by them to defendant. It was refused. T began suit. The court allowed the petition to be amended by joining W as plaintiff, without costs. Judgment for plaintiffs was entered immediately. Error.

Kingman, C. J. 1. Immediate notice of the forgery would not have enabled defendants to save any of their rights against the parties to the bill; the loss, therefore, was due to their failing to detect the forgery when presented. 2. The amendment was properly allowed, and the court's ruling as to costs will not be disturbed. 3. It was not error to enter judgment immediately under sec. 139 of the code, as the record showed that defendant could not be misled. Judgment affirmed.

Cited: 18 Kan. 123; 20 id. 136; 34 id. 106; 37 id. 72; 46 id. 378; 49 id. 724.

HALE v RAWALLIE (1871) 8 Kan. 136.

For special deposit. Plaintiff sued to recover \$15,000 left with defendants, bankers, in a package as a special deposit to be kept over night without reward. Defendants showed plaintiff the vault, where, they said, they kept their deposits. The package was placed in the safe, but not in the vault of the safe. During the

night it disappeared. The court instructed the jury that defendants were bound to use ordinary care in keeping the package, and that ordinary care is that which men of common sense and prudence usually exercise over their own property similar to that bailed. The court charged that if the testimony of a witness was false as to some points, his whole testimony might be disregarded. Judgment for plaintiff. Error.

Brewer, J. 1. Thus defining "ordinary care" and placing it before the jury, as the measure of obligation resting upon defendants, was error. The failure to exercise this degree of care is not gross negligence, for which alone defendants were liable. 2. The mere showing the vault did not enhance defendants' obligation to plaintiff. 3. Only that witness is to be disbelieved who has knowingly and willfully testified to a falsehood. Judgment reversed.

Cited: 8 Kan. 143 n; 9 id. 131 n; 15 id. 554; 41 id. 383; 49 id. 396.

PRATT v TOPEKA BANK (1874) 12 Kan. 570.

Foreclosure of mortgage. Defendant and wife executed a mortgage on land sold them by A, to secure four promissory notes. Three were given for the purchase price and one for growing crops and a reaper. They occupied the land as a home-stead. Afterward the notes and the mortgage were surrendered, and a new promissory note and mortgage given by the husband alone and assigned to plaintiff. The plaintiff alleged that the note and mortgage had been indorsed and delivered to M, cashier of plaintiff, and made a copy of the note and mortgage, showing transfer to M, "cashier," a part of the petition. Defendant demurred that no title in plaintiff was shown. The demurrer was overruled. Judgment for plaintiff. Error.

Brewer, J. 1. The allegation was sufficient to show title in the plaintiff, and the demurrer was properly overruled. 2. So much only of the note and judgment as was for the purchase price and interest should have been declared a lien on the land. Judgment reversed.

Cited: 13 Kan. 359; 18 id. 522; 26 id. 201.

ORNN v MERCHANTS NAT. BANK (1876) 16 Kan. 341.

Foreclosure of mortgage. Plaintiff, a national bank, took a mortgage on land in Illinois to secure a debt due from defendant. There was a prior lien which defendant promised to pay. Part of the prior lien becoming due, plaintiff, at defendant's request, and to save its own lien, paid this part and took as security the note and mortgage on Kansas land, now in suit. Defendant contended that the mortgage was void, having been taken to secure a debt concurrently created, a proceeding prohibited by the National Banking Law. Judgment for plaintiff. Error.

Valentine, J. The plaintiff had a right to get all the security it could for money necessarily paid out. The mortgage is valid. Judgment affirmed.

Cited: 41 Kan. 708.

GREGG v GEORGE (1876) 16 Kan. 546.

On check. Defendants gave plaintiff a bank check, which plaintiff presented. He asked the bank to credit it to his account. The bank refused. The court charged that the holder of a check is not required to present it more than once, when, on the first presentation, the bank has refused to pay it. The court refused to give such instructions requested by defendants as referred to the relations of banker and customer or to ordinary bills of exchange. Judgment for plaintiff. Error.

Brewer, J. 1. The refusal to place a check to the holder's credit is a dishonor thereof, and it is unnecessary after that to go through the form of specifically demanding its payment in cash over the counter. 2. It is not error to refuse to give instructions which, though they state the law correctly, are not applicable to the facts in evidence. 3. The failure to make demand in a reasonable time and to give notice of non-payment on the succeeding day does not discharge the drawer of a check unless he had suffered loss by reason of such failure. Judgment affirmed.

Cited: 23 Kan. 409; 53 id. 546.

GERMAN SAVINGS BANK v WULFEKUHLE (1877) 19 Kan. 60.

For money had and received. Defendant was vice-president and director of plaintiff, a state bank. While it was in an embarrassed condition he sold stock of plaintiff, belonging to himself and his partner, to H, who had overdrawn his account with plaintiff. Defendant in payment took H's check on plaintiff for \$2,100, payable to the firm, which check was subsequently paid. H sold the stock to plaintiff's cashier, and was credited with \$2,100. Plaintiff repudiated the transaction, tendered defendant the stock, demanded \$2,100, was refused, and brought suit. Judgment for defendant. Error.

Valentine, J. 1. The plaintiff could not purchase its own stock. 2. Defendant is conclusively presumed to have known that plaintiff received no consideration for it. 3. That the transactions were carried on in the name of the firm does not relieve defendant from liability. 4. The plaintiff was not estopped by the actions of its cashier. Judgment reversed.

Cited: 22 Kan. 411; 29 id. 325; 48 id. 682; 52 id. 781; 54 id. 218; 62 id. 23.

PAPE v CAPITAL BANK OF TOPEKA (1878) 20 Kan. 440.

Foreclosure of mortgage. Plaintiff, incorporated under the name of "The Capital Bank," as a savings bank, brought suit as "The Capital Bank of Topeka," to foreclose a mortgage given to secure a note made by defendant to S, and by him assigned to plaintiff. Art. 16 of ch. 23, G. S., authorized savings banks to discount negotiable notes. Plaintiff had for years exercised corporate powers as a savings bank, unchallenged by the state. Art. 13 of the state constitution provided that no banking law should be in force until voted on and approved at a general election. The law under which plaintiff had been incorporated had not been so voted upon. Judgment for plaintiff. Error.

Brewer, J. 1. Art. 13 of the constitution does not apply to savings banks. 2. Plaintiff is a de facto corporation, whose right to exercise corporate powers cannot be questioned collaterally. 3. If any amendment for misnomer is necessary, it will be considered as made by this court. 4. Plaintiff has the power, under sec. 127, art. 16, ch. 23, G. S. 225, of discounting negotiable notes; this power includes the power to purchase notes and mortgages. Judgment affirmed.

Cited: 23 Kan. 178; 29 id. 63; 35 id. 195; 39 id. 256; 44 id. 306; 48 id. 550; 53 id. 507; 58 id. 183; 61 id. 106, 563.

KNOX v COMMISSIONERS (1878) 20 Kan. 596.

Injunction Plaintiff sought to restrain county commissioners from collecting a tax levied on the average amount of a private bank's deposits. Sec. 23, ch. 34, Laws of 1876, provided that every private bank should list and return the "average amount of capital invested" in the business during the year preceding the first of March of each year, "whether such capital is in the form of a deposit in such bank or otherwise." Plaintiff, the owner of the bank, contended that the phrase "capital invested" meant the capital put into the concern by the banker himself. Judgment for defendants. Error.

Brewer, J. The statute aims to reach all the money used in the banking business, whether moneys owned by the banker before engaging in business, or borrowed by mortgage, loan, or obtained from depositors as deposits. Judgment affirmed.

LEMON v FOX (1878) 21 Kan. 152.

For deposit. M's private bank became the property, without change of name or place, of a partnership formed by M and defendants, M being the general manager and cashier. At first they used the old certificates of deposit, but, when plaintiff made his deposit, they were issuing new ones, differently colored, but the same in substance. M gave plaintiff an old certificate and did not write the word "cashier" after his name. He converted the money to his own use. Trial by the court. The testimony clashed on many points. Judgment for plaintiff. Error.

Brewer, J. 1. Where the testimony is conflicting, the findings of the court are conclusive. 2. The omission of the word "cashier" does not release defendants from liability for the acts of their partner. The color of the ink and the form of the certificates are matters of private regulation by the bank, which could in no way affect the plaintiff's rights. Judgment affirmed.

CITIZENS BANK v BOWEN (1878) 21 Kan. 354.

For deposit. Plaintiff and B, her husband, an insolvent, joined in a mortgage on their homestead to secure B's note. The money so raised B deposited to plaintiff's credit with the defendant bank, to which he was indebted in a sum greater than that deposited. Defendant issued a passbook to plaintiff, honored her checks, and balanced her passbook. Defendant subsequently retained this balance, contending that it was B's money. Defendant asked that B be made a party and the amount applied upon his indebtedness. Judgment for plaintiff. Error.

Horton, C.J. 1. The deposit of the money in the name of the wife, being a mere covinous cloak to secrete it from an insolvent's creditors, was liable for such insolvent's debts. 2. Defendant should have been allowed to set off the insolvent's indebtedness to it. Judgment reversed.

Cited: 25 Kan. 118, 339.

ABELES v COCHRAN (1879) 22 Kan. 405.

Breach of contract. Plaintiff sold to defendants, who were acting as directors of a state bank and for the bank, stock of the bank indorsed in blank. The bank afterward repudiated the contract on the ground that it had no power to purchase its own stock, whereupon plaintiff sued the directors, contending that the case came within the rule that an agent who acts without authority binds himself and not his principal. Judgment for defendants. Error.

Brewer, J. Where the contract is made in the name of the principal, and without any personal covenant on the part of the agent, and without any wrong on his part, the agent is not responsible, even though the principal be not bound. Judgment affirmed.

Cited: 25 Kan. 664; 48 id. 266.

BAKER v WOOLSTON (1882) 27 Kan. 185.

Ejectment. The plaintiff bought the land from the N Bank. The N Bank bought the land from the sheriff, under a judgment in its favor, which the record showed to be first lien. The defendant, a mortgagee, claimed that his mortgage was a prior lien, by an agreement with the bank. The evidence was conflicting as to whether plaintiff had or had not actual notice of this agreement, when he bought the land. The defendant claimed that the plaintiff, as a stockholder of the bank, had constructive notice. The plaintiff showed that he held stock merely as collateral, and though present at some meetings of the stockholders, took no part, and was not recognized as a member of the corporation. Judgment for plaintiff. Error.

Horton, C. J. 1. As to matters where the evidence is conflicting, we are concluded by the general finding of the trial court. 2. When a person is merely in possession of bank stock as collateral security, and does not participate in the meetings of the stockholders, and is not recognized as a member, he is not bound to have knowledge of the facts in possession of the corporation or its officials. Judgment affirmed.

ELLIS v LITTLE (1882) 27 Kan. 707.

Breach of contract. Plaintiff sued for failure to deliver a deed and to assign judgments. The defendant, receiver of an insolvent national bank, agreed with the plaintiff to deliver to him a deed to land and three judgments, thought to be owned by the bank, in exchange for a judgment lien, worth \$3,462.62, upon Ohio land, and a sum in cash. The judgment lien was assigned to defendant, who bid in the land at sheriff's sale, and subsequently realized \$500 upon it for the bank. The defendant acted without an order of the court. Judgment of \$500 for plaintiff. Error by plaintiff.

Horton, C. J. 1. The receiver had no capacity, without an order of the court, to enter into or act under the contract. 2. The estate of the bank is not liable for the default of a receiver, acting outside of his functions as receiver. 3. The plaintiff is entitled to recover the amount actually realized by the bank. Judgment affirmed.

Cited: 58 Kan. 803.

FIRST NAT. BANK OF FORT SCOTT v DRAKE (1883) 29 Kan. 311.

For conversion of bank's funds. Defendant became plaintiff's cashier, on his agreeing to work without a money compensation. He misappropriated \$3,165.50 of the bank's funds as salary. The rules of the bank, known to him, forbade allowing interest on demand certificates, but defendant issued demand certificates to himself and took \$2,203.97 of the funds of the bank as interest thereon. Acting as cashier, he sold to himself, as an individual, bonds belonging to the bank for \$846.66 less than their value. Defendant owned four-fifths of the bank's stock. Demurrer to the evidence. Sustained. Judgment for defendant. Error.

Brewer, J. 1. The contention that the directors are to be conclusively presumed to have known of and ratified the transactions of their cashier, cannot be supported. The presumption is for the benefit of stockholders, depositors and others dealing with the bank, not for protection of an officer converting the bank's funds. 2. The fact that defendant owned four-fifths of the stock, does not authorize him to do with the bank's assets what he pleased. Judgment reversed.

Cited: 31 Kan. 288; 36 id. 652; 37 id. 621, 622; 38 id. 127; 52 id. 115.

PEAK v ELLICOTT (1883) 30 Kan. 156.

To recover trust fund. Plaintiff alleged that he had made a note to a bank which he paid before maturity, at the request of the cashier, who promised to procure the note, then owned and possessed by another person, and to cancel it. The cashier gave plaintiff a receipt for a sum "in payment of note of same amount," describing it, signed it with his name, followed by the abbreviation "cash," and entered the amount as a cash deposit. The bank did not pay the note, but converted the money to its own use. It became insolvent and made an assignment. Plaintiff paid the note when due. He then sued the assignee for the amount paid the bank. Defendant demurred, on the ground that no cause of action was stated. Sustained. Judgment for defendant. Error.

Horton, C. J. The money was a trust fund and never belonged to the bank. The plaintiff, therefore, may follow and recover it from defendant, though it be mixed with funds of the bank. Judgment reversed.

Cited: 30 Kan. 163; 31 id. 171; 33 id. 70; 40 id. 380; 51 id. 99, 53 id. 653; 62 id. 792; 64 id. 505.

INGRAHAM v ELLICOTT (1883) 30 Kan. 163.

Horton, C. J. The questions in this case are identical with those in the foregoing case of "Peak v Ellicott," just decided, and upon the authority of that case the judgment of the district court will be reversed and the case remanded, with direction to the court below to overrule the demurrer filed by the defendant.

MANN v SECOND NAT. BANK OF SPRINGFIELD, OHIO, (1883) 30 Kan. 412.

On promissory note. Defendant notified the payees, the holders, that the consideration for the note had failed. Plaintiff then discounted it before maturity. It paid no money to the payees, but credited the amount agreed to be paid to the payees' account. At that time and up to the time of suit, the payees carried an average balance of several thousand dollars with plaintiff. Defendant set up failure of consideration. Judgment for plaintiff. Error.

Brewer, J. The plaintiff parted with no value for the note, and, having received actual notice of its infirmity, cannot claim the protection of a bona fide holder for value. Judgment reversed.

Cited: 30 Kan. 444; 34 id. 748, 750; 43 id. 200; 50 id. 96; 56 id. 496.

FOX v BANK OF KANSAS CITY (1883) 30 Kan. 441.

On promissory note. The payee sent the note indorsed to the plaintiff bank, which discounted it on the first day of grace and credited the amount to the payee, thereby increasing his balance, which he withdrew within five days thereafter and before suit. Defendant introduced a letter of the payee to the plaintiff, in which plaintiff was urged to present the note promptly, and another letter, written after protest, but before the payment of his balance to payee, asking plaintiff to put the note in the hands of attorneys for immediate

collection, with the advice that the attorneys consult the payee, and concluding, "We, of course have a point in this, which we will explain when I see you." Defendant was maker of the note. Judgment for plaintiff. Error.

Brewer, J. 1. One who purchases before the expiration of the days of grace is entitled to the ordinary protection of the bona fide holder. 2. The payment of his entire balance to the payee made the plaintiff a purchaser for value. 3. No mere suspicion will destroy the protection accorded to one dealing in negotiable paper. Judgment affirmed.

Cited: 43 Kan. 200.

ELLICOTT v BARNES (1884) 31 Kan. 170.

To recover trust fund. Plaintiff paid money to a bank, upon the cashier's promise to use it to pay a note, payable by plaintiff, held and owned by a third person. The money was not credited upon the books of the bank. Plaintiff's receipt from the cashier did not set forth the purpose for which the money was paid. The bank subsequently assigned to defendant for the benefit of creditors. The note was unpaid. The cashier was dead at the time of the suit. A conversation between the plaintiff and the cashier was admitted. Defendant contended: 1, That plaintiff could not maintain a suit without first paying the note; 2, that a conversation between plaintiff and the cashier should not be admitted, arguing that, if the words and acts of the cashier were those of the bank, then the cashier was the bank; but the cashier was dead; therefore the bank was a deceased person within the statute, sec. 322 of the code; 3, that the judgment could not be rendered for plaintiff, because the money was not credited on the books; and 4, that, by accepting the receipt, plaintiff was restricted to the rights of ordinary creditors. Judgment for plaintiff. Error.

Horton, C. J. 1. That plaintiff has not paid the note, does not affect his right as against defendant. 2. The argument that the bank is a deceased person, is neither plausible nor sound. 3. The omission of the cashier to enter the money on the books, cannot prejudice plaintiff's rights. 4. Plaintiff is not concluded by the character of the receipt from impressing the money he paid to the cashier with the trust. Judgment affirmed.

Cited: 33 Kan. 566; 53 id. 653; 57 id. 202; 58 id. 73.

HARRISON NAT. BANK v ELLICOTT (1884) 31 Kan. 173.

To declare trust. The plaintiff alleged that it had sent a promissory note for \$2,000 to a Kansas bank for collection; that the Kansas bank delivered the note to the makers for a new note for \$2,000, payable to itself, which it converted. The Kansas bank afterward, becoming insolvent, assigned to defendant. Plaintiff asked that defendant be declared a trustee for plaintiff for \$2,000, and ordered to pay plaintiff before paying the other creditors. Defendant demurred on the ground that the petition did not state a cause of action. Sustained. Judgment for defendant. Error.

Valentine, J. The petition is defective in that it does not show how the note was converted, or that the proceeds, if any, ever came into defendant's hands. Judgment affirmed.

Cited: 40 Kan. 380.

ASHER v SUTTON (1884) 31 Kan. 286.

For conversion of a safe. The president and cashier of an insolvent bank executed to plaintiff, one of its creditors, a bill of sale of the safe used in its business. Defendant, a sheriff, sold the safe before it had been removed by plaintiff, under an execution on a judgment in favor of another of the bank's creditors. The sale to plaintiff was not authorized by the directors, but the president and cashier had always conducted the bank's business. Judgment for plaintiff. Error.

Horton, C. J. Neither the president nor the cashier of a bank, organized under the laws of the state, had the power, *virtute officii*, to sell the safe for a debt of the bank. Judgment reversed.

Cited: 52 Kan. 115.

BANK OF LINDSBORG v OBER (1884) 31 Kan. 599.

Damages for negligence. Plaintiffs, owners and holders of a promissory note, delivered it to the Bank of S, with the understanding that it should be forwarded to

the defendant bank for collection. The defendant's attorney, a notary public, did not properly make demand or serve notice of non-payment, and the indorsers were discharged. Plaintiffs sued for the amount of the note. Plaintiffs neglected to make an amendment to their petition, though leave to do so had been granted during the trial. Judgment for plaintiffs. Error.

Valentine, J. 1. The defendant is liable for the failure of its agent to make proper demand and to give due notice of non-payment, although that agent was a notary public. 2. The amendment will be considered as having been made. Judgment affirmed.

Cited: 41 Kan. 396; 48 id. 550.

KANSAS LUMBER CO. v CENTRAL BANK OF KANSAS (1886) 34 Kan. 635.

For money paid by mistake. The general manager and agent of defendant, a corporation, presented a check, drawn in defendant's favor, to plaintiff, a bank, for payment. The check called for \$300, but plaintiff paid him \$800 in twenty dollar gold pieces. He accounted to defendant for \$300 only. Judgment for plaintiff. Error.

Valentine, J. The general manager and agent, in presenting and receiving payment of the check, was acting within the scope of the authority impliedly conferred upon him by defendant, and within the course of his employment. To give immunity to corporations in such cases would be against all authority. Judgment affirmed.

EMPORIA NAT. BANK v SHOTWELL (1886) 35 Kan. 360.

On draft. Plaintiff sued the bank for paying a draft to the wrong person. The plaintiff received an application for a loan from one falsely pretending to be G. The supposed G signed G's name to the application and executed to plaintiff notes and mortgages as G. The mortgages purported to be upon land owned by the real G. The plaintiff thereupon sent a draft to G, payable to G. The letter containing it was obtained without theft by the impostor, who presented the draft at the defendant bank, indorsing it as G. Defendant paid the draft to the impostor, who fled with the proceeds. Judgment for plaintiff. Error.

Horton, C. J. The plaintiff dealt with the false G as though he were the real G. The defendant is not responsible for the fraudulent letters and representations of the false G, and, as it took the draft in good faith and for value, it cannot be holden as for a conversion. Nor is it liable for the return of the money paid to the false G; it paid the money to the very person plaintiff intended should receive it. Judgment reversed.

FIRST NAT. BANK OF FORT SCOTT v DRAKE (1886) 35 Kan. 564.

For money wrongfully appropriated. Defendant, while president and cashier of the plaintiff bank, issued demand certificates to himself and took funds of the plaintiff as interest thereon. The interest was prohibited by the rules of the bank, and his action was then unknown to the directors and unratified by them acting as a board, though a majority individually ratified the transaction. Defendant contended that the bank was concluded by these individual ratifications. Judgment for plaintiff. Error.

Johnston, J. As the only powers conferred upon the directors are those which reside in them as a board acting collectively as such, the individual consent of a majority of the members, acting separately, is not enough to ratify the unauthorized appropriation of the money of the bank by the defendant. Judgment reversed.

Cited: 49 Kan. 226; 58 id. 308.

COOPER v FIRST NAT. BANK OF WASHINGTON (1888) 40 Kan. 5.

For money had and received. Plaintiff lent her husband, C, \$800, which he invested in a stock of goods. After he had been in business less than a year, he conveyed the stock to plaintiff to secure his indebtedness to her. At that time, C was indebted to the defendant in the sum of \$624, secured by an unfiled chattel mortgage on the goods. Plaintiff turned the goods over to defendant for sale as provided in the mortgage. The goods were inventoried by defendant at \$1,300 and transferred to others as security for the debt, which was also assigned. Defendant refused to pay plaintiff the value of the goods less \$624. Defendant

contended that the cashier exceeded his authority and that the transaction with plaintiff was ultra vires. Judgment for defendant. Error.

Holt, C. 1. C had a right to give his wife a preference over his other creditors. 2. Defendant had the power to take the property to secure its debt, and must account for any balance remaining after its claim was satisfied. Judgment reversed.

Cited: 46 Kan. 717; 53 id. 722.

BROCKMEYER v WASHINGTON NAT. BANK (1888) 40 Kan. 376.

For trust fund. Plaintiff had deposited money with a private banker, K, and held a certificate therefor. K went out of business and deposited his bank's cash, more than enough to pay its debts, with the defendant, a bank, directing it to honor such certificates of deposit, theretofore issued by him, as should be presented. Plaintiff neither knew of nor assented to these transactions. He learned of them, however, when his certificate became due, but meanwhile K had withdrawn all the funds deposited with defendant, which refused to honor the certificate when presented by plaintiff. Between this withdrawal and presentation K became insolvent. Judgment for defendant. Error.

Horton, C. J. The intention of K to appropriate the funds deposited with defendant to the payment of his bank's debts was revocable. Judgment affirmed.

Cited: 40 Kan. 744.

BROCKMEYER v WASHINGTON NAT. BANK (1889) 40 Kan. 744.

Rehearing. Where a bank delivered to another bank money and securities to pay a creditor, and the account was kept in the name of the depositing bank absolutely and not as trustee: Held, that the bank making the deposit could withdraw the same at any time before notice to the creditor. Denied.

ELWOOD v FIRST NAT. BANK OF GREENLEAF (1889) 41 Kan. 475.

For receiver. The plaintiff was owner of eleven shares of defendant's stock. He alleged generally that through the gross misconduct of its officers the bank had become insolvent, that its officers were then fraudulently squandering its assets, and that immediate relief was necessary to save him from irreparable injury. The records showed that the petition and precipe were filed, summons issued, and a receiver appointed, on the same day. The notice of the application for a receiver was served upon a director in the absence of the officers from the county. Defendant moved that the receiver be discharged. Motion granted. Error.

Valentine, J. 1. Where the record shows that action was begun and the receiver appointed on the same day, it will be presumed that these things were done in their proper order. 2. A receiver may be appointed without notice. 3. It is not necessary that the grounds for the appointment of a provisional receiver should be set forth in detail, as it is only an ancillary remedy. This is a proper case for the appointment of a receiver. 4. The officers and stockholders are not, at this stage, necessary parties defendant. Order reversed.

Cited: 48 Kan. 580; 52 id. 114, 664.

DREILLING v FIRST NAT. BANK (1890) 43 Kan. 197.

On promissory note against makers. The plaintiff, a bank, bought the note before it was due from the payees, and gave them credit on their account. The amount of the payees' credit had always been many times greater than the amount of the note. The supplemental petition showed that the plaintiff had been consolidated with another bank, under a new name, after the commencement of the action. Defendants proposed to show that the consideration had failed. The court required that they show first that the plaintiff was not a bona fide holder for value before maturity. Judgment for plaintiff. Error.

Holt, C. 1. The ruling was proper. It would have been idle to show a failure of consideration if the plaintiff was a bona fide holder for value before maturity. 2. The bank was the payees' debtor to the amount of the note. 3. The bank became a purchaser for value. Judgment affirmed.

Cited: 47 Kan. 569; 51 id. 509.

FIRST NAT. BANK v CITY OF OTTAWA (1890) 43 Kan. 294.

Garnishment. Plaintiff, a national bank, took an assignment from H of all moneys which should be owing to H from defendant, a city of the second class, under a contract for paving, then in the course of execution by H, to pay the existing bona fide indebtedness of H to plaintiff. H executed the contract. Defendant answered as garnishee in suits brought by H's creditors, admitting its indebtedness to H. When plaintiff instituted this action and sought to garnishee the fund, the defendant answered, setting up the garnishments, admitting its indebtedness to H, and praying interpleader between all the claimants, some of whom had reduced their claims to judgments. Defendant was adjudged to pay the costs of this suit and to pay the judgments. Error.

Simpson, C. 1. The assignment taken by plaintiff is valid, being intended to pay an existing bona fide indebtedness. 2. Defendant, being a city of the second class, cannot answer as garnishee. The creditors take nothing by their garnishment proceedings; each has the right to contest the priority and legality of the others' liens. Judgment reversed.

FIRST NAT. BANK v FISHER (1891) 45 Kan. 726.

Injunction to restrain the collection of a tax. Plaintiff was a national bank. The township assessor levied, in solido, a tax against plaintiff's property, including its stock, without notice to the stockholders. The county commissioners, without notice to the stockholders, increased the tax, the assessment being in solido, upon its property and its stock, the latter being assessed as the property of the stockholders. The first assessment was admittedly void; but defendants contended that before injunction could issue plaintiff must have paid some part of the tax lawfully due. Judgment for defendants. Error.

Horton, C. J. The assessment of the entire stock of the bank in solido against the bank was invalid, therefore the first assessment was void. The second assessment was void because no double deduction or exemption can be allowed to the stockholders. According to the allegations of the petition there is no tax lawfully due and therefore none can be paid. Judgment reversed.

Cited: 47 Kan. 745; 50 id. 361; 53 id. 461.

FIRST NAT. BANK v RIDENOUR (1891) 46 Kan. 707.

Foreclosure of mortgage. A firm executed a chattel mortgage to one of its members to secure a note given for a bona fide indebtedness due to plaintiff, a national bank. The mortgage recited the nature of the transaction. It was filed before the firm's other creditors, herein joined as defendants, attached the goods. The findings of fact declared that the mortgage was given to defraud the other creditors, but that this was not known to plaintiff; and that the value of the property was not in excess of the debts secured. The nominal mortgagee was a member of the firm, and defendant's attaching creditors alleged that plaintiff did not know of the mortgage until after the filing of the attachments. Judgment for defendants. Error.

Strang, C. The mortgage created an equitable lien, good against all persons except purchasers without notice, and it is enforceable without regard to the nominal mortgagee's knowledge of the fraud. Judgment reversed.

Cited: 46 Kan. 718; 49 id. 438; 53 id. 721.

POLLARD v FIRST NAT. BANK (1891) 47 Kan. 406.

Injunction to restrain the collection of a tax. Plaintiff's board of directors declared a dividend of \$40,000 payable out of the bank's surplus of \$50,000. The cashier charged the surplus account with \$40,000, opened a new account designated "Stockholders' Account," and entered thereunder: "February 28, 1889, by surplus account as per resolution of directors, \$40,000." Plaintiff returned to the assessor for taxation for 1890 only \$10,000 of undivided surplus and profits. The county officers assessed a tax upon \$50,000, as being the undivided profits or surplus of the bank, contending that the action of the directors was a subterfuge to avoid taxation and was induced by fraud. The finding of the court negatived fraud and was supported by the evidence. Judgment for plaintiff. Error.

Simpson, C. What the inducement was for the directors' action is a question of fact, and the finding of the trial court, being supported by some evidence, will not be disturbed. Judgment affirmed.

WINFIELD BANK v NIPP (1892) 47 Kan. 744.

Injunction against the collection of taxes. Plaintiff was a state bank with a capital stock of \$50,000, divided into five hundred equal shares, held by individual stockholders. The bank president's sworn return to the assessor represented that it owned corporate stock worth \$22,000, without giving a list of the stockholders and their holdings. A tax levied on this stock against plaintiff was sought to be enjoined on the ground that the bank stock was held by individuals. Judgment for defendants. Error.

Horton, C. J. All of the action taken by defendants in the assessment of the stock, and in the levying of the taxes thereon, was the result of the return of plaintiff. Judgment affirmed.

Cited: 50 Kan. 361.

COMMISSIONERS OF STAFFORD CO. v NATIONAL BANK (1892)
48 Kan. 561.

Action for taxes. On March 1, 1890, the stockholders in defendant, a bank, were assessed under sec. 6868, G. S. of 1889, which provided the method for collecting the taxes by suit. Subsequently the taxes against each of the stockholders were extended upon the tax rolls, and this action was begun against the defendant to recover taxes of 1890, assessed against the stockholders, and the penalties for the non-payment thereof. Judgment for defendant. Error.

Horton, C. J. A tax is not a debt in the ordinary acceptation of that term, and consequently an action at law cannot be maintained to recover a tax, for the collection of which adequate provisions are prescribed by statute. Judgment affirmed.

Cited: 49 Kan. 756; 59 id. 413.

INTERSTATE NAT. BANK v FERGUSON (1892) 48 Kan. 732.

Mandamus. Defendant, the treasurer of a first-class city, refused to deposit city money with plaintiff, a national bank. The mayor and council had designated plaintiff as a depository for city funds, and plaintiff had taken all necessary steps to make it such a depository. Secs. 87 and 189 of the city act provided, that the city treasurer should deposit all public money in some bank designated by the council, and that money collected as fines should first be applied to the payment of salaries and any surplus should be put in the general funds. Demurrer: 1, That "city funds" or "funds of the city" used in the ordinance in regard to plaintiff does not include money collected as fines under sec. 87; 2, that the mayor and council had no control, under either section, over any funds paid to the defendants; 3, that the provision for depositing public money in a bank was unconstitutional; and, 4, that a national bank had no power to receive such deposits.

Valentine, J. 1. The funds mentioned in the act are city funds, and for the purpose of creating a depository for them, the mayor and council have absolute authority over them. 2. The act is constitutional. 3. The bank has the power to receive all the funds, which the contract with the city authorizes it to receive, and under the terms and conditions imposed upon it by the statutes, the ordinances, and the contract. Demurrer overruled.

FIRST NAT. BANK v GRIMES (1892) 49 Kan. 219.

Replevin. Plaintiff sued to recover chattels which defendant, a national bank, asserted a right to retain under a chattel mortgage which plaintiff had given to secure his original note, which had been several times renewed. Plaintiff averred that defendant had charged usurious interest and included it in the note; that the several renewal notes had been tainted with usury; and that he had fully paid the original note. Defendant excepted to the charge that if the original note was usurious and was received without making a new contract, the usurious interest being embraced in the renewal notes, the mere renewal would not purge the transaction of usury. Judgment for plaintiff. Error.

Johnston, J. It is immaterial whether the usury was embraced in the original or renewal notes; in either case the bank could not recover the usurious interest. Judgment affirmed.

Cited: 53 Kan. 137, 617.

NATIONAL BANK v SHUMWAY (1892) 49 Kan. 224.

Mandamus to compel defendant to perform his duties as assignee of an insolvent bank. Defendant's return alleged that the deed of assignment was void, because authorized at a meeting, of which all the directors had not been notified; and because it had not been ratified by any subsequent lawful meeting. There were seven directors, four of whom participated in the meeting and voted to assign; no one of the other three was in the state. The whereabouts of one of the three was unknown, another had not participated in the management for three years, and the third had sold his stock three years before and had not since participated in the management of the bank. These three had not been notified. Prompt action had been necessary to save the assets from attaching creditors. Two of the non-resident directors had subsequently attended the creditors' meeting and helped elect defendant assignee. The bank made no objection to the assignment. Plaintiff demurred.

Horton, C. J. The assignee should, under the circumstances, proceed to discharge his duties and comply with the law. Demurrer sustained.

Cited: 62 Kan. 467.

BANK OF SANTA FE v BUSTER (1893) 50 Kan. 356.

Injunction to restrain the collection of a tax. The plaintiff, a bank, alleged that its cashier, through a mistake of law and fact, gave the assessor a statement showing the bank to be possessed of \$5,000 in personal property, whereas the sum on which it should be taxed did not exceed \$2,000. Pars. 6868, 6921 and 6922, G. S. of 1889, required banks to supply the tax officers with statements showing the stockholders, the value and ownership of the stock, and the value of the undivided profits. The law required banks to apply to the board of equalization to have errors in assessments corrected. This the plaintiff had not done. Injunction granted. Dissolved in district court. Error.

Valentine, J. The petition is defective in that it does not show that plaintiff either made the statement required by the statute, or sought to have the mistake corrected by the board of equalization. The plaintiff, therefore, is bound by the statement of its cashier and agent. Order sustained.

BANK OF SUN CITY v NEFF (1893) 50 Kan. 506.

An allegation that a bank "was, on the 10th day of June, 1887, and ever since said date, until the institution of this suit, has been a private corporation," is a sufficient allegation that the bank was a corporation at the time of instituting the action.

MYERS v BOARD OF EDUCATION (1893) 51 Kan. 87.

Action to recover a trust fund. H, treasurer of plaintiff, deposited its money to his credit, as treasurer, in a private bank of which he was manager, without authority from plaintiff, though with the knowledge of several of its members. This money was mingled with the bank's general fund to the knowledge of both parties. The bank's president assigned all his property, including the bank, to defendant for the benefit of his creditors. H, as treasurer, was then credited with \$3,265.71; the cash in the bank was \$1,535.57. H subsequently resigned as treasurer, and mortgaged land to plaintiff as collateral security for the payment of the \$3,265.71. After H's resignation, defendant notified H, but not plaintiff, to present claims. Plaintiff sued for \$3,265.71. Judgment for plaintiff. Error.

Johnston, J. 1. The amount sued for is a trust fund, a charge upon the entire assets held by defendant as assignee, and plaintiff has a preferred right thereto over the general creditors. 2. The taking of collateral security does not prevent plaintiff from recovering. 3. Notice to H was not notice to plaintiff. Judgment affirmed.

Cited: 52 Kan. 364, 454; 53 id. 650; 55 id. 128; 57 id. 782; 59 id. 158, 160; 62 id. 792; 64 id. 505.

WATKINS v NATIONAL BANK (1893) 51 Kan. 254.

Proceedings to appoint a receiver for a bank. Plaintiff alleged that the directors of a bank, in process of voluntary liquidation, were not acting in good faith, in winding up the affairs of the bank, averring them in one part of his petition to be "duly qualified and acting directors." The action of placing the bank in liquida-

tion was taken by a vote of two-thirds of the stockholders. Afterward the directors paid a dividend of 25 per cent to the stockholders. Plaintiff accepted his share. Defendants admitted the allegations not involving bad faith. Judgment for defendants. Error.

Johnston, J. 1. The plaintiff's allegation that the directors were duly qualified and acting directors, being admitted by the answer, must be taken as true. 2. The bank was placed in liquidation by a vote of two-thirds of the stockholders. Their right to so place it is given by the act of congress (Revised Statutes, sec. 5220) and plaintiff cannot have a receiver on the ground that his interests were thereby prejudiced. He is, besides, estopped, by having received the fruits of the liquidation, from denying its validity. Judgment affirmed.

Cited: 52 Kan. 664; 64 id. 434.

BROWN v EXCHANGE BANK (1893) 51 Kan. 359.

Action on certificate of deposit. Plaintiff employed T to sell land. T made a sale conditioned on the approval of plaintiff, and deposited in defendant part of the purchase price with the understanding between plaintiff, T, and the bank, that T should withdraw and return it, if plaintiff did not approve the sale. The defendant issued a deposit check to plaintiff for the amount. Plaintiff subsequently failed to approve the sale. T withdrew and returned the money. Plaintiff sued defendant therefor. Judgment for defendant. Error.

Johnston, J. The bank, as trustee, has turned over this fund to the party entitled to it, and should be exonerated from all liability on account of the deposit. Judgment affirmed.

HARRISON NAT. BANK v VOTAW (1893) 51 Kan. 362.

Motion for execution against stockholder. Defendants subscribed to this writing: "We, the undersigned, agree to take the number of shares set opposite our respective names in the Douglass Sugar Company, said shares to be in the sum of \$100 each." Afterward defendants W, B and others, filed a charter for the incorporation of the "Douglass Sugar Manufacturing Company," to exist for thirty years, with fifteen directors, a capital stock of \$100,000 divided into 1,000 shares, naming defendants A, M and P, as directors. The company was subsequently organized, but the new subscription list then prepared was not signed by A, M or P. At a meeting of subscribers to the new list, the company's name was changed, without A, M or P's knowledge or consent, to the "Douglass Sugar Company," and the change duly certified. Plaintiff was a creditor of the latter company. Motion overruled. Error.

Allen, J. Parties contemplating the organization of a corporation can abandon the project at any stage of the proceedings prior to the creation of any liability to outside parties. In this case we think it clear that they did so abandon the project, and also that the fact of such abandonment was fully recognized by those who became subscribers to the new list. A, M and P never having become liable to the "Douglass Sugar Company" as stockholders are not liable as such to its creditor, the plaintiff. Order affirmed.

FIRST NAT. BANK v NAILL (1893) 52 Kan. 211.

To recover the value of chattels converted by defendants. Plaintiff and defendants were creditors of the same debtor. Defendants, not knowing of plaintiff's claim, which was for \$4,444, sent theirs to plaintiff for collection. Plaintiff declined to undertake to collect it, but often consulted with defendants and their attorney about the matter, without disclosing its demand. It finally took a chattel mortgage on the debtor's stock. The defendants afterward attached the stock, which was worth \$5,000. Judgment for defendants. Error.

Allen, J. 1. No more property was covered by the mortgage than was necessary to secure plaintiff's claim. It was not, therefore, fraudulent. 2. The plaintiff was not bound to disclose the existence and amount of its claim to the defendants. To do so might jeopardize its own interests. Judgment reversed.

Cited: 53 Kan. 721.

FIRST NAT. BANK v ROWLEY (1893) 52 Kan. 394.

Where one of two joint makers of a note paid a usurious rate of interest to a national bank, and the other joint maker sought to recover the penalty imposed

by the U. S. R. S., sec. 5198. It was held that the liability, under the statute, arose in favor of the one paying the illegal interest, and no recovery could be had except by him, or his representatives.

LAFEYTH v EMPORIA NAT. BANK (1894) 53 Kan. 51.

For conversion. The plaintiff had a duly recorded first mortgage, and the defendant bank a second mortgage on chattels belonging to a common debtor. The defendant's debt came due first and it joined with the debtor in selling the chattels by auction. Defendant received the proceeds, which it applied to decrease the mortgagor's indebtedness. Judgment for defendant. Error.

Johnston, J. As the bank aided and assisted in the sale and conversion of the chattels, it became liable to an action for the wrongful conversion of them, equally with the mortgagor. Judgment reversed.

Cited: 63 Kan. 18.

DUTTON v CITIZENS NAT. BANK (1894) 53 Kan. 440.

Injunction to prevent the collection of a tax. The plaintiff was a national bank. Its stockholders were indebted in good faith, each in an amount equal to the par value of his stock, and were without other credits. The assessor had levied against each stockholder a tax on the net value of his shares. He also levied against plaintiff a tax on the net value of forty of plaintiff's shares held by itself. Par. 6847, G. S. of 1889, defines the term "credit" as "every demand for money, labor, or other valuable thing." Par. 6851 provides that any person may deduct the sum of his bona fide debts from the sum of his "credit," paying taxes only upon the remainder so obtained. Par. 5219 U. S. R. S., provides that no state shall tax national bank stock at a greater rate than it taxes other moneyed capital in the hands of its individual citizens. Judgment for plaintiff. Error.

Allen, J. 1. The term "credit," as defined in the statutes, does not include shares of stock in banking corporations, and owners of stock in national banks have no right to deduct their indebtedness from the valuation of their shares of stock. 2. The shares held by the plaintiff bank, should not have been assessed. Judgment reversed.

Cited: 53 Kan. 463, 464; 55 id. 121.

TALCOTT v FIRST NAT. BANK (1894) 53 Kan. 480.

Action as for money paid by mistake. Plaintiff, a national bank, sued to recover \$200 alleged to have been paid defendant on his check in 1890. Defendant answered that plaintiff was indebted to him for a balance due him as a general depositor, which balance had been demanded by him and refused in 1885, and exhibited a passbook showing debits and credits and a balance of \$200 in his favor. The statutory limitation on written contracts was five years; on oral contracts, three years. Plaintiff moved for judgment on the pleadings. Motion granted. Judgment for plaintiff. Error.

Horton, C. J. 1. A passbook given to a depositor and the entries therein do not constitute a contract in writing. 2. It is merely a receipt. 3. The statute began to run from the date of the demand for the balance, and defendant's setoff is barred. 4. Where all the pleadings show plaintiff to be entitled to judgment, the court may render judgment on the pleadings. Judgment affirmed.

BLAKER v HOOD (1894) 53 Kan. 499.

Attachment. A private bank was found to be insolvent by the bank commissioner, and a receiver was appointed under the banking law of 1891. Plaintiffs, creditors of the bank, attached its property in the receiver's hands. His motions to discharge the attachments were sustained. Plaintiffs' motions to set aside the order appointing the receiver, were overruled. Plaintiffs brought error, contending that the Act of 1891 was void because, first, it contained more than one subject; second, it authorized an undue interference with private business. This act provides for the organization of corporate banks, and for the regulation of all banking business except that conducted by national banks. It creates the office of bank commissioner, and authorizes him to exact reports of all those engaged in the banking business as to their resources and liabilities. It requires them to submit to inspection and investigation in order that their financial condition may be as-

certained, and prescribes methods of business intended to protect the depositors and patrons of the bank. Order discharging attachment. Error.

Johnston, J. In a broad sense, the enactment is one concerning business of banking, and all provisions are fairly comprehended within the general subject. The regulation of the common law right to conduct a banking business is of a quasi public nature, clearly within the police power of the legislature and the act is constitutional. Judgment affirmed.

Cited: 53 Kan. 661; 61 id. 36; 63 id. 516; 64 id. 790.

ANDERSON v RODGERS (1894) 53 Kan. 542.

On check against drawer. The defendant was indebted to plaintiff to whom he gave his check for the amount drawn on the Bank of R, located at a place 55 miles distant. The plaintiff gave it to a local bank for collection. This bank sent it directly to the Bank of R, with the request that it remit the amount in Kansas City exchange. The check reached the Bank of R on the 12th day of the month after business hours. On the 13th, the Bank of R was open and honored all demands on it. After banking hours it returned the check to the local bank with the statement, "No funds in bank." On the 14th the Bank of R made an assignment. The defendant during this time had a sum on deposit with the Bank of R, sufficient to meet the check. Judgment for plaintiff. Error.

Allen, J. It is negligence for the holder of a check to select the drawee as the agent for collection. The plaintiff, having trusted in the good faith of the drawee by sending the check to it, must bear the burden of the loss occasioned by its failure occurring after the day on which the regular presentment should have been made. Judgment reversed.

WICHITA NAT. BANK v MALTBY (1894) 53 Kan. 567.

Action to recover a bank deposit. Plaintiff, an administrator, alleged that his intestate, holder and owner of a certificate of deposit issued to him by the defendant bank before his death, had left it for safe-keeping with one who afterward delivered it, unindorsed by deceased, to deceased's widow, who delivered it to the bank and received payment; that plaintiff was entitled to the deposit as administrator, and that his demand on defendant had been refused. Defendant's answer contained a general denial. Plaintiff moved for judgment on the pleadings. Judgment for plaintiff. Error.

Johnston, J. If the action was to recover the deposit, defendant's answer put the ownership of the money and the widow's right to draw it in issue; if it was upon the certificate, the widow's wrongful possession and the indorsement were put in issue. Judgment reversed.

SHAFER v FIRST NAT. BANK (1894) 53 Kan. 614.

Where a national bank took a note as security for a loan, and knowingly charged usurious interest thereon up to time of maturity of the note, and thereafter charged a lawful rate, held, that the receipt of usurious interest in advance forfeited the entire interest which the note carried, both before and after maturity. A judgment on the bank's debt will bear interest from the time of its rendition, at the rate of 6 per cent per annum.

CITIZENS NAT. BANK v BERRY (1894) 53 Kan. 696.

Action to recover money paid as usurious interest. An answer to plaintiffs' petition was filed on behalf of the defendant bank, by attorneys employed by the board of directors, after defendant had gone into voluntary liquidation. Attorneys employed by defendant's president filed a demurrer, which was struck from the files on plaintiffs' motion. He afterward asked leave to file an answer. The court refused to consider such answer. The board of directors had taken no action to prevent the president from employing attorneys to conduct the bank's litigation. Judgment for plaintiffs. Error.

Allen, J. The mere fact that the board of directors had employed counsel, would not take away from the president the right to control a case in court, and to have the bank represented by other counsel if he saw fit. Judgment reversed.

Cited: 53 Kan. 699; 56 id. 445.

 THE STATE v MYERS (1894) 54 Kan. 206.

Information against the vice-president and director of a bank, in one count, for receiving a deposit; in another, for permitting it to be received, knowing the bank to be insolvent. The information did not allege that any one had suffered loss thereby. The proceeding was brought under Sec. 16, ch. 43, Laws of 1889, which made such acts felonies. Defendants had waived a preliminary examination on the warrant. Pleas in abatement, because he had had no such examination. Overruled. Defendants moved that the state be compelled to elect on which of the two counts it would proceed. Denied. The bank commissioner was allowed to testify as to his opinion, based on information furnished by others, relative to the bank's solvency. Defendants asked the court to instruct the jury that the bank was not required to keep on hand all its depositors' money; that it was not expected to be able to pay at once every debt it owed; and that it was solvent if able to pay or provide for its debts as they should fall due. Instructions refused. The court charged that defendant was conclusively presumed to know the condition of the bank and everything of importance that took place in it. The certification and authentication of the bill of exceptions, signed by the judge, stated that the bill was in two volumes, numbered one and two. The district clerk's certificate, at the end of volume two, stated "the within is a full, true, correct, and complete copy of the original bill of exceptions," describing it. Verdict, guilty. Appeal.

Horton, C. J. 1. The record presented is as contained in the two volumes filed, and as specifically authenticated. 2. The instructions asked for should have been given. 3. The opinion of the witness should not have been admitted. 4. The election in such cases as this rests in the sound discretion of the court. 5. As the defendant waived the preliminary examination, he cannot be heard to say, by a plea in abatement, that he should be discharged for want thereof. 6. It was not necessary to allege a loss by defendant's acts. 7. The charge as to presumptive knowledge was erroneous. Judgment reversed.

Cited: 57 Kan. 544.

 THE STATE v YEITER (1894) 54 Kan. 277.

Information for embezzlement. The defendant had been employed at a stated monthly salary as cashier in a private bank. He was accustomed to receive and obey the owner's directions as to the conduct of the business. He stole the bank's funds. The information was framed under the second clause of sec. 1, ch. 104, Laws of 1881, which provided for the punishment of agents who should convert their principal's moneys. The first clause was directed against clerks, apprentices, and servants who should embezzle their employer's funds, and the second clause against agents. Verdict guilty. Appeal.

Horton, C. J. 1. Two offenses were charged in the statute, as distinct as if they were covered by separate sections. 2. A master is one who has legal authority over another, and the person over whom such authority is exercised is his servant. The defendant was a servant, and was not, therefore, punishable under the second clause. Judgment reversed.

Cited: 57 Kan. 659.

 BANK OF LEROY v HARDING (1895) 1 Kan. App. 389.

To recover a special deposit. Plaintiff, as he alleged, deposited \$829.94 with defendant, a bank, to be paid only to W and D on their joint check. Sixteen months elapsed. W and D refused to accept the money. They refused also to draw a check for it. They sued and recovered against plaintiff on a debt which the deposit was intended by plaintiff to satisfy. Defendant was made a garnishee with respect to the money by a creditor of W. Defendant paid the money into court by order of the justice of the peace. Defendant refused to deliver the money to plaintiff on demand. Demurrer, on the ground that the petition did not state a good cause of action. Overruled. Judgment for plaintiff. Error.

Dennison, J. 1. The demurrer was properly overruled. 2. Plaintiff had a right to demand and receive the money from the bank. 3. An order of a justice of the peace, that a garnishee pay money into court, is not a final determination of the right of the garnishing creditor. Judgment affirmed.

McLENNAN v HOPKINS (1895) 2 Kan. App. 260.

Action for a deposit. The defendants with others agreed to establish a bank. They signed a stock subscription paper. Some were chosen to act as directors. A president and cashier were elected. The full amount of the capital stock was subscribed. A seal was provided. A dividend was declared. A regular banking business was done under the name of D Bank until it failed. The plaintiff's assignor was a depositor in the pretended bank. Plaintiff contended that defendants were liable as partners. Judgment for plaintiff. Error.

Garver, J. 1. The entire failure on the part of the officers of the bank to prepare and file the certificate of incorporation left the organizers without a de facto legal corporate existence. 2. Defendants are liable as partners. Judgment affirmed.

Cited: 2 Kan. App. 269.

McLENNAN v ANSPAUGH (1895) 2 Kan. App. 269.

Action on a draft issued by the defendants as bankers. The bank was unincorporated. The defendants, its promoters and organizers, were sued as partners. The answer denied the partnership, averred that the bank was incorporated, and denied liability under the suit. The plaintiff purchased the draft and sent it to M in Omaha. There was no evidence of what became of the draft—whether it reached M, or whether it was ever presented for payment. There was no evidence of the incorporation of the bank. Judgment for plaintiff. Error.

Garver, J. 1. The bank was not even a de facto corporation. Whatever cause of action existed in favor of the plaintiff, was against the defendants as partners. 2. Before plaintiff can recover, he must show that the draft has been presented and dishonored. Judgment reversed.

FIRST NAT. BANK OF GIRARD v CRAIG (1895) 3 Kan. App. 166.

To recover the proceeds of a note given by plaintiff to defendant, a bank, for collection. Defendant elected a sub-agent to collect the note. The sub-agent collected it and converted the proceeds. Judgment for plaintiff. Error.

Dennison, J. The agent of the owner is liable to the owner for acts of sub-agents selected by the agent on his own responsibility. Judgment affirmed.

FIRST NAT. BANK v TURNER (1895) 3 Kan. App. 352.

Action against a national bank to recover penalty. The action was brought under secs. 5197-8, U. S. R. S., which provide that a national bank cannot charge a greater rate of interest than is allowed by the laws of the state where the bank is located; for a forfeiture of the entire interest; and in case a greater interest has been paid, a recovery of double the amount so paid. The plaintiff paid 12 per cent. on a note and its renewal. The defendant pleaded the Statute of Limitations of two years, claiming that the time began to run from the date of the note. Two years had not elapsed from the time of the payment, before the suit was commenced. Demurrer upon the ground that no demand was made before suit was brought. Overruled. Judgment for plaintiff, including interest from the time the usury was paid to date of judgment. Error.

Dennison, J. 1. The bank was entitled to the principal only. Any sums paid must be credited on the principal. Usury included in a renewal note renders it usurious. When the principal debt is paid, further payments are payments of usury. The Statute of Limitations did not begin to run until the usury was paid, and this action was not barred. 2. No demand was necessary. 3. Plaintiff is not entitled to interest on the penalty before judgment. 4. The judgment should have been for the amount prescribed by the statute. The judgment modified.

Cited: 3 Kan. App. 536.

HODGSON v McKINSTREY (1895) 3 Kan. App. 412.

Action on an appeal bond. The plaintiff recovered a judgment against the C National Bank, and the bond in suit was given by the defendant, the former president of the bank. The bank went into liquidation, and dissolved before the judgment was rendered against it. Judgment for plaintiff. Error.

Johnson, P. J. A national bank may terminate its existence by dissolution. Its corporate powers then cease. It can neither sue nor be sued. Any judgment

or order taken against it is void, and may be collaterally questioned. Judgment reversed.

Cited: 3 Kan. App. 418.

CITY OF LARNED v JORDAN (1895) 55 Kan. 124.

Action to recover a trust fund. Funds were deposited to credit of plaintiff, a city, by its treasurer, in a bank. The bank became insolvent, and the defendant was appointed assignee. The money was admittedly a trust fund. The defendant notified the plaintiff and K, one of the defaulting treasurer's bondsmen, of the time and place of allowing claims. K presented his demand, reciting that the plaintiff had demanded the money of him and that it was payable to himself alone. The defendant allowed the claim and paid K a 10 per cent dividend, which K turned over to the plaintiff. Plaintiff credited it on the treasurer's account. The defendant contended that the plaintiff, by accepting this dividend, was estopped from pursuing an inconsistent remedy at law. Judgment for defendant. Error.

Horton, C. J. The defendant did not recognize the plaintiff as entitled to any allowance, when he made the dividend payable to the bondsman. The plaintiff, therefore, is not estopped from bringing this action. Judgment reversed.

Cited: 57 Kan. 118, 783; 60 id. 30; 61 id. 789.

THE STATE, EX REL. v BREIDENTHAL (1895) 55 Kan. 308.

Quo warranto. Laws of 1891, ch. 43, sec. 21, authorized the governor to appoint, with the advice and consent of the senate, a bank commissioner, whose term of office should be four years, and until his successor should be appointed and qualified. The act took effect on March 21, 1891, after the legislature had adjourned for two years. On that day the governor appointed a commissioner. A newly elected governor succeeded to the office in 1893. He appointed defendant commissioner. The senate confirmed the appointment February 13, 1893. Four years from the time the first commissioner was appointed, a third governor appointed a third commissioner. The defendant refused to vacate the office. Sec. 2 of art. 15 of the constitution prohibited the legislature from creating any office having a term longer than four years. The relator, the attorney-general, contended that the first legal term began in 1891, and ended in 1895, and that defendant had no right to retain the office.

Johnston, J. 1. The time definitely fixed in the law at four years is the term of office. 2. As the governor and senate did not act jointly until February, 1893, it follows that defendant was the first commissioner regularly appointed for a full term, and that the term for which he was chosen will not expire until February, 1897. Judgment for defendant.

Cited: 63 Kan. 514; 64 id. 866.

THE STATE v MENKE (1895) 56 Kan. 77.

Indictment for receiving deposits as cashier of a national bank, when the bank was insolvent. The state contended that the indictment was good under sec. 1, ch. 48, Laws of 1879, providing for the punishment of the officer of any bank who should receive deposits for an insolvent bank. Sec. 16, ch. 43, Laws of 1891, covered the ground embraced by the Law of 1879, but applied only to state banks. Defendant's motion to quash sustained. Judgment for defendant. Appeal.

Johnston, J. 1. Sec. 16, ch. 43, Laws of 1891, is a substitute for and repeals ch. 48, Laws of 1879. 2. Defendant is not punishable under our statutes. Judgment affirmed.

Cited: 61 Kan. 785.

FIRST NAT. BANK v MARTIN (1895) 56 Kan. 247.

Action against maker. Defendant was president of a bank whose cashier forged the bank's name to a note and sent it to W, who sold it for value to the plaintiff. Plaintiff contended that, even if the note was a forgery, defendant had ratified it by accepting the money paid to W. Plaintiff failed to prove any benefit to defendant, to his bank, or even to the cashier. Judgment for defendant. Error.

Per curiam. The defendant cannot be considered as having ratified the forgery. Judgment affirmed.

FIRST NAT. BANK v MCINTURFF (1896) 3 Kan. App. 536.

Action to recover a penalty. Plaintiff gave three notes to defendant, a national bank. Defendant charged interest at a rate usurious in Kansas. These notes were separately renewed. Plaintiff paid two of the series of original and renewal notes, principal and interest. On the third he paid only sums, as interest, less in the aggregate than the principal of the notes. Secs. 5197 and 5198, U. S. R. S., prohibited a national bank from charging interest at rate made illegal by the state where located, under penalty of forfeiting the entire interest, or, if paid, double the entire interest. Judgment for plaintiff for double the entire interest charged on each of the series. Error.

Cole, J. 1. The penalty prescribed by the statute, in case the usurious interest has been paid, is double the total amount of interest paid, not double the excess over the legal rate. 2. Plaintiff can recover no penalty on the third series, for his payments are to be regarded as payments on the principal of the notes, to which the defendant is entitled. Judgment affirmed except as to third series.

RYAN v PHILLIPS (1896) 3 Kan. App. 704.

To recover a trust fund. Plaintiff's debtor delivered money to a bank to be transmitted to plaintiff's agent for plaintiff's benefit. Plaintiff's name was not disclosed to the bank. The bank mingled the money with its own funds. It transmitted no money to plaintiff's agent. It failed and defendant was made receiver. The petition did not make plaintiff's debtor or agent parties. Defendant made no objection before judgment as to defect of parties. Judgment for defendant. Error.

Garver, J. 1. A trust attached to the entire estate even though the specific fund cannot be followed. 2. The plaintiff, as the one for whose benefit the trust was created, may demand its execution. 3. The bank is estopped to deny plaintiff's right. 4. A defect of parties not shown by the pleadings is waived by failure to object by answer. Judgment reversed.

Cited: 5 Kan. App. 120.

BEACH v MOSER (1896) 4 Kan. App. 66.

Action on a guardian's bond. The defendant, cashier of the F Bank, sent a draft, representing money to which he was entitled as guardian of plaintiff's estate, for collection. The bank collected the draft and appropriated the proceeds. It afterward failed. The jury found that defendant had not been guilty of negligence in selecting the bank as agent for collection. This action was for the amount of the draft. Judgment for defendant. Error.

Gilkeson, P. J. A guardian who in good faith and using reasonable care selects an agent of good repute to make a collection of a claim of his ward, is not liable for a loss resulting from such agent's conversion of the money collected. Judgment affirmed.

ASHLEY v FRAME (1896) 4 Kan. App. 265.

To recover deposits from officers accepting them for an insolvent bank. Par. 406, G. S. of 1889, prohibited officers from accepting deposits for an insolvent bank. It made them individually liable, without recourse against the bank, for deposits so accepted, no matter how much plaintiff might have received or be entitled to receive, as a creditor, out of the bank's assets. Contribution among the officers was provided for. The liability attached to the estate of a deceased officer. Regarding the action as one to recover a penalty, it was barred by the Statute of Limitations. Regarding it as one to recover on a statutory liability, it was not barred. Judgment for plaintiff. Error.

Cole, J. The statute in question is one prescribing a penalty and not a statutory liability. Judgment reversed.

PUTNAM v HUTCHINSON (1896) 4 Kan. App. 273.

Action on a subscription contract. The bank of Richmond was organized by the defendant, the plaintiff, and others. The defendant, at the time, subscribed and agreed to pay for ten shares of stock on which he paid 20 per cent. Thereafter, on request of the cashier, the stockholders returned their certificates and received as many new ones, at full value, as the amount paid in would cover. They were indorsed "fully paid up" and were signed by the cashier. The board of directors

never ratified the surrender and reissue. Defendant received a certificate for two shares. This transaction was made on account of the statute of 1891, which prohibited a bank, then in existence, from continuing business on 20 per cent of its capital stock unless it was solvent at the time. The defendant assigned his two shares of stock, the bank being then unsafe. The bank failed and plaintiff was appointed its receiver. He brought action to recover the balance of the subscription, contending that the stock paid in was a trust fund for the benefit of creditors; and that the bank had no authority to withdraw 80 per cent. Judgment for plaintiff. Error.

Dennison, J. 1. Nothing in the Act of 1891 prohibited a banking corporation then in existence, from continuing in business with only 20 per cent of its capital stock paid in, provided it was solvent and complied with the legal requirements of the bank commissioners. 2. Whatever the effect of the attempted reduction, as between the stockholders, it cannot be held to release them from the payment of their unpaid subscriptions. 3. The attempted reduction was a nullity and the plaintiff must answer to the demands of the creditors on his original ten shares and not on the two fully paid shares. Judgment affirmed.

BUIST v CITIZENS SAV. BANK (1896) 4 Kan. App. 700.

To enforce stockholders' statutory liability. Sec. 2, art. 12, of the constitution made stockholders liable in an amount equal to their stock for the debts of the corporation. Par. 1192, G. S. of 1889, provided that where execution against a corporation was returned unsatisfied, execution might issue against the stockholders. Par. 4567, G. S. of 1889, provided that the officer to whom the writ of execution against the bank was directed, should return it within sixty days. Execution on plaintiff's judgment issued against a bank in which defendant was a stockholder. It was returned within eleven days unsatisfied. Plaintiff then began this proceeding. Another similar proceeding against defendant, begun by another of the bank's judgment creditors, was pending. The court directed that execution issue against defendant. Error.

Clark, J. 1. When an execution against a Kansas banking corporation has been returned nulla bona, the judgment creditor may at once proceed against any stockholder thereof, under par. 1192, G. S. of 1889, even though sixty days may not have elapsed since the date of the execution. 2. Several creditors may proceed against the same stockholder at this same time. But he is discharged by satisfying the judgment of any one of them to the extent of his statutory liability. Order affirmed.

SCANNELL v FELTON (1896) 57 Kan. 468.

Proceedings to reverse a judgment. A judgment was rendered against R in favor of S and P, partners in the banking business. R filed a petition in error to reverse the judgment, after which the bank owned by S and P was placed in the hands of a receiver. P subsequently died. The receiver was not made a party in the petition in error. The surviving partner, S, contended that the petition in error should be dismissed on the ground that the receiver was a necessary party.

Allen, J. No suit in which the right to assets of the bank's estate is involved can proceed without the receiver being made a party. Petition in error dismissed.

Cited: 58 Kan. 162.

HAZELTINE v McAFEE (1897) 5 Kan. App. 119.

To recover trust funds. K & Co., bankers, collected a note and mortgage for the plaintiff. The proceeds were mixed with the general funds of the bank. K & Co. made an insolvent assignment to the defendant. The plaintiff presented no claim to the assignee. Judgment for defendant. Error.

Mahan, P. J. 1. It is not necessary to trace the funds into specific property in order to authorize the plaintiff to recover. 2. Presentation of this kind of a claim to the assignee, instead of expressly claiming the fund as a trust fund, would be an abandonment of the trust, and an election to stand as a general creditor. Judgment reversed.

TEAGNE v FIRST NAT. BANK (1897) 5 Kan. App. 300.

Action under secs. 5197-98, U. S. R. S., to recover for usurious interest. Three makers of notes borrowed money from defendant, a bank, at different times, giv-

ing joint notes for the amounts, with 12 per cent interest, and when they matured, each one would pay one-third of the interest from her separate funds, and they would give a joint renewal note. Two of them joined in the action at bar. The court sustained a demurrer to the evidence. Judgment for defendant. Error.

McElroy, J. 1. The plaintiffs did not show such a joint interest in the subject, matter as entitled them to maintain a joint action. 2. The one alone who makes the payment, or his legal representative, can recover. Judgment affirmed.

WICHITA NAT. BANK v WEEKS (1897) 5 Kan. App. 694.

An action brought under par. 406, G. S. of 1889, to hold an officer of a bank personally liable on the bank's indorsement and guaranty of a promissory note, not yet due, the indorsement and guaranty having been made while the bank was insolvent, and with knowledge of the officer, cannot be maintained until the notes become due, and the liability of the bank has accrued.

EMERSON v THATCHER (1897) 6 Kan. App. 325.

Action to enforce stockholders' individual liability. The C Banking Co. issued a certificate of deposit to the plaintiff's intestate, payable to his order "upon the return of this certificate properly indorsed." Defendant was a stockholder in the C Banking Co. Plaintiff died, and the certificate was indorsed by his executor. The clerk put the wrong amount in the writ and corrected it after the court overruled defendant's motion to quash. The undersheriff did not participate in determining the value of the property according to the statute. The petition did not allege that, at time the certificate was presented by plaintiff, it was properly indorsed. Demurrer. Overruled. Judgment for plaintiff. Error.

Mahan, P. J. 1. The reasonable construction of the contract did not require the certificate to be indorsed by the deceased or by plaintiff, as his executor, as a condition precedent. 2. The executor derived title by operation of law and should have been paid. 3. The court did not exceed its jurisdiction in issuing the writ and in allowing the amendment. 4. The failure of the undersheriff to participate in the valuation was not sufficient omission to justify the quashing of the writ. Judgment affirmed.

CHANUTE NAT. BANK v CROWELL (1897) 6 Kan. App. 533.

On check. Plaintiff and others sold live stock to N and G, partners, who kept individual accounts, and received in payment the individual checks of N. The checks were cashed at the H National Bank, and forwarded to the defendant, a bank. When either of the firm bought stock he paid by his individual check. The defendant had agreed to cash checks drawn by either partner and to look to the proceeds of the sale of the stock for reimbursement. The defendant refused to honor the checks, but applied the money to payment of an individual debt of N, due to it prior to the forming of the partnership. Defendant contended that the action could not be maintained under secs. 484-488, G. S. of 1889, which provided that no person should be charged as an acceptor of a bill of exchange, unless his acceptance be in writing. Judgment for plaintiff. Error.

Dennison, P. J. 1. A person may maintain an action on a contract made by another for his benefit, although he was not a party to it. The check holder can maintain this action. 2. Defendant cannot be charged as acceptor because it has funds of the firm's, and in equity and good conscience should have paid the checks given for the partnership stock. Judgment affirmed.

Cited: 7 Kan. App. 461.

DODSON v WIGHTMAN (1897) 6 Kan. App. 835.

Attachment Defendant was a private banker. Being insolvent he went to the bank commissioner and stated that he surrendered the bank and desired him to take immediate possession. Ch. 43, Laws of 1891, required the commissioner to take actual possession before a receiver could be appointed. While defendant was with the commissioner in conference the next day, the attachment was issued, and possession taken of articles belonging to defendant, by the sheriff going to the place where they were with his order and declaring them attached. An appraisal was not made at once, nor was it full, as part of the property was in a safe. The judge discharged the attachment upon the ground that the title to the property passed to the commissioner before attachment. Error.

Milton, J. 1. The commissioner could not have actual possession of the property attached, by an attempt by defendant to deliver it in a place where the property was not situated; nor was there constructive possession. 2. The sheriff took possession, although a full appraisal could not be made. 3. It was not necessary that the appraisal should be immediately made. 4. The levy was sufficient to hold goods which had not been taken actual possession of by the commissioner. Order reversed.

LONG BROTHERS v HUBBARD (1897) 6 Kan. App. 878.

On a bond. Plaintiffs filed a petition. Summons was served on defendant. Plaintiffs made an affidavit for an order of arrest, and filed a bond on which a bank, by its president, appeared as surety. The president was not authorized to sign for the bank. An order of arrest was issued. Judgment for plaintiffs. Judgment set aside. Plaintiffs filed an amended petition. Cause continued. The court vacated the order of arrest on the ground that the affidavit was insufficient. Sec. 149 of the code prohibited the issuing of an order of arrest unless a bond, with a sufficient surety, had been executed. Judgment for plaintiffs. Error.

Dennison, J. 1. By filing an amended petition, plaintiffs waived prior irregularities. 2. The summons, the order of arrest, and the subsequent judgment must each be considered the same as if the amended petition had been filed at the time the original petition was filed. 3. The district court had the right, under secs. 173, 174, 568 and 569 of the code, to vacate or modify its judgments or orders at or after the term at which they were made. 4. Sec. 114 of the code does not apply to affidavits for an order of arrest. 5. The bank had no power to become surety on a bond. It could not be bound by its president's unauthorized act in signing it. 6. If the ruling of the lower court, is correct it will not be set aside because the reasons given therefor are incorrect. Judgment affirmed.

KRIDER v COLEY (1897) 7 Kan. App. 349.

Action to charge the defendant as a stockholder in a bank. Plaintiff did not allege that he had recovered a judgment against the bank; that the corporation was dissolved; or that it had suspended business for more than a year before the suit was begun. It was alleged that the bank made an assignment nearly three years before. The defendant demurred. Overruled. Judgment for plaintiff. Error.

Mahan, P. J. 1. Under par. 1204, G. S. of 1889, as construed with par. 1200, it is only necessary to aver the existence of the corporation, the ownership of its stock by defendant at the time of dissolution, that it is dissolved as provided by par. 1200, and the corporation's indebtedness to plaintiff. 2. It is not necessary to aver a recovery of judgment and return of execution unsatisfied. 3. The allegation of the assignment was equivalent to an allegation of a suspension of business for more than a year before suit. A cause of action was alleged. Judgment affirmed.

KANSAS NAT. BANK v QUINTON (1897) 57 Kan. 750.

Action as for money had and received. The defendant, by its cashier, agreed with plaintiff and B to discount B's note, hold the proceeds, and pay them to plaintiff on his performing services for B. Defendant's answer was a general denial. There was a conflict of testimony on material points. Defendant objected to a conversation that was admitted, regarding the terms of the agreement had by plaintiff and defendant before going to the bank; offered to prove that one, not a party to the action, had satisfied plaintiff's demand; and contended that its agreement was ultra vires. Judgment for plaintiff. Error.

Johnston, J. 1. The findings of the jury are conclusive if there is competent evidence to sustain them. 2. The conversation was merely preliminary and explanatory, and its admission was not prejudicially erroneous. 3. Without an averment in the answer that the debt had been paid by one not a party to the action, evidence thereof was inadmissible. 4. The disbursing of a deposit on a contingency is incidental to the business of banking. Judgment affirmed.

Cited: 58 Kan. 75; 59 id. 365.

THE STATE v TOMBLIN (1897) 57 Kan. 841.

Indictment for having knowingly received deposits for an insolvent bank. Defendant was the bank's president, director, and managing officer. A person called

as a juror stated that he had an opinion as to the bank's solvency, and that evidence would be required to remove it. Challenged. Challenge overruled. L's deposition, taken at defendant's instance, but when he was not present, was put in evidence over defendant's objection and exception. The court instructed the jury that defendant might be found guilty, if, through his negligence, he did not learn the actual condition of the bank, when it was in fact insolvent. Verdict guilty. Judgment against defendant. Appeal.

Allen, J. 1. The court erred in overruling the challenge. 2. The mere fact that defendant asked that a deposition be taken, did not amount to a consent that the deposition should be read in evidence. 3. Mere negligence would not render him guilty of a crime. Judgment reversed.

KELLOGG v DOUGLAS COUNTY BANK (1897) 58 Kan. 43.

Where a bank had not received a certificate from the bank commissioner, authorizing it to transact business, but had nevertheless executed notes and guaranteed their payment, it was held, that the securities were not rendered void by failure of the bank to comply with the law; and that the guaranty was in effect an indorsement of the note.

Cited: 58 Kan. 664.

AMERICAN NATIONAL BANK v PRESNALL (1897) 58 Kan. 69.

Action as for money had and received. Plaintiff deposited deeds with the defendant, a bank, and D deposited checks on defendant payable to plaintiff, with the understanding, common to themselves and the cashier, that the deeds should be delivered to D and the checks to plaintiff on the happening of a contingency. The cashier signed and gave to plaintiff a certificate, stating that plaintiff had deposited with defendant \$22,200 to be delivered to plaintiff on the happening of the contingency. The contingency happened, but the bank refused payment, became insolvent, and went into a receiver's hands. D had a credit on defendant's books against which he had the right to check, though no money was deposited by him at the time of placing the checks in the cashier's hands. Judgment for plaintiff. Error.

Johnson, J. 1. The fact that no money was actually deposited for plaintiff's use and benefit does not relieve defendant from liability. 2. The certificate is prima facie evidence of the bank's liability, and the payment thereof, on a contingency, was within the powers of the bank. Judgment affirmed.

MERCHANTS BANK v HONEY (1897) 58 Kan. 603.

Where a surety seeks to relieve himself of any liability on a cashier's bond, given pursuant to sec. 1419, G. S. 1889, on the ground that the breaches occurred after the expiration of a year from the date thereof, it was held, that the mere fact that the cashier was appointed by the directors, and that the directors' term of office lasted only one year, did not operate to limit the cashier's term of office to one year, so as to relieve the surety from his liability.

STERNE v ATHERTON (1897) 7 Kan. App. 20.

Debt to enforce stockholders liability. The plaintiff, a creditor of the United States Savings Bank, brought an action in the district court against the defendant, who was a stockholder in the bank. The G. S. of 1890, par. 1192, provide that a corporation shall be deemed dissolved for purpose of such actions, if shown to have suspended business for more than one year. Par. 1204 provides that a suit against the individual stockholder may be had without joining the corporation. The petition alleged that defendant was a stockholder, and that the bank had suspended business for more than a year. Sec. 2, art. 12, of the state constitution provided that stockholders should be liable for the corporation debts in amounts equal to their stock. Demurrer. Overruled. Judgment for plaintiff. Error.

Wells, J. 1. The means of enforcing the constitutional liability is provided under pars. 1192, 1200, 1204, 1205, and 1206, G. S. of 1889. 2. For the purpose of enforcing this liability, it is enough to show that the corporation has suspended business for more than a year. Judgment affirmed.

BANK OF GARNETT v CRAMER (1898) 7 Kan. App. 461.

Debt. Defendants agreed with E to pay his checks. E gave defendants a bond, with two sureties. Plaintiff came into possession of E's check on defendants. Defendants refused to pay it, as at the time E had overdrawn his account, and one of his sureties had notified defendants he would not pay any but the existing overdraft. Verdict for plaintiff. Error.

Milton, J. An action will lie on a promise by defendants on a valid consideration to a third person for the benefit of the plaintiff, though the plaintiff was not a privy to the consideration. Judgment affirmed.

FIRST NAT. BANK OF GREAT BEND v BANNISTER (1898) 7 Kan. App. 787.

Action for goods sold and delivered. The bank purchased wheat to seed a farm that it had purchased under an execution for a debt. Defendant contended that a national bank was not authorized to buy and speculate in wheat. Demurrer to evidence. Overruled. Judgment for plaintiff. Error. The record did not contain all the evidence.

Dennison, P. J. 1. We can pass only on matters contained in the record. 2. Where the purchase is necessary to protect the bank's interest, it can purchase wheat. Judgment affirmed.

NATIONAL BANK OF COMMERCE v ATKINSON (1898) 8 Kan. App. 30.

On two notes against maker. Plaintiff prior to becoming a national bank was the holder of the notes in suit. Being unable to hold the notes as a national bank, but wishing the amount they represented to appear among the assets, the plaintiff, by its president and cashier, entered into a written agreement under its seal, whereby it was to exchange the notes for those of C, for the same amount; C was to collect them and the proceeds were to be applied to C's notes. C was not in any event to be held liable for any loss occasioned by his failure to collect. Nothing had been collected. C was not at fault. C died and plaintiff agreed with defendant that she should assume the position of C upon the notes. Plaintiff admitted the seal and signature on the writing, but contended that the agreement was inadmissible without proof, that the officers had authority to execute the contract. Judgment for defendant. Error.

Schoonover, J. 1. Where the president and secretary of a corporation execute a contract for the company, which is regular on its face, and not shown to be outside the regular business of the corporation, it is prima facie evidence that it was executed with authority, and those who deny the authority take on themselves the burden of establishing their claim. 2. Under the admissions and this rule, the contract was admissible. Judgment affirmed.

• FIRST NAT. BANK v WATTLES (1898) 8 Kan. App. 136.

On a certificate of deposit. A husband and wife joined in selling the wife's property. They deposited the proceeds with defendant. The certificate of deposit was in the wife's name. She delivered it to defendant to secure her husband's performing a contract with a third person. After the contract was performed, the defendant retained the money to apply it to a debt owed it by an insolvent company in which the husband was, and the wife had been, but was no longer, a stockholder. Oral testimony as to membership was offered. The books of the company were not in evidence. The wife assigned the certificate to plaintiff. He asked for inappropriate relief in his prayer. Judgment for plaintiff. Error.

Wells, J. 1. The plaintiff is entitled under the code to whatever reliefs the facts stated in his petition warrant, regardless of the prayer of the petition. 2. The court did not err in finding that Mrs. W was not a stockholder, since the only evidence claimed to establish that fact establishes that she long since ceased to be such. 3. Though the wife was not entitled to immediate possession of the certificate, she could assign the equitable right to the plaintiff. Judgment affirmed.

CITIZENS BANK v THE STATE (1898) 8 Kan. App. 468.

Proceedings to review an order allowing creditor's claim. M, a creditor of the C Bank, which was insolvent, held collateral to secure his deposit. He presented his certificate of deposit to the receiver, and it was allowed in full. Later he reported to the receiver that he had collected an amount on his collateral which he had ap-

plied to his claim against the bank. The receiver declared and paid two dividends, but refused to pay any to M. M filed a petition in court and got an order for the receiver to pay both dividends on the amount of his claim as allowed. Error.

Hilton, J. A distribution may be made by an insolvent bank to a creditor holding collateral security when he has exhausted the collateral; and then the dividends should be declared only on the amount of his claim remaining unpaid, and not upon the full amount of his claim as allowed. Order reversed.

FIRST NATIONAL BANK v LYMAN (1898) 59 Kan. 410.

On sheriff's bond for conversion. Plaintiff, a national bank, furnished to the assessors a list of its stockholders, setting forth the amount and value of the stock held by each. The Act of 1897 made no provision for collection of the taxes. Some of the stockholders neglected to pay the taxes severally assessed against them on their shares. Warrants for collection were issued, in obedience to which defendant, the sheriff, levied on property of the plaintiff, and turned its avails over to the county treasurer. Judgment for defendant. Error.

Doster, C. J. 1. No obligation is imposed upon banks by sec. 60, ch. 158, G. S. of 1897, to pay the taxes assessed against the stock of their stockholders. 2. Defendant was guilty of the wrongful conversion of plaintiff's property, and could not mitigate the damages caused by his act, by applying the property to the payment of the stockholders' taxes, against whom plaintiff might have elected to proceed. Judgment reversed.

FRAME v ASHLEY (1898) 59 Kan. 477.

Action against a bank's officers for receiving deposits with knowledge of its insolvency. Plaintiff was a depositor. The suit was brought under ch. 47, Laws of 1879 (G. S. 1897, ch. 18, sec. 74), more than one year, but less than three years, after the cause of action accrued. The statute provided that officers of an insolvent bank, who should receive deposits with knowledge of its insolvency, "should be individually responsible for such deposits." Defendants contended that the action was "upon a statute for penalty or forfeiture," and was therefore barred by the one-year Statute of Limitations. Plaintiff contended that it was "upon a liability created by statute," and so governed by the three years' limitation. Judgment for plaintiff. Reversed in Court of Appeals. Error.

Doster, C. J. 1. A statutory obligation to pay damages which the common law does not give is "a liability created by statute." 2. This action is "upon a liability created by statute" and the limitation of three years governs. Judgment reversed.

THE STATE v WARNER (1898) 60 Kan. 94.

Information for receiving deposits for an insolvent bank knowing it to be insolvent. The prosecution was instituted under sec. 16, ch. 43, Laws of 1891, which provided for the punishment of any bank officer who should knowingly accept or receive on deposit any bills or drafts circulating as money or currency, when a bank was insolvent. Defendant was president of an incorporated bank, but there was no testimony that he received deposits himself or that he gave special directions to the other officers or clerks to receive them. These deposits were alleged to be in the form of "checks." Several separate and distinct transactions were charged in the information, and defendant was sentenced to punishment on each of four different counts, part of which were for accepting and receiving deposits. Verdict, guilty. Judgment against defendant. Appeal.

Allen, J. 1. In cases like this, it seems entirely proper to join charges of separate transactions of similar character. 2. The term "draft" is a nomen generalissimum, and averment and proof of the receipt of a check is sufficient. 3. The proof was insufficient to sustain the counts for accepting and receiving. Defendant could not accept without at least knowing what was received. Judgment reversed.

CAMPBELL v REESE (1899) 8 Kan. App. 518.

Statutory liability of stockholders. The defendant, a stockholder of an insolvent bank, proved payments to creditors of the bank equal to his liability. The payments were partly by cash and partly by note. There was a variance of from one to five months in the dates of payments pleaded and those proved. The pay-

ments proved were made after summons issued, but before service. Judgment for defendant. Error.

Schoonover, J. 1. The variance was not such as will constitute error. 2. In the absence of actual notice, the notice imparted by the record, is not sufficient to bind the defendant before the service of notice. 3. Payment by promissory note is a sufficient payment. Judgment affirmed.

Cited: 8 Kan. App. 521.

KENDALL v UNDERHILL (1899) 8 Kan. App. 521.

Statutory liability of stockholders. The defendant set up as an offset that the bank was indebted to him to the amount of \$96 and that he had paid a creditor of the bank the balance of the claim in real estate. Judgment for defendant. Error.

Schoonover, J. 1. A stockholder who has voluntarily paid corporate debts to the full extent of his corporate liability is entitled to set up that fact, and when such payment was bona fide it is a bar to an action to collect any further amount. 2. The medium of exchange is immaterial, and it need not be made in money. 3. Where a stockholder, against whom proceedings are had to enforce the payment of his stock liability, is himself a creditor of the insolvent corporation, he will be allowed in equity to plead the indebtedness of the corporation to himself as a set-off against his liability to other creditors. Judgment affirmed.

STOCKTON v MONTGOMERY (1899) 9 Kan. App. 104.

On a check. The A Bank was indebted to the defendant, and paid it by a cashier's check for the amount of the indebtedness. He subsequently indorsed it to the plaintiff for cash. The same day, August 17, plaintiff transferred it to T, who then deposited in T Bank. The T Bank forwarded it to the M Bank for collection, and it was presented for payment, two or three days after delivery to plaintiff. On August 25, the check was duly presented, payment refused, and protested for non-payment. Judgment for plaintiff. Error.

Wells, J. Under sec. 8 of ch. 115, G. S. of 1897 (G. S. 1899, sec. 544) the plaintiff was entitled to recover, if he had used due diligence to obtain payment from the drawer, maker, or obligor. The presentation and demand of payment were certainly within due time. Judgment affirmed.

QUINT v FIRST NAT. BANK (1899) 9 Kan. App. 474.

Action by a national bank to recover an amount claimed to be due on several promissory notes, and to foreclose a mortgage given as security. The petition set out the notes by copy as exhibits, with all of the credits and indorsements thereon. The defendants moved that the plaintiff be required to make its petition more definite, which was overruled. The defendants, in addition to a general denial, pleaded usury. The notes were renewals of other notes which were not usurious. The evidence was conflicting, but there was evidence tending to show usury. Verdict for plaintiff, that the notes were tainted with usury. Judgment for plaintiff, with interest at 10 per cent. Error.

McElroy, J. 1. The motion to make them more definite was properly overruled. 2. When there is a conflict of evidence, the findings of the jury are conclusive. 3. Usury destroys the interest-bearing quality of a note. The court should have rendered judgment for 6, not for 10, per cent interest. Judgment modified as to interest only.

GARDNER v COOPER (1899) 9 Kan. App. 587.

Action on a bond. Goods bought by plaintiff were attached by creditors of the vendor. Plaintiff obtained a judgment against the sheriff for conversion on account of his levy. In satisfaction of the judgment, the sheriff gave plaintiff his promissory note, and assigned a bond of the E Bank executed by H H G, "Cashier," conditional to hold the sheriff harmless from all loss and damage by reason of such levy to secure the note. Plaintiff sued H H G individually. Demurrer. Overruled. Judgment for plaintiff. Error.

Schoonover, J. 1. A cause of action accrued on the bond to the sheriff on paying the judgment, absolutely, with the note. This cause of action he could assign to secure the note. 2. The word "cashier" is prima facie descriptive only, and extrinsic evidence is admissible to show how the word was understood, as determin-

ing the character in which he contracted. 3. But before the prima facie liability can be overcome, it is incumbent upon the defendant to prove that the bond was signed for the bank; that the bank had the power to execute the bond; and that it authorized the act of signing. Judgment affirmed.

DOUGLAS COUNTY BANK v AYRES (1899) 9 Kan. App. 606.

On a promissory note. Defendant was receiver of the F Bank. The note was signed by G, the cashier and general manager of the F Bank. As such officer, G, having power to borrow money and rediscount notes, transferred to the plaintiff certain notes payable to the F Bank, and guaranteed their payment in writing. He thereby promised to pay the plaintiff \$1,500. When the notes became due, the F Bank, by G, procured a loan of \$2,000 from plaintiff, and G executed his note in writing. Of that amount, \$1,500 was applied to take up the notes and the balance used by the bank in the regular course of its business. Records of the transactions were made on the books of the F Bank at the time by the proper officers. Demurrer. Sustained. Judgment for defendant. Error.

Schoonover, J. 1. The capacity in which G signed could be shown by parol. 2. The giving of the note sued on, constituted one of a series of transactions all connected, and for the sole use and benefit of the bank. Judgment reversed.

MYERS v KIOWA COUNTY (1899) 60 Kan. 189.

Action on a bond. Defendants gave a bond conditioned for the prompt payment, by a bank, of "county funds" deposited with it by the county treasurer. They contended that they were liable for its failure to pay only such money as properly belonged to the county; that it applied only to money thereafter deposited, and not to a sum that had been previously deposited by the county treasurer and was then standing to his credit. The money deposited by the county treasurer, for the payment of which a bond was required, was called not "county" but "public money." Defendants objected to the introduction of the passbooks to show the times and the amounts of the deposits. Judgment for plaintiff. Error.

Smith, J. 1. The terms "public money" and "county funds" are convertible. The funds in the treasurer's hands, the proceeds of other than county taxes, must be regarded as the property of the county until paid over to the state, municipality, or person for whom they were collected. 2. The bond was retrospective and covers the deposits made before its acceptance and approval. 3. We see no error in admitting the passbooks in evidence. Judgment affirmed.

Cited: 64 Kan. 302.

THOMPSON v PFEIFFER (1899) 60 Kan. 409.

Action to enforce stockholder's statutory liability. Sec. 50, ch. 66, G. S. 1897, provided that a judgment creditor of the bank, on execution being returned unsatisfied, might sue the stockholders. Plaintiff recovered a money judgment, against an insolvent bank, on a contract. He had previously had dealings with the bank's president, involving the subject-matter of the suit. The summons therein, showing on its face the amount demanded, was served on the president. Execution against the bank was returned nulla bona. Plaintiff thereupon brought this action. Defendant contended that the president had been plaintiff's agent and that service upon him was consequently void. The proof as to agency was conflicting. He contended that the summons was void because the amount did not appear on its back, and that the action was not maintainable, because the sheriff had made no bona fide effort to find property of the bank. Judgment for plaintiff. Error.

Smith, J. 1. This court will not review disputed questions of fact. 2. The purpose of the statute is to require notice to be given the defendant of the amount for which judgment will be taken if he fails to appear. 3. The truth of the sheriff's return of "no property found," on an execution, cannot, in an action like this, be contested. 4. The president was not plaintiff's agent. Judgment affirmed.

Cited: 60 Kan. 496, 497; 61 id. 294.

FIRST NAT. BANK v VALLEY STATE BANK (1899) 60 Kan. 621.

Action to recover a trust fund. H, the president of defendant held money, belonging to A, as A's agent. This he deposited to his own general account, telling the cashier of defendant that it belonged to A, and instructing him to remit it to A.

H borrowed of defendant enough to make up an amount which he had drawn out, and again directed the cashier to send it to A. Defendant, however, asserting a banker's lien upon the amount for a debt due it from the president, A's agent, retained it, and, becoming insolvent, went into the hands of a receiver. A assigned the right to the money to the plaintiff. Judgment for defendant. Error.

Doster, C. J. 1. The money did not pass beyond the control of A's agent and cannot be held to have been impressed by a trust. 2. Defendant could enforce its banker's lien upon the money for the debt of A's agent. 3. The burden of proof as to the contract was on plaintiff. Judgment affirmed.

THE STATE v MASON (1899) 61 Kan. 102.

Information for falsifying a bank's books and making a false report to the bank commissioner. The bank had been regularly incorporated and had carried on business for years before this proceeding, with the actual authority of the bank commissioner, though it did not possess the formal certificates of authority required by statute. The state acquiesced in its existence and the bank commissioner recognized the bank as having authority. Defendant wrote and mailed the false report in the county in which this proceeding was instituted. It was received in another county. The statute (G. S. 1899, sec. 5271) provided that an offense, committed partly in one county and partly in another, might be punished in either. Verdict, guilty. Judgment against defendant. Appeal.

Johnston, J. 1. The fact that the real authority granted was not in writing, did not absolve the officers of a de facto bank from the penalties of the banking law. 2. Jurisdiction is in either county. 3. If the report is false and is made with the intent to deceive the commissioner as to the condition of the bank, the offense is committed, although the person making it may not have intended to injure the bank or defraud its depositors. Judgment affirmed.

STOUT v LUSK (1900) 9 Kan. App. 694.

Action for a deposit. The plaintiff deposited money in a national bank. The bank was insolvent, a receiver having been appointed by the comptroller of the currency of the United States. The defendant was a director in the bank and knew of its financial condition. It was contended that the bank was liable under the provisions of the statutes of 1879, ch. 47, and the G. S. of 1899, sec. 471, making officers of banking institutions responsible for the reception of deposits or creation of debts, when such bank is insolvent or in failing circumstances. Objection was made and sustained to the introduction of evidence, on the ground that the petition did not state facts to constitute a cause of action. Defendant contended that the act did not apply to national banks and their officers. Judgment for defendant. Error.

Milton, J. The provisions of ch. 47, Laws of 1879, are not applicable to national banks and their officers. Judgment affirmed.

CITIZENS NAT. BANK v ELLIOT (1900) 9 Kan. App. 797.

Action on a note executed by D as principal, and E and E as sureties, to the plaintiff, a bank. After the maturity of the note D had money deposited with plaintiff, which plaintiff failed to apply on the note. The sureties contended that they were thereby discharged. Judgment for defendants. Error.

Dennison, P. J. The rule that a creditor, having funds of the principal debtor, must retain them for the benefit of the surety, is not applicable to this case. Its application would impair the free use of checks and inconvenience the commercial world. Judgment reversed.

KANSAS STATE BANK v FIRST STATE BANK (1900) 9 Kan. App. 839.

Money had and received. Plaintiff sent a check to the defendant, a bank, for collection. Defendant presented it to the drawee, a bank, and accepted as payment the check of drawee's cashier. Defendant failed to remit the amount of the check, and shortly after went into the hands of a receiver. The jury found that the check was used in the payment of debts by defendant, and that the estate which went into the hands of the receiver, was not augmented or bettered thereby. Judgment for defendant. Error.

Dennison, P. J. The estate is not liable for the payment of this claim as a trust, for the reason that defendant's estate, coming into the hands of the receiver, was not augmented or bettered by the check. Judgment affirmed.

SIMS v BROWN (1900) 10 Kan. App. 261.

Action for an injunction by a receiver of an insolvent bank, to restrain the defendant from prosecuting suits, as a creditor, against stockholders. The question was who should enforce the liability of the stockholders, if they were liable, the creditor or the receiver, under sec. 55, ch. 47, Laws of 1897, which provided that a creditor could not sue a bank stockholder to enforce liability, unless the receiver has failed to sue. The defendant demurred. Overruled. Injunction granted. Error.

Mahan, P. J. 1. The statute gives the creditor the right to sue. It is not taken from him by any other statute. 2. The action commenced by the creditor does not affect the rights of the receiver in any manner. He is in no danger of losing any asset of the bank by the defendant's action. The demurrer should have been sustained. Decree reversed.

McDERMOTT v HALLECK (1900) 61 Kan. 486.

Application to share in an insolvent's assets. Plaintiff held notes executed or indorsed by K, individually, in 1892 and 1893, on which K was indebted to him. K was then the sole owner and manager of a private bank, called the K Bank, without directors or stockholders. Defendant was appointed receiver in July, 1898, and contended that plaintiff could not put in K's individual indebtedness as a charge on the property and funds in the hands of the receiver. The notes were executed while ch. 43, Laws of 1891, was in force, which provided for the general supervision of banking institutions by a bank commissioner, and for the appointment of receivers on his reporting them insolvent. Afterward, in 1897, this act was repealed in part, and it was provided (sec. 42, ch. 47, Laws of 1897) that the assets of any private bank should be exempt from liability for its owner's individual indebtedness until all its own indebtedness should have been discharged. Judgment for defendant. Error.

Smith, J. 1. There is nothing in the law of 1891 which prevents plaintiff from participating in the assets or their proceeds in the hands of the receiver. 2. His claim could not be affected by the passage of sec. 42, ch. 47, Laws of 1897, because it places obstacles in the way of the collection of his debt, and postponed it to the rights of other creditors of the same debtor, which obstacles did not exist at the time the debts were contracted. 3. The court had jurisdiction. Judgment reversed.

Cited: 63 Kan. 421.

WOODWORTH v BOWLES (1900) 61 Kan. 569.

Creditors proceeding to enforce the statutory liability of stockholders. A bank became insolvent in 1895, and a receiver was appointed. He began turning the assets into money for distribution among the creditors. In 1897, the legislature passed an act by which the right of bringing such a proceeding was confined to the receiver during the year following the closing of the bank. In this proceeding, begun after the Act of 1897, the receiver was joined as a defendant, and the court, in accordance with his cross petition, ordered him to collect the sums due from the other defendants in respect to their statutory liability. Error.

Doster, C. J. 1. The effect of the judgment would be to deprive the creditors for a year of their right, accruing before the Act of 1897 went into effect. 2. The statute cannot be given a retroactive effect. 3. The statute was constitutional. 4. The remedy was several. Judgment reversed.

Cited: 62 Kan. 244, 283, 401, 404; 63 id. 469; 64 id. 462.

BATTEY v EUREKA BANK (1901) 62 Kan. 384.

Action to enforce a lien. The plaintiff, a bank, by its cashier, loaned money in good faith to M on his unsecured, individual notes. M conveyed his property to a trustee for the benefit of creditors, the stock owned by him in plaintiff being conveyed expressly subject to the lien of plaintiff thereon for a stockholder's indebtedness to plaintiff. The banking act gave the bank a lien on the stock of its debtors and their sureties. Plaintiff sued M on the note, joined the trustee, and asked that M's indebtedness be enforced as a lien on the stock. Judgment for plaintiff. Error.

Johnston, J. The banking act does not prohibit a bank from asserting a lien on its stock for a loan made in good faith and not on the security of its stock. Judgment affirmed.

KANSAS STATE BANK v FIRST STATE BANK (1901) 62 Kan. 788.

Action to recover a trust fund. The plaintiff bank sent a check for \$1,400 to a second bank for collection. The second bank forwarded it to defendant, a bank, for collection. Both acted as the plaintiff's agents. The defendant's cashier, at the close of the day's business, took the check, with others, to the bank on which they were drawn, and, according to custom, exchanged them for checks drawn on the defendant, paying the balance due on the transaction with a cashier's check for \$615.58. The defendant then had \$2,900 in cash in its vaults, of which it subsequently paid out all except \$363.45, before it went into a receiver's hands. Judgment for defendant. Error.

Johnston, J. 1. The plan of exchanging checks and making clearances is substantially the same as if cash had been paid for the check, and then mingled and used with other moneys and assets of the defendant bank in carrying on its general business. 2. The money when collected belonged to plaintiff and was a trust fund. Plaintiff had a right to follow the fund into defendant's hands. Judgment reversed.

Cited: 64 Kan. 505, 506.

SPRAGUE v THE FARMERS NAT. BANK OF ARKANSAS CITY, KANSAS (1901) 63 Kan. 12.

Action for damages for negligence. The defendant received a note for collection from plaintiff before maturity, but presented it after maturity, when it was dishonored. Thereupon, the makers being indebted to the defendant and to others, defendant secured its own claim and, as agent for another creditor, his claim, by procuring mortgages on the makers' chattels. Ten days after the note's maturity, the defendant notified plaintiff that the note had been dishonored. The foreclosure of the mortgages exhausted the makers' assets and rendered the note uncollectible. Defendant demurred to the evidence. Sustained. Judgment for defendant. Error.

Smith, J. It was a duty incumbent on the bank to present this note to the maker, immediately on its maturity, and, if not paid, to notify the holders. Judgment reversed.

WARNER v IMBEAU (1901) 63 Kan. 415.

Injunction to restrain the collecting of a judgment. The defendant sued before a justice of the peace, to recover a deposit made by himself in an insolvent bank, afterward put into the hands of a receiver. The return stated that the summons was served on "the within named defendant (W)," who was not a defendant, but president of the bank. The defendant obtained judgment, and an execution issued against the bank was returned unsatisfied. Separate notices were then personally served on two stockholders of a hearing on the motion to grant execution under sec. 1302, G. S. of 1901, but only one motion was filed. The return was signed "L. C. Jones, deputy sheriff." The stockholders did not appear, and the justice, ordering the summons to be amended by adding after the president's name the words "as president of the (defendant) bank," issued an execution against the two stockholders, and the constable levied on their property. These stockholders are the plaintiffs. Judgment for defendants. Error.

Ellis, J. 1. After a receiver has been appointed, and before dissolution, unless an order of injunction exists restraining suits against it, a corporation may be sued and defend in its own name. Sec. 26, ch. 43, Laws of 1891, does not alter this rule. 2. The ex parte amendment, accorded with the facts and the judgment, was not void for irregularities. 3. The notices being separate, the filing of only one motion against the plaintiffs was in effect a misjoinder of parties defendant, and was waived by failure to appear and plead. 4. A return of nulla bona upon an execution issued out of a justice's court is sufficient to give jurisdiction to proceed against stockholders. 5. The defect in the return of the notices is unimportant, so long as there was personal service thereof. 6. Ch. 47 of the Laws of 1897 repealed the banking law of 1891, but cannot affect defendant's suit, even as to proceedings therein taken after ch. 47 went into effect, for the reason that under G. S. 1901, sec. 7342, the repeal of a statute does not affect proceedings already commenced thereunder. 7. If the plaintiffs had any defense to the proceeding to charge them

as stockholders, they should have presented it at the hearing on the motion. 8. Equity will not grant relief for mere irregularities, where the plaintiffs have slumbered upon their rights. Judgment affirmed.

THE ROCK ISLAND LUMBER AND MANUFACTURING CO. v THE FOURTH NAT. BANK OF WICHITA, KANSAS (1901) 63 Kan. 768.

Garnishment. The plaintiff garnished the defendant bank as having moneys belonging to J. The bank's affidavit merely denied liability as garnishee, although G. S. 1901, secs. 4639 and 4646, permitted a garnishee to set up in the affidavit the claims of third parties to the fund. The plaintiff took issue thereon. The city of W then filed an interpleader, alleging that the defendant was the depository of funds belonging to the city, but deposited by J as president of its police board. The bank admitted the allegations except that as to ownership. Plaintiff denied the city's ownership. The cashier's books showed the money to have been deposited in the name of J, as president of the police board. The judgment denied the city's claim, but discharged the bank from liability. Error.

Pollock, J. The relation of debtor and creditor was established between J and the bank, and it could not claim the fund itself, or withhold it from the plaintiff, without an answer asserting a prior right in itself, or making disclosure of some claimant to the fund, and the nature of his claim. Judgment reversed.

KENTUCKY

GALLATIN v BRADFORD (1808) 1 Bibb Ky. 209.

Money had and received. The plaintiff was the cashier of the I Bank, and in cashing a check for the defendant paid him \$100 too much. When the cashier paid out amounts in excess of the checks received by him, the amount was charged to the cashier, and he was compelled to pay the loss. Evidence on behalf of the defendant to show an established custom among banks to refuse to rectify errors after the party left the bank was excluded. Defendant contended that the money had not been received for the use of the plaintiff but for the bank. Judgment for plaintiff. Appeal.

Trimble, J. 1. The money was received to plaintiff's use. Plaintiff's right to recover is founded on assumpsit implied in law, that defendant would repay the loss to him. 2. If the custom sought to be proven does exist, it is contrary to law. Judgment affirmed.

Cited: 6 B. Mon. 104; 82 Ky. 215.

BANK OF THE UNITED STATES v NORVELL (1819) 2 A. K. Marsh. 101.

On promissory note against maker. Defendant was sued by plaintiff on a promissory note drawn by him, and which came into the plaintiff's hands by a series of indorsements. Defendant demurred, claiming that the bank under its charter could not purchase the note sued on, and hence that he was not liable. The bank's charter provides that the said corporation shall not directly or indirectly deal or trade in anything except bills of exchange, gold or silver bullion.

Mills, J. 1. The power to deal in bills of exchange does not include the power to deal in promissory notes. 2. A title acquired against the law is not enforceable at law, even though merely *malum prohibitum* and not *malum in se*. Judgment for defendant.

SANDERS v BANK OF KENTUCKY (1820) 2 A. K. Marsh. 347.

Debt. Defendant S gave H his note at 60 days for \$1,000, which by several indorsements came into the hands of the plaintiff bank, which brought a joint action thereon against S and the indorsers. Indorsement to and holding by plaintiff was proved, but not actual discount. Defendants contended that a joint action against the maker and indorser was misconceived. Judgment for plaintiff. Error.

Boyle, C. J. 1. As the undertaking of the maker and of the indorsers, respectively, was several and not joint, it is clear that at common law a joint action could not be maintained against them, but the "Act to Establish a State Bank" places notes discounted upon the same footing with foreign bills of exchange. By statute, 2

Lit. 101, a joint action of debt is given against the drawer and indorsers of a foreign bill of exchange. It results, therefore, that this action on a discounted note was properly conceived. 2. The jury may infer discount of a note from evidence of indorsement to and holding by the bank. Judgment affirmed.

FRANKFORT BANK v ANDERSON (1820) 3 A. K. Marsh. 1.

Assumpsit for work and labor done in the construction of an iron vault. The evidence shows that the work done was satisfactory, and was accepted by the president of defendant, but no express agreement or promise to pay for the labor was proved. Judgment for plaintiff. Error.

Mills, J. 1. A statute which creates a corporation may authorize it to speak by other means than a seal, but if it is not thus authorized the common law supplies the seal as the universal mode, and contracts must be under seal to be binding. 2. The plaintiff still has a claim against the individuals with whom he contracted, but not against the bank. Judgment reversed.

Cited: 3 J. J. Marsh. 204; 7 id. 89; 1 Metc. 551.

BELL v MOREHEAD (1820) 3 A. K. Marsh. 158.

On promissory note against maker. Note was payable to H, and by the latter was indorsed to the plaintiff. Plea: That on the back of the note was an indorsement from the plaintiff to the Bank of K. The charter of said bank placed notes discounted by it on the same footing with foreign bills of exchange. The plaintiff's motion to strike out the indorsement was granted. Demurrer to plea. Sustained. Judgment for plaintiff. Appeal.

Mills, J. 1. Assignment of a note to a bank is prima facie evidence of discount. 2. The holder of a bill of exchange may at the trial strike out subsequent indorsements, although they are written in full. His holding of the bill is evidence that he has taken it up, and therefore he can treat subsequent indorsements as nullities. In this respect this note is to be considered the same as a bill of exchange. Judgment affirmed.

Cited: 3 A. K. Marsh. 1244; 2 Litt. 379; 4 Dana 327; 9 B. Mon. 612.

JONES v WOOD (1820) 3 A. K. Marsh. 162.

Where an indorser sued a remote assignor on a note payable at a bank, whose charter placed such notes "when discounted" upon the footing of foreign bills of exchange. The note was deemed not to be a bill of exchange until discounted, and a remote assignor was held not liable to an action by the holder.

BANK OF KENTUCKY v SANDERS (1820) 3 A. K. Marsh. 184.

On bill of exchange. T, district paymaster, drew a bill of exchange on the paymaster at Washington in favor of H, "on account of the subsistence of the United States Army." Defendant indorsed the bill and sold it to the plaintiff. It was dishonored and returned. An act of assembly then in force provided that the indorsers of bills of exchange, where dishonored, should pay 10 per cent damages. Plaintiff sued defendant under this act. The court held that the bill in question did not come under the act. Judgment for defendant. Appeal.

Mills, J. 1. A bill, though drawn by one government officer upon another, if negotiable in form and designated as a bill of exchange, manifests an intention to bind the individuals concerned and will be construed as a bill of exchange, and not as a contract of government. 2. A direction in such bill to pay out of a specified fund is directory merely, and, if the fund itself is certain, the bill is not thereby prevented from being a good bill of exchange. Judgment reversed.

Cited: 3 A. K. Marsh. 159; 2 Litt. 381, 382; 2 Dana 415; 1 B. Mon. 205

BANK OF THE UNITED STATES v NORTON (1821) 3 A. K. Marsh. 422.

On promissory note against maker. Defendant gave his note at 60 days for \$4,700. The note, by a series of assignments, was indorsed to the plaintiff, which sued defendant on the note. Defendant contended that the charter of the bank prohibited it from purchasing notes. The act of incorporation of the bank contains a clause to the effect that the bank shall not, directly or indirectly, deal or trade

in anything except bills of exchange, gold or silver bullion, or goods pledged and not redeemed. Judgment for defendant. Appeal.

Owsley, J. 1. It is upon the construction given to the expression "deal or trade," that the right of the bank to purchase promissory notes must turn. 2. In view of the use of the terms elsewhere in the statute, they must be held to limit only the class of things which the bank may both purchase and sell, and not to prohibit the mere purchase of a promissory note. Judgment reversed.

Cited: 4 Litt. 329; 78 Ky. 511.

TUGGLE v ADAMS (1821) 3 A. K. Marsh. 429.

On promissory note against maker. The note was executed by defendant to plaintiff, and was payable at the Bank of B, whose charter raised notes discounted by it to the dignity of foreign bills of exchange. Defendant pleaded that he executed the note to plaintiff by way of accommodation only, and that plaintiff indorsed it and negotiated it at the bank, whereby the note became the property of the bank. Demurrer to this plea. Sustained. Judgment for plaintiff. Appeal.

Mills, J. 1. The note, being discounted at the bank, was thereby, according to statute, raised to the dignity of a bill of exchange. 2. Foreign bills of exchange may be contested as between the immediate parties, and the fact that it was for accommodation only is a good defense. This being a suit between the immediate parties, the defense is a good one, and the demurrer should have been overruled. Judgment reversed.

SHRIEVE v DUCKHAM (1822) 1 Litt. 194.

Action on the case to recover the amount of a check on the F Bank. The check was drawn by S in favor of defendant, and by the latter indorsed to plaintiff. On the day after it was drawn it was placed by M, who then held the check, in the hands of a notary public, who presented it at the bank, and payment being refused, the notary protested it, and the next day notified defendant of its dishonor. The notice did not state who was the holder of the check, nor that the holder looked to defendant for payment. Defendant contended that this notice was therefore not sufficient. Judgment for defendant. Appeal.

The court. 1. Notice is sufficient if it apprises the party of the dishonor of the bill, and is sufficient to put him on the alert to save himself. Notice by notary public is sufficient. It was not necessary to state the name of the holder. 2. Presentation of a check on the day after it is drawn and notice of dishonor on the next day satisfies all legal requirements as to diligence. Judgment reversed.

Cited: 17 B. Mon. 664.

FARMERS AND MECHANICS BANK v TURNER (1822) 2 Litt. 13.

Debt, by the bank against the drawer and indorsers of a bill of exchange. The bill was drawn on S, payable to Smith, and by a series of indorsements came into the hands of the plaintiff. Plaintiff indorsed the bill to a bank for collection. Payment being refused, a Philadelphia notary protested the bill for non-payment on the last day of grace, and on the same day addressed notices to all the parties and inclosed therewith the bill and protest in a letter to the plaintiff. On receipt of this, the plaintiff immediately served the notices upon the parties and demanded payment. The defendants contended that the protest was not regular and not served with diligence. Plaintiff's charter placed all bills and notes discounted by it on the same footing as foreign bills of exchange. Verdict directed. Judgment for defendants. Appeal.

The court. 1. The protest was regular. The agent to whom a bill is remitted for collection may give notice of dishonor. Greater diligence is not required of him than of an indorsee or purchaser. 2. Protest of a foreign bill of exchange on the last day of grace is sufficient. 3. Under the Act of 2 Litt. 101, the bank may maintain a joint action against the drawer and surviving indorsers of a foreign bill of exchange, and the bill in question is, by the bank's charter, placed on the same footing as a foreign bill. 4. Notice of protest may be sent by mail, and one who, after receipt of notice, exercises due diligence in notifying prior indorsers, is entitled to recourse against them. Judgment reversed.

Cited: 2 Litt. 289; 1 T. B. Mon. 187; 3 Dana 128.

BANK OF KENTUCKY v BROOKING (1822) 2 Litt. 41.

On a bill of exchange against indorsers. The bill was payable in Philadelphia by the drawer. Drawee and indorsers all lived in Kentucky. The plaintiff put in evidence a protest by a notary, certifying presentment and dishonor at the proper time and place. Verbal notice of the protest and return of the bill was given to the defendants by plaintiff's cashier. The defendant B produced in evidence articles of copartnership, which stipulated that neither party should indorse the name of the company on any negotiable paper except with the consent of the other. The bank's charter provided that all bills discounted by the corporation should be placed on the footing of foreign bills of exchange. The court instructed the jury that written notice of the protest to the defendants was necessary, and that, if the indorsement of the firm was not in the company's line of business, the defendant B was not liable. Judgment for defendants. Appeal.

The court. 1. Notice is sufficient if it apprises the party of his liability. Where the parties are so situated that verbal notice can be given with certainty, it should be held valid. 2. When a bill drawn, accepted, or indorsed by one of several partners, on behalf of the firm, gets into the hands of a bona fide holder, it makes all the partners liable, although one partner acted without the consent of his copartners, and though the act was prohibited by the terms of the partnership deed. Judgment reversed.

Cited: 2 Litt. 289; 5 id. 272; 4 Bush. 604.

LAMPTON v COMMONWEALTH BANK (1822) 2 Litt. 301.

Where the consideration of a note to the bank was the loan of notes, as bills of credit, the violation of the judicial constitution was deemed to be no defense in an action by the bank on such note.

Cited: 7 J. J. Marsh. 349.

GREY v THE BANK OF KENTUCKY (1822) 2 Litt. 378.

Petition on promissory note against makers. The note was executed to C M, and indorsed by him to the plaintiff. The defendants pleaded that the note was executed without consideration. The bank's charter provided that all notes discounted by the corporation should be placed on the same footing as foreign bills of exchange. Judgment for plaintiff. Appeal.

The court. 1. As no privity exists between the parties to the suit, the want of consideration is no defense. 2. The note having been indorsed to the bank, the law presumes that the bank discounted it. The note was thereupon made the same as a bill of exchange. Judgment affirmed.

Cited: 2 T. B. Mon. 89.

BATTERTONS v PORTER (1822) 2 Litt. 388.

Assumpsit on bill of exchange against indorser. The bill was protested on the last day of grace, but before its expiration. The bill had been discounted by the Bank of C, which indorsed it to the plaintiff. By the bank's charter all bills discounted by the corporation were placed on the footing of foreign bills of exchange. The court's instruction was that, if the bill was protested before the third day of grace expired, the law was for the defendant. Judgment for defendant. Appeal.

The court. 1. After discount by the bank this bill must be treated as a foreign bill of exchange in the hands of every subsequent holder for a valuable consideration. 2. A foreign bill is properly protested on the last day of grace. Judgment reversed.

ANDERSON v EWING (1823) 3 Litt. 245.

Covenant. The plaintiff sued the defendant on a sealed instrument for the payment of \$800 on September 1, 1820, "in such bank notes as are received in deposit at that time in the Hopkinsville Branch Bank." The defendant offered evidence to prove that when the instrument fell due, notes were taken in deposit by the bank, of less value than specie or currency of the United States. Judgment for plaintiff for an amount in bank notes as would be equal to \$800 in specie. Appeal.

The court. 1. The instrument in this case bound the debtor to pay only so many paper dollars of the description mentioned as when counted at par would

amount to \$800. 2. The debtor is bound to pay only the notes of least value, if there be a difference, and he should be allowed to prove the value in specie on the due day. Judgment reversed.

TAYLOR v FARMERS AND MECHANICS BANK (1823) 4 Litt. 341.

On promissory note against indorsers. The note was made negotiable and payable at the F Bank. It was discounted by the plaintiff. At the time of the making of the note, there was a law which prohibited the negotiability of notes at certain banks, among them the plaintiff bank, unless it was so expressed on the face of the notes. Before the date of the discount of the note, another law was passed which made any note negotiable by its terms at a certain bank, also negotiable at any other bank. Judgment for plaintiff. Appeal.

Owsley, J. At the time the note was discounted by the plaintiff, that corporation possessed competent power to make the discount. After being discounted by the plaintiff, both the rights and the remedies of all persons concerned were the same as though the note had been discounted by the F Bank. Judgment affirmed.

HUGHES v BANK OF SOMERSET (1824) 5 Litt. 45.

Bill for accounting. Complainant obtained an injunction against judgments which the defendant had recovered upon notes executed to it by the complainant. He claimed that the defendant had forfeited its charter by mismanagement; that at the time of contracting the debt, a private agreement was made whereby the defendant was not to demand payment until complainant had received a return from a shipment of tobacco, and that the return had not been received; that he had a demand of \$340 against the defendant which should be set off against the judgments. The notes were in fact not executed at the time of the agreement; but after a controversy between the complainant and the defendant a settlement was made and the notes given on that settlement. The demand of \$340 was admitted by the defendant. The injunction was dissolved. Appeal.

Owsley, J. 1. Forfeiture of the bank's charter for mismanagement cannot absolve a debtor from liability. 2. Credit should have been given for the demand admitted by the bank. The injunction should have been made perpetual as to that amount and dissolved as to the residue of the judgments. Decree reversed.

Cited: 8 B. Mon. 123; 16 id. 7; 7 Bush. 640.

M'GOWAN v BANK OF KENTUCKY (1824) 5 Litt. 272.

Debt. The plaintiff bank sued the defendants as indorsers upon a note. The note was indorsed in the firm name of M'G & S by S, one of the partners. Evidence showed that notice of non-payment by the maker was put in the post office in proper time, but it did not show to whom it was addressed nor whether it was sent to the county in which the indorsers resided. Judgment for plaintiff. Appeal.

Owsley, J. 1. The indorsement by S in the firm name is binding on both of the partners, and makes them liable to the bank. 2. Notice of non-payment might have been given by putting into the post office in due time a notice addressed to the indorsers in the county of their residence, or by delivering notice to them through any other channel in proper time. The evidence is not sufficient for the jury to infer that notice was given in either way. Judgment reversed.

Cited: 4 Bush. 604.

COMMISSIONERS v JARVIS (1824) 1 T. B. Mon. 4.

Petition on promissory note. By an act of the legislature commissioners were appointed to close the business of the F and M Bank. The act authorized the commissioners to sue and be sued in their representative capacity. The commissioners, as such, sued the defendant upon his promissory note. Demurrer on the ground that the power conferred upon the commissioners, which previously existed in the corporation was unconstitutional. The constitution declared that no man's property should be taken without the consent of his representatives. The preamble to the legislative act stated that it was passed at the instance of the stockholders. Judgment for defendant. Appeal.

Owsley, J. From the preamble of the act the consent of the stockholders must be understood to have been given to its passage. No one was deprived of any right without his consent, and therefore the act is constitutional. Judgment reversed.

READ v BANK OF KENTUCKY (1824) 1 T. B. Mon. 91.

Debt. The plaintiff bank sued the defendant as indorser on a note. The note was protested by a private citizen in the presence of two witnesses, there being no notary public at the time in the place. Demurrer. Overruled. Judgment for plaintiff for the amount claimed and cost of protest. Appeal.

Mills, J. A notary is the proper officer to make a protest, but if there is no notary any substantial person may protest the note in usual form in the presence of two credible witnesses. They need not sign their names. 2. As the protest was made by a private individual who had no right to charge fees for protesting, it was erroneous to add this in the judgment. Protest is necessary on a foreign bill. Judgment reversed.

Cited: 5 J. J. Marsh. 342, 386.

PENDLETON v BANK OF KENTUCKY (1824) 1 T. B. Mon. 171.

Covenant. P was cashier of the plaintiff. Plaintiff sued P and his sureties on his official bond. The bond was executed to the president and directors of the bank. The declaration was in the name of the president, directors, and company of the bank, the correct corporate name. Subsequent to the bond in question, a new bond was given with different sureties, though the prior obligations were never given up or canceled. The defendants contended that this action discharged them from the date of the new bond. Evidence was given that P had improperly drawn and accepted a certain draft in his individual character. Demurrer. Overruled. Judgment for plaintiff. Appeal.

Mills, J. 1. This bond is not void and the variance is not fatal and cannot be taken advantage of by demurrer. 2. Where there is one good breach assigned, a demurrer to a declaration must be overruled. 3. An obligee may receive as many obligations as he pleases from different persons to secure the same demand, and unless one is accepted in accord and satisfaction of the rest, they are all in force. 4. The evidence was inadmissible because the bank had no interest in the draft accepted by the cashier. Judgment reversed.

Cited: 5 J. J. Marsh. 386; 15 B. Mon. 44; 2 Metc. 78.

THE BANK OF CARLISLE v HOPKINS (1824) 1 T. B. Mon. 245.

Debt. Plaintiff bank sued H, its cashier, and his sureties upon his official bond. The condition of the bond was not in strict conformity with the requisitions of the act incorporating the bank. Demurrer. Judgment for defendants. Appeal.

Owsley, J. The bond required nothing to be performed by the cashier which might not have been required of him by a bond conditioned in strict conformity to the act. The variance is not such as to invalidate the bond. Judgment reversed.

COMMISSIONERS v SMALL (1825) 2 T. B. Mon. 88.

Where a plea is demurred to on the ground that it does not show discount of notes alleged to be the consideration of the note sued on, the demurrer was properly sustained, for if the notes were not discounted they were not bills of exchange, and no notice would be necessary to charge the indorser. An averment that the note was protested at the bank will not imply a discount, for if discount were implied the note would be placed on the footing of a bill of exchange, and lack of notice would amount to payment.

Cited: 6 J. J. Marsh. 571.

FITZHUGH v BANK OF SHEPHERDSVILLE (1825) 3 T. B. Mon. 126.

Bill to compel the transfer of bank stock. T and R drew a bill of exchange, payable to the order of complainant, who indorsed it to the United States Bank. The bill was protested, and on notice thereof the complainant took up the bill. T and R gave the complainant, in payment, forty-five shares of stock of the defendant, on which they had paid three instalments amounting to about the same sum the complainant had paid for the bill. T and R held the scrip. They authorized the cashier of the defendant to make the transfer. He refused to do so on the ground that T and R were indebted to the defendant for notes indorsed, and that the stock was to be held as a pledge. Decree for defendant. Appeal.

Mills, J. 1. The possession of the stock gave the bank no lien. It had no ex-

press pledge of the stock, and no lien could be inferred by law. 2. The certificate or scrip was not only the evidence of title, but the evidence of negotiability of the stock, and must be taken as conclusive evidence against the bank. Decree reversed. Cited: 1 J. J. Marsh. 306.

LAMPTON v HAGGARD (1826) 3 T. B. Mon. 149.

Assumpsit on promissory note. L brought this writ of error to reverse a judgment against him in a suit by petition and summons on a note for \$350 "Kentucky currency." At the date of the note, gold and silver had not ceased to be the circulating medium, and the Bank of Kentucky was paying specie for its notes.

Owsley, J. The notes of that bank might then at any time have been converted into money, and were therefore the representative of gold and silver, which at that time was in fact the currency of Kentucky. The note was for the direct payment of money, and the action by petition and summons was therefore correctly conceived. Judgment affirmed.

Cited: 4 T. B. Mon. 551; 1 J. J. Marsh. 287; 100 Ky. 695.

TYLER v BANK OF KENTUCKY (1828) 7 T. B. Mon. 555.

Debt. The plaintiff sued the defendant, a bank, as indorser on a note which had discounted. The note was protested by a notary and due notice given to the defendant. There was no proof that the note was presented and dishonored except the protest of the notary. There was a law in force which provided that all instruments in writing, to which by law the signature and seal of a notary public were required, when thus signed and sealed, should be received as evidence. The note, by the charter of the bank, was placed on the footing of a foreign bill of exchange. Judgment for plaintiff. Appeal.

Mills, J. 1. This note, having been discounted by the bank, is in the nature of a foreign bill of exchange, and therefore protest is requisite. 2. As it is required, the law declares it to be evidence without further authentication. Judgment affirmed.

DANA v BROWN (1829) 1 J. J. Marsh. 304.

Bill to enforce a judgment. Defendant C owned in his own name \$800 of the stock of the F Bank. The bank had forfeited its charter, and was being wound up by commissioners. The complainant obtained a judgment against C, and caused an execution to be issued which was returned nulla bona. He then filed the bill against C and the commissioners of the bank, to subject the bank stock owned by C to his judgment. The defendant commissioners contended that the bank should have been made a party, and that C owed the bank for more than the amount of the stock. Decree for defendants. Appeal.

Robertson, J. 1. A bankrupt is not a necessary party to a suit against his commissioners. 2. The legislature, in authorizing the business of the bank to be done by commissioners, intended that it should be done without the intervention of the stockholders. 3. The stock in the hands of the commissioners may be attached without making the stockholders defendants. 4. The bank had no lien on C's stock and no right to a preference. Decree reversed.

DEPEW v BANK OF LIMESTONE (1829) 1 J. J. Marsh. 378.

Debt on a promissory note. R, by letter of attorney, acknowledged service of process on the defendants less than ten days before the return day, and pleas were thereafter filed in which the defendants denied the corporate existence of the plaintiff. The plaintiff was a corporation whose charter had been repealed. Defendant D, being a non-resident, and not having been proceeded against, asked for a continuance; this request was denied as an attempt to defeat the purpose of the Statute of 1812, which authorized the plaintiff, on a return of "not found," to proceed directly against resident defendants. The Act of 1820, repealing the charter of independent banks, continued their power to sue until 1823, when a similar act was passed continuing such power until 1827. The suit was begun in 1826. Judgment against defendant W. Abatement as to D. Appeal.

Underwood, J. 1. By the Act of 1812, the sheriff's return entitled the plaintiff to proceed at once against the defendant W. 2. The defendants are estopped from denying the plaintiff's existence. Judgment affirmed.

Cited: 8 B. Mon. 123.

BANK OF KENTUCKY v BARNETT (1829) 1 J. J. Marsh. 499.

Where the maker offered to pay an overdue note in bank paper, it was held that the note could be so discharged only on condition that payment be made on the day it falls due; thereafter the maker cannot compel the holder to receive paper in payment.

HARRISON v BANK OF KENTUCKY (1829) 2 J. J. Marsh. 140.

On promissory note against maker. Plea: That the note was given for its nominal amount in notes of the Bank of Kentucky, which were then greatly depreciated in value, and that the principal had paid to the bank an amount equal to the specie value. The Act of 1820, 1 Dig. 152, provided that the consideration of notes discounted by the bank should not be questioned by the drawers in any suit brought upon the same. Demurrer to plea sustained. Error.

Robertson, J. In a suit at law on a note executed by the Bank of Kentucky for a loan of depreciated bank paper the consideration cannot be impeached. Judgment affirmed.

TAYLOR v BANK OF KENTUCKY (1829) 2 J. J. Marsh. 564.

Covenant. The defendant was surety on the bond of a cashier of a principal branch of the Bank of Kentucky. The cashier defaulted. Defendant pleaded that the defalcations of the cashier were "known to" and "connived at as they occurred" by the president and directors of the branch bank. Demurrer to plea. Sustained. Judgment for plaintiff. Appeal.

Robertson, J. 1. As the bond shows that Taylor was the cashier's surety, the plea was admissible at law as well as in equity. 2. The fraud of the branch is not the fraud of the parent institution. 3. The plea does not show that the sureties were prejudiced by any forbearance to the cashier. 4. Fraud by the obligees would not bar this action, because it would admit a liability for the first defalcation. Judgment affirmed.

Cited: 5 Dana 110; 89 Ky. 604.

WALLER v BANK OF KENTUCKY (1830) 3 J. J. Marsh. 201.

Assumpsit to recover salary as clerk. The law authorized the appointment of clerks by this bank and fixed their salaries. The contract with plaintiff was not under seal. Demurrer to the declaration on the ground that the bank could only be bound by a contract authenticated by its corporate seal. Sustained. Judgment for defendant. Error.

Robertson, C. J. A corporation can act with respect to outside parties only by use of its seal, but with respect to itself contracts made for the running of the bank need not be executed with seal. Judgment reversed.

Cited: 1 B. Mon. 14.

POLLARD v STOCKHOLDERS (1830) 4 J. J. Marsh. 52.

On bond. The complainants, who were stockholders in the K Co. sold stock to the defendants. The defendants executed to the complainants a bond conditioned to pay all the debts of the company. The K Co. did a private banking business, and some of the notes issued by it were unpaid. The defendants failed to pay them, and the complainants bring this bill as obligees, and because they will be obliged to redeem the notes if the defendants fail to do so. Decree for complainants. Error.

Underwood, J. 1. All the obligees of the bond must be made parties to the bill. 2. Before the complainants can recover they must put a stop to the circulation of the notes. Decree reversed.

VANDYKE v HARDIN (1831) 6 J. J. Marsh. 122.

Bill to enjoin collection of judgment. Plaintiff subscribed to fifty shares of stock in the F and M Bank, and had his note discounted at the bank and the proceeds applied to his subscriptions leaving \$500 due. Defendant and others were appointed commissioners to wind up the bank's business. They called for a further payment of 10 per cent by each stockholder to cover the bank's losses, and V, refusing to

pay the 10 per cent, sued him on his note and obtained judgment. V filed this bill for an injunction. The defendants answered that they had a right to coerce \$500 from V by this judgment. Bill dismissed. Error.

Buckner, J. The whole amount of the judgment on the note could be coerced if necessary to discharge the debts of the bank. The defendants only claim \$500, and it was certainly improper to dissolve the injunction for more than they claim. Decree reversed.

BANK OF THE COMMONWEALTH v TRIPLETT (1831) 6 J. J. Marsh. 549.

On promissory note against surety. T, with two others, executed a note to the plaintiff. T was a director of the plaintiff. The charter provided that no officer should "be bound" as security on any contract. T pleaded that he signed the note as security. Demurrer to the plea. Overruled. Judgment for defendant. Error.

Robertson, C. J. The enactments are directory and cautionary. If an officer of a bank shall disregard the express will of the legislature, he will be guilty of malfeasance. But the undertaking to the bank, which has been improperly permitted, would not be therefore void. The contract by T as surety is as binding on him as it would have been, had he not been a director. Judgment reversed.

BANK v RAY (1832) 7 J. J. Marsh. 272.

Where a bank receives in exchange for the original note a renewal note, having different parties thereto, and this latter note is discovered to be a forgery, the bank cannot sue on the original note, as the renewal note will be deemed a discharge and payment of the original.

LETCHER v BANK OF THE COMMONWEALTH (1833) 1 Dana 82.

Debt on a note against surety. Plaintiff discounted the note. Defendant pleaded payment. After the note sued on became due, another note signed by the same obligors, and for the same amount, was discounted by the bank. The amount of this last note was not paid over to the drawer but was entered on the bank's books to his credit, and by another entry was applied in payment, or discharge of the due note. Verdict directed. Judgment for plaintiff. Appeal.

Underwood, J. 1. The whole transaction is equivalent to drawing the money resulting from the discount of the new note, and then paying it back in discharge of the old note. It should be enforced as a payment. 2. The question whether the purchase of the new note and credit entered therefor was fairly done and without fraud should have been left to the jury; a verdict should not have been directed. Judgment reversed.

Cited: 3 J. J. Marsh. 195.

TILFORD v THE BANK OF KENTUCKY (1834) 2 Dana 114.

Debt for a devastavit. The plaintiff obtained judgment against the administrators of J R on a note which he had given to the plaintiff. The present suit was brought against the administrators and their sureties for a devastavit on the ground that other notes had been paid, although the note in suit was entitled to priority equal to a judgment. By statute it was provided that all foreign bills of exchange, protested before or after the death of the drawer or indorser, should be accounted of equal dignity with a judgment. The bank's charter provided that all notes or bills discounted by the corporation should be placed upon the same footing as foreign bills of exchange. The court instructed the jury that the note in question was by law entitled to the priority of a judgment. Judgment for plaintiff. Appeal.

Robertson, C. J. The statute invoked by the bank can have no application to the note in this case. Since the note was not entitled to the priority of a judgment, the defendant was not guilty of a devastavit in paying others. Judgment reversed.

BANK OF COMMONWEALTH v SWINDLER (1834) 2 Dana 393.

In an action on promissory notes discounted by the Bank of the Commonwealth, a plea, that the charter of the bank is unconstitutional, is bad, since the charter has heretofore been adjudged legal and valid.

BANK OF THE COMMONWEALTH v SPILMAN (1835) 3 Dana 150.

Debt on bank notes. Plea: That the capital of the Bank of the Commonwealth was fictitious and nominal; and that the notes issued by the bank were issued and circulated on the credit of the state, and not on the credit of the corporation or its capital. Demurrer to the plea. Overruled. Judgment for defendant. Appeal.

Robertson, C. J. The act establishing the bank should be deemed a public statute of which the courts of this state are bound to take judicial notice; the demurrer therefore admitted no allegation inconsistent with the bank's charter. The charter shows that an actual and available fund was created and pledged as a capital stock of the corporation, and that the bank's notes were issued and circulated on the corporation's credit. The plea was insufficient. Judgment reversed.

BANK OF KENTUCKY v HANCOCK'S ADM'R (1838) 6 Dana 284.

Injunction. The bank obtained judgment against the plaintiff on a promissory note, through the negligence of the plaintiff's attorney. The plaintiff sought to have the bank enjoined from enforcing the judgment. A fact contended to be material, and which was not presented in the agreed case, was that the bank had suspended specie payment when the note was given, and the consideration given for the note was the depreciated currency of the bank at its nominal value. Decree for plaintiff. Appeal.

Robertson, C. J. 1. The bank should always accept in payment of every such note its own notes at their nominal value, or notes of the Bank of the Commonwealth at the same rate, or the value of them in specie. 2. If, on judgment on such note, the bank should unjustly attempt to enforce it for specie, equity will give relief. Decree affirmed.

JOHNSON v THE COMMONWEALTH (1838) 7 Dana 338.

For fine. The defendant was required to appear before the county court and to disclose on oath what he was then worth, subject to taxation under the Act of 1837. That act provided that all persons, when giving in their lists of taxable property should state what they were worth, exclusive of the property required to be specifically listed for taxation. The law provided a fine and treble tax for failing to give a correct list for taxation. The bank's charter provided that the cashier should pay each year to the treasurer of the Commonwealth a certain amount on each \$100 of stock issued by the corporation, which should be in full of all tax or bonds. The defendant claimed that he should not be required to be a witness against himself, and that his N Bank stock was not taxable. The plaintiff was tax commissioner. The court imposed a fine and treble tax on the property disclosed by the defendant. Appeal.

Robertson, C. J. 1. The court had no power to compel a disclosure in a proceeding instituted for the purpose of punishing defendant for delinquency, as such a proceeding is in the nature of a criminal prosecution. 2. The provision in the prior law regarding a fine and treble tax is applicable, but not in a proceeding of this kind. 3. The tax clause in the bank's charter was a contract between the stockholders and the state. There is no power to tax an individual stockholder. The court erred in assessing a treble tax on the bank stock, or any tax on extorted evidence. Judgment reversed.

Cited: 12 Bush. 236; 82 Ky. 666; 97 id. 608.

RAY v BANK OF KENTUCKY (1843) 3 B. Mon. 510.

Assumpsit for money paid by mistake. S drew a bill of exchange on T of New Orleans in favor of the plaintiff. P S & Co. and F and R indorsed it for plaintiff after acceptance by T, and plaintiff passed it to the G Branch of the defendant. Funds to pay it were placed in the hands of B. It was due November 4, but was not mailed from G to New Orleans until too late to arrive by November 4. B applied to the defendant on that day to pay it. Not knowing these facts, plaintiff after protest and notice sent on November 12, when the acceptor was insolvent, went to the G Branch and paid it. The court instructed the jury that on this evidence the plaintiff could not recover. Judgment for defendant. Appeal.

Ewing, J. By the laches of the bank in not sending the bill in time the plaintiff was relieved from liability. Having paid the money in ignorance of the facts, he ought in equity and good conscience to recover it back. Judgment reversed.

Cited: 4 B. Mon. 190; 10 id. 383; 1 Metc. 153; 2 id. 228; 2 Rod. 338; 84 Ky. 465; 87 id. 613; 97 id. 574; 102 id. 77.

BANK OF KENTUCKY v THORNSBERRY (1843) 3 B. Mon. 519.

Debt. The charter of the defendant provided that it should never suspend payment in gold or silver, and if the officers ever refused such payment, the bank should be liable in damages at 12 per cent per annum until payment was made. The bank suspended payment. Thereafter T gave to the cashier \$1,200 in the bank's notes, and said, "I want the specie." The cashier replied, "We are not paying specie." T then took back the notes and brought this suit for the 12 per cent damages. The court instructed the jury that a demand on "any of the officers" of the bank was sufficient, and refused to instruct them that the demand proved was insufficient. Judgment for plaintiff. Error.

Ewing, J. 1. The charter had reference to those officers whose business it was to pay or to direct or refuse the payment. The instruction was too general in authorizing a recovery upon a demand made of any officers. 2. The bank has the right to require that the demand shall have been made in so distinct and unequivocal a manner as to enable the officer to understand, certainly, that specie was required and insisted on. Judgment reversed.

ATTERBURY v KNOX (1843) 4 B. Mon. 90.

On bill of exchange. The complainant, an agent of a Maryland bank, had his agency in Virginia to receive notes, and issue the same as money. A bill of exchange was indorsed by the defendants and delivered to the complainant for a loan of the notes. The Virginia Statute, Act of February 24, 1816, declares void, all bills made by unchartered banks, and imposes penalties upon all concerned. The defendant's cross bill alleged that, inasmuch as the bank was not incorporated in Virginia, the bill of exchange was given for a loan of notes issued in violation of the statute and is void. Decree for defendants. Appeal.

Ewing, J. Maryland had no power to charter a bank, and give to it the authority to establish agencies within the limits of Virginia. Such agencies must be deemed unchartered and within the statute. Decree affirmed.

Cited: 10 B. Mon. 99; 12 id. 226.

BANK OF GALLIOPOLIS v TRIMBLE (1846) 6 B. Mon. 599.

On promissory note. The defendants in 1839 executed their note to the plaintiff. The action was commenced in 1840, and the case was continued until 1841. In January, 1841, the bank failed and its notes depreciated. In February, 1841, the plaintiff assigned part of its claim to N and the balance to B. Notice of the transfer was given to defendants. In March, 1841, the defendants tendered to the plaintiff its bank notes as a setoff. There was no evidence as to the precise time the defendants acquired and became the holders of these notes. The statutes of Ohio, where the plaintiff was incorporated, permitted the setoff of bank notes. The charter of the bank expired in January 1, 1843. Under the laws of Kentucky no further prosecution of the suit was authorized in the name of the expired corporation. The Act of March, 1842, Ohio, provides that upon the dissolution of a corporation its directors or managers shall be constituted trustees of the creditors and stockholders to settle the affairs of the dissolved corporation. They had authority to sue in the name of the trustees of such dissolved corporation. Act of March, 1843, Ohio, provides that no suit pending in the bank's name shall abate, but it shall be presented by the parties having legal charge of such dissolved corporation. It also provides, if the suit had abated by means of such dissolution, it shall be revived and proceeded in by such parties having charge of the assets. In October, 1843, the case was tried. The court held that by virtue of the laws of Ohio, where the plaintiff was chartered and located, the defendants had a right to set off the notes of the plaintiff. Judgment for defendants. Error.

Breck, J. 1. The plaintiff did not transfer the legal title to the note to the assignees. It remained in the plaintiff in trust for the benefit of the assignees. 2. The defendants failed to show that they were the holders of the notes prior to the assignment, or to the commencement of the suit. The onus of proving that fact devolved upon them. 3. The setoff not having been acquired until after the commencement of the suit, the defendants could not render it available under the

laws of Kentucky. 4. The statutes of Ohio, by no rule or law of comity, can have any operation or consideration in the courts of Kentucky, especially when in conflict with our laws. 5. Setoff is a mode of defense essentially, not a part, connected with the remedy. Remedy by the universal doctrine is governed by the law of the forum, and not by the *lex loci contractus*. 6. Under the laws of Kentucky the abatement of the suit was a necessary consequence of the expiration of the charter as much so as if the plaintiff had been a natural person and had died. 7. The laws of Ohio as to the revival and further prosecution of a suit in the name of a dissolved corporation are not only applicable to the remedy, but they emphatically provide and regulate it. The *lex fori* should govern. Judgment reversed.

Cited: 8 B. Mon. 123, 127; 5 Bush. 165.

PILCHER v THE BANKS (1847) 7 B. Mon. 548.

On bills of exchange. The plaintiffs purchased bills of exchange on New Orleans drawn by the defendant. Some of them were returned from New Orleans. The court decreed the payment of the amount paid by the banks for them, thereby imposing on the banks the loss of the exchange they had charged. Error.

Simpson, J. 1. The law has not fixed the rate of exchange at which banks shall deal, or limited the discount in the purchase of bills by them. 2. As regards the other parties to the bill, they are liable to the holder for its full amount. This rule should not be varied when applied to the banks. Decree reversed.

JONES v BANK OF TENNESSEE (1847) 8 B. Mon. 122.

Assumpsit on promissory note. On the note, seals were attached opposite the names of the makers. The defendant pleaded: 1, That plaintiff was incorporated by the State of Tennessee, which owned all the stock, and that the note sued on was given for bills of credit issued by the bank, which was a violation of the United States Constitution; 2, that plaintiff's charter had been forfeited and plaintiff did not exist; that the plaintiff had no corporate powers to acquire title to the note; that the note was usurious in violation of the charter and state laws; 3, that the bank could only execute notes, not bonds. Neither the charter nor the laws alluded to, were set out in the pleas. Demurrer to pleas. Sustained. Judgment for plaintiff. Error.

Simpson, J. 1. A forfeiture can only be established by a direct proceeding. By executing the note payable to the corporation, the defendants were estopped to deny its existence at that time. 2. These pleas allege deductions of law instead of facts. 3. It is but a promissory note under seal. If the bank had a right to discount notes, it had a right to discount the paper in question. Judgment affirmed.

Cited: 8 Bush. 401.

BANK OF UNITED STATES v LEATHER'S ADM'R (1847) 8 B. Mon. 126.

Assumpsit. This suit was brought in 1834. After 1843, on amendment of pleadings, the court ordered that the suit be abated on the ground that the Bank of the United States had ceased to exist. The bank's charter gave it two years after the expiration of the time for which it was created, to sue; and United States Statutes at Large, 211, passed in 1838, before the two years expired, declared no pending action should abate by reason of the charter. Plea in abatement, that there was no Bank of United States when the writ emanated. Demurrer to the plea. Overruled. Error.

Marshall, C. J. The act is binding upon all courts to the same extent to which the original charter was binding, and preserves the suits of the corporation by continuing the corporate name and capacity for maintaining suits. Judgment reversed.

COMMONWEALTH v BANK OF KENTUCKY (1848) 9 B. Mon. 1.

The Commonwealth alleged an increase of the capital stock of the defendant under the Act of 1842, and a failure to pay the tax thereon. The legislature, to enable the defendant to cover a loss sustained by fraudulent over-issues of its stock by the cashier, passed an act in 1842, authorizing the defendant: 1, To set apart all future earnings over 5 per cent, and invest the same in its stock; 2, to recognize all over-issues in the hands of innocent purchasers; 3, to purchase sufficient stock to reduce the capital to the proper amount, irrespective of over-issues. Bill dismissed. Appeal.

Breck, J. There has been no increase of the capital, and neither the letter nor the spirit of the law will subject the bank to a tax on more than the original stock paid in. Decree affirmed.

BANK OF TENNESSEE v SMITH (1849) 9 B. Mon. 609.

Assumpsit. Plaintiffs sued on a bill of exchange against drawer and indorser jointly. The bill was presented for acceptance and refused. To prove notice of non-acceptance, the plaintiff showed an entry by the cashier, who had since died, of the notice of protest for non-acceptance made by the notary. Indorsements on the bill at the time of protest made for collection, were stricken out before the suit. The court therefore excluded the protest on the ground of variance between the bill described in it and the one sued upon. Two plaintiffs brought a joint action of assumpsit. Judgment of nonsuit. Appeal.

Simpson, J. 1. When a bill has been presented for acceptance before it becomes due and has been dishonored, there is no inference that a party who promises to pay after the bill falls due, knew of the refusal to accept, or of the neglect to give notice of such acceptance. 2. Such entries are competent evidence after the death of the person by whom they were made. 3. The plaintiffs had a legal right to strike out these indorsements and sue in their own name. They had a right to use the protest in evidence. 4. In giving a joint action against the parties by an action of debt, the statute (2 Stat. Law, 249) does not authorize a joint action of assumpsit. Judgment affirmed.

Cited: 2 Metc. 282; 96 Ky. 160.

BANK OF LOUISVILLE v SUMMERS (1853) 14 B. Mon. 306.

Where it was satisfactorily established that notes of the bank had been destroyed, the bank was held responsible for the amount to the owner.

LOUISVILLE SAV. BANK v COMMONWEALTH (1854) 14 B. Mon. 409.

To collect tax. There were three corporations in Louisville chartered as "savings institutions." The revised statutes, p. 550, imposed a tax "on bank stock, or stock in any moneyed corporation of loan or discount." On page 354 it was provided that "the cashier of a bank, and the treasurer of any other institution whose stock is taxed, shall pay the amount due." Judgment that the corporation, not the stockholders, should pay the tax. Error.

Simpson, J. These savings banks are expressly embraced by the statute. 2. They are liable for the tax and it is their duty to pay it. Judgment affirmed.

FINNELL v NESBIT (1855) 16 B. Mon. 351.

On bill of exchange. The plaintiffs were commissioners of an insolvent trust company. Defendants were the drawers, acceptor and indorser of a bill of exchange, held by the company. N answered that before the company failed, he, as drawer, had on deposit with it more than enough to pay the bill; that he demanded this sum by check and was refused. He claimed a right of setoff against the plaintiffs and judgment for surplus. Demurrer to answer. Overruled. Judgment for defendants. Appeal.

Simpson, J. If the defendants had money on deposit with the bank before liquidation, he is entitled to offset the amount against the commissioners. Judgment affirmed.

Cited: 1 Metc. 110; 1 Dur. 89.

FINNELL v SANFORD (1856) 17 B. Mon. 748.

On promissory note against the maker. The defendant subscribed for stock in the K Trust Co. and gave the note in suit in payment therefor. Plea: That the note was made on an illegal consideration in that the stock had all been purchased before the defendant attempted to buy. The charter of the company recognized two kinds of stock: that paid for as such, and stock purchased by deposits in the bank declared to be for the purchase of stock. At the time of the defendant's purchase only the deposit stock remained undisposed of. Demurrer to plea. Overruled. Judgment for defendant. Appeal.

Simpson, J. The capital stock consists of the money paid in; there is no differ-

ence between the two kinds of stock. The defendant's purchase therefore was legal even though nothing but deposit stock remained. The stock should have been paid for in money; but the defendant having obtained the benefit of the note cannot be allowed to set up such a defense. The fact that the defendant had on deposit other money, is no defense. Judgment reversed.

COMMERCIAL BANK v BENEDICT (1857) 18 B. Mon. 307.

Action on mutilated bank note. K mailed to the plaintiff bank notes torn in half for safety in transmission. One part of the notes was lost. The bank refused to pay more than half the value for each half note, alleging that the notes were voluntarily torn. Judgment for plaintiff. Appeal.

Duvall, J. The plaintiff is entitled to recover on proof of the purport of the notes and their partial loss. Judgment affirmed.

Cited: 18 B. Mon. 510.

NORTHERN BANK v FARMERS BANK (1857) 18 B. Mon. 506.

On bank note. Plea: That the note had been fraudulently mutilated and altered, and material and important features of the bill destroyed and replaced by other engraved pieces of paper, and partly by pieces of other notes mutilated in the same way. Demurrer to answer. Overruled. Judgment for defendant. Appeal.

Duvall, J. 1. The note in question was not mutilated by accident or for an honest purpose, and therefore no recovery can be had on it. 2. It can hardly be said that the plaintiff occupies the attitude of an innocent holder. The note itself must have presented upon its face such unmistakable evidence of fraud and forgery, as to amount to notice. Judgment affirmed.

SANFORD v KENTUCKY TRUST CO. BANK (1858) 1 Metc. 106.

To recover interest. The bank failed, and commissioners were appointed. S and others bought up a number of the bank's bills, and in addition to the amount thereof demanded 12 per cent damages, alleging that the charter provided that if the bank refused to redeem the notes in specie, it should pay to the holder 12 per cent, and that when the notes were presented to the commissioners, they refused payment. Judgment for defendant. Appeal.

Stites, J. After the appointment of commissioners, the bank had no existence for the purposes of payment or for the creation of new liabilities. Judgment affirmed.

KEEN v COLLIER & CO. (1858) 1 Metc. 415.

Assumpsit. Plaintiffs left with W money to pay several notes, one of which was held by the defendant. W deposited the money in the bank of W S & Co. K presented his note there for payment, and was paid by mistake \$70 too much. The cashier instituted this suit in C & Co.'s name, K having refused to return the overpayment. Judgment for plaintiffs. Appeal.

Duvall, J. 1. The deposit was a general deposit. The money overpaid was therefore the money of the bank, and not the money of the plaintiffs. 2. The right of action was in the bank, and not in the plaintiff. Judgment reversed.

OFFUTT v BANK OF KENTUCKY (1866) 1 Bush. 166.

To set aside satisfaction. Plaintiff bank having obtained a judgment against H, defendant replevied for him. The execution had issued on the replevin bond, when defendant and H induced the plaintiff to take a note signed by three other parties, payable to plaintiff, in satisfaction of the execution, both parties assuring the bank that the note was good, and would be paid at maturity. Plaintiff discounted the note and the proceeds were applied to the payment of the execution, which by order of plaintiff was returned satisfied. The note proved to be a forgery, and plaintiff brought suit against the makers and H and Offutt, asking to have the order of satisfaction set aside, and another execution on the replevin bond awarded. Judgment for plaintiff. Offutt appealed.

William, J. 1. The note being a forgery, there could legally be no proceeds with which to pay the execution. 2. Therefore the order of the bank to satisfy it was a nullity, so should the return be considered. Judgment affirmed.

SMITH v JONES (1867) 2 Bush. 103.

On check. Defendant, as the gratuitous bailee of plaintiff, received from him in the city of O about \$8,000 in confederate bonds on trust, to exchange them for gold. Having exchanged all but \$1,925, he drew a check for this balance to Smith, dated April 12, 1862. The city of O was captured in May, 1862. The remaining bonds on deposit were subsequently withdrawn to prevent spoliation, and having become almost worthless, were exchanged for a draft on B for \$1,200. The check was presented to the bank on January 13, 1863, and was protested, the drawer having no funds in bank. Judgment for defendant. Appeal.

Robertson, J. 1. Unlike a bill of exchange, a check does not require due diligence. Unreasonable delay only will exonerate the drawer. Smith might have presented the check and received the amount of it, but when nine months after its date the check was presented for payment, the confederate bonds were almost worthless. 2. The plaintiff by his acts has exonerated the defendant from all liability on the check. Judgment affirmed.

Cited: 6 Bush. 461.

HAHN v PINDELL (1867) 3 Bush. 189.

Ejectment. The charter of the F Bank declared that the bank may loan money and take security for the payment thereof, and dispose of the latter as may be agreed on, as natural persons may do at common law. Defendant borrowed money from the bank and mortgaged certain real estate to secure the loan, agreeing that, on default, the property should be sold by an auctioneer and the mortgagee should have the privilege of buying in. Default occurred and at the sale, plaintiff, agent of the bank, bought the property. Hahn refused to surrender possession. Judgment for plaintiff. Appeal.

Robertson, J. 1. At common law a sale of mortgaged estate can by agreement be made, without foreclosure proceedings in equity. 2. To restore the common law in this respect, and so far repeal the Statute of 1820, was the plain purpose of the provision in the charter. 3. The bank was authorized to loan money on mortgage. Judgment affirmed.

Cited: 91 Ky. 302.

COMMONWEALTH v FIRST NAT. BANK (1868) 4 Bush. 98.

To collect tax on bank shares. The suit was to compel payment of fifty cents on every share of stock, as required by the Act of 1865. The bank claimed that the shareholders were liable for the tax, and that it was not so liable. Judgment for defendant. Appeal.

Williams, C. J. 1. This law makes no discrimination against national banks in favor of state banks. Both stand upon the same footing. 2. A tax on the shares is not a tax on the capital of the bank. The tax is really and bona fide a tax upon the shareholders. 3. The bank officers can be legally compelled to pay those taxes for their respective shareholders. Judgment reversed.

BANK OF KENTUCKY v DUNCAN (1868) 4 Bush. 294.

On bill of exchange. The bill was accepted by M and indorsed by defendant. The following memorandum was admitted in evidence, made by the notice clerk of the bank, since dead: "Received January 8, 1861, with notices directed to C. S. Morehead and B. Duncan. Same day I delivered notice at the residence of Duncan, left with his daughter." Duncan had two daughters, aged four and seven, respectively. Judgment for defendant. Appeal.

Williams, C. J. The leaving of a notice at the place of abode or business of a party, with any one who may reside there, or be a member of the family, of sufficient age and discretion to take care of it, should be regarded as a delivery to the person. If the daughter who responded to the case was of sufficient intelligence to inform the clerk that she was Duncan's daughter, it may be presumed that she was the elder daughter and that she was of sufficient intelligence to deliver it to her father. We regard the liability of Duncan as fixed. Judgment reversed.

PETITT v FIRST NAT. BANK OF MEMPHIS (1868) 4 Bush. 334.

On check. The check was drawn by C on defendant, First National Bank, payable to P, and protested for non-payment. P attached C's property, which was

cotton, in the hands of the railroad, consigned by C to T of Boston. The bank, on petition, was made a party defendant and claimed a lien on the cotton for advances on bills of exchange from T to C, discounted by the bank, the bills of lading of said cotton having been deposited with the bank. The bills of exchange were protested for non-payment because of the non-delivery of the cotton. The court ordered the cotton to be sold, and applied the proceeds to the payment of the bank's claim. Appeal.

Hardin, J. To create a valid lien on personal property susceptible of delivery, by pledging it as security for a debt, a delivery must be made. The deposit of the bills of lading was effectual for the purpose of delivery and the lien was paramount to the levy. Judgment affirmed.

Cited: 14 Bush. 563; 86 Ky. 181.

BURGESS v NORTHERN BANK OF KENTUCKY (1868) 4 Bush. 600.

On bill of exchange. The bill of exchange purported to have been drawn by E B upon and accepted by defendants, Jurey and B partners, payable to E B, and indorsed by the latter. Jurey sold the bill to the plaintiff. The proceeds of the bill were paid to him, on a check purporting to have been drawn by E B, in favor of the firm and indorsed in the firm name. J B, by special answer, claimed that the name of E B had been forged to the bill and to the check, and that plaintiff, having received them upon a forged indorsement, was not the owner thereof, and acquired no right of action thereon. Judgment for plaintiff. Appeal.

Hardin, J. If one of the parties to the bill negotiate it with a forged indorsement, in the name of the payee, he is estopped from denying the genuineness of the indorsement or setting up the forgery in defense of an action by the holder. Judgment affirmed.

CALDWELL v EVANS (1869) 5 Bush. 380.

On note. The note was executed in 1860 by T V & C with the word "surety" after the name of the latter, and was payable at the D Bank. The note was indorsed "Pay T. Mitchell, cashier, or order, W. F. Evans," and also "Pay J. W. Proctor, cashier, or order. T. Mitchell, cashier." Both indorsements were crossed by lines drawn over them. The note, being unpaid, was protested. Suit was brought in 1867. C filed an answer claiming that the note was discounted by the D Bank, and thereby was put on the footing of a foreign bill of exchange, and that more than five years had elapsed since the note was due. Mitchell was cashier of the Bank of K and Proctor was cashier of the D Bank. The note and indorsements were the only evidence. Judgment for plaintiff. Appeal.

Williams, C. J. The subsequent possession of the paper with the erasures of the indorsements fully rebuts the presumption of a transfer of the legal title for any other purpose than that of collection. Therefore the Statutes of Limitations could be no bar, as the check had not been discounted and could not be put on the footing of a foreign bill of exchange. Judgment affirmed.

FARMERS BANK v COMMONWEALTH (1869) 6 Bush. 127.

Where the charter of a bank provides that payment of a certain tax on the stock of the bank should be in full of all tax, and the assessors levied upon certain property purchased in satisfaction of a debt, the bank was held to be discharged from the payment of all of the taxes, upon compliance with the provisions of its charter.

BROWN v FARMERS BANK OF KENTUCKY (1869) 6 Bush. 198.

To recover deposit. Plaintiff was assignee in bankruptcy of T. There was \$200 on deposit with defendant to the credit of T. The defendant pleaded by way of setoff two debts due defendant from T. Plaintiff replied that before suit the defendant had duly proved these claims in the bankruptcy proceedings without making any allowance for the \$200 in controversy, and hence the claims were by law beyond defendant's control. Demurrer to reply. Sustained. Judgment sustaining the setoff. Plaintiff appealed.

Hardin, J. Proving the entire debts in the proceedings in bankruptcy, without offering to abate the claims by the amount of the deposit, was a waiver of the right to do so, and an election to proceed on said claims only in bankruptcy.

The subsequent assertion of the claims as a setoff in this case is equivalent to the prosecution of an original suit upon said claims against the prohibition of the bankrupt law. Judgment reversed.

CAWEIN v BROWNINSKI (1869) 6 Bush. 457.

On check. Defendant drew a check on T & Co., bankers, for \$300 payable to plaintiff. On the day after the check was drawn, it was presented for payment, but the bank had that day closed and taken the benefit of the bankrupt law. If the check had been presented the day previous, it would have been paid. Judgment for plaintiff. Appeal.

Peters, J. 1. A check unlike a bill of exchange does not require "due diligence." 2. Apparent laches in presenting it for payment does not exonerate the drawer unless, by unreasonable delay, he has suffered loss, and then he is entitled to relief pro tanto. It is sufficient to charge the drawer, to present the check the day after it was drawn. Judgment affirmed.

HYATT v BANK OF KENTUCKY (1871) 8 Bush. 193.

On promissory note against indorser. The N Co. executed to defendant its four months' note for \$1,908.24, in the city of New Orleans. Defendant discounted the note before maturity, to plaintiff and plaintiff then sent the note to a New Orleans bank for collection. At maturity, it was protested for non-payment. Judgment for plaintiff. Appeal.

Pryor, C. J. 1. This note having been executed in Louisiana, as between the maker and the payee, its legal effect must be determined by the law of that state. But the assignment of a note, being a contract in itself, must be regulated by the law of the place where the assignment is made. 2. The paper indorsed by Hyatt being a mere promissory note, under the law of Kentucky he is not liable as the indorser of a bill, although such would have been his liability had the contract been construed under the law of Louisiana. Judgment reversed.

Cited: 99 Ky. 29.

LESTER v GIVEN (1871) 8 Bush. 357.

On unaccepted check by holder against bank. C drew a check on defendants, bankers, in favor of L, and, on the same day, notified the bankers thereof. Subsequently, the check was presented for payment, and protested for non-payment, although defendants had in possession sufficient funds belonging to C to pay it. Demurrer to petition. Sustained. Judgment for defendant. Appeal.

Peters, J. 1. A check on a bank is payable immediately on presentment and no acceptance as distinct from payment is required. 2. It implies a previous deposit of funds and is an absolute appropriation of so much money in the hands of the bankers to the holder of the check to remain there until called for, and cannot after notice, be withdrawn by the drawer. 3. The holder must have the right to maintain the action, otherwise the drawees would not be responsible to any one for the funds in their hands. 4. No acceptance of a check being required, the right of the holder to sue the payees or drawers is not dependent on the acceptance. Judgment reversed.

Cited: 12 Bush. 140; 103 Ky. 591.

UNITED SOCIETY OF SHAKERS v UNDERWOOD } (1873) 9 Bush. 609.
DAVENPORT v UNDERWOOD }

Petition to enforce directors' liability. Defendants were directors in the Bank of B G, which became insolvent. The plaintiffs deposited with the bank certain bonds on special deposit. Petition alleged the deposit; the conversion; that the money proceeds were paid out as dividends to the stockholders, including defendants; that the defendants had notice, or could have had it by ordinary diligence. Demurrer. Sustained. Judgment for defendants. Appeal.

Lindsay, J. 1. It is sufficient to show that the misconduct was such that it must have been brought to the directors' knowledge. If the deposit was lost by gross negligence of directors, the bank is liable. The allegation of notice is sufficient. 2. Having notice, it was the directors' duty to prevent the sale of the bonds. 3. Their subsequent action in directing the proceeds to be paid out as dividends to the stockholders, including themselves, was a ratification of the conversion.

which they had wrongfully permitted. 4. Bank directors are more than agents. They are trustees. Judgment reversed.

Cited: 10 Bush. 355; 658; 11 id. 268; 14 id. 139; 86 Ky. 555; 87 id. 322; 97 id. 719.

GRAVES v LEBANON NAT. BANK (1873) 10 Bush. 23.

Cross action on cashier's bond. The bank began business, and M, the cashier, was inducted into office, August 3, 1869. The first transaction was the taking over by purchase the assets of the private bank of B M & Co., B becoming a director and M the cashier of the cross plaintiff. M was then in default, having embezzled about \$12,000 of his bank's money. The fact would have been discovered but for the negligence of the directors of plaintiff. In October, the plaintiff made and published in a paper read by the sureties a report to the comptroller, certified by three directors, showing the bank's condition, which would have been discovered to have been false, had reasonable diligence been used by the directors. The bond sued on in the bank's name ran to "the president and directors," and was undated, except "the—day of—1869." No written acceptance was shown. The testimony preponderated in favor of about November 1, as the date of delivery. Judgment for plaintiff. Appeal.

Lindsay, J. 1. The supposed defect of parties cannot be first raised in this court, but must be made by demurrer, or plea. 2. It is not essential that the directors show by written memorandum their acceptance of the official bond of the cashier, it may be presumed by the retention. 3. The legal presumption from the dating of the bond would be the last of the year, 1869, and the preponderance of the evidence fixes not earlier than November 1 as the time. 4. No official negligence short of fraud, after a valid bond is given, will excuse the sureties. 5. A fraud may be perpetuated by the assertion of facts which do not exist, ignorantly made by one whom the person, acting on the assertion, has a right to suppose has used diligence, as by concealing facts, and the sworn reports were of a character to be relied on. The sureties were free from blame, and the loss must fall on the association, the bond being invalid. Reversed with directions to dismiss the cross petition.

Cited: 81 Ky. 545; 95 id. 447; 104 id. 164, 823.

BANK OF AMERICA v McNEIL (1873) 10 Bush. 54.

Damages for conversion. A assigned to plaintiff the promissory note of S & Co. for \$12,000, due in six months. To secure its payment, A transferred to X, plaintiff's agent, certain securities, among them a certificate for twenty shares of the stock of the defendant. The defendant's cashier signed a statement to the effect that the stock was unencumbered and that the defendant released all claims against it for six months. The bank had notice of the passing of the stock certificate to plaintiff's agent as security. On maturity, a renewal note of S & Co., indorsed by A, was given, and the pledge of the stock continued. Defendant thereafter loaned A other moneys. A failed, and S & Co., in which he was a partner, became insolvent. A applied to the defendant to transfer the stock to him, as agent for plaintiff, on the bank's books. Refused. The bank's charter provided that the corporation should have a lien on its capital stock to secure any indebtedness by a stockholder to it. The plaintiff claimed that the bank's refusal to transfer the stock was a conversion of it. Judgment for plaintiff. Appeal.

Lindsay, J. 1. The assignment of the certificates was a symbolical delivery of the stock. 2. The bank had notice of the assignment, and had such information as put it upon inquiry as to the status of A's stock. 3. The bank cannot be allowed to gain an advantage, which it could not have claimed, had it exercised proper diligence. 4. The limitation of six months cannot affect the plaintiff's claim. 5. From the time the pledge was made and notice given, the right of the bank to acquire a lien was subordinate to the rights of the plaintiff, who had a right to treat the action of the bank as a conversion of his property. Judgment affirmed.

Cited: 84 Ky. 445.

CAMPBELL'S EX'R v FARMERS BANK OF KENTUCKY (1873) 10 Bush. 152.

On note against indorser. The petition alleged that the note had been discounted by the bank and had thereby become a bill of exchange. The bank's charter provided that promissory notes, discounted by it, should be placed on the

footing of foreign bills of exchange, if made payable at its office or any other bank. The note in question was payable at the bank of M, which was not alleged to be incorporated. Judgment for plaintiff. Appeal.

Hardin, C. J. 1. "Other banks," referred to in the plaintiff's charter, were not intended to embrace any other than incorporated or legalized banks. 2. Where there is no allegation or judicial knowledge that a bank is incorporated it will be regarded as not incorporated. 3. The defendant's liability is only that of an ordinary assignor, and not that of an indorser of a foreign bill of exchange. Judgment reversed.

PAYNE v BANK OF BOWLING GREEN (1873) 10 Bush. 176.

On promissory note against maker. The plaintiff discounted the note. The note was not payable to the order of the payees, but under the statute of assignments they were able to invest the party to whom they sold it with the right to sue in his own name. It did not appear that the note was payable at a bank. Demurrer to an answer, which set up a complete defense as against the payees, was sustained on the ground that plaintiff's discount of the note placed it upon the same footing as a foreign bill of exchange, and defendants therefore could rely on no defense not available in an action on commercial paper. Defendant thereupon took issue on an immaterial point. The bank's charter provided that all promissory notes discounted and owned by the corporation should be put upon the footing of foreign bills of exchange. The charters of most of the banks of the state provided that notes, made negotiable and payable at a chartered bank, and discounted by it, should be regarded as foreign bills of exchange. Judgment for plaintiff. Appeal.

Lindsay, J. 1. A statute allowing an assignee of a note to sue in his own name does not impair the right of the payor to set up any defense which would be available as against the payee. 2. Plaintiff's charter must be construed with reference to the general policy of the laws as expressed in charters of other banks; and the provision placing notes discounted by plaintiff on the same footing as foreign bills, must be held to refer only to those payable in bank. Judgment reversed.

GERMAN SECURITY BANK v JEFFERSON (1874) 10 Bush. 326.

Petition to share in the general funds of an insolvent estate. G and F failed, and, pursuant to an agreement with their creditors, made a deed of assignment to defendant. The deed stipulated that no existing priorities or liens were to be disturbed. The assignors were stockholders in plaintiff and other banks. The banks' charters provided that the corporations should have a lien on the shares of any stockholder indebted to them. After applying the proceeds of the sales of these shares to the partial satisfaction of their claims, the banks claimed the right to share the general fund with the creditors having no such advantages for the satisfaction of the balances still due them. Petition denied. Judgment for defendant. Appeal.

Lindsay, J. 1. The liens of the banks were created solely by law, and they cannot therefore object to the marshaling of general assets in favor of the other creditors. They are not entitled to the right, which would be accorded to those holding liens by contract, to participate equally with other creditors in the general assets for the satisfaction of any balance. 2. When the banks have applied the whole of the proceeds of the bank stock to the payment of their debts, equity demands that they shall be postponed until the general creditors have been indemnified out of the general and unencumbered estate. When this is done, the balance will then be distributed *pari passu* among all the creditors. Judgment affirmed.

Cited: 13 Bush. 22; 84 Ky. 90; 92 id. 474; 99 id. 402.

RAY'S ADM'RS v BANK OF KENTUCKY (1874) 10 Bush. 344.

To recover the value of special deposits. R deposited with the defendant, at its branch in B G, two packages of United States notes and gold, as special deposits, for the keeping of which the bank was to receive no compensation. The defendant afterward sold its branch to a new bank styled "The Bank of Bowling Green." The special deposits were overlooked in the change, but they were left in the vaults where they had always been kept, and the special deposit entry book was left in the custody of the new bank. R died, and his administrators demanded

a return of the special deposits from the defendant. The deposits had been stolen by the cashier of the Bank of Bowling Green. The court instructed the jury that if the defendant transferred the deposits to the Bank of Bowling Green as its successor or agent, and R ratified the transfer, and agent's cashier stole the deposits, the plaintiff could not recover. Judgment for defendant. Appeal.

Lindsay, J. 1. Unless R, directly or by implication, ratified the transfer of his deposits to the Bank of Bowling Green, before the loss, the defendant is liable. 2. Failure by a bailor to object, within a reasonable time after knowledge, to the transfer of the deposit by the bailee, is a ratification of such transfer. 3. A gratuitous bailee is liable only for loss due to gross negligence of himself or agent. 4. Though not in general liable for loss resulting from the criminal act of an agent, a bailee is responsible therefor when he has been guilty of negligence in employing or retaining the agent. 5. A corporation is not liable for the criminal act of its agent, unless committed while acting within the scope of his authority. Judgment reversed.

Cited: 11 Bush. 269.

SECOND NAT. BANK OF LOUISVILLE v NAT. STATE BANK OF NEW JERSEY
(1874) 10 Bush. 367.

Petition to compel transfer of stock on books and for an accounting of dividends. S, owner of shares of defendant's stock, was indebted to plaintiff. He transferred to the latter his stock in the former by signing the transfer on the back of the certificate and delivering it to plaintiff. He afterward borrowed other sums from the plaintiff, on the faith of this security, until his indebtedness exceeded the value of the stock. The attorney of plaintiff thereafter applied to the defendant to be allowed to make a transfer of the stock on the latter's books. Permission was refused on the ground that under its by-laws it had a lien on S's stock for an indebtedness to it. Thereafter S was declared a bankrupt, and the assignee, by agreement with defendant, deducted the value of the stock from the amount of its claims against S, giving as a reason therefor, in his report, that defendant "claimed a lien." This report was approved by the bankruptcy court, but the validity of the alleged lien was not passed upon. Plaintiff was neither made a party to the bankruptcy proceedings nor named as a creditor therein. At the time of the transfer to plaintiff, and at all subsequent times, S was indebted to plaintiff in a greater amount than the value of his stock. Judgment for plaintiff. Appeal.

Lindsay, J. 1. No banking association organized under the National Currency Act of 1864 can create or hold such a lien as is set up in this case. 2. The powers of an assignee in bankruptcy are in no sense judicial; he can convey no greater title than that of his assignor, and his acts bind only those he represents. 3. Though bankruptcy courts can compel all persons holding liens or asserting claims against the bankrupt's estate to submit such claims to their jurisdiction, they are not compelled to do so. 4. Where secured creditors are not made parties in bankruptcy proceedings, their rights are not affected, and may be enforced in the state courts. 5. The transfer of the certificate passed a beneficial interest, for the payment of which the bank stock is bound, and defendant cannot retain the stock without satisfying S's debt to plaintiff. Judgment affirmed.

Cited: 11 Bush. 134.

WOOLFOLK v BANK OF AMERICA (1874) 10 Bush. 504.

Assumpsit on a bill of exchange. N drew a bill on A, who accepted it, payable to W, who indorsed it in blank in the following form: "\$500. Pay to the order of W ——— dollars." N and W acted solely for A's accommodation. Subsequently, A raised the marginal figures to \$5,000, inserted this amount in the body of the bill, and added "Bank of America, N. Y." In this form the bill was discounted by plaintiff, a bona fide purchaser, but was dishonored when due. Defense. The fraudulent alterations. Judgment for plaintiff. Appeal.

Pryor, J. 1. The marginal figures can be regarded as a material part of the bill affecting the rights of innocent holders for value, only where such parties have knowledge of the limitation placed upon the power to fill blanks. 2. If this skeleton of a bill was signed and indorsed by the parties sought to be charged, it is immaterial whether the act of A increased their liability or not. Where one indorses an incomplete bill, he must suffer the loss rather than the innocent holder. 3. Unless the holder obtains the paper mala fide, neither want of ordi-

nary care nor gross negligence will divest his title. Whether the defects in the bill were apparent, is for the jury to decide. Judgment affirmed.

Cited: 13 Bush. 201; 14 id. 614; 78 Ky. 606; 97 id. 491; 100 id. 104, 279.

WESTERN GERMAN SAV. BANK *v* FARMERS AND DROVERS SAV. BANK
(1874) 10 Bush. 669.

Petition for rescission of contract. A man calling himself N obtained from the defendant \$6,500 by means of a forged check. On the same day, another man calling himself N obtained from the plaintiff \$4,500 by the same means. The parties, thinking there was but one N, entered into an agreement by which expenses incurred in hunting down the thief were to be paid by them in proportion to the amount obtained from each, and any money recovered was to be apportioned in the same way. It turned out there were two N's, both of whom were arrested. One of them had in his possession the \$4,500 obtained from the W G Bank, plaintiff, which sought by this petition to rescind the agreement. Judgment for defendant. Appeal.

Pryor, J. A contract made under mistake of fact is voidable in equity only when that fact is material; and where a fact is equally unknown to both parties, and each has equal or adequate means of information, or when the fact is doubtful from its own nature, the parties having acted in entire good faith, no relief will be granted. Judgment affirmed.

NEWELL *v* NAT. BANK OF SOMERSET (1876) 12 Bush. 57.

Assumpsit against sureties on notes. R and P borrowed from the plaintiff bank, with defendants as sureties, on notes. These notes were renewed from time to time as they fell due, the plaintiff, on the original discount and at each renewal, retaining 10 per cent interest in advance. The last renewal notes were not paid. Plea: Usury, under Session Acts 1871, p. 61, and sec. 4 of art. 2, ch. 60, G. S. Defendants further claimed a forfeiture of twice the amount under the national currency act. By the Act of 1871, p. 61, it was provided that more than 6 per cent interest could not be collected, unless the loan is upon a "memorandum in writing signed by the parties chargeable thereon." Judgment for plaintiff. Appeal.

Lindsay, C. J. 1. The deduction in advance of full legal interest from the face of a note has always been tolerated in this state. Transactions of that sort are not to be treated as usurious. 2. The notes signed and delivered to the bank were written memoranda signed by the parties to be charged. 3. It has not been the policy of the courts of this state to enforce penalties arising under national laws. Judgment affirmed.

Cited: 12 Bush. 438.

HUFFAKER *v* NAT. BANK OF MONTICELLO (1876) 12 Bush. 287.

On a note. The petition avers that the defendants are indebted to the plaintiffs on two notes, "herewith filed as a part hereof," without stating any promise to pay them. Demurrer. Overruled. Defendants were payees. The notes were payable at plaintiff bank, and were indorsed by defendants to it. In the answer the defendants questioned the organization of the plaintiffs under the national currency act, and denied that the notes were "duly" protested, and that they had sufficient knowledge to form a belief as to whether the notes were presented and payment demanded and refused. The protest was filed with the petition. It was not under the notary's seal, but was signed by him. Demurrer to answer. Sustained. Judgment for plaintiffs. Appeal.

Lindsay, C. J. 1. When the party has accepted, as payee, a promissory note made payable at a banking institution which the parties to the note style a national bank, and has sold the note to that bank, he cannot question its incorporation by merely averring want of knowledge or information sufficient to form a belief as to whether the institution is a body corporate. 2. An answer is demurrable which sets up lack of sufficient information to form a belief as to protest, where the protest is on file and open to defendant's inspection. 3. The notary being an officer of this state, his official signature is all that is required to the protest. 4. In an action on a note in this state, a promise or agreement must be averred to make the petition good, and the exhibition of the note sued on will not obviate

the necessity of setting out the undertaking, promise, or agreement. Judgment reversed.

Cited: 12 Bush. 336.

TRUSTEES OF EMINENCE v DEPOSIT BANK OF EMINENCE (1877)
12 Bush. 538.

Case submitted. For a certain specified purpose, authority was given by law to plaintiffs "to levy and collect a tax on the taxable property in the town." They assessed against the defendant, which was located in the town, \$100,000 on its capital stock. Judgment for defendant. Appeal.

Cofer, J. 1. The bank stock is a liability to its stockholders. To require it to pay taxes upon its stock is to require it to pay taxes on its debts, and not upon its property. 2. For purposes of taxation, the bank is a resident of the town. Judgment affirmed.

POOR v ROBINSON (1877) 13 Bush. 290.

Petition. Creditors of R seek to reach a fund held by R's widow, claiming it to be money paid R by the United States government, and fraudulently invested for his wife. The plaintiffs proved by the assistant teller of the M Bank that a draft, drawn by the assistant treasurer of the United States, was deposited to the credit of C H & Co., R's attorneys, that the bank drew a draft in favor of C H & Co. The assistant cashier testified that the records of the bank showed the draft to the attorneys had been paid, and the proceeds placed to the credit of J C & Co. An attorney who had access to J C & Co.'s books testified that they showed the proceeds of the draft were invested in United States bonds. Objection to this evidence overruled. Without this evidence plaintiffs could not have established any case. Judgment for defendant. Appeal.

Lindsay, C. J. 1. Such entries must be proved by the person making them. It is not sufficient to prove mere conclusions of other witnesses as to their substance and effect. 2. Where the affirmative case rests entirely upon incompetent evidence, judgment for the negative will be affirmed on appeal. Judgment affirmed.

BANK OF OWENSBORO v WESTERN BANK (1877) 13 Bush. 526.

Negligence. Plea: Ratification. The plaintiff had on deposit with defendant certain funds. Plaintiff wrote to the latter and requested it to invest plaintiff's funds in good paper. The defendant loaned \$5,000 to A on note, and took as security stock certificates of the Bank of L indorsed by A, and asked plaintiff if it wished the certificates transferred to it on the Bank of L's books. The plaintiff replied, "Do by them as you would if yours." Subsequently A failed. The cashier of the defendant wrote the plaintiff that at the time the loan was made, he was told by the cashier of the Bank of L that it had no lien on A's stock; that the Bank of L now refused to allow a transfer on its books, claiming a lien for an indebtedness to it by A at the time the loan was made. When the note matured, the plaintiff, O bank, sued A and the Bank of L, and recovered judgment against the former only. The proceeds of A's stock were used in paying his debt to the Bank of L. The court instructed the jury that if the defendant communicated all the facts which were then known to it to the plaintiff, and the latter then treated the notes and collaterals as its own, the law was for defendant. Judgment for defendant. Appeal.

Cofer, J. 1. A delinquent agent is not exonerated from liability if he communicates to the principal all the facts known to him at the time and the principal ratified the delinquency, and it afterward turns out that the facts as communicated were not the real facts of the case. 2. Not until the suit was decided did the plaintiff obtain a knowledge of the facts necessary to make an election whether to adopt or repudiate the acts of its agent. Judgment reversed.

HUFFAKER v NAT. BANK OF MONTICELLO (1878) 13 Bush. 644.

Petition on promissory notes. On a previous trial, it was decided that a demurrer to the second paragraph of the plaintiff's petition was properly sustained. At the second trial, the petition was amended. A demurrer to the amended petition was overruled. The notes sued on were indorsed by the defendants to the plaintiff bank, where they were made payable. Judgment for plaintiff. Appeal. In the record before this court, the original petition was not included.

Cofer, J. 1. When the transcript shows that the record contained a paper that would sustain the decision, and which the court was bound to consider in rendering the decision, the appellant must include such paper in his schedule; and if he does not, this court will presume the decision appealed from to have been correct. 2. Possession of the note by the bank, in the custody of the proper officer, on the day of maturity, is of itself treated as due presentment and may be proved in support of an allegation of presentment. Judgment affirmed.

Cited: 14 Bush. 428.

DUNN'S ADM'R v KYLE'S EX'R (1878) 14 Bush 134.

Petition to enforce liability of directors. Petitioners were stockholders of the H Institution. The bank was organized in 1854, and C appointed cashier. All the business of the bank was entrusted to him. In 1867, C had defrauded the bank out of large sums, which had been going on for four years. The books were kept in such a way that none but an expert could have detected the frauds. C was regarded generally as a man of exceptional integrity. Judgment for defendants. Appeal.

Pryor, J. Bad faith or gross negligence is certainly necessary to render the directors liable in a case like this. Directors do not insure the honesty and fidelity of those employed in the bank. Judgment affirmed.

Cited: 86 Ky. 555; 87 id. 322.

BATCHELOR v PLANTERS NAT. BANK (1880) 78 Ky. 435.

On a bond. Defendant, the cashier of plaintiff gave a bond with sureties for the faithful performance of his duties as cashier and for the delivery of property of plaintiff "on proper demand" to the authorized recipient, R, general book-keeper, subordinate to the cashier, plundered the bank by false entries of \$70,000, which sums were in the custody of the cashier. It was contended that the action could not be maintained as there was no averment of formal demand that the action should have been tried by a jury and not transferred to equity. Judgment for plaintiff. Appeal.

Pryor, C. J. 1. The issues were purely legal and we see no reason for transferring the action to a court of equity. 2. The acceptance of a bond does not preclude the bank or its directors from designating the position of a subordinate. 3. If no judgment could have been rendered against defendant, none could have been rendered against the sureties. 4. The cashier is not an insurer of the honesty of those who occupy subordinate positions. He is required only to exercise reasonable diligence. Want of diligence on the part of the directors constitutes no defense on the part of the cashier for a neglect of duty. 5. Demand is a condition precedent to the right of recovery in covenant and should have been averred. Judgment reversed.

HARPENDING'S EX'RS v DANIEL (1882) 80 Ky. 449.

On check. H, defendant's testator, drew a check on H & Co., with whom he had funds, on August 30, payable to E & Co. E & Co. indorsed it to B & Co. On September 23, H & Co. failed. Their assets proved insufficient to pay the preferred claims. The check was presented on September 25, and was protested for non-payment. E & Co. then took up the check and had B & Co. indorse it, without recourse to plaintiff, a member of the firm of E & Co. H died. D, a member of the firm of E & Co., testified, over objection, to an agreement made with M, the agent of H, whereby it was agreed that the check might be presented any time before October 11. At the time of the trial M was dead. At a previous trial he had testified regarding this agreement, but his previous testimony was not produced. Sec. 606, subdiv. 2, civil code, provides that no person shall testify for himself concerning any verbal transaction with one who is dead. Sec. 606, subdiv. 6, provides that the assignment of a claim by a person who is incompetent to testify for himself, shall not make him competent to testify for another. Judgment for plaintiff. Appeal.

Lewis, J. 1. Any holder of a check, who can trace a clean legal title to it, may maintain an action upon it in his own name, whether he possesses the beneficial interest in it or not. The possession of such holder is prima facie sufficient evidence of his right to sue. 2. M being dead, D could not legally testify for himself concerning the agreement, even if H was living. D, while not a party to the action, was disqualified under sec. 606, subdiv. 9. Judgment reversed.

HOWARD v DEPOSIT BANK (1882) 80 Ky. 496.

Taxpayer's action. D County authorized an issue of bonds to the extent of \$250,000. The commissioners issued \$70,000 more than authorized. The excess bonds were declared to be void. The petition alleged that the commissioners raised the money to pay the bonds by a county tax, and received therefrom more than enough to pay the legal issue of the bonds; that the whole of said sum was deposited with defendant, and paid out on the void bonds through the collusion between the commissioners and defendant. Defendant demurred. Sustained. Judgment for defendant. Appeal.

Hargis, C. J. The taxes collected could not be lawfully used in paying the void bonds, hence the bank is bound for the amount of the collected taxes, and also to the extent of payments made by it to others in discharge of void bonds. The bank could not become a depository of the taxes and permit the money in its possession to be misappropriated to the discharge of the void bonds. Judgment reversed.

BRANNIN v LOVING

LOUISVILLE CITY NAT. BANK v SAME } (1884) 82 Ky. 370.

In equity to hold directors liable for permitting the E Company to incur debts in excess of its charter limitation. Its manager, under instructions from defendant H, its president, drew two bills of exchange in the company's favor on S, which were accepted by S for the company's accommodation. These bills, indorsed by H, came into the hands of plaintiffs B and L Bank. The cashier of the company falsely represented to plaintiffs that the bills were secured by pledged collateral. The plaintiffs extended the time of payment by S, who thereafter settled with plaintiff B and secured a release. S and the company, becoming insolvent, this action was brought against H and defendants L and B, directors, who had no knowledge of the transaction until consummated. Plaintiff contended the transaction was fraudulent. Judgment for defendants. Appeal.

Holt, J. 1. Directors are required to exercise ordinary care, and are only liable for gross negligence. 2. As between one liable by contract and one responsible for a tort committed with it, there is no right of contribution, as there is no privity between them; and no one is affected by a release in such case, save the parties to it. 3. H was guilty of a violation of a known duty, and therefore a breach of trust, amounting to a tort. 4. Equity will take cognizance of every breach of trust, whether the person be guilty in a private or public capacity. Judgment affirmed as to B and L, and reversed as to H.

Cited: 94 Ky. 95.

MASONIC SAV. BANK v BANGS, ADM'R (1886) 84 Ky. 135.

On promissory note. B gave his note to defendant, a bank, and, to secure it, gave certificates of stocks of the N Co. The nature of the pledge was indorsed on the note, and authorized the bank to sell the stock if the note was not paid at maturity. B died insolvent, and plaintiff was appointed administrator. The defendant sold the stock, realizing more than the amount of the note, and, after satisfying its claim, applied the residue to another indebtedness of B. Plaintiff contended that defendant had no right of setoff by reason of a general lien. Judgment for plaintiff. Appeal.

Pryor, J. The stock was not converted into money in the lifetime of the intestate, and no lien existed, either equitable or legal, outside of the pledge. The estate being insolvent, the defendant must stand back until the other creditors are made equal to the lien asserted, and allow it by reason of the pledge. Where a creditor is given priority by a lien, the residue after satisfying the lien must be paid to the creditors pro rata with the lien creditor. The statutory provision applies to all liens created on the personal estate. Judgment affirmed.

JONES, ASSIGNEE v JOHNSON (1888) 86 Ky. 530.

Action to terminate the affairs of a bank and to hold the directors liable for negligence. Plaintiffs were the stockholders, and defendants were the president and directors, of a bank. E set up a claim against the bank, and asked that the stockholders be compelled to pay up their stock for its satisfaction. D was the cashier and active manager of the bank. Notes had been taken for unpaid stock. Plaintiffs contended that the directors were negligent in allowing the cashier, knowing

him to be insolvent, to overdraw his account; for discounting his worthless paper; for canceling his cashier's bond; for allowing him to issue stock, borrow money on the same from E, and deposit it to his own credit; for electing him a director after removing him as cashier; for allowing him to check out the balance after an alleged settlement for the overdrafts; for releasing stockholders from the payment of their stock by surrendering their notes in lieu of their claim for services, and for allowing some directors to surrender worthless stock for loans. The directors examined the cashier's accounts and, on discovering his inability to pay, required a settlement. The indorsers on the cashier's paper were supposed to be solvent. The president and directors received no compensation. One of the released stockholders had an option on taking the stock and elected not to take it. E presented its claim against the bank and also against the cashier's estate. Judgment for defendants. Appeal.

Pryor, C. J. 1. The only remedy of the directors was to secure from the cashier as much as possible by a settlement, and this was done. 2. That the indorsers on the cashier's discounted paper turned out to be worthless is not sufficient to convict the directors of gross neglect and make them liable. 3. No damage resulted by making the cashier a director after removing him from the office of cashier. 4. It was proper to release the stockholders from payment of their subscription. 5. The settlement with the cashier would include his liability on the bond and released his sureties. 6. E's money went into the bank's assets, and E's action against the directors was for their tort in permitting the bank stock to be so transferred, and such an action could not be joined with one by the stockholders. 7. If, when the creditor discovers the principal, and with a full knowledge of the circumstances, then gives sole credit or proceeds to judgment against the agent, it is equivalent to an election to abandon all claim against the principal. Judgment affirmed, except as to the cross petition of E, which is reversed.

SAVINGS BANK OF LOUISVILLE, ASSIGNEE v CAPERTON (1888) 87 Ky. 306.

Damages for negligence of bank directors. The directors elected R cashier, and defendant president. R filled the place of cashier, teller and bookkeeper of plaintiff's bank. The books were kept solely by R, who, by means of false entries, embezzled a large sum of money belonging to plaintiff. When deposits were made, R would credit them on the individual ledger. The directors examined the general condition of the bank every six months. The bank failed and the directors settled with the bank by paying it the amount of the cashier's bond. Its assignee brought this action against defendant, its president, and directors. Judgment for defendant. Appeal.

Pryor, C. J. The directors have made the deficiency good by accounting for the penalty of the bond. The directors exercised ordinary diligence and suffered loss in common with plaintiff for the frauds of the cashier. Judgment affirmed.

Cited: 97 Ky. 754; 103 id. 160.

ALVES v HENDERSON NAT. BANK (1889) 89 Ky. 126.

On promissory notes. Plaintiff, a national bank, sues on four notes made by R. Plaintiff loaned R money, putting so much to his credit, and retaining the balance as interest for the next four months, every time the notes were renewed, which was more than 6 per cent. At maturity, R executed to plaintiff a mortgage on real estate to secure payment, the mortgage expressly providing that 8 per cent be paid on each note from maturity until paid. The note itself was silent as to interest. R's trustee sought to set off twice the interest paid. The Act of Congress of 1864 provided that the knowingly taking or charging a rate of interest greater than 6 per cent should be adjudged to be a forfeiture of the whole interest, and the person paying same could recover twice the amount of interest paid. Defendant contended he was entitled to twice the amount of the interest. Judgment for plaintiff for interest on each note from maturity until judgment. Appeal. Plaintiff filed a cross appeal.

Bennett, J. 1. It is not necessary, to effect a forfeiture of the entire interest, that the agreement to pay usury should appear in the note, or that the agreement should be made simultaneously with the lending of the money. 2. It was accruing every day as interest, although expressed in the mortgage and not in the notes, and as the agreement included usurious interest, it comes within the act. Judgment on cross appeal affirmed. Judgment on defendant's appeal reversed.

Cited: 94 Ky. 233; 101 id. 285.

DEPOSIT BANK v FAYETTE NAT. BANK (1890) 90 Ky. 10.

To recover moneys paid on forged checks. W, once a clerk in the plaintiff bank, forged the name of B, one of its depositors, to sixteen checks. The checks were drawn to the order of H & W, and were paid by the two banks, such firm H & W never existing. The banks of Lexington took the checks in regular course of business, with the indorsement of the payee, and then indorsed the paper for collection to plaintiff which paid it. Judgment for defendant. Appeal.

Pryor, J. 1. As between parties equally innocent, it is presumed that the bank knows the signature of its regular customers on the checks, but it is not presumed to know that the amount is correct or that no fraud has been perpetrated in that regard. 2. It rests with a bank where checks are drawn to show negligence in the indorser or holder, who in good faith has received the money before the drawee can escape liability. 3. Where the parties are equally innocent, the drawee is the loser. Judgment affirmed.

KENTUCKY FLOUR CO. v MERCHANTS BANK (1890) 90 Ky. 225.

Action to recover a deposit. Plaintiff made an assignment for the benefit of creditors. At the time, it had on deposit with the defendant bank several thousand dollars in cash and unmatured notes left for collection the day before the assignment. When it assigned, it was a debtor of the bank to an amount of nearly thirty thousand dollars. The assignee sues to recover the money. The bank contends that it has the right to credit it on its debts. Judgment for defendant. Appeal.

Holt, J. The bank is merely a debtor to its depositor; if the depositor becomes insolvent, the right of equitable setoff exists, just as in cases of co-existing demands between individuals. In case the depositor assigns, his assignee takes the estate, subject to any equities which existed against the assignor at the time of the assignment. Judgment affirmed.

Cited: 97 Ky. 556.

ARMSTRONG v NATIONAL BANK OF BOYERTOWN (1890) 90 Ky. 431.

On a draft. A draft, payable at the Bank of L, was discounted by plaintiff bank and sent to the F Bank for collection, indorsed in blank. The F Bank sent it to the L Bank, which collected it and notified the F Bank and plaintiff by mail. The F Bank failed the day the draft was collected, and defendant was appointed its receiver. The F Bank disclaimed ownership, and the money was brought into court. Judgment for plaintiff. Appeal.

Lewis, J. 1. The blank indorsement implied a transfer to the bank with authority to fill up the blanks. 2. The relation between the parties was that of principal and agent. 3. When a bank receives a note for "collection on account," it does not own the amount until collected, though credit be given therefor prior to collection. The bank is not precluded on canceling such credit, if the paper is dishonored. 4. A mere usage between banks is not alone sufficient to be set up to deprive the real owner of his rights. 5. The receiver cannot legally claim the money. Judgment affirmed.

CITY OF BOWLING GREEN v BARCLAY (1890) 91 Ky. 66.

To collect taxes. Defendants had a private bank in the city of B, where they received deposits of money, made loans, and discounted paper. The defendants had been paying state, county, and municipal taxes on their stock to plaintiff, until the auditor of the treasury interfered, when they paid taxes to him. The plaintiff brought this action to compel them to pay state, county and municipal taxes, contending that private banks were embraced under the G. S. ch. 92, sec. 1, art. 2, which provided that shares of stock in state and national banks, and other institutions of loan and discount, should be taxed seventy-five cents on each share thereof equal to one hundred dollars, which should be full of all county, state, and municipal tax. Defendants contended that, having paid the tax to the auditor, they were exempt. Judgment for defendants. Appeal.

Pryor, J. The statute was intended to apply to institutions invested with corporate rights, but not to apply to a private bank. Judgment reversed.

HENDERSON NAT. BANK v ALVES, ASSIGNEE (1891) 91 Ky. 142.

Debt to recover penalty for excessive interest, charged by defendant, a bank, to R & E, for notes given to defendant. R & E failed and plaintiff was appointed assignee. The defendant contended that the assignee had no legal capacity to sue and that the court had no jurisdiction. The statute prescribed "the taking, receiving, reserving, or charging a rate of interest greater than the law of the state allows," gave the legal representative the right to recover twice the amount of interest thus paid. Sec. 5198 R. S. U. S., provided suits for violation of the act could be brought in any state court having similar jurisdiction. Demurrer, because petition failed to allege the taking of interest was "knowingly done." Overruled. Judgment for plaintiff for part of claim. Appeal. Cross appeal.

Lewis, J. 1. The term "legal representatives" used in the statute comprehends an assignee under a deed of trust for benefit of creditors. 2. The infraction of the statute affects only private rights, and the complaint must be by a private citizen seeking redress against another citizen or corporation, and the remedy can be obtained only in a state court. 3. The criterion of recovery is "twice the amount of interest paid." 4. The statute begins to run from the time the usurious transaction occurred, and not at the time of payment of the notes. Judgment reversed. Affirmed on cross appeal.

Cited: 101 Ky. 285; 91 id. 182.

NATIONAL BANK OF LANCASTER v JOHNSON (1891) 91 Ky. 181.

To recover a penalty for usury. The defendant had made loans to the plaintiff within two years, for which it charged more than the legal rate of interest. Sec. 5197 U. S. R. S., provided that a national bank could not charge more than the legal rate in the state where located. Sec. 5198 provided that the borrower could recover twice the amount of interest paid, and that the action could be maintained in state courts having similar jurisdiction. Judgment for plaintiff. Appeal.

Lewis, J. 1. The state courts have jurisdiction in such actions. 2. The criterion of recovery, according to the plain language of the statute, is twice the amount of interest paid, and not merely twice the amount of the usury. Judgment affirmed.

FIRST NAT. BANK v BEHAN (1891) 91 Ky. 560.

To recover money paid by mistake. The plaintiffs deposited their draft with the C Bank for collection. It was sent to the N Bank, which sent it to defendant, a bank, which sent it to the K Bank. On September 2, the K Bank advised the defendant that the amount of draft was credited to it, subject to payment. The K Bank sent it to a bank in R, which presented it, and payment was refused. The defendant, having waited until September 7, and hearing nothing, concluded that it had been paid and so notified the N Bank. The C Bank, having the same information, paid it to plaintiff. It was contended that negligence of the defendant caused the voluntary payment. Judgment for defendant. Appeal.

Bennett, J. 1. Money paid under a material mistake of fact may be recovered although there was no negligence. 2. The payment cannot be recalled when the position of the person to whom the payment has been made, has been changed to his prejudice toward his debtor in consequence of the payment. Judgment reversed.

GARNETT v NATIONAL BANK OF CYNTHIANA (1891) 91 Ky. 614.

On surety bond. Plaintiff, a bank, appointed K as clerk. Defendant was surety on K's bond, as clerk only. In the absence of the cashier, K did his work. While performing the cashier's duty, he embezzled a sum of money by false entries, taking the money directly from the cashier's funds. Defendant contended that, being surety for K's duties as clerk only, the bank, at its own risk, empowered him to act as cashier. Judgment for plaintiff. Appeal.

Lewis, J. 1. As the loss resulted from the act of the plaintiff in putting K in a position where he could and did take the money, the defendant did not bind himself to answer therefor and cannot be held liable. 2. The fact that K was detailed to another position does not operate to release the sureties from the bond, as to defalcations made in course of his original employment. Judgment reversed.

PREWITT v TRIMBLE (1891) 92 Ky. 176.

To rescind a sale of bank stock. The defendant, president of the E Bank, sold the plaintiff twenty shares of its stock at \$120 per share. The bank sent out a statement signed by the president and board of directors as to the prosperous condition of the stock, stating that the stock was worth \$115 per share and more, and was selling at \$120. The purchaser of the stock had no other means of finding the status of the bank. Tender and offer to transfer the stock was made and refused. Judgment for defendant. Appeal.

Lewis, J. Something more than ordinary diligence is required of a bank president to exempt him from liability to one who has suffered loss by false statements or reports of its affairs. The president, being in a position to know the truth, he, in contemplation of law, did know it, and such a statement is therefore fraudulent; and plaintiff has a remedy for the loss sustained, or a rescission. Judgment reversed.

Cited: 97 Ky. 718; 103 id. 159.

NICHOLSON v NATIONAL BANK OF NEW CASTLE (1891) 92 Ky. 251.

On promissory note. The plaintiff, a national bank, purchased, before maturity, a note made by defendants at a "lumping discount" of one dollar. It was contended, by defendants, that it was not a discount, but barter and sale, and as such ultra vires under the act of Congress. The statute provided that notes payable to any person or corporation, payable and negotiated at any bank of the state or any of the banks specified, should be placed upon the same footing as a foreign bill of exchange. Judgment for plaintiff. Appeal.

Bennett, J. 1. A discount by a bank means a deduction or drawback made upon its advances or loans of money upon negotiable paper or other evidence of debt, payable at a future day, which are transferred to the bank. 2. By barter and sale the seller does not indorse the note at all, except, perhaps, without recourse, and is not accountable for the value of it. 3. The bank may discount the note at a price agreed before maturity, and without notice of any infirmity in it. The purchase was by discount, and not barter and sale. The instrument was placed on the footing of a bill of exchange. 4. The act of Congress does not require banks to adopt any uniform discount rate. Judgment affirmed.

COMMONWEALTH v SCHWARTZ (1892) 92 Ky. 510.

Indictment for obtaining money under false pretenses. B employed the defendant, a banker, to collect a bond and mortgage of \$2,500. He collected the money, and by representation that he was solvent and would pay her 4 per cent interest and repay the money at any time after thirty days, induced her to leave the money with him. B refused to accept 4 per cent, and he agreed to pay her 6 per cent. At the time of receiving the money, the defendant was insolvent owing over \$400,000. Art. 13, sec. 2, ch. 29, G. S., provided, "If any person by false pretenses, statement, or token, with intent to commit a fraud, obtains from another, money which may be the subject of larceny, he shall be confined in the penitentiary." The court instructed the jury to find for the defendant. Verdict, not guilty. Appeal.

Bennett, J. 1. If the defendant knew or had reason to believe that the bank was insolvent, although he intended to repay B, such false pretenses, if made as indicated, were sufficient to authorize the case to go to the jury. 2. If the delivery is not necessary to a complete transfer, the false pretenses need not relate to the delivery in order to make out the offense against the statute. If the possession has been delivered to the party, but not the right of property, and he, after such possession, obtains the title by false pretenses, he is guilty under the statute. The case is ordered to be certified.

BROWN, ASSIGNEE v MARION NAT. BANK (1892) 92 Ky. 607.

Debt. Plaintiff was assignee for creditors of the maker of certain notes. The action was to recover sums paid on four notes above the legal rate of interest of the state, in which defendant, a national bank, was located. The United States statutes provided that, where interest, greater than that allowed by law of the state where the bank is located, is taken, the legal representative can recover twice the amount thus paid. Judgment for plaintiff on two of the notes, no exception taken as to the other two. Defendant contended on cross appeal that he was entitled to 6 per cent interest, not allowed from the date of judgment.

Lewis, J. 1. The taking a rate of interest on a note greater than 6 per cent, is a forfeiture of the entire interest. The debtor, who has paid such greater rate, may recover twice the amount thereof, provided such action is commenced within two years after such usurious transaction. 2. The demands, when evidenced by judgment, bear interest, but not before. Judgment reversed on appeal and affirmed on cross appeal.

Cited: 101 Ky. 285.

SNYDER v MT. STERLING NAT. BANK (1893) 94 Ky. 231.

To recover a penalty. Defendant, a national bank, loaned the plaintiff money on notes at a usurious rate of interest. The notes were from time to time renewed, and usurious interest was charged on the renewals. The National Banking Act provided that taking a rate of interest greater than that allowed by the state in which the bank is located shall be deemed a forfeiture of the entire interest. Plaintiff contended that the interest on the note and renewals should be forfeited. Judgment for defendant. Appeal.

Bennett, C. J. 1. By the act of Congress, the charging of such rates of interest works a forfeiture of the entire interest, which the several notes carry with them. 2. Such forfeiture was not waived by the giving of subsequent notes. They were mere renewals and given without any consideration. 3. If there be usury in the original transaction, it affects all the consecutive securities, however remote, growing out of it. Judgment reversed.

Cited: 101 Ky. 285.

PURSIFULL v PINEVILLE BANKING CO. (1895) 97 Ky. 154.

On a note payable at plaintiff, a bank, made by H, and defendant as surety. Plaintiff discounted the note before maturity. H, at the maturity of the note, had an account with plaintiff, and had at all times to his credit more than sufficient to pay the note. Plaintiff allowed H to draw out all his account. H failed and the note was not paid. Four years elapsed before notice of non-payment was given. Defendant answered that plaintiff, not having exercised its lien on the maker's account with it, the surety was discharged. Demurrer to answer. Sustained. Judgment for plaintiff. Appeal.

Eastin, J. The right on the part of the plaintiff to retain a sufficiency of the maker's deposit, gives it the absolute control of an ample security for the payment of the debt. It had the right to appropriate the money which it owed H, to the payment of H's debt to it, and in failing to do so, the bank was guilty of bad faith. The want of good faith on the part of the bank in not notifying the sureties of the non-payment of the note entitles them to a release from their liability. Judgment reversed.

Cited: 99 Ky. 265.

MORELAND'S ASSIGNEE v CITIZENS SAV. BANK (1895) 97 Ky. 211.

On bill of exchange against drawer. The bill was accepted by W, indorsed by F, and payable at the plaintiff, a bank. M was cashier of plaintiff, and agent of an insurance company. W was a borrower of plaintiff, and M procured him to discount the paper, and with its proceeds bought life insurance. W was insolvent. Defendant signed the bill believing W would use it in renewals of bills he was bound for, or the money would be paid to W. It was contended that the bill was accommodation paper and the proceeds were fraudulently diverted; that the cashier, being also a stockholder, could not, as notary, give notice of protest. Notice of protest was sent to M at O, and he received it, though he did not live there. Judgment for defendant. Appeal.

Paynter, J. 1. If the note be made for general accommodation, the party accommodated may use it in any way beneficial to himself. 2. The cashier's agency ceased when the bill was purchased. Whenever a bill of exchange is made for accommodation to raise money by its sale, the one who buys and pays for it cannot be held to look to the application of the proceeds. 3. The fact that a notary has an interest in the bank does not render him incompetent. 4. The notice of protest was sufficient. Judgment affirmed.

THE FARMERS BANK AND TRUST CO. v NEWLAND (1895) 97 Ky. 464.

Action for damages. Plaintiff received a certificate of deposit issued by the P Banking Co. for \$500 and delivered it to the defendant, a bank, for collection, before

maturity. The certificate was presented, and a check on the L Banking Co., its correspondent, was given in payment, on receipt of which the certificate was surrendered by the defendant. The check was sent in the usual course of business to the L Banking Co., which refused payment because the P Banking Co. had failed between the time the check was sent to the defendant and the time it was presented. The defendant answered that there was no negligence on the part of the bank, as it had proceeded in the regular course of business and according to the uses and customs of banks. The complaint did not allege that the bank could have collected the amount of the certificate at any time after its receipt. Demurrer to answer. Sustained. Appeal.

Paynter, J. 1. When a customer deposits a check, note, or certificate of deposit with a bank for collection, he is presumed to know the methods employed by the banks in making such collection; he has made the bank his agent to collect, and he impliedly agrees that the bank will follow the customary methods. 2. The bank can only be held responsible for the exercise of due care and diligence in making the selection of agents or correspondents at other points to make the collection. 3. A check drawn on a bank where there is a deposit or fund to meet it, is an absolute appropriation of so much money in the hands of the bank or banker to the holder of the check, and cannot after notice be withdrawn by the drawer. 4. The petition was defective in that it failed to allege the bank's ability to collect the amount at any time after the receipt of the certificate. Demurrer overruled. Judgment reversed.

MERCHANTS NAT. BANK v ROBINSON & CO. (1895) 97 Ky. 552.

On a check. W and Co. were customers and depositors in the defendant bank. When insolvent, they gave their check on the bank, where they had a deposit of \$1,800, to the plaintiff for \$215.60. The check was presented and payment refused. Answer that W & Co. were insolvent, and were indebted to the bank in sums not yet due, aggregating \$6,000, and they were entitled to set off that amount against the indebtedness. Demurrer to answer. Sustained. Judgment for plaintiff. Appeal.

Guffy, J. An unmatured debt cannot be set off against a bona fide assignee, for value, of a demand due from the defendant to the assignor; that is to say, as between the holder of a depositor's check and the bank on which it was drawn. Judgment affirmed.

COMMONWEALTH v FARMERS BANK OF KENTUCKY (1895) 97 Ky. 590.

To set aside tax assessment. A tax of 50 cents per share was imposed on state banks incorporated prior to 1856; the plaintiff national banks were taxed at this rate; other plaintiff state banks incorporated since 1856 were taxed at a different rate. By the Act of 1886, it was provided that if all the state and national banks would waive their statutory exemptions, the rate of taxation would be changed to 75 cents per share, which should be in lieu of all taxes; also, that it would be subject to the provision of the Act of 1856, which authorized the amendment or repeal of all grants to corporations. Secs. 174 and 175 of the constitution of 1891 provided that the property of corporations should be taxed in proportion to its value; and that the power to tax property should not be surrendered by any contract to which the Commonwealth was a party. Judgment for banks exempt by laws of 1856, relieving them from taxation. Judgment declaring the levy under the Act of 1886 valid as to those incorporated since 1856. Cross appeals.

Pryor, C. J. 1. The Statute of 1886 imposing the tax of 75 cents, and its acceptance by the banks on the conditions imposed, created a contract between the banks and the state. 2. The reservation of the right to amend or repeal in the Act of 1856 was never intended to so apply to the Act of 1886, so that after its acceptance the legislature could disregard the contract thus made. 3. The legislation repealing the contract being unconstitutional, leaves the Act of 1886 in full force, and the banks will be taxed under its provisions. Judgment reversed in part and affirmed in part.

TRIMBLE v REID (1895) 97 Ky. 713.

Deceit. Plaintiff purchased of the defendant, president of the E Bank, 33 shares of its stock, at \$120 per share. To induce the purchase, the president, in a printed circular, stated to the plaintiff that the stock was worth \$120, and that the book value was \$110 to \$115 per share. The stock was, in fact, worth \$70 per share. The court instructed the jury that if the statement was untrue, and

if it was read and relied on by the plaintiff, then they should find for the plaintiff. Judgment for plaintiff. Appeal.

Grace, J. 1. Knowledge of the falsity of the statement is the very essence of the action. 2. The president of a bank may be held liable in an action for deceit affecting the value of the stock of the bank, if he makes these statements, knowing them to be false, or where he makes a false statement, but without any reason to believe it to be true, or when the statement is made in a reckless disregard of its truth or falsity. Under appropriate instructions framed on this line the question should always be submitted to the jury. Judgment reversed.

CITIZENS BANK OF PARIS, KENTUCKY v HOUSTON (1895) 98 Ky. 139.

On check. The plaintiff delivered to the Citizens Bank of Paris a check drawn to his order by G, on the Cynthiana National Bank for collection. It was sent to that bank by the Citizens Bank, and payment refused. Notice was immediately mailed to Citizens Bank and to G, who drew a draft on the Bourbon Bank of Paris for the original amount and protest fees, payable to the cashier of the Citizens Bank, which, on his representation that he had money there, was accepted by the bank, and the original check was canceled and given up. G made an assignment for benefit of creditors, and plaintiff brought this action for the amount of the original check. It was contended that the bank had accepted another check in lieu of the original without authority. Judgment for plaintiff. Appeal.

Lewis, J. The bank was the plaintiff's agent. No injury was done to the plaintiff by the cancellation of one and acceptance of another check in its place, nor, according to the evidence, was the transaction either without implied authority of plaintiff, or such as he could have reasonably objected to if present. The defendant is therefore not liable. Judgment reversed.

HALL v NEW FARMERS BANK'S TRUSTEE (1895) 98 Ky. 144.

On promissory note. The defendant executed his note for \$300 payable to the bank. Thereafter the wife of the defendant deposited \$438 with the bank to her credit. The bank became insolvent and assigned to the defendant. The defendant contended that he was entitled to a setoff by reason of the deposit made by his wife. By the rule of the common law personal property in possession of the wife after coverture was the property of the husband, and her possession was regarded as that of the husband. G. S. Ky., sec. 16, art. 4, ch. 52, provided that married women may make deposits in incorporated institutions authorized to receive deposits, and their checks for the same shall be valid to the same extent as if they were not married. Judgment for plaintiff. Appeal.

Pryor, C. J. 1. This fund is not a chose in action which the husband has failed to reduce to possession, but was in his possession in legal contemplation when, and at the time, it was deposited in the bank. 2. The statute was passed for the protection of such corporation, and does not deprive the husband of his right to demand the money of the bank if it belongs to him. This demand should be allowed as a setoff to the note. Judgment reversed.

MT. STERLING NAT. BANK v GREEN (1896) 99 Ky. 262.

Damages for defendant's refusal to pay a check drawn on it by plaintiff. Plea: setoff. Plaintiff at the time had enough funds deposited in the bank to meet the check, but was indebted to the defendant on an overdue note for more than plaintiff had on deposit. Demurrer. Judgment for plaintiff. Appeal.

Lewis, J. 1. If the bank refuses without justification to pay the check of a customer, he has an action for damages against the bank. 2. But the facts stated in the answer constitute a sufficient justification in refusing to pay the check and prima facie sufficient ground of defense to the action. Defendant was, on the pleadings, entitled to judgment. Judgment reversed.

NEW FARMERS BANK'S TRUSTEE v YOUNG (1897) 100 Ky. 683.

On a promissory note. Defendant executed his note to plaintiff, with N as surety. Plaintiff failed, and S, its agent, directed B, a clerk, that where any depositor or creditor owed a note to the bank at the date of its failure, to set off the same against the creditor's claim and enter credit for the amount. N having a

deposit at the time, B entered credit therefor by arrangement. B knew that defendant was the maker of the note and N was only the security, yet the fact was unknown to plaintiff. Plaintiff, at the time of the assignment, was indebted to N. Plaintiff contended that it was inequitable for N to be paid in full and it prayed for a judgment canceling the credit, and to compel defendant to pay the amount of the note. Judgment for defendant. Appeal.

Guffy, J. 1. To allow this offset to N would be to secure payment of his claim against the bank in full while other creditors would be paid pro rata. 2. The credit, having been given without proper authority, should be canceled. Judgment reversed.

MARION NAT. BANK v THOMPSON (1897) 101 Ky. 277.

To recover usurious interest. Defendant, with C as surety, discounted a note with plaintiff at four months. The plaintiff reserved the interest on the amount at 7 per cent, and renewed every four months, the interest being paid at these renewals for the ensuing four months, except on five renewals, when the interest was added to the amount of the note. Sec. 5198 of the revised statutes provides, that taking a rate of interest greater than the lawful interest of 6 per cent, when knowingly done, shall be a forfeiture of the whole interest. Defendant contended that it was entitled to recover double interest. Judgment for defendant canceling the note, and adjudging that the interest on the renewal notes be applied on the original indebtedness. Appeal.

Paynter, J. 1. It was error to allow the offset of interest. 2. Under the statute double the amount of interest could be recovered, and when the interest has been paid then the penalty is recoverable. The court could properly cancel the note, but erred in not finding judgment for the amount on its face. Judgment modified.

BANK OF KENTUCKY v BONNIE (1897) 102 Ky. 343.

To enforce a lien and subject collateral to payment of notes. Bank of C sued on three notes, first, made by N Co. to D, and by him indorsed to and discounted by the bank; second and third, made by S Co. to D, indorsed to defendant B, and by him indorsed and discounted by said bank on May 8, 1893. The defendant, Bank of Kentucky made a cross petition against defendants D and B, setting up three notes, executed to and held by it; first, made by S Co. to D, maturing May 18, 1893; second, made by same parties, maturing May 22, 1893; and third, made by D on June 29, 1893. As security for these notes D transferred to petitioner on May 6, 1893, certain shares of stock of the Bank of C, together with certain shares of stock owned by him. The first note held by the Bank of C was discounted before the petitioner acquired the stock. The Bank of C, hearing that D and the S Co. were in financial trouble, had defendant B discount two notes of D and S Co., which he held, and thus enabled it to take advantage of the bank's charter lien. Judgment, giving Bank of C a prior lien on all securities, and denying the Bank of Kentucky the right to participate in the residue of the proceeds of the 90 shares of stock in the Bank of C, prior to B. Appeal.

Lewis, C. J. 1. When the check was discounted by the Bank of C, D became indebted to the bank, and it was not necessary to proceed against the maker. 2. The Bank of Commerce has a prior right to subject the stock to the payment of its debts. 3. The proceeds of the 90 shares, after paying the Bank of C's debt, should be first applied to the payment of the notes held by the Bank of Kentucky. 4. The charter lien of a bank is for its own use. Judgment reversed.

WARD v TRIMBLE (1898) 103 Ky. 153.

Deceit. The defendant, president of the Exchange Bank, sold plaintiff through T, her agent (a director in the bank), fifteen shares of stock of the bank at \$120 per share. The sale was made on statements made in a written circular to the effect that the bank's resources were ample and the undivided profits large, and the assets worth dollar for dollar, when in fact the assets and resources were not as stated and the stock was worth only \$85. The certificate was signed by the defendant and the director T. The court instructed the jury that as the defendant was in a position to know the condition of the bank, he is conclusively presumed to have had such knowledge, and that plaintiff was entitled to judgment for any damage sustained. Judgment for defendant. Appeal.

White, J. 1. The president of a bank, as between him and parties, not with equal means of knowledge of the bank's condition, must be held to know the condition of the bank whether the statement published as to its condition is true or false. The presumption of knowledge by the president cannot be avoided by showing that in fact he did not know. 2. This presumption does not, however, apply to a director. If a report is published over the director's signature, it is *prima facie* evidence that he knew the same to be true or false. 3. The court should have charged that the burden was on the defendant to show that T did not know the falsity of the statement. Judgment reversed.

DAVID v MERCHANTS NAT. BANK (1898) 103 Ky. 586.

On check drawn by the defendant on the Farmers and Traders Bank for \$350 to the order of C, president. It was indorsed by C, for collection and credit, to the plaintiff. Defendant set up: 1, Want of consideration; 2, fraud. Demurrer. Sustained. The court refused to allow the defendant to amend. Defendant contended the check was deposited merely for collection, and not payment. Judgment for plaintiff. Appeal.

Lewis, C. J. 1. The paper fulfills the description of a bank check, and the holder, on refusal of payment, has *prima facie* a cause of action against the drawer. 2. The attainment of the check would not avail as a defense, but it would impose the burden on the plaintiff of showing a bona fide title in order to recover. Judgment reversed.

DEPOSIT BANK OF MIDWAY'S ASSIGNEE v HEARNE (1898) 104 Ky. 819.

On bond. S, a clerk in the plaintiff bank, executed a bond for the faithful performance of his duties, with defendant H as surety. S defaulted. The charter provided that the stockholders should elect five directors who should hold office for one year, or until successors were appointed; that the directors appoint a president, secretary, cashier, and clerk, and take bond for faithful performance of their duties. The cashier and clerk were the only ones from whom a bond was exacted. The defendant contended that the term of office of the clerk was one year; and as the first breach occurred more than seven years ago, the action was barred. Nonsuit. Appeal.

Hazelrigg, J. 1. The clerk is not one of the class of persons to be removed by the stockholders under the limitation of one year. He held his place at the pleasure of the directory, and his bond holds good for his defalcation. The action was brought within the statutory period of seven years. 2. The covenant of the bond ran with the service of the employee, and the bank might sue for each and every breach of duty. Judgment reversed.

CITY NAT. BANK v CONLEE (1899) 106 Ky. 788.

To recover money lost through the mails. Plaintiff enclosed a check of \$100 to defendant directing it to send him the cash. The bank received the check, and mailed him the amount in currency, at his address, in an envelope with necessary stamps. The letter was put in the mail box of the post office, but it was not registered. Plaintiff never received the amount. The defendant pleaded payment; that "it had mailed to him the money by placing it in an envelope addressed to plaintiff and putting it in the mail box at the post office." Judgment for plaintiff. Appeal.

Paynter, J. In order to constitute a payment, it was necessary that the bank should have selected the usual agency for the transmission to the point where it was directed to be sent. The proper method was to send it by registered package. Judgment affirmed.

HENDERSON TRUST CO. v RAGAN (1899) 52 S. W. (Ky.) 848.

On check. O borrowed \$100 of the plaintiffs, and at the time he had \$112 on deposit with the defendant. In payment of the loan, O tendered a check on the defendant, payable to the order of plaintiff T. The check was written with a pencil. T declined to accept it because not written in ink, and not payable to the order of the plaintiffs. O threw the check on the floor without destroying it, and drew another one in ink payable to the plaintiffs. Before this check was presented, the one written in pencil was presented, indorsed by T, and by S who presented it, and

paid. The indorsement of T was a forgery. When the defendants presented the other check, there was only \$12 to O's credit, and the defendant refused to pay it. Judgment for plaintiffs. Appeal.

Paynter, J. 1. If a bank pays a check on a forged indorsement, it must sustain the loss. 2. The plaintiffs were entitled to have their check paid when presented, as the withdrawing of the money on the check in pencil, did not deprive them of the fund which was there for the payment of their check. Judgment affirmed.

GERMAN NAT. BANK v GRINSTEAD (1899) 52 S. W. (Ky.) 951.

On checks. T arranged with the defendant through its cashier to ship eggs to New York. T was to draw a draft on the New York consignees, with a bill of lading attached, and deposit it with the defendant, which was to credit T with the amount of the draft on its books, and on T's passbook. T could draw checks against this credit for the purchase price of the eggs. T drew three drafts which were discounted by the defendant and placed to his credit. After the defendant paid all checks drawn against the first draft, and some checks drawn by T against the second draft, and after the second draft had been dishonored, the president of the defendant, who had not known of the cashier's arrangement with T, directed the cashier to charge back to T's account the two drafts, and to place them on the books of the defendant as drafts for collection. The cashier did so, without the knowledge or authority of T. In the meantime T had drawn the checks in question, which were presented and payment refused. The president refused to deliver to T the New York drafts and bills of lading. The dishonor of T's second draft was caused by a New York creditor of T attaching the consignment of eggs on which the defendant had the first lien. Defendant took no steps to resist the claim of the attaching creditor. The plaintiffs presented the checks, thus issued by T, to the defendant for payment which was refused. Judgment for plaintiffs. Appeal.

Hobson, J. 1. Authority from, or ratification by, a principal of an antecedent act, creates, by implication, authority in an agent to bind the principal by subsequent acts. A principal cannot ratify in part and repudiate in part the unauthorized acts of an agent. 2. The act of the bank in discounting the drafts and placing the amount to T's credit was in law equivalent to a cash deposit in the bank by T, subject to his checks. 3. The outstanding checks were an appropriation of this credit. 4. It was the bank's duty to have insisted on its rights against the attaching creditor, for the protection of the checkholders as well as itself. Having failed to do so, the resulting loss should fall on it. Judgment affirmed.

GRANT COUNTY DEPOSIT BANK v POINTS (1900) 56 S. W. (Ky.) 662.

On bond of bank cashier. Defendant's intestate, F, was appointed cashier of the plaintiff, and gave a bond. F appointed N his bookkeeper, and they managed the plaintiff. When F died, N was appointed cashier. The estate of F was divided among his adult and infant children, defendants herein. Over four years after F's death, the directors discovered that N had allowed overdrafts to a large amount, but some of the overdrafts were allowed while F was cashier. F was incapacitated from supervising N's work for some time before his death, by excessive drinking. N & Co., of which N was a partner, commenced overdrawing his account during F's life, as did C, another depositor; but subsequently both firms deposited from time to time large sums of money, and had withdrawn them. The bank during these years had published semi-annual reports that it was all right, and made no claim against F's estate. Judgment for plaintiff on part of the overdraft of N & Co. Appeal.

Hobson, J. 1. In a running account where no appropriation of a payment is made by either party, it must be applied in discharge of the oldest item of the account. Consequently the overdrafts of C, made in F's term, were paid. 2. Notice to the cashier of a bank is ordinarily notice to the bank. 3. The intestate and his representatives had the right to trust the published statements of the bank. Judgment affirmed.

GRANT COUNTY DEPOSIT BANK v LITTLE'S EX'R'X (1900) 56 S. W. (Ky.) 669.

On bond of sureties. On January 22, 1892, N, as cashier, executed his bond to plaintiff. N and his sureties covenanted that they would make good to plaintiff any loss that might result from overdrafts, or other mismanagement of its cashier. N was elected cashier in each successive January for four years, executing a similar

bond each year. The defendant's testator, with others, signed the five bonds. In 1896, it was discovered that, beginning in 1892, and continuing for each subsequent year, N had permitted large overdrafts of which there was \$29,000 against insolvent persons. The plaintiff published reports during this period showing that it was in a prosperous condition. No reference was made to overdrafts in the reports. Judgment for plaintiff, for the pro rata loss which occurred during 1892. Judgment for defendant, as to the balance. Appeal by plaintiff.

Hazelrigg, C. J. 1. There was no fraud or bad faith on the part of the directory or any member of it toward the sureties. The defendant is liable on each of the bonds. 2. The directors were not bound to state that they themselves had been remiss in examining into the condition of the bank. It was the duty of the sureties to make inquiry, before they bound themselves. Judgment reversed.

LOUISIANA

MINER v BANK (1809) 1 Mart. 12.

Action to recover \$100, the amount of a bank note of the defendant bank, the lower part of which was torn or worn out so that the signatures of the president and cashier were missing.

Mathews, J. This case is not that of a lost note, and it would be unreasonable to confine the holder to the same principles which govern in the ordinary cases of mutilated paper, that is, that the loss of the signature or seal of the promissor must be considered as an entire destruction of the evidence of the debt. As the parts of the note which remain are proved to be genuine, we will infer that the remainder, which was destroyed, was equally so. Judgment for plaintiff.

Cited: 2 Rob. 115; 9 La. Ann. 374.

MUSSON v BANK OF UNITED STATES (1819) 6 Mart. 707.

To recover deposit. J left certain barrels of flour with S to be sold. The flour was sold, and proceeds were deposited with the defendant in the name of J. S died, without settling accounts with J. While on his death bed, he declared to A, a notary, that he wished to give J the money belonging to him. He directed the notary to write and sign a check for him, leaving the sum blank. The check as drawn was delivered to J, who died without filling in the blank. The plaintiff as J's administrator filled in the blank and presented it for payment. Refused. Judgment for defendant. Appeal.

Derbigny, J. 1. The power to fill a blank check is personal. 2. The declaration of Smith, the vendor, is sufficient to show the title of Johnson to the money, and his representatives may maintain an action therefor. Judgment reversed.

Cited: 7 Mart. 287.

STATE BANK v SEGHERS (1819) 6 Mart. 724.

A bank cannot obtain a judgment and order of seizure against the indorser of a note, protested for non-payment, pursuant to sec. 6 of the Act of March 13, 1818, unless he first give notice of the demand to the indorsee.

Cited: 2 La. Ann. 889.

DURNFORD v PATTERSON (1820) 7 Mart. 460.

On promissory note against indorsers. P made his promissory note to the defendants, payable "on the first day of May next fixed." The plaintiff, having become the holder, put the note in the bank for collection. The bank made demand on P at the expiration of the days of grace, on May 4, and the note was protested for non-payment. The plaintiff sued the indorsers, and, in the event of their not being liable, he made the bank also a defendant, to answer for its neglect in allowing days of grace. The indorsers contend that days of grace should not have been allowed. Judgment for plaintiff against the indorsers. Appeal.

Derbigny, J. The use of the word "fixed" made the note payable on May 1, absolutely, inclusive of the days of grace. A demand for payment ought to have been made on that day, and for want of such a demand the indorsers are not

liable; the bank was either ignorant or negligent, and in either case it is liable. Judgment against the indorsers is reversed, and judgment is given against the bank for the full amount of the note.

Cited: 12 Mart. 500; 11 Rob. 82; 28 La. Ann. 923.

UNITED STATES BANK v FLECKNER (1820) 8 Mart. 141.

On promissory note against maker. Fleckner gave his note to N, which, by a series of indorsements, was finally discounted at the plaintiff, and afterward protested for non-payment. The suit was, under the Act of 1818, for seizure and sequestration. The defendant contended that this act did not apply to the note sued on. Judgment for defendant. Appeal.

Derbigny, J. The act applies only where the bank lends money, and where the parties to the note are the bank on one side, and the borrower and his co-obligors on the other. It does not apply to all cases where the banks choose to discount notes at the request of the holder. The legislature did not intend to subject the maker or indorsers of a note to this summary proceeding, unless it was intended for discount. Judgment affirmed.

Cited: 8 Rob. 50.

UNITED STATES BANK v FLECKNER (1820) 8 Mart. 309.

Where a cashier transferred a note, held by the bank, by indorsement in his official capacity, and no such power was shown to have been granted the cashier, the court refused to receive evidence of a custom among banks of transferring its bills by the cashier's indorsement, on the ground that such banks were the creatures of the law, and they must conduct their business in accordance with prescribed laws.

Cited: 8 Rob. 50; 10 La. Ann. 66.

BRANT v LOUISIANA STATE BANK (1820) 8 Mart. 310.

Where a stockholder sought relief against a forfeiture of an antecedent installment paid on a subscription for stock, resulting from the non-payment of subsequent ones, and the charter of the bank expressly provided that, in such a case, a forfeiture would be effected, the relief prayed for was denied, on the ground that forfeiture was imposed by statute.

Cited: 5 Mart. N. S. 343.

LOUISIANA BANK v BANK OF UNITED STATES (1821) 9 Mart. 398.

On a post note against maker. The note was payable to order of H, and indorsed in blank. It was stolen from the mail between Natchez and New Orleans, and came into possession of the Louisiana Bank. It was not proved that plaintiff received it in good faith and for a valuable consideration. Judgment for plaintiff. Appeal.

Mathews, J. Admitting that the burden of proof, as to good faith and consideration in ordinary commercial bills and notes, lies on the holder, an exception is made in law in the case of bank notes. Possession is *prima facie* evidence of property in them, and the holder is entitled to all the benefits resulting from a rightful ownership, until the contrary is proved. Judgment affirmed.

WOLF v BUREAU (1823) 1 Mart. N. S. 162.

Parol evidence, tending to establish a grant of authority to the president of a bank to effect a compromise of a debt, is admissible in an action against the president as indorser on a promissory note.

CRAWFORD v LOUISIANA BANK (1823) 1 Mart. 214.

Action for damages on account of misconduct and negligence. A bill of exchange was drawn in favor of the plaintiff by C & B on J, and sent to defendant to be presented. The defendant denied negligence, and averred that the plaintiff knew that the drawer had no funds in the hands of the drawee, and that he suffered no damage by its not being accepted by the drawee. There was a general verdict for the defendant, without the particular facts to be found having been specified. Judgment for defendants. Appeal.

Mathews, J. 1. A holder of a bill for collection is bound to use the same diligence in giving notice of non-acceptance as is required of a holder who has discounted or purchased a bill. 2. The law presumes that the anterior parties sustained damages by an omission to give notice of non-acceptance, and the onus probandi was on the holder to show that no damage had been sustained. 3. The defendant may show that the drawer of the bill had no funds in the hands of the drawee. 4. The jury seemed to proceed upon the theory that it was incumbent on the plaintiff to show injury by the defendant's laches. Judgment reversed.

Cited: 10 La. Ann. 427.

MONTILLET v BANK (1823) 1 Mart. N. S. 365.

Action for damages for negligence. Plaintiff deposited a note in defendant for collection. The note was protested, and through the negligence of a notary, who failed to give notice, one of the indorsers was exonerated from liability. Judgment for defendant. Appeal.

Martin, J. 1. Banks are the agents of holders of negotiable paper. 2. He who undertakes gratuitously to serve another is bound to indemnify the person whose business is undertaken from the consequence of the agent's negligence. 3. The notary was the agent of the bank. Judgment reversed.

Cited: 15 Mart. 610; 16 La. 568; 17 id. 567.

LOUISIANA STATE BANK v FLOOD (1825) 3 Mart. N. S. 341.

A printed pamphlet of the laws of the state, showing the incorporation of a bank, is admissible as evidence of the bank's corporate existence, the act of incorporation being a public one; and a request to charge that an action on a corporate note could not be maintained until the officers of the bank had taken the oath prescribed by the Act of March 26, 1823, sec. 7, was properly refused, since the failure to qualify does not operate to invalidate the election.

CANOUGE v LOUISIANA STATE BANK (1825) 3 Mart. N. S. 344.

Action by indorsee of note against a bank and a notary, its agent, for negligence in not notifying C, an indorser. The court admitted evidence questioning plaintiff's title. The record of a judgment in C's favor in a suit by plaintiff was admitted. Evidence offered by defendant to show why C was not notified was excluded. Evidence to prove solvency of, and due notice to, other indorsers was rejected. Judgment for plaintiff. Appeal.

Mathews, J. 1. Defendants had no right to question plaintiff's title. 2. Evidence was admissible notwithstanding the judgment to explain and excuse their omission to notify C. 3. The evidence of the solvency of other indorsers was immaterial, as the plaintiff has the right to pursue. Judgment reversed.

FAURIE v MILLAUDON (1825) 3 Mart. N. S. 476.

Petition by the plaintiffs, as stockholders of the P Bank, against the defendants, directors of said bank, to obtain an award of the value of their respective shares, with damages. The petition alleged that the defendants continued themselves in the management of the funds of the bank, after the expiration of their term of office; that, by their misconduct, the shares of stock of said bank had become of no value; and that the bank's charter had been forfeited and the corporation had been dissolved. Petition dismissed. Appeal.

Martin, J. Admitting that the defendants are accountable for the loss occasioned to the stockholders, the sum they owe is part of a common fund, which is not to be divided till all the debts are paid, and a balance struck; and no action can be maintained by any member of the bank against another, until the bank's charter is declared void by a competent authority. Judgment affirmed.

Cited: 5 Mart. N. S. 342; 6 id. 85; 8 id. 281; 2 La. 451; 3 id. 570; 6 id. 689; 8 id. 267; 4 Rob. 161; 7 id. 513, 515, 516; 30 La. Ann. 59; 52 id. 1395.

INSURANCE CO. v LOUISIANA STATE BANK (1825) 3 Mart. N. S. 610.

Action for negligence in not collecting notes placed with the defendant for that purpose. The bank contended that it was relieved from liability by the removal

of the maker from New Orleans before the notes fell due, and it was averred that the defendant never undertook to collect notes outside of the city, and that the implied contract ceased on the removal of the maker of the notes. Judgment for plaintiff. Appeal.

Mathews, J. The defendant could have released itself from the obligation to collect, under the implied contract, only by returning the notes to the owner, after the fact of the maker's removal became known to it. Its duty as agent could have been terminated only in that way, or by an explicit declaration that it would no longer act for the owner. Judgment affirmed.

UNITED STATES BANK *v* JOHNSON (1827) 5 Mart. N. S. 310.

To recover overdraft. The plaintiff offered to prove by one of its clerks that a check, which was drawn for \$876.29, had been overpaid \$1,000, in consequence of the amount in figures being \$1,876.29 instead of \$876.29, the sum in which it was filled up in the body of the check. Defendants objected to the competency of the witness. Objection overruled. Judgment for plaintiff. Appeal.

Porter, J. 1. Agents and servants are competent witnesses, although the regularity of their conduct is involved in the transaction on which they give testimony. 2. The clerk is a competent witness to prove the over payment, without a release. Judgment affirmed.

Cited: 19 Mart. 373, 592; 4 La. 501.

STATE *v* BANK OF LOUISIANA (1827) 5 Mart. N. S. 327.

To recover dividends. Plaintiff, being a stockholder in the defendant, sued it for dividends due plaintiff from profits arising from the sale of state bonds. Defendant declined to pay, contending that it was the right of the directors to regulate the payment of dividends, and that the directors, in order to obtain a good price for the bonds, had by resolution agreed that an amount not less than \$400,000 should be reserved until one-sixth part of the bonds should be discharged, and that therefore the dividends were held up. Judgment for plaintiff. Appeal.

Martin, J. We conclude that the passing of the resolutions by the board of directors, in reference to the sale of the bonds, was a discreet exercise of legitimate authority; and that the engagement, taken in pursuance of resolutions by the parties undertaking to sell the bonds, ought not to be violated. Judgment reversed.

Cited: 6 La. 253; 4 Rob. 173; 12 id. 466; 30 La. Ann. 928; 32 id. 803; 33 id. 1210; 34 id. 590; 38 id. 545; 49 id. 1786.

PERCY *v* MILLAUDON (1829) 8 Mart. N. S. 68.

Action by a bank stockholder for accounting and liquidation. The defendants are stockholders in the P Bank in liquidation. The plaintiffs alleged some of the defendants, who were directors of the bank, had by their fraudulent misconduct become indebted to the bank in the sum of \$451,000, and that this amount should be accounted for in the settlement. Judgment for defendants. Appeal.

Porter, J. Directors of banks are required to exercise ordinary care in the discharge of their duties. But if anything occurs to awaken suspicion of the fidelity of the officers of the bank, a high degree of diligence must be exercised. They are individually responsible for any loss arising from an illegal measure which they did not oppose. They cannot, under the bank's charter, delegate to the president and cashier the authority to discount bills or notes. They cannot borrow money from the bank on a promise to replace it either in cash or bank stock. If they fraudulently report the cashier's transactions to be correct, they become responsible as sureties for this action. Judgment reversed.

Cited: 3 La. 570; 7 Rob. 513.

BANK OF LOUISIANA *v* STERLING (1830) 2 La. 60.

On promissory note against maker. The note began "I promise to pay," was payable more than four months after it was discounted by plaintiff, and was signed by defendant and another. The bank's charter established 9 per cent as the maximum of interest which it might charge on a discount, when a note was payable more than four months after discount. Defendant claimed that the note was a joint obligation, and that he was only liable for one-half the

sum mentioned therein. Judgment for plaintiff for the amount of the note with 9 per cent interest. Appeal.

Martin, J. 1. If a note signed by several persons begins "I promise to pay," it is several as well as joint; and the parties may be sued jointly and severally. 2. Legal interest on sums discounted by banks is that established by their charters. Judgment affirmed.

Cited: 8 La. 261; 10 Rob. 176; 2 La. Ann. 344; 15 id. 475; 30 id. 583; 33 id. 1466.

PRITCHARD v LOUISIANA STATE BANK (1831) 2 La. 415.

For negligence of agent in giving indorsers notice of dishonor. Plea: General issue. The loss sustained was through the defendant's neglect in not giving notice of protest on a note deposited with it for collection. There were four indorsers on the note and two were discharged by the neglect of the bank. The court held that the plaintiff had not shown that he had sustained any damage. Judgment for defendant. Appeal.

Martin, J. The loss of the security of two of the indorsers is an injury for which the plaintiff has a right to compensation. The plaintiff has a right to demand payment of the amount of the note from defendant, on delivering to the latter the note, together with a transfer of all his rights thereon. Judgment reversed.

Cited: 22 La. Ann. 144; 49 id. 160.

PERCY v MILLAUDON (1832) 3 La. 568.

For damages. The defendants were three of the eleven directors of the P Bank, whose capital stock was reduced to nothing at the expiration of its charter. The plaintiff sought to hold defendants liable in solido for the dissipation of the bank's funds. The evidence showed that the directors had, in violation of the charter, placed the funds of the bank under the control of the president, and had authorized the purchase of a large number of shares of the bank's stock, which purchase had greatly diminished the bank's funds; that the president and defendants had benefited by the sale of their stock to the bank; and that the president and cashier, by means of the power granted the former, had embezzled large sums from the bank of which the directors knew nothing till the disappearance of the two officers. The bond of the cashier, on which defendant L was a surety, was canceled by illegal action of the directors. The ruin of the bank was owing to the mismanagement of its affairs. There was no express provision of the bank's charter in regard to the liability of the directors. The civil code provided that an obligation in solido should not be presumed, but must be expressly stipulated. Judgment for defendants. Appeal.

Martin, J. Mandataries or agents are not responsible for errors of judgment when the case is one in which doubt may reasonably be said to exist. But when the errors are gross, the acts illegal, and the consequences fatal, they must be held responsible. The defendants are chargeable for the amount of the stock illegally bought by the bank from them respectively, and the defendant L is also chargeable with the amount for which he was bound as the surety of the cashier. For any additional loss to the bank, the defendants are liable, each for one-eleventh part thereof. Judgment reversed.

Cited: 3 La. 534; 6 id. 585; 8 id. 146; 9 id. 443; 18 id. 489; 1 Rob. 509; 2 id. 401; 7 id. 513, 515, 516; 9 id. 399.

BANK OF LOUISIANA v ROBERTS (1832) 4 La. 530.

On a promissory note. Plaintiff, to the use of N & Co., sued defendant as indorser on a promissory note on which N & Co. were the last indorsers, and defendant a prior indorser. The bank's charter restricted it to 6 per cent on loans or discounts. The note in controversy, by its terms, bore interest at 10 per cent after maturity, but it was not discounted by the bank, only being deposited by N & Co. for collection. Defendant claimed that the bank, having no real interest in the note, had no right to sue; that the bank could not sue on a note bearing 10 per cent interest; and that the rights of plaintiff had been extinguished by payment. N & Co. had paid the amount of the note to a prior holder. Judgment for plaintiff. Appeal.

Martin, J. 1. As holder of the note with blank indorsements, the bank had the legal interest which is sufficient to entitle it to recover. 2. The bank's charter

restricted it to 6 per cent on what it took for the use of its money from persons to whom advances were made on loan or discount. As to other contracts than loans or discounts, this charter restriction cannot be invoked. 3. Payment to the holder of a note does not extinguish the right of the indorser who pays, against the previous indorsers and the maker. Judgment affirmed.

Cited: 17 La. 157; 19 id. 549.

UNION BANK v McDONOUGH (1833) 5 La. 63.

To cancel a stock subscription. The charter of the plaintiff provided that subscriptions to its stock could only be made upon a pledge of sufficient security; that in case of over-subscription, the excess should be deducted from the largest subscription in such manner that no subscription should be reduced while a larger one remained. The defendant M'D made simulated sales of his property to the other defendants in order to enable them to subscribe for him. The security offered by the defendants was sufficient, and their subscriptions were accepted. Defendants claimed that the bank had no capacity to maintain the suit; and that the subscriptions, having been accepted, could not afterward be canceled. M'D also contends that, should the subscription be found to be illegal and that he is the actual subscriber, the decree should be that the whole should stand in his individual name. Judgment for plaintiff. Appeal.

Porter, J. The bank has the right to oppose the issue of stock to any one improperly becoming a subscriber. Directors have power to determine who shall be stockholders when such determination is necessary to carry out the purport and spirit of the constitution charter. An act which attempted to evade the provisions of the charter can confer no right on the party by whom it was committed. Acceptance of subscriptions is no defense. Judgment affirmed.

Cited: 7 Rob. 463.

WALDEN v UNION BANK (1834) 6 La. 248.

To compel acceptance of stock subscription. Plaintiff subscribed to a certain amount of defendant's stock and offered as security a mortgage on his plantation. The directors of the bank considered the title to the property defective and rejected the subscription. Plaintiff claimed that his title was good and sued to compel the bank to receive his subscription and security therefor. The bank's charter required the subscribers, respectively, to produce title to the satisfaction of the directors. Title to the plaintiff's plantation had come through a succession and there had been some question in regard thereto, but no judicial decision had settled it. Judgment for plaintiff. Appeal.

Martin, J. Directors are not necessarily men learned in the law, and if they have erred, the plaintiff has sustained *damnum absque injuria*, but no injury. The title has been fairly considered by those whom the charter designates for that purpose, and has been declared unsatisfactory. Judgment reversed.

MIRANDA v CITY BANK (1834) 6 La. 740.

To recover for negligence of bank. Plaintiff deposited with the defendant a promissory note for collection. By the negligence of the bank at maturity, in failing to make legal demands on the makers, and to give regular and due notice to the indorser, the latter was discharged from liability. The makers became insolvent. The court excluded evidence of the deliberations of creditors of the makers, in order to show that the indorser had appeared at one of their meetings and assumed the quality of creditor for a large sum, in which this note was included. Judgment for plaintiff. Appeal.

Bullard, J. 1. A bank which receives a note for collection is bound to use the same diligence as the holder; and the onus is on the bank to show that the holder of the note sustained no damage by its neglect to make a proper demand, and to give notice to the indorser. 2. A collection agent who has been negligent is not exonerated from the liability thus incurred, because it has not been made a party to a suit against an indorser to which it failed to give proper notice. 3. It not being shown that the notary, giving notice of protest, was ignorant of indorser's domicile, or that he used diligence to find it, a notice addressed to him and deposited in the post office of the city in which he resided, was insufficient. 4. The evidence was properly excluded, since it is not to be presumed that the indorser intended to make himself unconditionally liable for the amount of the note indorsed

by him, or to waive a demand on the drawer and regular notice as an indorser. Judgment affirmed.

Cited: 20 La. Ann. 549.

STATE OF LOUISIANA v BANK OF LOUISIANA (1834) 6 La. 745.

To recover profits made by the bank upon the sale of state bonds. The capital stock of the Bank of Louisiana was fixed at \$4,000,000, and the State of Louisiana became the owner of one-half of this stock by granting to the bank, in payment therefor, its bonds to the amount of \$2,400,000. The bonds matured in series in ten, fifteen, twenty, and twenty-five years. In the sale of the bonds, the bank made a profit of \$321,822, but the contract of sale provided that the bank should retain this sum till the maturity of the first series. At the time of the transaction, individuals owned stock in the bank to the amount of \$138,840, which, with the \$2,000,000 of stock owned by the state, was the entire amount then issued. Before the maturity of the first series of bonds the entire capital stock had been issued. The state sued to recover its share of the profits of \$321,822. Judgment for the state for \$201,012. Appeal by both parties.

Martin, J. 1. All the property of a bank after the payment of its debts, deducto aere alieno, is the exclusive property of its stockholders for the time being. No one else can have any right thereto. 2. The ownership of shares in the capital gives to the state precisely the same right which it gives to other stockholders, and no more. 3. The profits made by the sale of the bonds belonged to the bank, or, in other words, to the then existing stockholders, in the proportion which the number of shares subscribed for and paid in by each of them, respectively, bore to the total number of shares then subscribed for and paid in. The fact that the original stockholders could not enjoy a distribution of this sum of \$321,822, because of the terms of the contract of sale for ten years, does not affect their rights to this property. Judgment reversed and judgment for the state for \$300,931.

MENARD v COX (1834) 7 La. 167.

For money loaned. Defendant presented to plaintiff, cashier of the Bank of Louisiana, a check, drawn by P, for \$300. P had no funds in the bank and the cashier refused to pay the money. Defendant promised to become personally liable for the amount, and indorsed on the check that he had received the \$300. Upon this consideration, plaintiff paid the sum to the defendant. Plaintiff sued for the recovery of the money; but defendant claimed that the money was paid out of the funds of the bank, that it was an overdraft, and that plaintiff could not recover without first showing that he had been rendered responsible to the bank. Judgment for plaintiff. Appeal.

Bullard, J. The facts show that plaintiff advanced the money to defendant as a loan. We must presume that he advanced his own money, and that the transaction was wholly personal between the parties. Judgment affirmed.

PRIEUR v COMMERCIAL BANK OF NEW ORLEANS (1835) 7 La. 509.

Mandamus to compel defendants to allow plaintiffs to participate in an election. The charter of the Commercial Bank provided that, in case of a vacancy occurring in the board of directors, it should be filled by the directors for the remainder of the year. It also provided for a board of thirteen members, two to be appointed by the city of New Orleans, and eleven to be elected by the other stockholders. One of the eleven vacated his seat, and the board proceeded to fill his place, but refused to allow the city directors to vote in the election. The latter asked a mandamus directing the board to receive their votes. Judgment for plaintiffs. Appeal.

Martin, J. The act of incorporation has made no distinction between city directors and directors elected by the other stockholders. All vacancies in the board are to be filled in the same manner, i. e., by the board of directors, which is composed of thirteen members. Judgment affirmed.

Cited: 5 La. Ann. 92; 12 id. 59.

CLAGUE v CITY BANK (1835) 8 La. 48.

For cancellation of a surety bond. Plaintiff was cashier of defendant bank till three years before this suit. He alleged that he had handed over to his suc-

cessor all that ever came into his hands as cashier, and that all his accounts were found to be correct by the president and directors. Wherefore, he asked that the bank be compelled to cancel his bond and return it to him. Judgment dismissing the suit. Appeal.

Martin, J. Plaintiff could not legally compel the bank to surrender the evidence of the obligation of his sureties taken to indemnify it, should it thereafter be discovered that the conduct of the plaintiff had occasioned any injury to the institution. Prescription cannot be said to have extinguished the obligation of which his bond is the evidence. Judgment affirmed.

BANK OF LOUISIANA v STANSBURY (1835) 8 La. 257.

For an injunction. U, deceased, executed a mortgage on a plantation and slaves, to secure a loan from defendant. Defendant instituted proceedings to foreclose. Plaintiff, wife of U, claimed that property in question was community property, part of it having been purchased by her husband with her money. This claim was allowed by probate court. It is not stated what portion of property was purchased with plaintiff's money. Laws of 1820 authorize the payment of 10 per cent on mortgage loans. Bank's charter, subsequently passed, declares that bank shall not take more than 9 per cent interest. It is claimed the court erred in considering the opposition of the widow as authorizing a change from the *via executiva* to the *via ordinaria*. Injunction dissolved. Judgment for defendant. Appeal.

Bullard, J. 1. The claim set up by the bank was reconventional and not a proceeding in the ordinary way as distinguished from the summary. 2. Even admitting she accepted the community, it does not establish her liability in this case to pay more than one-half debt contracted by her husband. 3. The legal interest which the bank is entitled to receive in such cases is 9 per cent. Judgment reversed.

Cited: 49 La. Ann. 509.

SYNDICS OF YARD & BLOIS v MECHANICS AND TRADERS BANK (1835) 8 La. 480.

By syndics for surrender of collateral of insolvents pledged to secure the payment of a note held by defendant. The act of pledge stipulated that it was given for a loan then made by defendant, and "for payment of any other note or obligation which may be now due or become due from us to the bank." The loan made at the time the pledge was given had been paid, but defendant claimed the right of pledge as against other notes of the insolvents. These latter were in existence at the date of the pledge, but were not drawn to the order of the bank and were not then in its possession. Judgment for plaintiffs. Appeal.

Bullard, J. The plaintiffs represent all the creditors of Yard & Blois, and as to them the pledge is not valid beyond the amount of the note, specially mentioned in the act. It was not within the contemplation of the parties that the pledge should extend to other notes, according to articles 3124 and 3125 of the Louisiana Code. Judgment affirmed.

BOISDERE v CITIZENS BANK (1836) 9 La. 506.

Petition by free persons of color, claiming right to be stockholders in C Bank. The bank's charter gives all persons, owners of real property, the right to become stockholders. The plaintiffs subscribed to 350 shares, giving security therefor. Thereafter the charter was amended, pledging the state's faith for the loan of the bank capital, and providing that all securities held by the bank are hereby transferred to the state; and, further, providing that no person "not free white citizens, shall be, either directly or indirectly," owners of stock. The original charter did not give the directors authority to obtain such a modification, and the amended charter was not submitted to the stockholders. It was accepted by the president and directors only. Judgment for plaintiffs. Appeal.

Bullard, J. 1. Previous to the act amending the charter, the plaintiffs' rights as stockholders were fully vested. 2. They have not, by the president's and directors' consent, lost their privilege. 3. The legislature only intended to provide that hereafter none but free white citizens shall become stockholders, leaving the rights of all who were at that time stockholders unimpaired. 4. A negotiation of the rights of the plaintiffs would not vitiate any condition upon which the faith of the state has been pledged. Judgment affirmed.

UNION BANK v FORSTALL (1837) 11 La. 211.

On bond. Defendants were sureties on the bond of a clerk of the plaintiff bank. The president gave this clerk, on dismissing him from service, a certificate expressing satisfaction with his conduct while employed in the bank. Subsequently, it was discovered that he had been guilty of embezzlement of the bank's funds. The defendants requested the court to charge the jury that if they believed the president had authority to give the certificate, it is binding on the bank and discharges the defendants. Refused. Exception. Judgment for plaintiff. Appeal.

Martin, J. Admitting that the certificate is binding on the bank, it does not operate as a discharge of the defendants, for the discovery of the clerk's misconduct was posterior to it. Judgment affirmed.

COMMERCIAL BANK v MAYOR (1837) 11 La. 213.

Money paid for the use and benefit of the defendants. The city of New Orleans subscribed for, and became a stockholder in, the capital of the plaintiff bank. It paid its subscription by executing bonds in favor of the bank, and engaged to pay the interest thereon to the bank or order, semi-annually. The bank's charter provided that it should apply the dividends, which might accrue on the city's stock, to the payment of interest on the bonds. The bank went into operation in November, 1833, and no dividends were declared till June, 1834. The first interest on the bonds fell due in December, 1833. Prior to the last-mentioned date, the bank had sold the bonds, and by its contract with the holders was responsible for the interest. Having paid the interest out of its funds, the bank demanded repayment. The sum was made up in part of interest on the bank's advances to the city. Judgment of nonsuit. Appeal.

Mathews, J. 1. If the bank had not been able for some years to make sufficient profits to enable it to declare a dividend, the city was nevertheless bound to pay the interest on the bonds. The bank rendered itself liable to pay the interest on the bonds which the obligors were bound to pay, and when paid, the bank became subrogated to the rights of the purchasers, and can compel the original promisors to refund the money paid for their benefit. 2. The bank was entitled to interest on its advances. Stockholders in a bank may be likened to partners in trade, and when one partner fails to furnish his quota of stock, and it be supplied by the other partners, he is chargeable for the advance, with interests. Judgment reversed.

S. c.: 11 La. 217; cited: 8 Rob. 25.

MECHANICS & TRADERS BANK v BANKS (1837) 11 La. 260.

To recover for an overdraft. The plaintiff alleged that the defendant had overdrawn his account. The defendant averred that plaintiff was in reality indebted to him for a balance for which he prayed judgment in reconvention. The controversy turned on the verity of one deposit. The defendant's bank book showed the deposit entered in the handwriting of one of the bank's clerks. The entry of the deposit was made on the books of the bank, after the items of money received on that day had been cast up, and the deposit was not included in those items. There was no allegation of any collusion between the defendant and any clerk of the bank. Judgment for defendant. Appeal.

Martin, J. The plaintiff must be bound by the evidence of the deposit in the entry on the defendant's bank book in the absence of collusion between the defendant and any clerk of the bank. Judgment affirmed.

THATCHER v GOFF (1839) 13 La. 360.

Attachment. A rule was taken, on the plaintiff, to show cause why the attachment should not be set aside, because the bond was signed by a commercial firm. A deposition was also admitted over objection that the official character of the justice, before whom it was taken, in another state, was not sufficiently shown. The deposition was accompanied by a certificate of the governor of the state as to the justice's qualifications. The defendant objected to the introduction in evidence of the note sued on because it was payable at the "Bank of the United States at Natchez," and the protest said it was presented for payment at the "United States Bank." Judgment for plaintiff. Appeal.

Martin, J. 1. The partner who subscribes the name of the firm is in all cases

bound. 2. The attestation of the governor, under the great seal of the state, was the next best evidence to the justice's commission. 3. The note and protest were properly received in evidence. Judgment affirmed.

Cited: 18 La. 64; 2 La. Ann. 360; 8 id. 30; 14 id. 797; 22 id. 29; 23 id. 190; 32 id. 1126.

DENTON v COMMERCIAL & R. R. BANK OF VICKSBURG (1839) 13 La. 486.

Action on bank notes. W, A & Co. presented \$20,700 of its notes to the defendant, and payment thereon was refused. The notes were then passed to plaintiff, who sued the bank for the amount thereof and 8 per cent interest. The plaintiff laid an attachment in B's hands, the bond being signed in the firm name of W & A. The defendant excepted to the action on the ground that the notes had been put in circulation after the demand, and that the plaintiff had made no demand. Exception dismissed. The defendant objected to testimony by H, a member of the firm of W & A, and to T's testimony, that H was absent when the bond was signed, and the signature was in W's writing. Objections overruled. Judgment for plaintiff. Appeal.

Rost, J. 1. When the notes ceased to be convertible into gold or silver, they lost the character of bank notes, and became mere evidences of debt and were fair subjects of bargain and sale. 2. Trading in them was not putting them in circulation, and the plaintiff, under his purchase, acquired them with all the benefits and advantages which had vested in the previous holder, by the fact of his demand of payment. 3. The plaintiff had the right to rebut the presumption which the signature of W & A to the attachment bond created against the competency of the witness. 4. The fact that H was out of the state, and that he did not sign the bond, made him prima facie a competent witness. Judgment affirmed.

Cited: 15 La. Ann. 528.

ATCHAFALAYA BANK v DAWSON (1839) 13 La. 497.

Attachment against the indorser of a promissory note. Plaintiff's charter provided that if suspension of payment should continue for more than ninety days, its charter should be, ipso facto, forfeited. Plaintiff had suspended payment for more than ninety days when this attachment was levied. Defendant excepted to the attachment on the ground that plaintiff could no longer sue in its corporate capacity. Sustained. Appeal. After judgment, an act was passed; relieving banks from forfeiture on account of suspension of specie payments. Judgment for defendant. Appeal.

Eustis, J. 1. To enforce the forfeiture of the charter of a corporation, proceedings must be instituted to that effect by the state, and unless the power of instituting such proceedings be expressly delegated by law, the state alone possesses it. 2. The state, having this power, may forbear to exercise it and waive the forfeiture. Until the forfeiture is judicially decreed, the existence of the corporations cannot be questioned incidentally or collaterally. Judgment reversed.

Cited: 14 La. 541; 15 id. 26; 17 id. 478; 1 Rob. 501; 3 La. Ann. 294, 314; 5 id. 179; 7 id. 365, 366; 9 id. 267, 570, 573, 583; 15 id. 445; 16 id. 29; 20 id. 142; 30 id. 958, 959; 31 id. 825; 51 id. 467.

LOUISIANA STATE BANK v SENECA (1839) 13 La. 525.

On a promissory note against indorser. Mrs. P sold certain land, and a note indorsed by defendant was given in payment and delivered to P, her husband, who had signed the deed of conveyance. This deed contained a stipulation that the note should not be negotiated nor payment exacted, until certain mortgages on the property were discharged. P, being a director of the plaintiff, offered the note for discount without disclosing the conditions mentioned. Judgment for plaintiff. Appeal.

Rost, J. Directors are not officers of the bank, in the proper sense of the word, nor have they individually any power or control in the management of its concerns; they act collectively, and at stated times, and have otherwise no more to do with the general management of the institution than the other stockholders. It would be extending constructive notices beyond all reasonable bounds to say that the plaintiff must be held cognizant of facts which are proved to have been intentionally concealed from them, by a person who, individually, was neither its officer nor its agent. Judgment affirmed.

Cited: 8 La. Ann. 39; 28 id. 814.

CALDWELL v ATCHAFALAYA BANK (1840) 14 La. 308.

Revocatory action. In January, 1837, C, being largely indebted to the defendant, pledged 1,000 shares of stock to it. In August, 1837, C transferred the stock to the defendant absolutely, being allowed more than the market value for it. At that time, he was in embarrassed circumstances, and subsequently failed. In January, 1838, the plaintiff obtained judgment against C. The plaintiff sought to have the transfer to the defendant revoked alleging it was made in fraud of his creditors. The syndic of C's creditors intervened, joining plaintiff in his demand of nullity. The defendant averred: 1, That C, while solvent, transferred the stock in payment for the debt for which it was pledged; 2, that it is a bona fide holder and owner; 3, the prescription of one year. Judgment for plaintiff. Appeal.

Bullard, J. The sale of the stock was but a consummation of the contract of pledge. If the pledge was valid at the time of the transfer, and the stock was transferred at its full value, then the contract did not prejudice other creditors. This action may be brought by a single creditor within one year from the date of his judgment, or by a syndic representing all the creditors within a year from his appointment. Judgment reversed.

Cited: 19 La. 600; 4 Rob. 440; 3 La. Ann. 250.

MARTIN v BRANCH BANK OF ALABAMA (1840) 14 La. 415.

Attachment. The plaintiffs were holders of bank notes issued by defendant, a corporation created by a law of Alabama. The defendant excepted to the attachment: 1, Because all the stock was owned by the State of Alabama, and it was therefore a suit against a state, which is not amenable to the process of the courts of a sister state; 2, because the bank could not be sued by attachment. Exceptions overruled. Judgment for plaintiffs. Appeal.

Martin, J. 1. This is not a suit against one of the States of the Union. 2. A foreign attachment lies against a corporation incorporated by the laws of another state. Judgment affirmed.

UNION BANK v MORTEE (1840) 14 La. 541.

Where a bank suspended specie payments, and thereby forfeited its charter, it did not lose its capacity to sue and stand in judgment. Atchafalaya Bank v Dawson, 13 La. Rep. 497.

UNION BANK v MACDONALD (1840) 15 La. 25.

In an action by a bank on a promissory note, the maker set up want of capacity of the bank to sue, on the ground of suspension of specie payment for a longer period than that allowed by their charter, and also interposed a plea in reconvention, claiming damages for injury to credit. Held, that the bank had capacity to sue and stand in judgment; and that the plea was properly rejected, as there was no connection between the two demands. Atchafalaya Bank v Dawson, 13 La. Rep. 497.

COTTON v UNION BANK OF LOUISIANA (1840) 15 La. 369.

On a promissory note. A note was sent to defendant for collection, by plaintiff, but was not protested in due time; the note was deposited in X Bank. There were two blank indorsements, the first being that of payee. Defendant was a creditor of X Bank. There was no evidence to show how plaintiff came in possession of the note. Plea: The general issue. Judgment for plaintiff. Appeal.

Martin, J. 1. Possession of the note with blank indorsement of payee will authorize the holder to recover on it, where his ownership is not specially denied. 2. Under the plea of general issue, defendant cannot set up as a counterclaim a debt of the plaintiff's agent, who employed him. Judgment affirmed.

ARMINGTON'S EX'R v GAS LIGHT AND BANKING CO. (1840) 15 La. 414.

Negligence for failure to demand payment and protest. The plaintiff deposited with defendant for collection an accepted draft, payable in Grand Gulf. The bank mailed it to Grand Gulf. Ten days later a letter was received from that place, in which no mention of the draft was made. Another letter was received two months later, saying some letters must have miscarried. A second bill of exchange was

mailed by defendant to Grand Gulf, and upon being presented for payment, was dishonored and protested. Meantime the plaintiff called frequently at the bank to inquire about the draft. The acceptor became insolvent before the second bill was mailed. Judgment for plaintiff. Appeal.

Simon, J. It was in the defendant's power to use more diligence. By failing to demand payment, and not using the ordinary diligence to secure the liability of the parties to the bill, the defendant has made it its own and has become liable to the owner for the amount. Judgment affirmed.

Cited: 22 La. Ann. 144; 28 id. 923.

MERCHANTS BANK v EXCHANGE BANK (1840) 16 La. 457.

To recover money paid on forged check. Plea: General issue. The Bank of M drew a check on plaintiff for \$215 to the order of D, who indorsed it to T, who fraudulently raised it to \$5,013 and sold it to defendant. The latter collected it from the plaintiff, which was ignorant of the alteration until subsequently notified by the Bank of M. The plaintiff then notified the defendant, and brought this suit to enforce repayment of the difference between the original and altered amounts. Defendant contended: 1, That the plaintiff paid the check before the Bank of M notified them it had been drawn; 2, that the forgery was apparent; 3, that plaintiff was guilty of laches in not giving timely notice. Judgment for plaintiff. Appeal.

Martin, J. We are unacquainted with any law requiring or authorizing the suspension of the payment of a check, until advice of its being drawn has been received. The evidence disproves the plea of general issue and establishes the allegations of the complaint. The three grounds set up in the defense were proper matters for the consideration of the jury. Judgment affirmed.

Cited: 44 La. Ann. 245.

CARROLLTON BANK v TAYLEUR (1840) 16 La. 490.

To recover balance due on bills of exchange, with interest, damages, and costs. Defendants gave G a letter of credit for \$10,000; G drew on them, exhibiting to the plaintiff the letter of credit, and sold the drafts to it, which were subsequently dishonored by non-acceptance and were protested. The plaintiff maintained that the letter of credit was a virtual acceptance by the defendants of the drafts. The case turned on the two following questions: 1, Whether the defendants were bound to third persons on their letter to G, and whether it was a virtual acceptance of such drafts as he might draw within the limits prescribed; 2, whether the defendants had not complied and accepted drafts already to the full amount authorized in the letter. Judgment for defendants. Appeal.

Morphy, J. A letter written within a reasonable time, before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterward takes the bill on the credit of the letter, a virtual acceptance binding the person who makes the promise. But where general authority to draw is given, the purchase of the drafts must take the risk of the bad faith of the drawer. Judgment affirmed.

Cited: 2 Rob. 149, 312; 27 La. Ann. 655.

BANK OF ILLINOIS v SLOO (1840) 16 La. 539.

To enforce payment of accepted bill. Defendants wrote a letter promising to accept and pay bills drawn on them by A and discounted by the plaintiffs, to the amount of \$50,000. S H and M, by indorsement on said letter, guaranteed the payment of such bills as might be drawn in pursuance thereof. Bills amounting to \$37,000 were drawn, discounted and accepted, but protested for non-payment. The plaintiffs, doubting the solvency of A, prevailed on C, a partner, to confess judgment for a sum exceeding the amount of their indebtedness to them, to satisfy which \$60,000 of the firm's property was sold. This was before the bills were due, but after acceptance. It was not shown that the judgment included the amount of the bills. Not until the bills were dishonored did the plaintiffs notify S H and M of the acceptance of their guaranty. The plaintiffs sued the defendants as acceptors and joined all the guarantors. The former claimed that plaintiffs' claim was merged in their judgment; and the latter, that the bank was guilty of laches in giving notice. Judgment against defendants not including the guarantors. Appeal.

Martin, J. 1. At the time of the judgment the plaintiffs had no claim against

the firm upon the bills sued on. There can be no discharge unless the debt was included in the judgment. 2. Judgment was properly given against the plaintiffs as regards the guarantors, because no notice had been given of the acceptance of the guaranty, or of any advances made on it at the time they were made, nor until the circumstances of the debtors were materially changed by the dishonor of the bills. Judgment affirmed.

Cited: 16 La. 544; 7 La. Ann. 389; 47 id. 412.

McCULLOCK v COMMERCIAL BANK (1840) 16 La. 566.

Negligence for failure to give notice of dishonor. P gave S his note for \$310. S indorsed it to the plaintiff, who, in turn, indorsed it to H. H placed it in defendant bank for collection. The note was protested for non-payment and notices sent by the bank's notary to all the indorsers but S. Plaintiff was compelled to pay H, but could not recover from S because of the want of notice to him. He therefore sued defendant for its notary's failure to give notice. Plaintiff nonsuited. Appeal.

Garland, J. 1. By the deposit defendant became H's mandatory. The plaintiff and defendant were strangers. 2. If the plaintiff desired to hold a prior indorser liable, it was his duty to see whether the notary had notified him; and, if not, he should have notified that indorser himself. Every indorser must take care of himself, and take the necessary steps to hold his predecessor liable. Judgment affirmed. Cited 12 Rob. 129.

UNION BANK v DUNN (1841) 17 La. 234.

On a promissory note. The petition set out the name of the plaintiff in the following manner: "The president and board of directors of the branch of the Union Bank of Louisiana at Clinton, whose principal establishment is in the city of New Orleans." The branches created by the act incorporating the Union Bank were without authority to stand in judgment for the mother bank; the corporate name of the latter being the "Union Bank of Louisiana." Defendants pleaded to the merits, but, after issue joined, filed an exception to the petition claiming that the Union Bank at Clinton had no capacity to sue. Plaintiff contended that the exception was founded on form and came too late. Judgment for defendants. Appeal.

Morphy, J. 1. The exception embraces something more than mere form. It goes to the absolute want of any right in plaintiff to stand in judgment in any form or shape whatever, and can therefore be urged at any stage of the course. 2. The plaintiff has no legal existence as a corporation and therefore cannot sue and be sued in a court of justice. The right to sue as owner of a negotiable bill is very different from the capacity to sue. Judgment affirmed.

Cited: 4 Rob. 174; 18 La. Ann. 469; 36 id. 750.

WILLIAMS v BANK OF LOUISIANA (1841) 17 La. 378.

Proceeding by purchaser of succession property to have mortgage thereon canceled. The defendant held a mortgage on the plantation of B, a deceased debtor. By its charter, defendant had the right to cause property mortgaged in its favor to be seized and sold in whosoever hands found, notwithstanding any sale or change of title by descent or otherwise. L was appointed administrator of B's estate, and the bank expressly authorized him to proceed in the sale of the mortgaged property. This was done, and plaintiff became the purchaser. Afterward the administrator filed a tableau of distribution of the funds of the estate proceeding from the sale of the property, in which, after stating different payments to defendant as interest, it was carried as mortgage creditor for the sum of \$10,000. This tableau was duly homologated and became the judgment of the court of probate. A second tableau was filed by the administrator, in which defendant was not mentioned, representing that all debts were fully paid and that a balance of \$12,448 remained for the heirs. This tableau was also duly homologated. Subsequently, defendant demanded and received of the administrator the \$10,000 due it under the decree of the probate court, homologating the first tableau. Subsequent to these proceedings, the plaintiff brought this suit to compel defendant to cancel its mortgage on the property. Defendant claimed that it still had its right of mortgage for a balance of \$4,216 due it from B's estate. Judgment for plaintiff. Appeal.

Simon, J. 1. The acts of defendant show that it had, from the beginning of the administration, made itself a party to the probate proceedings, had continued to do so, and had relinquished any exemption it might have claimed from the general operation of the laws regulating probate sales. 2. Defendant cannot now look to the property purchased by the plaintiff for any balance which may remain due; its remedy is against the administrator or against the heirs. Judgment affirmed.

Cited: 6 Rob. 302; 7 id. 318; 8 id. 98; 10 id. 127; 11 id. 212; 2 La. Ann. 607; 4 id. 335; 6 id. 770.

OAKLEY v BANK OF LOUISIANA (1841) 17 La. 386.

For loss sustained by failure to properly demand payment on promissory notes. Plaintiffs were the second indorsers on two notes which had been discounted by the defendant bank. After protest, they paid the amount of the notes to the bank, and attempted to recover from the first indorser. It was then discovered that proper demand had not been made of the maker, and the indorser had been thereby discharged. Plaintiffs then sued the bank and the notary who made the protest, claiming that the defendants were liable, in solido, for the loss sustained. Proof showed that plaintiffs had paid the note by mistake. Judgment against defendants, in solido. Appeal.

Bullard, J. 1. The plaintiffs having taken up the notes, in ignorance of the failure to make demand of the drawer and at the instance of the bank, can recover back the money from the bank. 2. There was no privity between the plaintiffs and the notary, who was the agent of the bank, and not theirs. The bank alone is responsible to them. Judgment affirmed as to the bank, and reversed as to the notary.

Cited: 11 Rob. 386; 5 La. Ann. 15; 18 id. 390; 21 id. 280, 550.

HYDE v PLANTERS BANK OF MISSISSIPPI (1841) 17 La. 560.

For loss sustained through negligence of bank's notary in protesting a note. Plaintiffs sued defendant for loss sustained on a promissory note which they had deposited with the bank for collection. By the negligence of the bank's notary in protesting the note, the indorser was discharged from liability. A Mississippi law required notaries public to give a bond for \$2,000 conditional for the faithful performance of the duties of their office. Defendant claimed that the notary and his sureties were the ones legally responsible to the plaintiffs for the loss. Judgment for plaintiffs. Appeal.

Morphy, J. Defendant cannot be held responsible for the loss sustained. If, by the neglect of the notary employed for plaintiffs by the bank, the plaintiffs have suffered an injury, they must look to the notary and the sureties on his official bond, because such neglect was a breach of his official duties. Judgment reversed.

Cited: 2 Rob. 296; 1 La. Ann. 15.

DELOACH v JONES (1841) 18 La. 447.

Attachment against non-resident. Plaintiff sued defendant, a resident of Arkansas, and attached at the same time the proceeds of 208 bales of cotton as defendant's property. The R E Bank of Arkansas intervened and claimed the proceeds. Prior to this suit, the bank loaned defendant a certain sum, and as security for repayment the latter agreed to deliver to the bank's agent his cotton crop to be shipped to New Orleans and sold. Any residue, after payment of the indebtedness, was to be paid over to the defendant. Plaintiff knew and approved of this arrangement. The crop, the 208 bales in question, was delivered, shipped, and sold according to the agreement, but the proceeds were attached in the hands of the assignee. Judgment for intervenor. Appeal.

Simon, J. 1. The contract was to secure the bank the payment of its debt and was not a violation of its rights and privileges. 2. The cotton was delivered and consigned for the purpose of paying a specific debt; the intervenor had thereby acquired upon it, within the knowledge of the plaintiff, such a lien as to entitle it to be paid by preference out of the proceeds thereof. 3. As a pledge it was defensible before delivery, but after delivery the contract became complete. The plaintiff had therefore no right to attach said proceeds further than the residue in favor of the defendant. Judgment affirmed.

Cited: 12 Rob. 413; 31 La. Ann. 599, 621; 43 id. 422; 49 id. 480.

JORDY v HEBRARD (1841) 18 La. 455.

Quo warranto to oust defendant as director in the Louisiana State Bank. The bank's charter provided for a board of eighteen directors, six to be appointed by the governor and twelve to be elected by the stockholders. It also stipulated that only two-thirds of the old board were eligible for re-appointment and re-election. The governor, in making his appointments, left out two members of the board, but they, with seven others of the board, were re-elected by the stockholders, making thirteen members from the old board. Hebrard was one of the seven re-elected, but he was the last one on the list, having obtained the smallest number of votes. Plaintiff, who came next to Hebrard in point of number of votes, contended that the latter was not legally elected, and that he, the plaintiff, should be considered as the last director elected. Defendant Hebrard claimed that the prohibition in the charter applied to the board as composed of two distinct bodies, and that the restriction against appointing more than two-thirds of the old members was to be understood as applying separately to each class of directors, without reference to the other. The court held that the two members of the old board not reappointed by the governor, but elected by the stockholders were ineligible and gave judgment vacating their seats and ordering a new election to fill their places. Appeal.

Morphy, J. 1. The Board of Directors of the Louisiana State Bank can be viewed as but one body, of which two-thirds only can be continued in office for the ensuing year. 2. When the stockholders are about to re-elect the eight old directors, they are permitted to retain in office all the members of the former board, whether before elected by them or appointed by the governor, and they stand before them on an equal footing and with an equal right to re-election. 3. Hebrard cannot be recognized as duly elected, but it does not follow that plaintiff is therefore to be considered as elected. There must be a new election to fill the vacancy. Judgment reversed.

GAS BANK v DESHA (1841) 19 La. 459.

Against indorser on promissory note. Plaintiff bank sued defendant as indorser on a promissory note for a balance due thereon and interest. Defendant claimed that he had been discharged from liability, because the notary's certificate did not state that notice was sent to his nearest post office. The certificate named the post offices to which notices were sent. The defendant did not deny in his answer or offer to prove that the notice sent him was misdirected, or that there was another post office nearer to him. The defendant pleaded want of an amicable demand. Judgment for plaintiff. Appeal.

Garland, J. 1. The demand of payment on the drawer of the note and a notification to the defendant, that the holder looked to him for payment, is a sufficient demand. The plea of want of an amicable demand will not avail. 2. In the absence of a denial by defendant, the notary's certificate is sufficient proof of notice to him as indorser. 3. The plaintiff can recover at 7 per cent from the day of protest. The plaintiff is the holder of the note, which on its face shows it was made for the accommodation of the drawer. The inference that it was discounted is irresistible. Judgment affirmed.

Cited: 4 Rob. 78, 201.

SEGHERS v NEW ORLEANS IMP. & BANKING CO. (1842) 1 Rob. 239.

Against vendee of bank stock. Plaintiff sold defendants certain shares of a bank, just organizing, at a premium, payable when said bank should go into operation, provided it did so within a fixed time. In order for the bank to go into operation, it became necessary to reopen the books of subscription and reduce the number of shares originally allotted. Plaintiff consented and the number of shares received by defendants was reduced to nearly one-fourth of the number contracted for. Plaintiff claimed premium on whole number originally sold. Verdict and judgment for plaintiff for premium on number actually acquired by defendants. Appeal.

Martin, J. The sale of the shares was absolute, but payment of premiums depended on a contingency, the happening of which was brought about by the act of plaintiff. He cannot throw on defendants the loss from the reduction of the shares actually acquired by defendants. Judgment affirmed.

TREZEVANT v BANK OF TENNESSEE (1842) 1 Rob. 465.

To recover value of bank notes. Defendant bank had its principal bank at Nashville, and branches elsewhere in the state. Plaintiffs were holders of notes of the principal bank payable at a branch, where they were presented for payment and refused. The charter of defendant bank gave no right to its branches to issue notes of their own, nor to sue or be sued. Each of the notes was protested. The suit was brought against the principal bank. Judgment for plaintiffs, with interest and costs of protest. Appeal.

Morphy, J. 1. The bank and its branches form only one corporate body, and the principal bank is responsible for its notes and for those of any of its branches issued under its authority. 2. The object of protesting the notes was not only to secure interest, but also to procure evidence of the demand made at the place designated in them for payment. The notary might well refuse to include all the notes in a single protest, as he had a separate demand to make on each. 3. Costs of protest of a bank note may be recovered, though a notarial demand was unnecessary to entitle plaintiffs to interest. Judgment affirmed.

HATCH v CITY BANK OF NEW ORLEANS (1842) 1 Rob. 470.

Mandamus to compel inspection of books. The plaintiff, a director and stockholder of the bank, applied to the president and board of directors for permission to inspect stock ledger and transfer book. Being refused, he applied for mandamus, alleging above facts, and that it was for purposes material to the interests of the institution and the public, but did not set forth except in the most general terms his reasons for desiring the inspection. By the bank's charter, the transfer book and the minutes of the board of directors are the only books required to be kept. The latter is only open to the inspection of the stockholders during one month in each year; and as to the former, the charter is silent. Art. 15 of the code of practice says that "an action can only be brought by one having a real and personal interest, which he pursues." Mandamus issued. Appeal.

Garland, J. A mandamus will not be issued to compel the custodian of corporate documents to allow an inspection where no right is shown, and no just or useful purpose is to be effected. Judgment reversed.

Cited: 13 La. Ann. 290, 291; 22 id. 7; 28 id. 207; 29 id. 513; 32 id. 585; 33 id. 109; 39 id. 1076; 49 id. 809, 840; 50 id. 260; 104 La. 132.

BARTLETT v NEW ORLEANS CANAL & BANKING CO. (1842) 1 Rob. 543.

For recovery of value of bank notes. Defendant bank suspended specie payment. The plaintiff presented certain of its notes for payment, demanding principal and interest from the time of suspension. The charter allowed interest in such case from time of suspension till payment in full of notes. It was provided that, in case of a violation by the bank of its contracts, damages were due from the contravention and the debtor need not be put in default. Principal was tendered in legal coin, but interest refused. Judgment for plaintiff without interest. Appeal.

Bullard, J. 1. Not paying in specie is merely a passive violation of contract, which does not ipso facto put the bank in default. 2. The penalty or interest supplied by the charter, for suspending or refusing to pay in specie, cannot be recovered without a demand and failure to pay on the part of the bank; and interest will run only from the time of putting the bank in default. Judgment affirmed.

Cited: 10 Rob. 198; 4 La Ann. 475.

MURODOCK v UNION BANK OF LOUISIANA (1842) 2 Rob. 112.

Against maker of bank note. Plaintiff presented to the defendant for payment the halves of certain of its notes, signed by the cashier, and clearly showing the amount of each note and a promise to pay. Loss of other halves was accounted for, and a bond was offered to secure the bank from damage of repayment of lost moieties, which contained the signature of the president. The bank contended that no note is binding on the corporate body unless it contains the signature of the cashier and the president. The president refused to pay more than half the amount of the notes. Judgment for plaintiff for amount claimed, he to give bond to secure defendant. Appeal.

Garland, J. 1. The mutilation is fairly accounted for, and the bank is bound to pay the note in full on recovering security to indemnify it against any loss sustained by it from the production of the lost half. 2. The holder of a half of a bank note, which does not contain the signature of the president, need not prove such signature. It will not be presumed that notes were issued without his signature. Judgment affirmed.

Cited: 2 La. Ann. 1012.

JACKSON v COMMERCIAL BANK OF NEW ORLEANS (1842) 2 Rob. 128.

Against drawer of duplicate bill of exchange. Original bill, with forged indorsement, was paid by defendant; he refused to pay second set, which was then protested and suit on it brought. Judgment for plaintiff. Appeal.

Maybin, J. Where a bill is assignable only by indorsement, a person obtaining possession of it by a forged indorsement acquires no interest in it although ignorant of the forgery, and the original holder may recover of the acceptor although the latter may have paid it. Judgment affirmed.

Cited: 19 La. Ann. 18; 44 id. 245; 46 id. 51.

WALDEN v CITY BANK OF NEW ORLEANS (1842) 2 Rob. 165.

To rescind a contract of loan. Plaintiff effected a loan secured by mortgage, from defendant bank, receiving, in lieu of current money, certain bonds at par, though their real value was much less. Plaintiff claimed the bank made a profit of more than 8 per cent, the rate of interest allowed by its charter, and that the contract of loan was usurious and contrary to its charter, but made no offer to restore the bonds and interest received. He prayed for an annulment of the contract, and for an injunction to restrain enforcement of the mortgage. The defendants contended that the petition should have set forth the plaintiff's readiness to restore the bonds and interest. Defendants' peremptory exception sustained, and preliminary injunction dissolved, and judgment against principal and sureties on injunction bond for damages. Appeal.

Bullard, J. 1. A usurious contract is voidable only so far as it concerns the interest, and is valid for the principal. 2. There can be no rescission of a contract without placing the parties in the situation they were in before the contract was entered into. 3. It was error to give judgment against the principal and sureties on the injunction bond for damages. The defendants should have been left to their remedy on the bond. Judgment dismissing suit and dissolving injunction affirmed, but reversed as to damages.

Cited: 2 Rob. 181, 182; 10 id. 409; 2 La. Ann. 364; 3 id. 476; 11 id. 629; 21 id. 426; 29 id. 213; 32 id. 31, 610; 33 id. 792; 52 id. 1291.

FRAZIER v NEW ORLEANS GAS LIGHT & BANKING CO. (1842) 2 Rob. 294

Action by plaintiff as assignee of Bank of V for balance of account. The banks acted as agents for each other under an agreement to make collections, and to give prompt advice of protests. Defendant set up as a counterclaim an indebtedness of the Bank of V to the amount of a promissory note, which it had failed through negligence to collect for defendant. It contended that the Bank of V had failed to give a prompt notice of non-payment, and that its notary had failed to give the only solvent indorser notice of protest. The plaintiff denied liability for negligence of notary, also excused his omission because of peculiar and equivocal character of the indorsement which was by allonge, and denied breach of covenant to give prompt notice. Judgment for plaintiff. Appeal.

Bullard, J. 1. A bank is not liable for the neglect of a regularly employed notary. 2. The indorsement was so equivocal as to cause the omission to notify. 3. The agreement did not require such immediate notice as would enable defendant to give the notice of protest in time. Judgment affirmed.

Cited: 1 La. Ann. 15.

STATE v NEW ORLEANS GAS LIGHT & BANKING CO. (1842) 2 Rob. 529.

Quo warranto. To forfeit the charter of the defendant for failure to make specie payment for a period of 80 days before suit and to pay balances. The charter expressly required specie payment, and provided that a failure for 90 days should ipso facto forfeit. The bank, with others, ignored the provision for nine months, and a general law was passed restoring all charters, on condition that

the banks should pay once a week the balances they owed each in gold or silver, publish a monthly report, and not in the future suspend weekly payments. Eighty days before this petition was filed, defendant had passed a resolution suspending specie payment. Defendant claimed that 90 days omission must take place before forfeiture. Judgment for defendant. Appeal.

Garland, J. 1. The obligation to pay balances to other banks in specie is declaratory only; and if the party in whose favor it was stipulated chose to waive it, the state cannot complain. 2. It is incumbent on a corporation to live up to the object of its creation. The 90 days' clause did not authorize an omission for a less period. 3. There is no evidence of an actual refusal to make specie payments on demand. It does not appear that this resolution caused any public injury and the defendant may be able to prove that its adoption was justified. Reversed for new trial.

EXCHANGE & BANKING CO. v BOYCE. (1842) 3 Rob. 307.

On notes against indorser. The notes sued on, with interest at 10 per cent per annum from maturity till paid, were given plaintiff bank in renewal of other notes which carried interest at 7 per cent, the highest rate allowed by the plaintiff's charter. The renewal notes were indorsed by agent of indorser before he received his power of attorney. A certificate of a notary not taken under a commission, was offered in evidence to prove that no notes of the maker of the note sued on had been protested by him within a certain time. Defendant lived at two places alternately, to one of which notice of protest was addressed. Judgment for plaintiff. Appeal.

Morphy, J. 1. Notaries can only legally certify copies of proceedings in their offices, any other facts within their knowledge must be disclosed under oath. 2. A power of attorney to indorse notes, which the agent has already indorsed before receiving the power, will be considered as a ratification of his act. 3. A bank cannot legally stipulate for a higher rate of interest on loans and discounts than its charter allows, in consideration of its forbearance to sue. 4. Where an indorser has no fixed place of residence, but lives alternately at two different places, a notice of protest sent to either is sufficient. Judgment affirmed.

Cited: 9 Rob. 247; 11 id. 474.

MILLAUDON v NEW ORLEANS & CARROLTON R. R. CO. } (1843) 3 Rob. 488.
NEW ORLEANS & CARROLTON R. R. Co. v MILLAUDON }

To compel collection of stock subscriptions. The defendant, a banking company, issued shares of its capital stock of the par value of \$100 each, of which a payment of \$50 per share was called for from the subscribers. A resolution was passed allowing pro rata dividends to stockholders who paid. The plaintiff paid in full, received dividends in proportion, and effected a loan, less than his stock holdings, from defendant on the pledge of his stock. Defendant went into liquidation and called upon plaintiff to settle his indebtedness on the notes, but did not call for additional payments from stockholders who had not paid in full. This suit was to compel defendant to call in the payment of the whole amount on the stock subscribed for, or to recover the amount paid in by him in excess of \$50 per share, and to restrain the bank from exacting repayment of his loan, until the stockholders should be placed on an equality as to their payments. The bank then sued him on his notes given for the loan. The cases were consolidated. Judgment for plaintiff for the amount paid by him in excess of the \$50 originally called for, and for the bank for the amount of notes. Appeal.

Bullard, J. 1. No stockholder can be liable for more than \$100 for each share. Each share is to lose an equal amount on a final liquidation of the bank. The payment of the whole amount of his shares by a stockholder does not change his relative position to the stockholders who are his partners. As to them, the party who makes the advance is a creditor to the extent of the surplus, which implies as between them a right of retention in each partner over the fund for any advances he may have made to the company, or for any debt due by the company for which he may be made responsible. 2. When a bank is in liquidation, a stockholder who has paid more than the other stockholders, independently of a loan made to him, cannot be compelled to pay his indebtedness, until the necessity of the sum to pay the bank's debts is shown. 3. In liquidating the concerns of a bank, the board of directors become the mandatories of the stockholders, and the trustees of the creditors. It is the paramount duty of the board of directors

to call in the amount unpaid on the stock to meet the exigencies of the bank, and to equalize the burden of the stockholders. Judgment reversed.

Cited: 12 Rob. 635; 3 La. Ann. 2, 30; 4 id. 88; 44 id. 53.

BAYARD v GIRARD BANK OF PHILADELPHIA (1843) 4 Rob. 262.

Against payee by accommodation drawee. Plaintiffs accepted and paid draft for accommodation of drawer, and on faith of certain notes consigned to meet the draft, which later proved insufficient. Drawer informed plaintiffs of guarantee of draft by defendants. Defendants denied guarantee. Suit brought on two grounds: 1, Of alleged guarantee; 2, of money paid for use of defendants. Judgment for plaintiffs. Appeal.

Garland, J. 1. It was the duty of the plaintiffs to make out their case; and, when the facts are doubtful, judgment must be given against party holding the affirmative of the issue. The testimony as to the guarantee is contradicted by testimony equally credible. 2. Plaintiffs did not pay to accommodate the defendants. 3. The loss, if any, should fall on the party who accepted for the accommodation of his correspondent, without knowledge of defendant's guaranty. Judgment reversed.

Cited: 11 Rob. 260.

BANK OF LOUISIANA v SMITH (1843) 4 Rob. 276.

On promissory note against maker and heir of indorser. Plaintiff first got judgment against maker, and issued execution thereon during pendency of the suit against co-defendant, the heir of the deceased indorser. Execution was stayed by order of plaintiff, without knowledge or consent of indorser's heir. Notice of protest had been sent addressed in the name of deceased indorser. Judgment for defendant. Appeal.

Simon, J. 1. Where indorser is dead, notice of protest should not be sent to him by name, but to his legal representatives. A certain degree of diligence must be used to ascertain who are the indorsers' executor or administrator, or heirs and representatives. 2. The giving of further time to the drawer of a note, without the assent of the other parties thereto, discharges them from liability. Judgment affirmed.

Cited: 12 La. Ann. 584; 21 id. 359.

UNION BANK v LATTIMORE (1843) 4 Rob. 342.

On a stock note. Plaintiff, a bank of New Orleans, sued defendant in the court at New Orleans on a note, payable at New Orleans, given for stock subscription. He resided in another parish. It claimed that making the note payable at New Orleans was an election of domicile for jurisdictional purposes as provided by the Act of March 13, 1818; also that the claim was in reality a partnership claim and within a statute making the firm's place of business the residence for suit. Defendant contested the jurisdiction. Judgment for plaintiff. Appeal.

Martin, J. 1. The Act of March 13, 1818, related to rules of proceeding, and was therefore repealed by the Act of March 25, 1828. 2. The claim of the plaintiff against the defendant is the same as it might have against any other borrower. The obligation of the stockholder results from his note, and not from any matters relative to the partnership. Judgment reversed.

WHITE v COMMISSIONERS OF MERCHANTS BANK (1843) 4 Rob. 363.

Petition by acceptors of draft for rule to show cause why protested checks of or on defendant bank should not be received in payment. Defendants answer that they are holders of a draft, not yet due, accepted by petitioners, but aver that petitioners cannot obtain relief by this mode of proceeding. Judgment decreeing compensation for amount of checks, and rule absolute as to surrender of draft. Appeal.

Garland, J. 1. The matter must be necessarily connected with, and incidental to, the main action to obtain a summary proceeding by rule. 2. The plaintiff could not bring an ordinary suit against the defendants and recover the amount of the checks. Judgment reversed.

BANK OF PORT GIBSON v BURKE (1843) 4 Rob. 440.

Against agent. Defendants, commission merchants, received for sale a consignment of cotton from C, a debtor of plaintiffs. The bill of lading read: "Proceeds of the above to be subject to the order of the Port Gibson Bank." Defendants attached the proceeds of sale for a debt due them by C, who was a non-resident, as was plaintiff bank. Defendants claimed the proceeds were liable to their attachment, and that plaintiffs, under their charter, could not acquire the title, interest, and lien in the cotton which they set up. Judgment for defendants. Appeal.

Bullard, J. 1. The defendants, having received the cotton in virtue of the bill of lading, were bound to carry out their agency and to account for the proceeds of sale to the plaintiffs. 2. The authority of the bank to contract in Mississippi, where the contract appears to have been entered into, cannot be questioned under their charter. Judgment reversed.

Cited: 10 La. Ann. 782.

PHILADELPHIA BANK v LAMBETH (1843) 4 Rob. 463.

On bill of exchange against acceptor. The defendants admitted their signatures on the bill, but denied the existence of plaintiffs, as a corporation. Plaintiffs, a non-resident bank, did not produce the act of incorporation, but offered to prove incorporation by offering evidence: 1, Of certain acts extending its charter; 2, extracts of executive minutes of the state attesting the notification of the bank's acceptance of those acts; 3, of testimony of witness who had correspondence with it at a certain period. Judgment for plaintiffs. Appeal.

Martin, J. 1. The acts extending the charter prove that it was originally granted. 2. The extracts from the executive minutes prove the acceptance of the extension of the charter, and the testimony of the witness, that he had correspondence with the bank, establishes that it was in operation and is cumulative evidence of the extension of the charter. Judgment affirmed.

STATE v UNION BANK OF LOUISIANA (1843) 4 Rob. 499.

Mandamus. Under the second sec. of ch. 22 of the Act of 1842, which constituted a board of currency to have supervision and control of the banks of the State of Louisiana, the board is given free access to the books of the banks, and may compel the bank officials to submit their books and papers to their inspection and thorough examination. The evidence showed that the application was made in order to obtain the information which the law required the board of currency should obtain from the banks to prepare a statement for the legislature. They called on defendant bank to furnish a statement, at its own expense, showing lists of debtors of bank, and amounts due by stockholders and others on loans. Defendant refused. Mandamus issued. Appeal.

Simon, J. The board had no authority to call on the bank for such a statement at the bank's exclusive expense. The information may be derived from an examination of the books of the bank, which the board are at liberty to inspect with their own eyes. Judgment reversed.

Cited: 4 Rob. 506.

FRAZIER v WILCOX (1843) 4 Rob. 517.

On promissory notes against the maker. Defendants indorsed the notes to the Bank of United States. In a suit brought against that bank, they were attached as its property. Subsequently they were claimed by the bank's several assignees. Pending this controversy, the petitioners were appointed receivers by the commercial court, with the consent of all parties interested, and authorized to bring this action. The notes and mortgage were given to secure a loan made by the Bank of Pennsylvania, in Louisiana, at a higher rate than allowed by its charter, but not higher than allowed by the law of Louisiana. Civil code 2491 provides for appointment and duties of conventional sequestrators. In ordinary cases of attachment, the law directs that the sheriff shall be the judicial sequestrator. Sec. 2954 provides that parties interested in a debt may appoint agents to protect their interests. Subsequently B, a creditor, commenced an attachment suit against the bank, citing both plaintiffs and defendants as garnishees. Judgment for plaintiffs. Appeal.

Garland, J. 1. This conservatory provision of the law does not preclude the parties from making any other arrangement which will be more to their interest. The parties may confer additional powers on their sequestrator. 2. Plaintiffs stand

in relation of agents to all parties interested. Parties are not bound to stand still and see the alleged common debtor wasting his means and depriving them of their security. 3. The garnishee has no right to interfere with the merits of the case between the plaintiff and the defendant. He is viewed as a stakeholder. 4. The last attaching creditor can have no claim against the garnishee until the previous attachments are ascertained and paid. 5. The capacity of foreign corporations to contract, according to our laws, is amply sustained by authority, as the laws of other states have no extra territorial force. The rules of comity between foreign nations apply to the States of the Union. Judgment affirmed.

Cited: 5 Rob. 250, 339; 6 id. 28; 11 id. 336, 419; 12 id. 413; 6 La. Ann. 63; 12 id. 299; 16 id. 238; 33 id. 1209; 35 id. 199; 43 id. 422; 832; 51 id. 145.

STATE v ATCHAFALAYA R. R. & BANKING CO. (1843) 5 Rob. 63.

For forfeiture of charter. Proceedings were brought on the ground of violation of charter by a suspension of specie payment for more than ninety days. The president and directors answered, consenting that their charter be declared null and void. On this confession judgment of forfeiture was passed. The Act of February 5, 1842, sec. 7, provided that banks which had completed public works, might retain their charter powers; but that defendants should not be released from building the railroad imposed by the charter, except so far as the state was concerned. Judgment for petitioner. Appeal by stockholder.

Bullard, J. The president and directors were incompetent, without the consent of the stockholders, to confess a forfeiture of the charter. But the grounds set forth in the petition, and not denied by the defendants in their answer, are sufficient to authorize a judgment of forfeiture. The stockholders still had a right to require the construction of the road, notwithstanding a forfeiture of banking privileges. Judgment reversed. Charter decreed forfeited.

Cited: 15 La. Ann. 334; 31 id. 838; 35 id. 248.

SECOND MUNICIPALITY OF NEW ORLEANS v COMMERCIAL BANK (1843)
5 Rob. 151.

To recover taxes on slaves and real property, owned by a bank. Defendant's charter, sec. 37, provided that its capital should be exempt from state taxes. Plaintiff taxed defendant on its slaves and real property. Defendant claimed its property was exempt, under sec. 37 of its charter. Judgment for plaintiff. Appeal.

Martin, J. Nothing is exempted from taxation, except the capital of the bank, furnished by its stockholders. Judgment affirmed.

Cited: 10 Rob. 188; 6 La. Ann. 66.

MAYOR OF NEW ORLEANS v COMMERCIAL BANK (1843) 5 Rob. 234.

For compound interest. The city of New Orleans held shares of the capital stock of defendant. Its charter provided that the surplus of the dividends arising from shares held by plaintiff, remaining after the payment of the interest on its bonds given by it in payment for its stock, should be passed half-yearly to the credit of plaintiff to be set apart as a sinking fund for the payment of the bonds, and that 5 per cent interest per annum should be allowed. Plaintiff contended that every six months the whole amount of the sinking fund, composed of principal and interest, should be recapitalized and continue to bear interest at 5 per cent per annum. Judgment for plaintiff. Appeal.

Simon, J. There is nothing in the charter of the bank to justify the contention of the plaintiff so as to allow the city half-yearly compound interest upon all previous capitalization of interest. Interest upon interest cannot be recovered. Judgment reversed.

Cited: 3 La. Ann. 97.

MARIGNY v UNION BANK (1843) 5 Rob. 354.

Damages for fraud. Plaintiff was indorser of notes secured by mortgage, given by the cashier of defendant to pay his indebtedness to the defendant. Plaintiff, in settlement of his indorsements, gave bonds to defendant, received in return the notes, and was subrogated to the mortgage. He received, as a creditor of the cashier's insolvent estate, a dividend on the notes. Plaintiff alleged that his in-

dorsements were secured by fraud of the bank, in assuring him that the cashier was solvent and would be retained in his position, and that the payment of the notes would be guaranteed. Evidence of oral statements of president and directors of the bank made to witness, was admitted under objection. It is claimed that plaintiff indorsed with full knowledge of all the facts which preceded, attended or followed a certain transaction. The civil code, art. 2252, par. 3, provided that the voluntary execution of a contract was a ratification thereof, and involved a renunciation of the means and exceptions opposed to it. Judgment for plaintiff. Appeal.

Simon, J. 1. The action being based upon alleged acts of fraud and deception on the part of the directors of the bank collectively and separately, their declarations are admissible in evidence. 2. The voluntary execution of an obligation amounts to a ratification of the contract, and involves a renunciation of the means and exceptions that might be opposed to it. Art. 2252 of the civil code, par. 3, applied to this case. Judgment reversed.

Cited: 12 Rob. 284; 20 La. Ann. 170; 30 id. 941.

ERWIN v LOWRY (1843) 6 Rob. 28.

On promissory notes. The plaintiff is a holder for value. Defense, usury. The notes were originally given to a Pennsylvania bank, contracting in Louisiana. They bore interest at the rate of 8 per cent, which was legal interest in this state. The bank's charter declared that the rate of discount at which it may make loans in Pennsylvania, shall not exceed one-half of 1 per cent for thirty days.. Judgment for defendant. Appeal.

Bullard, J. 1. The clause in the charter does not apply to contracts which the bank may make in other states of the union, where it is authorized to contract either by law, or by the comity of nations. 2. The validity of such contracts must be tested by the law of the place where they are entered into. Judgment reversed.

Cited: 33 La. Ann. 132.

FELLOWS v COMMERCIAL & R. R. BANK (1843) 6 Rob 246.

Attachment. Defendant was a Mississippi corporation for banking purposes and to construct a railroad. To complete the road at a specified time, and to save its charter, it made an assignment, for the benefit of its creditors, to trustees of all its effects, including notes of C. The deed provided that the bank should have the right to fill vacancies in the trustees; that a certain sum should be borrowed to complete the road, the payment of which was made a preferred claim. No schedule of creditors or specification of property intended to be conveyed was included. The bank reserved authority to control the trustees in relation to doubtful claims. In an action to recover the amount of certificates of deposit, the plaintiff attached a debt owed by C, garnishee, on his notes held by the defendant. The trustees under the assignment intervened, and prayed for dissolution of attachment, and that the notes be adjudged their property. Judgment for plaintiff. Appeal.

Bullard, J. Many of the stipulations of the deed of trust are inconsistent with the idea of a bona fide assignment. It is rather the creation of an agency to manage the affairs of the corporation. We do not feel authorized to infer the assent of the plaintiff as a creditor to the terms offered in the deed. It is not such an assignment for the benefit of creditors as would be held valid by the laws of Mississippi. Judgment affirmed.

Cited: 8 Rob. 415.

CITY BANK OF NEW ORLEANS v BARBARIN (1843) 6 Rob. 289.

On note against indorser. The Act of February 5, 1842, reviving the charter of the C Bank, provided that the debts due the bank on the passage of the act should form part of the "dead weight" of the bank, and should be entitled to renewal, on certain conditions. The defendants subsequently became indebted to the plaintiffs, by the discounting of the notes in suit. Defendants claimed the notes were "dead weight" and should be renewed. Judgment for plaintiffs. Appeal.

Simon, J. The benefit of the "dead weight" is limited to debts due the bank at the time of the passage of the act, and cannot include those contracted afterward, even if contracted between the date of the adoption of the act and of its promulgation or acceptance by the bank. Judgment affirmed.

COMMISSIONERS v MUDGE (1844) 6 Rob. 387.

For recovery of rent. The plaintiffs sue for rent due under a lease made to defendants by the E Banking Co., which was in liquidation under the Act of 1842, which provided for forfeiture from violations of charter other than insolvency. The defendants owned bank notes of this bank in an amount equal to the rent, which they tendered to the plaintiffs in settlement. The tender was refused, on the ground of the presumed insolvency of the bank. By another Act of 1842, p. 454, it was provided that persons having notes to pay to banks in liquidation should have the right to pay in bank notes of the liquidating banks. Defendants pleaded in compensation the tender of the bank notes. Judgment for plaintiffs. Appeal.

Morphy, J. 1. A bank is insolvent only when the whole amount of its capital stock, together with its assets, is insufficient to meet its liabilities. A bank, which goes voluntarily or is forced into liquidation under the Act of 1842, is not necessarily insolvent. Insolvency is nowhere, under that act, contemplated as a cause for placing it in forced liquidation. Until insolvency is shown, debts due the bank should be compensated with, and extinguished by, its obligations or notes held by its debtors. 2. A fair construction of the Act of 1842, p. 454, would extend the right of debtors to pay in notes of liquidating banks to all debts though not evidenced by notes. The plea of compensation should have prevailed. Judgment reversed.

Cited: 6 Rob. 397; 10 id. 91; 11 id. 287; 4 La. Ann. 233; 5 id. 10; 15 id. 20; 37 id. 238; 48 id. 270.

STATE v ATCHAFALAYA R. R. & BANKING CO. (1844) 7 Rob. 198.

Petition to annul bank's charter. During the proceedings, S, a notary, was employed to make an inventory. He charged \$3,000 for his services in making two originals, one copy, and in canceling and destroying the bank's notes, in accordance with sec. 13 of the Act of 1842. He took a rule to show cause why his claim should not be paid by privilege. The court reduced the first charge one-half, because one of the originals consisted of memoranda to enable him to draw the inventory in proper form; the second charge was reduced one-half because it did not appear the copy was made out of the notary's office; and the third charge was rejected in toto. The notary appealed.

Bulard, J. Notaries cannot recover, as on a quantum meruit, extra compensation, for the small services of destroying the notes, which form an essential part of the labor of making an inventory as required by law. Judgment affirmed.

Cited: 12 La. 242.

UNION BANK OF LOUISIANA v HYDE (1844) 7 Rob. 418.

On notes against maker and indorser. Defendant pleaded in reconvention that the plaintiff had been the holder of notes indorsed by defendant, which had been protested for non-payment, and which, on demand of plaintiff, he had paid, believing that the notes had been protested, and the indorsers properly notified; that by the negligent and unlawful conduct of the plaintiff he had lost his recourse against the other indorsers. Judgment for plaintiff. Appeal.

Bullard, J. 1. The holder of a promissory note on which there are several indorsers, is not bound to give notice to any, except the one whom he intends to hold liable. 2. He who alleges error as to the basis of an action, must show it or at least show satisfactorily that the evidence of it is exclusively in the power of his adversary. 3. The plaintiff was bound to allege distinctly that he was not notified. 4. An actual payment furnishes a presumption of indebtedness. Judgment affirmed.

Cited: 20 La. Ann. 46.

PLAUCHE v ROY (1844) 7 Rob. 453.

On promissory note. At a syndic's sale, slaves were sold to defendant, who gave to the syndic a note for the purchase price. The syndic indorsed the note to the C A Bank, which indorsed it to plaintiff. Defendant answered that the syndic could not, without order of court, transfer the note and make a deed of subrogation to the bank; that the president of the bank could not legally transfer it to the plaintiff; and that the defendant offered to avail himself of the following law and was refused. The Act of February 5, 1842, provided "such debts now due or that may mature hereafter," shall be renewed upon application on certain time payments and on giving certain security. The bank did not hold this note at the date of

this act. On refusal to renew, the defendant withdrew the 10 per cent. The board of managers had passed a resolution authorizing the president to take all necessary steps to diminish the cash liabilities of the bank before the transfer to plaintiff to whom the bank was indebted. Judgment for plaintiff. Appeal.

Morphy, J. 1. It is only in relation to debts due the bank at the time the act was passed, that its debtors were entitled to claim the delays therein granted. 2. The resolution clearly authorized the transfer of the note. 3. The defendant cannot complain that the syndic did not have authority to transfer the note in question. The creditors of the insolvent alone can complain and the defendant is not called upon to protest their right. Judgment affirmed.

ETTING v COMMERCIAL BANK OF NEW ORLEANS (1844) 7 Rob. 459.

For refusal to honor checks. Plaintiff had a deposit with defendant subject to his checks. Checks, which proved forgeries, were cashed by the defendant, which caused an overdraft of plaintiff's account. An officer of the bank, on refusing to pay other checks presented, said that the plaintiff had overdrawn his account, and did so frequently. The action was to recover the amount of the forged checks, and damages for the alleged slanderous statements. Judgment for plaintiff. Appeal.

Garland, J. 1. The depository must take care that he pays none but the checks of the depositor. The bank must bear the loss. 2. A bank is not responsible for an unauthorized accusation made by one of its officers against another person. 3. There was no malicious intent in the statement. Judgment reversed as to the damages. Judgment for plaintiff for amount of forged checks, with interest from judicial demand.

Cited: 14 La. Ann. 483; 23 id. 311; 27 id. 367; 40 id. 93.

CITIZENS BANK OF LOUISIANA v BUISSON (1844) 7 Rob. 506.

Mortgage foreclosure. P mortgaged to the plaintiff lots of land, of which defendant took possession after P's death, as his executor. Plaintiff sued the defendant as a person in possession. Defendant objected to the jurisdiction of the court on the ground that the suit should have been in the probate court. Overruled. The plaintiff's charter provides that all property mortgaged to it may be sold at any time, according to law, in whosoever possession found, "notwithstanding any change of possession by succession," the same as if it was in the possession of the original mortgagor. Judgment against defendant as testamentary executor, to be satisfied from the proceeds from the sale of the mortgaged property. Appeal.

Martin, J. 1. The circumstance of the person in possession, being the testamentary executor of the mortgagor, could have no influence on the conduct of the bank. The objection to the jurisdiction of the parish court was properly overruled. 2. The judge erred in giving judgment against the defendant in his capacity as testamentary executor. Judgment reversed.

Cited: 20 La. Ann. 311; 31 id. 58, 139, 140; 40 id. 416.

MERCHANTS INS. CO. v CHAUVIN (1844) 8 Rob. 49.

On promissory note against drawer and indorser. Defendant gave his note to R, who indorsed it to the C Bank, which, in turn, indorsed it in blank through its cashier. The C Bank transferred it to the A Bank in payment of a balance due it, and it was afterward given to plaintiff in payment of deposits due it. Plaintiff sued the drawer and indorsers in solido. Judgment for plaintiff. Appeal.

Morphy, J. The cashier of a bank has prima facie authority on behalf of the bank to indorse negotiable paper held by it in payment of its debts. Judgment affirmed.

WADE v NEW ORLEANS CANAL & BANKING CO. (1844) 8 Rob. 140.

Action to recover for bank notes destroyed by fire. Judgment for plaintiff, on condition that she give bond with surety to indemnify the bank, in case it should appear hereafter that the notes were not destroyed. Appeal.

Bullard, J. 1. Very strong proof and conclusive evidence of the destruction of the bank notes by fire is required. The want of identity by numbers and dates is remedied by such strong concurrent circumstances as to leave no reasonable doubt of the destruction of the notes. 2. Equity forbids that the bank should profit by their destruction at the expense of the plaintiff. Judgment affirmed.

BROWN v MECHANICS AND TRADERS BANK (1844) 8 Rob. 143.

On a duplicate bill of exchange, drawn by the defendant to the plaintiff upon the C Bank, and protested for non-payment. Plaintiff proved that defendant drew the bill in duplicate; that the first was lost; that the finder forged plaintiff's name, presented it, and received payment thereon at the C Bank. Plaintiff received the duplicate, and upon presentment to the C Bank, acceptance being refused, it was protested. Judgment for plaintiff. Appeal.

Bullard, J. 1. The payment of the first bill, having been upon a forged indorsement, was at the peril of the bank making the payment. Upon such evidence the C Bank could not recover of the defendant the amount of the bill. The loss must fall on the former. 2. The plaintiff had no right of action against the C Bank until after acceptance, and, that being refused, his course was against the drawers. Judgment affirmed.

NORTHERN BANK v LEVERICH (1844) 8 Rob. 207.

On bill of exchange against acceptors. A drew the bill on defendants in favor of V. The latter transferred it to plaintiff before maturity. The draft was lost, which fact was communicated to the defendants, who promised to pay it out of the proceeds of cotton which was to be shipped by the maker. The cotton arrived, but A countermanded his previous order to pay the draft, and the proceeds thereof were paid to him. The plaintiff did not assent to a release of the defendants. Although the draft was not protested, interest was allowed from the date that it became due. Judgment for plaintiff. Appeal.

Bullard, J. 1. The promise to pay the bill out of the proceeds of cotton which should be received was a conditional acceptance which became absolute on the receipt of the cotton. 2. The drawer could not countermand his order after the acceptance, though before the delivery of the property, so as to discharge the acceptors, without the consent of the owner of the draft. 3. It was error to allow interest from the due day as the draft was not protested. The interest should run only from the day of judicial demand. Judgment reversed.

UNION BANK v THOMPSON (1844) 8 Rob. 227.

On bond against surety. Defendant was surety on the bond of J P, given by the latter as note clerk. A certain number of notes and bills had been given to J P, by the cashier, which were sent to the plaintiff by its correspondents for collection. By the fault of J P, these instruments were not protested at maturity and the indorsers were thereby discharged. The bank then paid the amount of the notes and bills to its correspondents. The court instructed the jury: 1, That whether the acts of J P were or were not breaches of the bond, was a matter for the jury to decide; and 2, that if at the date of maturity the parties to any of the instruments were insolvent, loss on such instruments was not occasioned by want of protest, and the payment thereof by the plaintiff was in its own wrong. Judgment for defendant. Appeal.

Simon, J. 1. The judge should have charged the jury, as matter of law, that if the loss complained of was caused by negligence or dishonesty, it operated as a breach of the bond. 2. The second charge of the judge was correct. Judgment reversed.

UNITED STATES v BANK OF THE UNITED STATES (1844) 8 Rob. 262.

To obtain preference. The defendant was chartered by the State of Pennsylvania. Being in an insolvent condition, it made several assignments for the benefit of creditors, giving them preferences over other creditors. The property so assigned was in the possession of the agent of the assignees in the city of New Orleans. The United States claimed a priority over all other creditors, and asked that the assignments be declared void. The assignees intervened, and asked that the property assigned, be decreed to them, and that the assignments be declared valid. Judgment for the intervenors declaring the assignments valid. Judgment for the United States for a priority. Appeal by assignees. Appeal by United States, for an amended judgment so as to declare all of the assignments void.

Garland, J. 1. The assignments were good under the laws of Pennsylvania. 2. A corporation is competent to make an assignment and to give a preference to one or more creditors, even after insolvency. 3. Delivery of the evidence of a debt is a sufficient delivery of the possession of it. 4. The act of Congress gives the

United States a priority when there is an actual insolvency, though not a declared one, and when the assignment is general. 5. A party, by assigning all his property by different acts, cannot thus, under the pretext of partial assignments, defeat this right of priority. 6. The assignment in Pennsylvania transferred the personal property in this state. Judgment affirmed.

Cited: 10 Rob. 535; 2 La. Ann. 662; 5 id. 394; 17 id. 237; 18 id. 306; 21 id. 595; 24 id. 579.

HYDE v PLANTERS BANK (1844) 8 Rob. 416.

Against debtor by transferee of the debt. A judgment in favor of plaintiff against defendant, a Mississippi corporation, having been reversed in this case, the former was ordered to refund to the latter payments on account of such judgment. Defendant transferred the debt to O. Plaintiff then resisted collection on the ground that the transfer was void. A Mississippi law provided that it was unlawful for any bank in the state to transfer, by indorsement or otherwise, any evidence of debt. The court held the law unconstitutional on the ground that the legislature could not deprive the bank of its chartered rights. Judgment for transferee. Appeal.

Bullard, J. 1. The disability created by the statute affects all of a particular class of artificial persons, not in reference to any particular corporate right or franchise, but as to a species of contract of which they were previously capable. 2. No one can be said to have any vested right in any existing legal capacity in reference to any future contract. 3. The capacity or incapacity of particular classes of persons to contract depends upon the legislative will. 4. The Mississippi statute did not impair any obligation of contract. The transferee, therefore, acquired no legal title to the debt due the bank by plaintiff. Judgment reversed.

Cited: 12 Rob. 126, 200; 21 La. Ann. 564; 25 id. 69.

DORVILLE v CITIZENS BANK (1844) 9 Rob. 362.

To recover interest on deposit. The plaintiff deposited money in the defendant as a special deposit to draw interest. Thereafter defendant was decreed insolvent, without having allowed interest on the deposit. The plaintiff brought this suit in a different court from that which had issued the decree placing defendant in liquidation. The Act of 1842 provided for a suspension of judicial proceedings against banks in liquidation. The defendant objected to the jurisdiction. Judgment for defendant. Appeal.

Bullard, J. All contests relating to the liabilities of banks put in liquidation should be tried before the court which pronounced the judgment placing them in liquidation. Judgment affirmed.

Cited: 11 Rob. 169; 18 La. Ann. 282.

BYRNE v UNION BANK OF LOUISIANA (1845) 9 Rob. 433.

To compel transfer of stock and to recover damages. The plaintiff owned stock of the defendant, secured by a mortgage on real estate. The property was deemed sufficient to secure 250 shares of stock. Plaintiff sold part of the property and 200 shares of the stock to C. Defendant recognized C as a stockholder to that amount. The plaintiff repurchased the property and stock from C. C was indebted to the defendant, and it refused to transfer the stock to plaintiff. It also contended that the property had so depreciated in value as to be insufficient to secure the stock. The defendant's charter by sec. 8 provides that subscribers shall be bound to give mortgages to the satisfaction of the directors, equal to the amount of their stock. Sec. 24 makes the directors judges of the sufficiency of the mortgages. Sec. 29 provides that a stockholder may transfer his mortgage, and be discharged only upon the new members furnishing mortgage to the satisfaction of the directors. Judgment for defendant. Appeal.

Bullard, J. 1. The provisions of the 8th section relate to the taking of the mortgage in the first instance, and not to any subsequent transfers of the same stock thus secured. 2. There is no provision in the charter authorizing a reduction of the number of shares of stock, if the property first offered and accepted to secure it becomes of less value. 3. Sec. 29 refers to a new mortgage to be given on other property by the transferee of the stock, as the condition upon which the first is discharged. 4. The charter does not authorize the directors to prevent the alienation of stock, together with the real estate mortgaged to secure it, by refus-

ing to the purchaser the rights and privileges of a stockholder. 5. The stock was in no manner pledged or specially affected, and the indebtedness of the bank did not prevent the alienation of the stock to a third person. Plaintiff was entitled to damages, the measure of which is the comparative value of the stock at the time the transfer was refused and at the time of trial. Judgment reversed.

COMMISSIONERS v CITIZENS BANK (1845) 10 Rob. 14.

To recover on a check. Several banks entered into an agreement to pay the check of the secretary appointed by them collectively, for balances in proportion to their authorized circulation, in event any of said banks should be unable to meet its obligations. The secretary drew the check in question in favor of the I Bank, but the defendants and others of said banks refused to pay. The commissioners in liquidation for the I Bank thereupon brought this action. Judgment for the virile share of each in proportion to the number of bank's parties to the contract, with interest on the check from the date. Cross appeals.

Bullard, J. 1. The contract is binding on the banks. 2. The obligation was several, not joint. 3. The court erred in condemning each to pay its virile share according to the number of banks. 4. Interest should be allowed from date of protest, not from date of check. Judgment modified.

Cited: 10 Rob. 17; 3 La. Ann. 551; 33 id. 248, 736.

UNION BANK OF LOUISIANA v BAGLEY (1845) 10 Rob. 43.

For sale of mortgaged property. The property in controversy was mortgaged by T to the plaintiff. Defendant bought the property from T, subject to the mortgage. Subsequently, T made a surrender of his property to his creditors. At a meeting of the latter, the plaintiff's cashier, *virtute officii*, granted the insolvent his discharge. Defendant claimed that the discharge extinguished the debt and, with it, the mortgage on the property in his possession. Judgment for plaintiff. Appeal.

Morphy, J. A discharge of the insolvent was an act of ownership, and not one of administration. The cashier had, therefore, no authority to act without a special power. An absolute discharge is not a rescission of the debt. Judgment affirmed.

Cited: 10 Rob. 45; 4 La. Ann. 239.

BANK OF LOUISIANA v FOWLER (1845) 10 Rob. 196.

On promissory note against maker. The charter of the plaintiff provided that, if the bank should suspend specie payments on any notes, the person entitled to receive such moneys should be entitled to interest thereon from the time of such suspension or refusal until the same should be paid, at the rate of 12 per cent. The defendant pleaded in reconvention that he had on deposit with plaintiff at the maturity of the note an amount which, with interest then due, left a balance in his favor, after extinguishing the note. He further claimed interest for dividends declared by the plaintiff, and not paid to him as a stockholder at the rate of 12 per cent per annum. The plaintiff suspended specie payments on May 13, 1837, and the note fell due July 6, 1837. No demand was made for the interest. Civil code, art. 2204, provided for compensation, whenever parties are mutually indebted to each other. Judgment for defendant allowing interest on defendant's deposit from May 13, 1837, but without interest on the dividends. Appeal by defendant.

Bullard, J. 1. The court erred in allowing interest from the suspension of payments until the maturity of the note. 2. The bank should have applied the fund or deposit to the payment of the note. The provisions of the bank's charter do not apply to dividends and no interest should be allowed on them. Judgment reversed.

Cited: 12 La. Ann. 258; 17 id. 250; 23 id. 116.

MUDGE v COMMISSIONERS OF EXCHANGE BANKING CO. (1845) 10 Rob. 460.

Injunction. The defendant became insolvent and commissioners were appointed to liquidate its affairs. Its principal asset was the C Hotel. The legislature incorporated the Charles Hotel Company, at the instance of the bank's creditors, and directed the commissioners to transfer the hotel property to the corporation, to be used by the latter in payment of the debts of defendant. Plaintiff and other credi-

tors began these proceedings to have the act of the legislature declared unconstitutional, and to obtain an injunction against the corporation. Judgment for defendant. Appeal.

Bullard, J. 1. The power of the legislature to provide for the distribution among the creditors of the property of insolvent corporations which have forfeited their charters, is undoubted. 2. The act is constitutional. Judgment affirmed.

Cited: 35 La. Ann. 428.

REED v POWELL (1845) 11 Rob. 98.

To determine validity of an election. A meeting of the creditors of defendant was held for the purpose of appointing a syndic of his estate. On the day of the meeting, the officers of the C Bank, except its president, were all absent from the city. The cashier, after consulting with the president, appeared at the meeting, made oath to the amount of defendant's indebtedness to the bank, and voted for H W as syndic. Objection was made to the cashier's vote as illegal, and D F was declared elected. Subsequently, at a meeting of the directors of the bank, the cashier's action was ratified. A judgment of the district court sustained the appointment of D F as syndic. Appeal.

Morphy, J. 1. When it is necessary for the bank to appoint an agent for any particular purpose, the cashier has no better right to act than any other person. The cashier was without authority, virtue officii, to vote for a syndic on behalf of the C Bank. 2. It is true that the ratification relates back to the time when the acts were done, but not to impair rights acquired in the meantime. The votes legally given, gave D F a majority. His rights, being once vested, could not be affected by anything done afterward. Judgment affirmed.

Cited: 36 La. Ann. 905.

GAILLARD v CITIZENS BANK (1845) 11 Rob. 168.

Debt. The plaintiff sued the managers of the defendant, in whose hands its assets had been placed for liquidation, under the Act of March 14, 1842. He asked a judgment for the amount of his claim against the defendant and that he might be paid in the course of administration. The action was instituted in the district court having jurisdiction of the liquidation. An order had been passed staying all proceedings against defendant. Defendant excepted to plaintiff's right to one. Sustained. Appeal.

Bullard, J. 1. The legislature never intended to exempt the bank, while under the administration of managers, from all judicial investigation of its obligations toward individuals which arose previously to their appointment. 2. The order of the district court, staying judicial proceedings, does not mean that suits like the present cannot be instituted in that court against the managers, having for object merely the liquidation of a claim against the bank. Judgment reversed.

UNION BANK OF LOUISIANA v MARIGNY (1845) 11 Rob. 209.

To recover proceeds of mortgage. M, deceased, in 1840, became a stockholder in the plaintiff by the purchase of 150 shares of its stock, together with certain lots of ground which were mortgaged to secure it. He assumed the obligations of the original stockholder, and furnished his own stock note for \$4,875. On failure to pay the instalments that afterward became due, plaintiff sued M's executors, defendants, in the district court. It secured judgment, and had the property seized and sold. A surplus in the hands of the sheriff was paid over to the defendants. The N Co. proved a note of deceased to it, bearing mortgage on the lots of ground, and applied to the court to be allowed to appeal. It claimed that the whole proceeding in the district court was void for want of jurisdiction, and the bank should have proceeded via executiva, instead of via ordinaria. An article of the code provided that the court of probate should have exclusive jurisdiction to order the sale of succession property administered by executors or administrators, and to decide on claims brought against successions so administered. The bank's charter provided that it should have the right to seize and sell, according to law, mortgaged property in whose hands soever the same might be found, notwithstanding any change of the title thereof, by inheritance or otherwise. Judgment for plaintiff. Appeal.

Morphy, J. 1. The bank's charter gave it special privileges, and by exercising the same, this suit is properly brought against the executors in the district court. The words "according to law" referred only to seizure and sale. Under the 24th

section of the charter, the rights of the bank to sell and seize the property are unimpaired by the death of the mortgagor. Both proceedings tend to bring about the same result, i. e., the seizure and sale of the property. Judgment affirmed.

Cited: 20 La. Ann. 311, 312; 22 id. 267; 31 id. 58.

CITIZENS BANK v LEVEE STEAM COTTON PRESS CO. (1845) 11 Rob. 286.

To recover a dividend declared on stock in defendant. The defendant tendered to plaintiff the latter's notes in payment of the dividend. The notes were depreciated and plaintiff refused to accept them at their face value. A law provided that banks of the state should receive in offset of debts due them, their own obligations. Judgment for defendant. Appeal.

Morphy, J. Payment of the dividend to the bank in its own notes or obligations is a discharge of its claim by compensation. Judgment affirmed.

WILLIAMS v PLANTERS BANK OF MISSISSIPPI (1845) 12 Rob. 125.

Injunction. The plaintiff was indebted to the P Bank, which transferred the debt to S. By the laws of Mississippi, where the P Bank was incorporated, the banks of the state were required to receive their own notes in payment of debts due them, and they were prohibited from making any assignment of claims. The notes of the P Bank were at a discount, and S refused to accept them in payment of plaintiff's debt. Plaintiff then deposited the tendered notes in the bank, subject to the order of the bank or its assignee, and asked an injunction restraining S from proceeding against him for the debt. S and the bank contended that the laws invoked were unconstitutional. The surety on the injunction bond was permitted to testify. Injunction granted. Appeal.

Bullard, J. 1. The disability created by the laws complained of, affects all of a particular class of artificial persons, in reference to a species of contract which they were previously capable of making. No one can be said to have vested rights in any existing legal capacity in reference to any future contract. 2. The surety on the bond was properly permitted to testify. The laws involved in this case are constitutional. Judgment affirmed.

Cited: 12 Rob. 200.

MARSHALL v GRAND GULF RAILROAD & BANKING CO. (1845) 12 Rob. 198.

Attachment. The plaintiff sued to recover the amount of a number of bank notes issued by the defendant, an incorporated bank of the State of Mississippi, and attached certain property. I & R intervened and claimed the property. Prior to the action, the defendant had made a general assignment of all its property, including that attached, to the intervenors. By the laws of Mississippi, all banking corporations of that state were forbidden to assign and transfer their notes or other evidences of debt. The intervenors claimed the prescription of one year in support of the assignment, and also that the law invoked had reference only to the assignment of a particular chose in action. Judgment for plaintiff. Appeal.

Bullard, J. 1. By seeking to avail themselves of the assignment, the intervenors became actors, and the illegality of the contract is set up by way of exception. Prescription cannot be pleaded. 2. Although an action to revoke a contract might be prescribed and barred in one year, yet at whatever period a party seeks to enforce the contract, the exception will avail him. 3. The prohibition of the Mississippi law applies to each and every chose in action, whether assigned separately or in mass. 4. The property in this case did not, therefore, pass by the assignment. The plaintiff, having attached it, may plead the illegality of the transfer. Judgment affirmed.

Cited: 12 Rob. 203.

MARIGNY v UNION BANK (1845) 12 Rob. 283.

Petition. By the negligence of its cashier, the defendant suffered a heavy loss. To protect himself from suspicion, the cashier gave his notes for the amount, indorsed by the plaintiff. He became insolvent and the plaintiff paid them at maturity, but with a full knowledge of all the facts appertaining to the transaction. Thereafter the plaintiff sought to recover back the money on the ground that the cashier's promise to refund was void for want of consideration, and that he had been induced to become an indorser by fraud. Judgment for plaintiff. Appeal.

Garland, J. 1. The acknowledgment of a debt presupposes a consideration. The cashier was under a natural obligation to make the deficit good, and this was sufficient to support his acknowledgment and promise. This being settled, it is sufficient to bind the plaintiff. 2. The plaintiff voluntarily executed the contract. 3. Having done so, he cannot now rescind it and recover back the money. Judgment reversed.

Cited: 20 La. Ann. 170.

COMMISSIONERS OF THE BANKING CO. v BEIN (1846) 12 Rob. 578.

On promissory note. C B, under the authority of her husband, purchased stock in the plaintiff bank and gave her note, drawn to the order of her husband and indorsed by him, in payment therefor. There was a community of gains between C B and her husband. Under the civil code, the wife neither incurred any personal responsibility therefor, nor bound herself in any manner with her husband for the payment of the price. The bank's charter provided that in all contracts of hypothecation entered into by any person with the bank, it should be lawful for the wife of such person to bind herself jointly and in solido with him. The charter also authorized loans on lands and slaves to be secured by mortgage. C B's husband became bankrupt and the bank sued her on the note. Judgment for defendant. Appeal.

Morphy, J. 1. The provision of the bank's charter relied on is in derogation of the general rule as laid down in the civil code, and should be construed strictly. 2. The section authorizing loans clearly shows what contracts come within the intent and meaning of "contracts of hypothecation." The contract in this case is not of that class. 3. The bank stock was community property. Judgment affirmed.

Cited: 20 La. Ann. 532; 29 id. 585.

FRENCH v LANDIS (1846) 12 Rob. 633.

Action for maladministration. The plaintiffs, commissioners for the liquidation of the A Bank, under the Act of March 14, 1842, ch. 98, sued the defendants, the former officers and directors of the institution, to recover damages for the maladministration of the bank. Defendants claimed that the plaintiffs had no power to bring the suit. The act provided for the liquidation of banks, and gave the commissioners the same powers as syndics of insolvent estates. The insolvent laws provided that all rights and actions of an insolvent should become vested in his creditors, to be administered by the syndic. Judgment for defendants. Appeal.

Bullard, J. An action which the directors might have maintained, while the corporation was in existence, may well be instituted by the commissioners after its dissolution. Judgment reversed.

FRENCH v STANTON (1846) 1 La. Ann. 8.

To recover money received for use of the plaintiffs. The defendants had on deposit in the A Bank \$553.91, when its charter was forfeited. Plaintiffs were appointed commissioners for the bank, under the bank law of 1842, March 9. After the forfeiture, defendants collected for the bank a like sum, against which they claim the right to offset their deposit. Judgment for plaintiffs. Appeal.

Eustis, C. J. The money had no connection with the business of the bank previous to its failure, and the defendants cannot, in any manner, connect it with their own claims on the bank. Judgment affirmed.

Cited: 2 La. Ann. 972; 5 id. 10.

BALDWIN v BANK OF LOUISIANA (1846) 1 La. Ann. 13.

On promissory note. Plaintiff deposited a note with defendant for collection. The note was not paid at maturity, and defendant delivered it to its regular notary to make usual demand and protest. Notary failed to notify indorser. Maker was insolvent. Judgment for defendant. Appeal.

Slidell, J. The bank pursued the necessary course of business in such cases, and did to its correspondent precisely what he would have done for himself if present. It is not therefore liable for the negligence of the sub-agent. Judgment affirmed.

Cited: 1 La. Ann. 345; 9 id. 260; 24 id. 550.

BANK OF LOUISIANA v FARRAR (1846) 1 La. Ann. 49.

On bond against husband and wife. Plaintiff held notes of H B & Co. exceeding the bond in amount. Defendant was debtor of H B & Co. in 1838. F and wife obtained from plaintiff on the bond in suit secured by mortgage on real estate and slaves \$29,000; \$24,443.25 was credited to H B & Co., and the notes were surrendered to them. \$3,520.18 was refunded to F and wife. Plaintiff's charter provides that \$2,000,000 of the capital stock shall be appropriated to the sole purpose of being loaned on bonds secured by mortgage on immovable property, and that in all hypothecary contracts or obligations entered into by any individual with the bank according to the intent and meaning of this act, it shall be lawful for his wife to bind herself jointly and in solido with him. "The civil code, art. 2412, subsequently passed, provides that the wife cannot bind herself for her husband nor conjointly with him" for his debts. Judgment for plaintiff. Wife appealed.

Eustis, C. J. 1. As no change was made by the code in the law the provisions of plaintiff's charter should not be held to be repealed by the enactment of art. 2412. 2. The terms, "according to the true intent and meaning of this act," refer to all mortgages which the bank, under its charter, may lawfully receive, and not merely to loans to the landed interest. Judgment affirmed.

Cited: 1 La. Ann. 456; 2 id. 376, 874, 920; 3 id. 664; 5 id. 188; 6 id. 124, 241; 20 id. 141; 24 id. 156, 274; 32 id. 1210; 33 id. 854, 51 id. 855.

NEW ORLEANS CANAL & BANKING CO. v HAGAN (1846) 1 La. Ann. 62.

Seizure and sale of mortgaged property. Defendant executed to the plaintiff and the S Bank a mortgage on certain property to secure loans by them of \$12,000 and \$20,000 respectively, promising therein to pay 7 per cent interest, and to give the E Bank a mortgage on the same property with interest at 8 per cent to secure the payment of debts due it by third persons amounting to \$81,000. The mortgagor had inserted a clause confessing judgment in case of non-payment. The E Bank's charter prohibited it from taking more than 7 per cent interest on loans. It became insolvent and its commissioners sold to A & P for \$470 notes for \$67,510, being part of the debts of \$81,000, secured by the second mortgage by H to the E Bank. Plaintiff obtained an order of seizure and sale of the mortgaged property on its claim of \$12,000. A & P intervened, claiming an interest in the proceeds and judgment against H personally. H pleaded usury. Judgment for H. Appeal.

Slidell, J. 1. The bank is not only incapable of making an agreement to take more than 7 per cent interest on a loan, but it is prohibited from so doing. In stipulating that the further mortgage should be given, it stipulated for something more than 7 per cent interest, and when that stipulation was fulfilled, it received more. 2. The intervenors can stand in no better position than the bank. 3. The mortgage having been given for the benefit of third persons, the mere fact that the mortgagor inserted a clause confessing judgment is not evidence that he intended to bind himself personally, as that is a question of intention to be solved by a just and reasonable interpretation of the whole instrument. Judgment affirmed.

Cited: 3 La. Ann. 158, 159; 26 id. 707; 34 id. 905; 47 id. 508.

BERTOLI v CITIZENS BANK (1846) 1 La. Ann. 119.

Injunction to restrain seizure and sale. S mortgaged to defendant a house and lot to secure seventy-one shares of its stock, and borrowed from it the amount to which he was entitled under the charter. Subsequently defendant made two other loans to S secured by mortgage on the same property. S died insolvent. By order of the court of probates the house and lot were sold to plaintiff for little more than the stock loan, which he paid to defendant's clerk, and demanded a transfer of the stock. The bank referred the matter to their counsel, on whose advice the property was seized under the last mortgage. Injunction dissolved. Appeal.

Rost, J. 1. No sale of property mortgaged to the C Bank can affect the rights secured by its charter. 2. The action of the clerk and board does not amount to a ratification. Judgment reversed.

Cited: 2 La. Ann. 607; 4 id. 308, 335; 5 id. 142.

COMMERCIAL BANK OF NEW ORLEANS v MARTIN (1846) 1 La. Ann. 344.

On promissory note against indorsers. In 1837 plaintiff discounted a renewal note indorsed by the defendants. Soon after the maturity of the original note,

which was protested for non-payment, defendants requested the plaintiff to place it in the hands of an attorney for collection to whom the M and T Bank, which held a similar note, had transmitted theirs. Plaintiff sent the note to another attorney who brought suit at the earliest term of court thereafter. The M and T Bank recovered judgment in April, 1839, and collected the amount due. The plaintiff recovered judgment in the fall of 1839, and *fi. fa.* was returned "no property." The defendants claimed they were discharged because a *ca. sa.* should have been issued, and because of negligence in not collecting the original note to which the note in suit was collateral. Judgment for defendants. Appeal.

Slidell, J. 1. The duty of a pledgee cannot be considered more onerous and stringent than that of an agent. The agent will not be responsible for the negligence of the subagent, if he has used reasonable diligence in his choice as to the skill and ability of the subagent. 2. A mere pledgee is not bound, without the pledgor's request, to incarcerate the debtor whose obligation is given in pledge. Judgment reversed.

Cited: 30 La. Ann. 1064; 43 id. 396.

HUBERT v HIS CREDITORS (1846) 1 La. Ann. 443.

To obtain preference. The syndic placed the Louisiana State Bank on the tableaux of distribution as a privileged creditor for \$1,000, to be paid out of twelve shares of the bank's stock, pledged by H to secure the debt. The act of pledge was passed by the cashier and not attested by witnesses, and not registered in a notary's office. Art. 3125 of the code provided acts of pledge must be witnessed and recorded in a notary's office. Art. 3126 makes acts of pledge authentic proof when passed by bank cashiers. Creditors opposed the bank's preference on the ground that its act of pledge was illegal. Judgment for bank. Appeal.

King, J. Such acts when passed by cashiers are private acts to whose validity the attestation of witnesses is not essential, but against third persons they produce the effect of public instruments without registry. Judgment affirmed.

IN THE MATTER OF THE MERCHANTS BANK (1847) 2 La. Ann. 68.

Liquidation of M Bank. The bank commissioners were appointed in 1842. At that time the law allowed them \$3,000 per year as salary. On April 6, 1843, a law was passed reducing the salary to \$1,000 per year. Some of the creditors objected to the tableau of distribution. Judgment, reducing the allowance of \$3,000 a year to the commissioners in the tableau to \$1,000 a year from April 6, 1843. Appeal.

Eustis, C. J. 1. The court was bound to carry into effect the law reducing the salaries of the bank commissioners. 2. A contract fixing the compensation of commissioners for a term of years, without the salutary control of the legislature, would convert the commission into a job and defeat the very object of the laws. Such a construction is totally repugnant to its intentment. Judgment affirmed.

Cited: 12 La. Ann. 393; 14 id. 487; 23 id. 690.

UNION BANK v GUICE (1847) 2 La. Ann. 249.

To recover stock loan. A subscribed to stock of plaintiff. The charter provided that each stockholder should be entitled to a loan equal in amount to one-half his stock, and that his loan should be secured by the same property mortgaged by the stockholders to secure his subscription to the stock. A made a stock loan and defaulted. After his decease, defendant, executor of A, acknowledged the debt by act of pledge given to plaintiff. A's bond had been delivered to his executor, who claimed the debt was novated and the mortgage extinguished. Judgment for plaintiff. Appeal.

Rost, J. 1. Novation derives its binding force from the intention of the parties to make it. Here no such intention existed. 2. The mortgage was not extinguished by the delivery of the bond of the testator to the executor. These mortgages are not affected by any change in the evidence of the advances made. 3. The charter is a contract, and if the intent of the parties to it be doubtful, the construction put upon it by the manner in which it has been executed by both parties furnishes the safest rule of interpretation. Judgment affirmed.

Cited: 3 La. Ann. 114, 664; 7 id. 64; 10 id. 602; 22 id. 347; 33 id. 707; 34 id. 1001.

BANK OF LOUISIANA v WILCOX (1847) 2 La. Ann. 344.

Where a bank discounted a note at 9 per cent, the highest rate allowed by its charter, and there was no provision made in the note for the rate after maturity, held, if unpaid at maturity, the bank is entitled to the same rate after as before maturity.

MECHANICS AND TRADERS BANK v ROWLY (1847) 2 La. Ann. 372.

Suit on note and mortgage executed by defendants, when husband and wife. Before the suit was instituted the defendants separated. Judgment against husband by default. The wife filed an answer denying her liability, and pleading the separation. The charter of the plaintiff bank confers on it similar privileges to those conferred on the Bank of Louisiana in making loans on mortgages, taking security, and enforcing the payment thereof. A clause in the charter of the Bank of Louisiana provides that the wife of an individual, entering into an obligation with the bank, may bind herself jointly and in solido with him, and her property shall be affected by said obligations. Judgment for plaintiff. Appeal.

Eustis, C. J. The statute incorporating the plaintiff bank, having accorded it like privileges in making loans on mortgage, taking security, and enforcing payment as are accorded to the Bank of Louisiana, all the privileges granted to the latter will be conferred on the former without further specification. Judgment affirmed.

Cited: 6 La. Ann. 124.

BARROW v BANK OF LOUISIANA (1847) 2 La. Ann. 453.

Injunction to stay an order of seizure and sale, whereby defendant is attempting to enforce a mortgage given by plaintiff's assignor, O, on unimproved property. The petition identified the lands as those described in the mortgage. The bank had also another mortgage on certain slaves. Plaintiff contended that as the bank was required by its charter to loan upon mortgage on improved land, the mortgage could not be enforced. Judgment for plaintiff. Appeal.

Slidell, J. That the bank was required by its charter to loan upon mortgage on improved loans is an objection which plaintiff is not permitted to raise. Defendant is estopped from disputing its validity, and from asserting a variance in the description. Plaintiff could not compel the bank to resort first to its mortgage on the slaves. The plea of prescription was not sustained. It is a question of duty, which concerns the state and the stockholders. Judgment reversed.

Cited: 3 La. Ann. 669; 22 id. 351; 44 id. 338.

NEW ORLEANS GAS LIGHT AND BANKING CO. v WEBB, ADM'R (1847)
2 La. Ann. 526.

For money loaned. S borrowed from the bank and gave a mortgage to secure the loan. The mortgage property was sold at a probate sale. A year after the sale and after the first instalment had fallen due, W assumed administration of S's estate. The plaintiffs claimed payment by privilege out of the funds from the probate sale. The bank's charter gave it the right to seize property so mortgaged, notwithstanding any sale or change of possession. Judgment for plaintiffs for privilege. Appeal.

King, J. 1. The plaintiffs by claiming the price in the hands of the administrator have affirmed the probate sale, and can no longer proceed against the property in the hands of the purchaser. But by this affirmation the bond has forfeited none of its rights to be paid out of the proceeds. 2. If any part of the proceeds were received by his predecessors, it was his duty to have held the latter to account. But the statute confers no privilege. So much of judgment as decrees privilege reversed.

Cited: 2 La. Ann. 607; 4 id. 335; 7 id. 166.

SUCCESSION OF McNEIL (1847) 2 La. Ann. 567.

On a promissory note to be adjudged entitled to a dividend as its owner. McN made a note, which was indorsed by C and discounted by a Mississippi bank for his benefit. McN died insolvent and the defendant was appointed curator of the succession. E, a creditor of the bank, in garnishee proceedings, attached the note in a suit on a judgment, which was afterward reversed. At maturity the note

was taken up by C as his wife's agent. The defendant is ready to declare a pro rata dividend. Statute of Mississippi, 1840, sec. 7, prohibits state banks from assigning its evidences of debt. Judgment for C's wife. Appeal.

King, J. 1. There is nothing in the statute which prevents a bank from collecting its debts. 2. The funds used in making payment belonged to a third person, and to that person the benefit must result. Judgment reversed.

WEBB, UNDER-TUTOR v UNION BANK (1847) 2 La. Ann. 585.

To annul act of mortgage. A H and husband borrowed money from defendant on a bond to secure which they gave a mortgage. The law required that when a married woman is about to renounce her rights, the notary shall make her acquainted with those rights. It was not done in this case. The bank's charter enabled married women to bind themselves and their property. The plaintiff, under-tutor of the minor children of A H, sought to have the mortgage annulled. Judgment for defendant. Appeal.

Rost, J. The bank had nothing to do with the application of the fund borrowed. The ground that the rights of A H were not explained to her on that occasion by the notary, out of the presence of her husband, is untenable. Judgment affirmed.

NEW ORLEANS CANAL AND BANKING CO. v ESCOFFIE (1847)
2 La. Ann. 830.

On bond against principal and surety. The plaintiff brought suit against E as principal and V as surety, upon a bond in which they bound themselves in solido. B contended: 1, that he was entitled as surety to a discussion of E's property; 2, that the plaintiff greatly depreciated the value of the premises mortgaged to secure the bond by delaying the sale thereof; and 3, that the plaintiff failed to have four notes protested which were given to B by E, to secure B for signing a second bond. The notes were deposited in the plaintiff bank, where they were made payable. The evidence showed that the transaction took place after B executed the bond in suit. Judgment for plaintiff. Appeal.

Slidell, J. 1. The surety, being bound in solido, with the debtor, became a debtor in solido and has no right to discussion. 2. The plaintiff was not compelled to resort to its rights under the mortgage before calling upon the surety. 3. There was no liability upon the plaintiff by reason of the failure to protest the notes. Judgment affirmed.

Cited: 29 La. Ann. 844.

UNION BANK OF LOUISIANA v BREWER (1847) 2 La. Ann. 835.

Petition. Defendant drew a note to S's order, who, with M and C, indorsed it. He discounted it at plaintiff bank. Not being paid at maturity, the bank sued all the indorsers, who pleaded that they were released because of a material change apparent on the face of the note since their indorsement. The note was for "the sum of \$1,500 payable at the Union Bank of Louisiana, at Avayelles." But by a grossly palpable erasure the word "fifteen" had been inserted, and the words "at Avayelles" had been added. The surface of the paper had been abraded, and the ink had run and blurred. They failed to show any communication with the indorsers at the time of the discount, although it was proved that the note was received by the bank in its changed condition. Judgment for plaintiff. Appeal.

Slidell, J. The alteration, in a substantial part, which is grossly patent on the face of the instrument, detracts from its credit and renders it suspicious; and this suspicion the plaintiff was bound to remove as against one who had not delivered it to the plaintiff. It is for the holder to prove, and not for the defendant to disprove, that it was altered under circumstances which will make it still available. Judgment reversed.

Cited: 9 La. Ann. 484; 15 id. 207; 34 id. 774.

FARRAR v NEW ORLEANS BANKING CO. (1847) 2 La. Ann. 873.

Petition to annul mortgage given by the plaintiff to the bank as surety for her husband. The charter gave married women of age the right to bind themselves as surety on their husband's hypothecatory contracts with the bank. Judgment for defendant. Appeal.

Eustis, C. J. The wife could bind her property by mortgage as security for payment of a debt due by her husband to the bank. Judgment affirmed.
Cited: 4 La. Ann. 189.

MEEKER v THE COMMISSIONERS (1847) 2 La. Ann. 971.

Injunction to restrain execution on bond. The plaintiff enjoined an execution issued by the commissioners on a bond given to them by her for the purchase at a sheriff's sale of certain property mortgaged to the defendant by her husband and herself, to secure a stock loan to plaintiff's husband. An act passed in 1842, appointing the commissioners, and giving them the powers of syndics, provided that the liquidation of the defendant shall be conducted according to the provisions of the act passed in the same year for the liquidation of banks. Injunction perpetuated. Appeal.

Rost, J. 1. Stock mortgages are not assets of banks. 2. The section giving to the commissioners the powers of syndics has never been considered as placing these mortgages under their control. 3. The stock mortgage was not extinguished by the sale; the commissioners could not release it. 4. The stipulation in the mortgage was an obligation on a condition protestative on the part of the debtor. 5. This mortgage did not take rank from the date of inscription. Judgment affirmed.
Cited: 5 La. Ann. 2; 632 id. 457; 14 id. 235, 245; 15 id. 633.

LITTLE v MANAGERS OF CITIZENS BANK (1847) 2 La. Ann. 976.

Petition to recover proceeds of stolen note. B G's store was broken open and certain post-notes of the defendant bank stolen. The plaintiffs bought the stolen notes from a person unknown to them at 35 cents on the dollar. Plaintiffs did not keep any record of the purchase. They brought this suit upon them claiming to have purchased them in due course. Judgment for defendant. Appeal.

Rost, J. The holder in no case could recover any more than the price he had paid, and to be entitled to recover that price, he must show affirmatively that he bought the post-notes at public auction, or from a person in the habit of selling such things. Judgment affirmed.

Cited: 6 La. Ann. 618.

BANK OF CHARLESTON v HAGAN (1847) 2 La. Ann. 999.

Petition. Defendant gave to McD a power of attorney "to draw, indorse, or accept any bills of exchange, promissory notes, drafts, or checks for any sum whatever; to receive all demands, notices, and protests from the Bank of Charleston," and provided that the bank should not be affected by the revocation of the power until notified of it. There was nothing in the instrument empowering McD to manage H's affairs either generally or in any particular case. McD drew four notes to defendant's order, indorsed defendant's name under the power, and had the bank discount them. When the bank sued H as indorser, he claimed that the power did not authorize McD to draw paper for his personal accommodation, as was done in this case. Judgment for plaintiff. Appeal.

Eustis, C. J. 1. The instrument is a contract between defendant and the bank, and not a naked procuration to McD. 2. The indorsement of McD's own notes was not excluded from the power given to him. The words "for me" and "in my name to draw," without any terms of restriction whatever, created a sufficient power. Judgment affirmed.

HEPBURN v CITIZENS BANK OF LOUISIANA (1847) 2 La. Ann. 1007.

Petition to recover balance on bonds. The plaintiffs were depositors of the defendant bank. By agreement their bank book was left with the bank. A clerk entered to their credit \$2,200 for bonds deposited. Plaintiffs sued to recover that sum. The bank averred that the entry was made by mistake, that it should have been made on the book of P & F for bonds deposited by them. The bank clerk swore that the plaintiffs made no deposit on the day the entry bears date, and the plaintiffs' clerk swore positively they did. The entry was made after its date. Judgment for plaintiffs, without interest. Appeal.

Rost, J. 1. The error alleged may be examined into. 2. The presumption of truth is in favor of the witness who swore affirmatively. Judgment affirmed.

LITTLE v MANAGERS CONSOLIDATED ASS'N (1847) 2 La. Ann. 1012.

Action for recovery of amount of several bank notes of the defendants sent by mail from New York to New Orleans in halves, the left-hand halves being received, and the others sent by subsequent mail. The loss of the right half was advertised. Plaintiff gave bond to secure the defendant. Refusal by defendants to pay, unless the other half was produced. The bank's charter allowed 12 per cent interest. Judgment for plaintiff for principal and simple interest only. Appeal.

Eustis, C. J. 1. The judgment allowed interest from judicial demand. 2. No objection is made to this allowance, nor is there any application for new trial below on the part of the defendants. 3. We make no change in the judgment, but we desire that this case be not a precedent for allowance of interest on lost obligations. Judgment affirmed.

Cited: 35 La. Ann. 431.

ROBERTS v STARK (1848) 3 La. Ann. 71.

On promissory notes. The action is brought on three promissory notes, which are the first of a series of 12 notes, which were given to the plaintiff in renewal of certain notes on which the defendant Stark was indebted to the A Bank in Mississippi. The A Bank assigned these notes to the plaintiff, with the consent of the debtor. The defendant contended that the transfer of these notes to the plaintiff was in violation of a statute of the State of Mississippi, and consequently void, and that the notes in suit, being given in renewal thereof, were without consideration, and gave no right of action to the plaintiff. Sec. 7 of the Act of Mississippi, 1840, provided that it shall be unlawful for any bank in the state to transfer, by indorsement or otherwise, notes or bills, and, if such transfer be pleaded, the action upon it shall abate. Judgment for plaintiff. Appeal.

Eustis, C. J. The policy of the state is declared by its own courts of last resort to have been the security of the rights of debtors to pay their debts to the banks in their several notes, and to prevent a violation of that right; and the statute vests in the debtor the option of waiving or insisting on the privilege which is conferred, and which was created for his benefit in furtherance of public policy. Judgment affirmed.

Cited: 5 La. Ann. 378.

CITIZENS BANK v NICOLAS (1848) 3 La. Ann. 112.

Petition to compel seizure of stock. N, cashier of the U Bank, made a simulated sale of property to certain persons for the purpose of enabling them to subscribe to stock in the U Bank for him. Instead, the vendees subscribed to stock in the C Bank, and secured their subscription by a mortgage on the property, which was subsequently retransferred to defendant. The plaintiff sued to have the property sold for a loan on the stock subscribed to for N, for which they also held a mortgage under the charter. A third possessor intervened, knowing all the facts stated, claiming the property under a sheriff's sale after the retransfer to N, in whose hands it was seized. In the sale by the sheriff, the intervenor bound himself to pay "all privileges and mortgages prior to his own." Judgment for plaintiffs. Judgment for N against the intervenor. Appeal by intervenor.

Rost, J. The intervenor purchased the property with a full knowledge of the claims of the bank. A question so free from difficulty is seldom presented to a court of justice. Judgment for plaintiff affirmed. Judgment for N reversed.

Cited: 3 La. Ann. 664; 22 id. 347, 648; 33 id. 707, 708; 34 id. 1001.

BANK OF LOUISIANA v BRESCOL (1848) 3 La. Ann. 157.

Petition. The P Bank of Natchez held funds of the defendant bank. B applied to the defendant bank for a loan, and it offered to loan him part of its funds in the P Bank. B accepted. He gave a mortgage to secure \$18,000, and received the proceeds of the loan in notes of the P Bank. This was when the P Bank notes had depreciated 27 per cent in value, the bank having suspended payment. It resumed payment and continued one year when it finally suspended. The debt of the P Bank to the defendant was always paid in full with interest. Sec. 2895 of the code provided that interest cannot exceed 10 per cent, and the defendant's charter allowed 9 per cent on loans and discounts. Plaintiff obtained an injunction restraining execution on the bond he gave for the loan, on the ground of usury. Injunction dissolved. Appeal.

Eustis, C. J. 1. The operation of this article of the code has always been limited to loans for money, and been held not to apply to the purchase and sale of negotiable instruments, nor to the sale and transfer of credits. 2. The case is an ordinary sale or exchange of a credit in another state, for which the defendant is bound to pay the price agreed upon according to the terms of his contract. Judgment affirmed.

Cited: 3 La. Ann. 243, 496; 5 id. 682; 7 id. 311; 15 id. 460.

LOUISIANA BANK v ORLEANS NAVIGATION CO. (1848) 3 La. Ann. 294.

On notes against indorser. The defendant was incorporated for the purpose of digging a canal. To raise money for this purpose, it issued notes or bonds. The payment of these notes was guaranteed by the indorsement of the mayor of the defendant municipality, in accordance with a resolution of the council. The notes set out that the indorsement was by virtue of this resolution. The powers of the city are limited by the code, the legislature, and state jurisprudence. The city's charter provided that the mayor might construct sewers, drains, and canals in every part of the city of New Orleans, and gave it no right to make contracts of suretyship. The Act of February 17, 1805, incorporating the City of New Orleans, provided an exclusive system of government. The enterprise was a failure, and the company was unable to meet its obligations. The plaintiff is a bona fide purchaser for value. Judgment for plaintiff. Appeal.

Eustis, C. J. 1. This action is one of suretyship. The form of a contract is subordinate to its real character. 2. Where an indorsement is by an agent, and there is a reference in the body of the instrument to his authority, a person, who holds the instrument by virtue of the indorsement, is charged with notice of the power under which it is made. 3. The powers of political corporations charged with the local governments are administrative, except where express authority is given by law. 4. The direct appropriation of money by the officers of a municipality has nothing in it in common with the contingent contract of suretyship. 5. This contract has never inured to the benefit of the corporation, and could not have been ratified by it. 6. The municipal authority transcended its powers in passing the ordinances. 7. The word "canals" meant canals for draining, not for navigation. Judgment reversed.

Cited: 9 La. Ann. 46; 15 id. 362; 16 id. 367; 23 id. 236; 24 id. 61, 69; 26 id. 487; 27 id. 146; 29 id. 261; 32 id. 752, 952; 34 id. 813; 36 id. 696; 41 id. 174.

BOARD OF CURRENCY v MANAGER OF CITIZENS BANK (1848)
3 La. Ann. 346.

Mandamus to compel access to papers. The Acts of February 5, 1842, and of March 14, 1842, provided for a board of currency for the management of banks in liquidation of banks in which the state was a stockholder, and that, under certain conditions, a board of managers should be appointed, one of whom, under the direction of the plaintiff, should conduct the bank's business. The Act of April 5, 1843, explained the previous law, and provided that the powers of the managers of the defendant should be unchanged, except that the state secretary and state treasurer should be ex-officio members. The Act of April 6, 1847, provided for a board of bank managers to manage the liquidation of defendant, not inconsistent with existing laws. Art. 144 of the new constitution provided that no office should be superseded by the taking effect of the new constitution, but that the laws relative to the duties of the several officers should remain in full force. Defendant went into liquidation under the Act of 1842, but after the Act of 1847 refused to allow the state secretary and treasurer members of the board, to have access to its books and papers, claiming: 1, The authority of the plaintiff was repealed by the Acts of 1843 and 1847; 2, the operation of the plaintiff was in violation of art. 126 of the constitution, which prohibited one person from holding more than one civil office or emolument at the same time. Judgment for defendant. Appeal.

Rost, J. Membership of the board of currency being a civil office of emolument, under the dispositions of art. 144, the act creating the office was not repealed or in any manner affected by the new organic law. The statute remained in full force. The state treasurer and secretary were authorized to continue to perform the duties of the board of currency according to existing laws. Judgment reversed.

Cited: 23 id. 147; 33 id. 620.

ADAMS v BANK OF LOUISIANA (1848) 3 La. Ann. 351.

Petition. The League of Bank Presidents drew checks for \$59,000 upon the E Bank to the order of the U Bank. Shortly thereafter proceedings to force the E Bank into liquidation were begun. The checks were protested for non-payment. By agreement each member of the league was liable for its portion of such protested checks. The U Bank sold several portions of the amount which E Bank paid, but the payments were not imputed to any special banks. The remaining checks were sold to the plaintiffs, who claimed from the defendant bank, a member of the league, the proportion for which it was originally bound. Judgment for plaintiffs. Appeal.

Rost, J. The association of the creditor banks was primarily bound for the whole amount of the check after its protest, and all those banks had an equal interest in the payment of it by the E Bank. The payments made by the latter inured to the benefit of the association under the well-known rule that, where all things are equal, and there has been no imputation, credit must be given proportionately. Judgment reversed.

Cited: 36 La. Ann. 312.

EYSSALLENNE v CITIZENS BANK (1848) 3 La. Ann. 663.

To annul a mortgage. The plaintiff and her husband made a bond and mortgage in favor of the defendant. The surety signed the bond in blank, and the same was thereafter properly filled up. The plaintiff contended that the mortgage was invalid, because: 1, Being a married woman, she could not become a surety for her husband; 2, the loan was to herself and her husband, not a loan to her husband individually, and that no loan was made to her, and the amount of the loan was not specified in the mortgage; 3, dotal property could not be alienated; 4, the bank's charter did not require mortgages from stockholders to secure stock loans. The bank's charter authorized women to bind themselves jointly and in solido with their husbands. Judgment for defendant. Appeal.

Rost, J. 1. Dotal and paraphernal property fall within the provisions of the charter. 2. The responsibility of the surety attached when he signed the bond. 3. The wife could bind herself jointly or in solido with her husband in any contract with the bank. The mortgage was valid. Judgment affirmed.

Cited: 12 La. Ann. 69; 33 id. 707, 708; 34 id. 1001; 45 id. 351.

LOUISIANA STATE BANK v LEDOUX (1848) 3 La. Ann. 674.

Petition to enforce a surety's liability. L became surety of D, who was note clerk in the bank. D embezzled \$12,000. The bank sued L as surety. The defenses were: 1, That the charter of the bank provided for the annual election of a president and directors who appointed the clerk; that therefore the clerk's term of office lasted but one year, and had expired when the embezzlement took place, wherefore the surety was released; 2, that the plaintiffs refused, after request, to have D arrested; 3, that the plaintiffs were negligent in not performing express and imposed conditions of the bond, in that the cashier had not examined daily the cash account and reported any errors; and that the directors had not examined the bank's affairs monthly. Judgment for defendant. Appeal.

Slidell, J. 1. Clerks and servants are the clerks and servants of the corporation, and the limited term of service of the directors does not control the duration of their appointments. 2. The omission to arrest D is no defense. The defendant should pay and then seek redress. Moreover, there was no proof of actual injury, in that D had nothing that could have been recovered even if he had been arrested. The mere fact of a want of due diligence on the part of the cashier, unaccompanied by knowledge on the part of the directors, is entitled to no weight. Judgment reversed.

Cited: 7 La. Ann. 121; 9 id. 423; 29 id. 844.

HEPBURN v COMMISSIONERS (1849) 4 La. Ann. 87.

Petition by bank creditors to recover from stockholders. The state banks whose charters had been forfeited, not having their capital fully paid, were authorized by the legislature to suspend stock payment for two years. The act provided that the stock actually paid in at that time should constitute the bank's capital. Later the Exchange Bank's charter was forfeited. The plaintiffs thereafter came

into possession of some of its notes not then matured. The bank received its notes and paid them out during all this time without changing their dates. The defendants paid all the calls on their stock up to the time when payment was suspended. Judgment for defendants. Appeal.

Eustis, C. J. 1. The obligation of the bank is fixed by the reissuing of the notes and the date on its face is immaterial. 2. When once paid into the bank, after the reduction of the capital, the notes were extinguished, and the obligation of the original stockholders could not be revived by their reissue, the bank only, with its reduced capital, being bound by such reissue. Judgment affirmed.

Cited: 7 La. Ann. 366; 9 id. 343; 20 id. 294.

CHAPMAN v NEW ORLEANS BANKING CO. (1849) 4 La. Ann. 153.

Petition to hold bank liable for allowing transfer of stocks on its books. B transferred stock in the defendant bank to C. Subsequently Z sued B and attached the stock. C intervened, pleading the assignment to him. The plea was overruled and judgment was rendered against B, who, with C, appealed, but did not give bond to supersede the judgment. Z thereafter had the stock seized under the judgment and sold without appraisalment, and the bank allowed the sheriff to transfer it to the purchasers on its books. The judgment was subsequently reversed, and the stock declared to belong to C, who then brought this suit to compel the transfer and delivery of the stock to him, or, in default thereof, to recover its value. Judgment for defendant. Appeal.

Eustis, C. J. 1. The claim of C having been determined in favor of the attaching creditors, the stock was subject to be seized as B's property and sold as such, unless the execution was stayed. The subsequent reversal of the judgment does not affect the bank's responsibility. 2. Third parties cannot consider a sale of movables as null because of want of appraisalment. Judgment affirmed.

UNION BANK v MEEKER (1849) 4 La. Ann. 189.

Petition on note. The note commenced "— months after date." It was alleged that the note was meant to be at twelve months. The plaintiff offered to prove this fact by the cashier. Objection. Sustained. Judgment for defendant. Appeal.

Slidell, J. 1. The testimony does not go to contradict the written instrument, but to supply an omission. 2. The cashier was not an incompetent witness. Judgment reversed.

SAUNDERS v SMITH, ADM'R'X (1849) 4 La. Ann. 232.

Where a debtor to a bank tendered in payment a bond of the bank, held, that under the Acts of 1842 and 1843, providing for the liquidation of banking corporations, a debtor might give in payment the obligations of such bank, regardless of the date when he acquired them.

UNION BANK OF LOUISIANA v JONES (1849) 4 La. Ann. 236.

On promissory note against indorsers. Plea: Release of makers. T, the maker made a cessio bonorum. At the meeting of the directors, the cashier of the branch of the plaintiff at C, under the authority of the directors of the C Branch, voted a discharge of the insolvent. By the charter the powers of the branch bank's directors were set forth, and nowhere are they given express power to vote the debtor's discharge. Judgment for defendant. Appeal.

Slidell, J. The discharge was a mere donation, and was not within the legitimate sphere of the directors' authority. The power of the C board was the creature of a statute, and as such was known to the defendant; and a party can derive no benefit from the known usurpation of power by the agent on whose acts he relies. Judgment reversed.

ALLING v CITIZENS BANK (1849) 4 La. Ann. 308.

Injunction to restrain seizure and sale of stock. D subscribed to stock in the defendant bank. To secure his subscription he mortgaged certain property. Subsequently he gave the bank a second mortgage to secure a cash indebtedness. The bank gave D's syndic its consent to sell the mortgaged property on condition that

all sums due the bank should be paid. In an advertisement of the sale of D's property prepared by the syndic, the bank inserted only the indebtedness arising out of the first mortgages. The mortgaged property was sold to the plaintiff for more than enough to pay all of D's debts to the bank. On the tableau of distribution, the bank was placed as an ordinary creditor. The bank allowed the tableau to be homologated without opposition. Afterward it refused to transfer stock sold to the plaintiff unless he paid the cash indebtedness. He refused and enjoined a sale of the stock by the bank. Appeal.

Rost, J. The plaintiff purchased on the faith of the defendant's authorization to sell the property, and the price he paid was lost to it through the negligence of its officers. It would be most unjust to throw this loss upon an honest purchaser. Judgment affirmed.

Cited: 4 La. Ann. 335; 22 id. 128.

WILTZ v PETERS (1849) 4 La. Ann. 339.

Petition to oust certain directors alleged to have been illegally elected. The petitioners were the commissioners of the election, and as such received votes which they objected to as illegal. They certified that the defendants received the majority of the votes cast. Subsequently, the plaintiffs signed a declaration that they refused to declare any ticket elected, and so, as relators, brought this suit. Judgment for petitioners. Appeal.

Slidell, J. Under such circumstances the petitioners cannot be heard as relators. The subsequent declaration does not destroy the effect of their previous reception of the votes upon their competency now to impeach, as relators, the legality of those votes. Judgment reversed.

MATTER OF THE NEW ORLEANS IMP. AND BANKING CO. (1849)

4 La. Ann. 471.

Oppositions to the tableaux of distribution. Opponents were the holders of notes secured by a mortgage. The liquidating bank, a property bank, purchased land from A, paying part cash, and issuing its bonds for the balance secured by a mortgage on the land. The mortgage was handed to the register, who did not record it in the current register in the order of its date. The bonds were transferred to the C Bank, together with a subrogation to the mortgage. This transfer was recorded on the agreement subsequent to the mortgage entry. On the insolvency of the bank, the parties each claimed the preference. Civil code, art. 3333, provides that it shall be the duty of the recorders to erase, upon application, all inscriptions of mortgages which have existed on their records for 10 years, except mortgages in favor of property banks. The liquidating bank was taxed on its real estate. Sec. 19 of its charter exempted its capital stock from taxation; and also provided that, if it shall at any time suspend, the holder of its bills shall be entitled to interest from the time of his demand for payment. The taxes levied by the general council and those levied by the municipalities were all of the same nature. Judgment for opponents. Appeal.

Rost, J. 1. The subrogation was made by authentic act, and recorded where required by law; this affected the opponents with notice without any inscription in the books of the recorder of mortgages. 2. A tax upon the real estate of a bank is not a tax on its capital stock. 3. The interest allowed by the charter is not due from the time of the suspension, but only from day of the demand for payment by the note holder. 4. Art. 3333 extends to mortgages acquired by subrogation. The state was entitled to privilege as to two years taxes only. The C Bank had a right to the rents after seizure which was valid. Reinscription of the mortgage was unnecessary. The C Bank seized the St. L Hotel under their mortgage, and rents amounting to \$4,600 accrued, which the court allowed to that bank. Judgment reversed.

Cited: 7 La. Ann. 550; 10 id. 596; 33 id. 1453.

WALKER v MUNICIPALITY OF NEW ORLEANS (1850) 5 La. Ann. 10.

Where it appeared that a bank discounted a note and thereafter went into liquidation, and the note was transferred subsequent to maturity to A, who upon the trial established that a tender of payment had been made in the bank's notes, held, under the Acts of 1842 and 1843, the bank was obliged to receive its own

notes in payment; that the transferee acquired no greater rights than the bank had, and he, too, could be compelled to receive the bank's notes.

CITIZENS BANK v DUGUE (1850) 5 La. Ann. 12.

To recover money paid by indorser by mistake. In 1843, under an agreement with his creditors, defendant executed notes secured by mortgage. The mortgaged property was to be sold, and releases were to be given by the creditors as the proceeds from each sale were deposited for their benefit. A note had been indorsed by S to the plaintiff bank, and by it indorsed in turn to the S Bank. The latter refused to sign the agreement until plaintiff agreed to continue its liability as indorser. In 1845, defendant acknowledged its inability to sell its property, and made a new agreement abandoning all his property to his creditors, on their agreement to pay the debts and give him a release in full. In pursuance of this latter agreement, of which the plaintiff had no knowledge, the S Bank released the mortgage of 1843 to perfect the purchasers' titles, and gave defendant a discharge. Subsequently, the plaintiff paid the S Bank the amount of the note indorsed by it, and afterward sued defendant, the maker, who made the S Bank a party. Judgment for defendant and against the S Bank. Appeal.

Slidell, J. 1. The S Bank had by its own acts lost all personal recourse against the maker of the note, and was estopped from looking to anything but the proceeds of the property abandoned to the creditors. 2. When therefore it received payment of the note from the plaintiff, its indorser, it received what the plaintiff was not bound to pay, and paid in ignorance of its discharge from liability by the discharge of the debtor primarily liable. The money paid can therefore be recovered. Judgment affirmed.

Cited: 18 La. Ann. 390; 21 id. 280; 47 id. 514.

CONSOLIDATED BANK v STATE OF LOUISIANA (1850) 5 La. Ann. 44.

Petition. When the plaintiff bank was chartered, the state guaranteed \$2,500,000 of its bonds in order to enable it to raise its capital. To secure the state, all the bank's assets were to constitute a fund for the repayment of the bonds. The bank's charter acknowledged the state to be a stockholder to the amount of \$10,000,000 "as a bonus." In time it became necessary to call for \$6 on each share of the bank's stock to meet a deficit. This suit was brought by the bank to decide whether the state was liable on its stock for the call. Judgment for plaintiff. Appeal.

Slidell, J. 1. We regard a bonus as fairly implying an advantage, a benefit given in return for the benefit received. If losses were sustained and the state is to pay an equal share of those losses, and thus stand upon an equal footing with the individuals with whom it is associated, with what propriety can it be said to have received a bonus from them? 2. The state cannot be considered as having contemplated any other course than that all the assets of the bank should be exhausted before the public treasury should be resorted to by the bondholders. Judgment reversed.

DUHART v CITIZENS BANK (1850) 5 La. Ann. 141.

Under the charter of the bank, the court has no control over mortgages given to secure a loan, unless the debt has been paid.

POSEY v BANK OF LOUISIANA (1850) 5 La. Ann. 187.

Petition to enjoin the sale of land and slaves covered by a bond and mortgage executed by plaintiff to defendant, a bank. The bond and mortgage were payable at defendant, and no demand for payment had been made there. The land had been sold by plaintiff to D, who transferred it to his creditors. Plaintiff contended that the bond, like a note, was entitled to demand at the place named for payment; that defendant waived the mortgage by claiming to share in D's insolvent proceedings, and that two notes had been given the defendant, which should have been credited on the bond. There was no evidence of a waiver or of the receipt of the notes. Judgment for plaintiff. Appeal.

Eustis, C. J. 1. It was not necessary to demand payment of the bond at the place where it was made payable. 2. The plaintiff, having failed to show a

delivery of the notes to the bank, or that they were to be credited on the bond, is not entitled to such a credit. 3. The sale of the land would not be grounds for enjoining the sale of the slaves. Judgment reversed.

Cited: 12 La. Ann. 671; 16 id. 252; 30 id. 399, 1290.

PERKINS v BANK OF LOUISIANA (1850) 5 La. Ann. 222.

Petition. Defendant was surety of D in a twelve months' bond. The obligee transferred it to plaintiff, a bank. At maturity, upon payment of part of the capital, accrued interest, and a year's interest on the balance in advance, an extension of one year was given. Similar extensions were granted during several years. Execution was finally issued for the balance. No assent of the surety to the extensions was proved. Defendant contended that he was discharged by them. The bank maintained that the cashier had no authority to grant the extensions; that the bond was a judgment against the surety; and that the extensions did not discharge him. By statute, execution could be issued on a twelve months' bond "in the same manner as on a final judgment." Judgment for defendant. Appeal.

Slidell, J. 1. The bank has taken the benefit of the acts of the agent, and in so doing has ratified them. 2. A debtor upon a twelve months' bond is not a judgment debtor. Judgment affirmed.

ROBERTSON v CONREY (1850) 5 La. Ann. 297.

A person who is the sole stockholder of a bank, and recipient of its assets, is bound to pay a claim against the bank if the assets equal the amount claimed.

CANAL BANK v HOLLAND (1850) 5 La. Ann. 363.

On a promissory note. Defendant gave his note for certain stock, and it was agreed that at maturity it be received, one-half for six months and the other half for twelve months. The consideration for the note was expressed on its face. Plaintiff, a bank, discounted the note in the ordinary course of business. It was alleged by defendant that the stock was issued contrary to the charter of the issuing company. Judgment for plaintiff. Appeal.

Rost, J. 1. The negotiability of the note is not affected by the fact that the nature of the consideration for which it was given appears on its face, provided that consideration be lawful. 2. The informality in the issue of the stock is not one of which defendant can take advantage. 3. The proper construction is that the note was to be replaced by two others, each for one-half the amount; one payable at six and the other at twelve months. Defendant, not having tendered notes, of that description, is bound on his original contract. Judgment affirmed.

ROBERTS v WILKINSON (1850) 5 La. Ann. 369.

Petition to enforce married woman's contract. Defendant and wife gave to plaintiff, trustee of the Bank of the United States, promissory notes payable in United States bank notes for a debt due by W to the bank. To secure these notes, a mortgage was given by defendant's wife on her separate property. Renewal notes were given by her to the trustee in the absence of the defendant, but in pursuance of a previous agreement between him and the trustee. Subsequently defendant and wife executed a second mortgage to secure the renewal notes. Both the mortgages and notes were made in Louisiana, but the latter bore date in Mississippi. The mortgages contained a clause that the mortgagors reserved the right to construe the mortgages by the law of Mississippi. In that state a married woman could not make a binding contract. By the Louisiana Code, arts. 1775 and 1779, married women could contract on authorization of their husbands. Plaintiff, as trustee, sued the wife on the original notes, and the court discharged her from all personal liability, but subjected her property to the mortgages. Both parties appealed.

Eustis, C. J. 1. The capacity of the wife to contract in ordinary cases, she being a married woman, domiciled in this state, must be determined by our laws. 2. A ratification of the contracts of the wife, which the subsequent mortgage was given to secure, is implied from the mortgage. 3. So far as the authorization of the husband is concerned, the wife is bound by his signature to the notes. 4. Where the wife becomes surety for a stranger, the incapacity of the wife is removed by the authorization of the husband as in any other contract. 5. Where a

note is given to a bank payable in its own notes, the contract, on the part of the purchaser, is to extinguish so much of the bank's liabilities on the maturity of the note. Judgment for plaintiff amended so as to be payable in notes of the Bank of the United States.

Cited: 14 La. Ann. 18; 16 id. 311; 17 id. 234; 19 id. 48; 27 id. 121; 29 id. 335, 753; 33 id. 478, 625; 34 id. 403.

MUNICIPALITY NUMBER ONE v STATE BANK (1850) 5 La. Ann. 394.

Petition. Plaintiff sued to recover taxes levied on real estate belonging to defendant, a bank. Defendant's charter, granted in 1818, provided "that real estate belonging to said bank shall forever be exempt from the payment of any state tax." Plaintiff contended that the charter was repealed by art. 127 of the constitution of 1848, providing for equality and uniformity of taxation. Judgment for defendant. Appeal.

Eustis, C. J. We do not understand the constitution to repeal the charter. It provides that no law impairing the obligation of a contract shall be passed, and that vested rights shall not be divested. Judgment affirmed.

Cited: 10 La. Ann. 762; 32 id. 1210; 33 id. 854.

LEDOUX v RUCKER (1850) 5 La. Ann. 500.

For an injunction. Plaintiff and her husband executed a mortgage to a bank on a tract of land, and on some slaves belonging to plaintiff. Subsequently they issued a second mortgage to defendant. Defendant paid the debt to the bank, became holder of both mortgages, and instituted foreclosure proceedings. Plaintiff asked to have the land first applied to payment of bank mortgage, and her slaves liberated from operation of both mortgages. The bank's charter provided that a wife could join with her husband in executing contracts and obligations to it. Judgment for plaintiff. Injunction granted. Appeal.

Slidell, J. 1. The plaintiff's slaves were liable to seizure and sale under first mortgage, the contract being one into which she was authorized to enter. 2. The law created a legal subrogation between debtors in solido. This subrogation carries with it a resort to the securities given by each. Judgment reversed.

Cited: 43 La. Ann. 216; 51 id. 745.

COMMERCIAL BANK v FOSTER (1850) 5 La. Ann. 516.

Jactitation. The defendant made a reconventional demand upon the plaintiff bank for \$3,100, being the amount of protested bank notes, together with 10 per cent interest. The bank's charter provided that if it suspended specie payment, the holder of the notes should be entitled to 10 per cent interest until paid. The bank suspended payment in 1843 and resumed in 1844. Judgment for defendant. Appeal.

Eustis, C. J. 1. The bank was no longer liable to pay interest, which it was at all times ready to pay after it resumed in 1844. 2. The charge of cost of protest, is inadmissible, under the Act of March 11, 1842. Judgment affirmed.

Cited: 11 La. Ann. 441; 21 id. 103.

HARRIS v BANK OF MOBILE (1850) 5 La. Ann. 538.

Petition. The defendant bank obtained a judgment against plaintiff and issued execution on it. The sheriff went to the M and T Bank and declared to the cashier that he seized, by virtue of the execution, 500 shares of the stock thereof belonging to the plaintiff. The plaintiff brought this suit to enjoin the sale of the stock, contending that the defendant never seized it. The sheriff did not get possession of the certificates. Judgment for plaintiff. Appeal.

Preston, J. It was a valid seizure of the plaintiff's stock. It was the same thing as declaring he seized the undivided interest of the defendant in the funds and assets of the corporation. Judgment reversed.

Cited: 9 La. Ann. 606; 13 id. 292; 14 id. 109, 110; 18 id. 58; 20 id. 196; 30 id. 1379, 1383; 31 id. 151; 32 id. 1253; 42 id. 1184; 105 La. 711, 712.

CONANT v MILAUDON (1850) 5 La. Ann. 542.

Where a corporation, chartered for railroad and banking business, availed itself of a statute which allowed such corporation to drop one form of business and continue the other, and after discontinuing the banking business, elected an alien as director of the company, it was held that the statute, which prohibited an alien from being a director of a bank, did not apply, and that the election was therefore valid.

See full report under title "Corporations."

ALBERT v CITIZENS BANK OF LOUISIANA (1850) 5 La. Ann. 720.

Petition to compel payment of interest on bonds. The defendant bank was bound by its charter to pay certain Louisiana state bonds, payable in dollars, pounds, or guilders. The interest coupons were indorsed, "Thirty guilders, payable at H & Co., in Amsterdam." The plaintiff held a number of these coupons. For several years previous no funds had been placed in H & Co.'s hands, so the plaintiff demanded payment at the defendant bank. Thirty guilders were worth \$12. The plaintiff demanded this sum, but the defendant refused to pay more than \$11.11, the amount they had been in the habit of paying for thirty guilders. Judgment for plaintiff. Appeal.

Slidell, J. 1. It was not the intention of the legislature to permit the bonds to be issued as convertible or alternative. 2. By the indorsement the bond became definitely payable in the money named in it. 3. The plaintiff was entitled to receive thirty guilders in Amsterdam. The bank having failed to perform its contract there, and the creditor being obliged to sue here, he ought to have just as much allowed him here as he would have had if the contract had been duly performed. 4. The holder of a negotiable promise to pay money need not show a demand at the appointed place, when no funds have been provided there by the debtor. The acquiescence of the plaintiff in the redemption of other coupons at a lesser rate is no defense to a recovery of what is lawfully due upon the obligations now before us. Judgment affirmed.

Cited: 12 La. Ann. 671.

MECHANICS & TRADERS BANK v JONES (1851) 6 La. Ann. 123.

On promissory note. Defendant, a married woman, signed the note as a surety for her husband. The charter of the bank provided that a wife may bind herself jointly and in solido with her husband in all hypothecary contracts or obligations. Judgment for defendant. Appeal.

Eustis, C. J. The charter gives no validity to the contract of the wife in solido with the husband which is not hypothecary in character. Judgment affirmed.

HAYNES v BECKMAN (1851) 6 La. Ann. 224.

On promissory note. The defendant made an instrument promising to pay to the order of S, cashier of the C Bank, \$640 one year from date, and reciting in the instrument that stock was left in pledge as security for the loan. The plaintiff was appointed liquidator of the C Bank. The defendant pleaded the Statute of Limitations applicable to negotiable instruments. The plaintiff contended that the instrument was not negotiable. Judgment for defendant. Appeal.

Slidell, J. In the case of promissory notes held by banks, an indorsement by the cashier of the bank, in his official character, is sufficient, at least prima facie, to pass the title of the bank thereto. The note was not less negotiable by being made payable to the order of the cashier than it would have been if made payable to the order of the bank. The statement it contains touching the pledge is not inconsistent with the intention to make it negotiable. Judgment affirmed.

Cited: 22 La. Ann. 181.

COMMERCIAL BANK v VILLAVASO (1851) 6 La. Ann. 542.

To collect a debt due plaintiff. Plaintiff was in process of liquidation. A commissioner had been appointed and the franchise surrendered. It was contended the action should have been begun in the name of the commissioner. Judgment for defendant. Appeal.

Slidell, J. The commissioner, in collecting debts, is not inhibited from using the corporate name. Judgment reversed.

SMITH v MECHANICS AND TRADERS BANK (1851) 6 La. Ann. 610.

Petition to recover deposit. The plaintiff, a bill broker, kept an account in the defendant bank. He discounted a bill drawn by V on P & H, and gave a check on the bank in favor of P & H. The acceptance of P & H on the bill and the indorsement on the check were forged. Both forgeries were very badly done, the name Harin appearing for Harrison on the check. The person for whom the plaintiff discounted the bill was totally unknown to him. It was the plaintiff's custom for years, when discounting bills, to make his checks payable to the person for whom discounted. The defendant maintained that payment of the forged check canceled its obligation on the deposit. Judgment for defendant. Appeal.

Eustis, C. J. 1. The plaintiff cannot be considered as taking this bill in the usual and ordinary course of business, not having exercised a proper and reasonable caution respecting the person offering it. 2. Being bound to exercise caution in the first instance, he is not permitted to impose any responsibility on the bank by any signature he interposes, to save himself from a loss which ordinary caution might have prevented. Greater caution is required of a discounter, whose business is to buy bills, than of a bank whose business it is to pay them. Judgment affirmed.

Cited: 6 La. Ann. 626; 14 id. 488; 24 id. 221.

CONRAD, ASSIGNEE v CITY BANK (1852) 7 La. Ann. 4.

Petition to recover interest on note. B obtained a loan from the defendant, giving therefor his note, secured by a pledge of his stock in defendant. Subsequently B became bankrupt and assigned all his property to plaintiff for his creditors' benefit. Plaintiff sold the stock to the defendant, which deducted the amount of the note, with interest, from the purchase price. Plaintiff denied that interest was due, because the note was not protested, and sued to recover it. Judgment for plaintiff. Appeal.

Preston, J. 1. The inutility of demanding payment afforded ample reason for disposing with that vain form without losing anything by so doing. 2. In borrowing money from a corporation created for the purpose of obtaining interest by the loan of money, the borrower must be considered as binding himself by an implied agreement that, if the principal was not paid at the term fixed, it should continue to bear interest until paid. Judgment reversed.

BERMUDEZ v UNION BANK (1852) 7 La. Ann. 62.

Petition to recover interest on stock loan made to stockholder. The defendant, a stockholder of the plaintiff, executed to it two obligations for money loaned, secured by mortgage. Sec. 24 of the charter of the plaintiff provided that 7 per cent interest on the loan should be paid in advance, and the principal in equal instalments, and that the whole be paid in twenty years; that mortgages given as security for stock loans should bear 10 per cent interest after maturity, if not punctually paid. Instalments were not promptly paid. The plaintiff claimed the right to interest on the whole amount. The defendant contended that interest could be collected only on each instalment as it became due, and at 7 per cent, and not 10 per cent. The second loan was for an additional 15 per cent beyond the usual amount loaned on stock. The court allowed only 7 per cent interest on the second loan on the ground it was not a stock loan. Judgment for defendant. Appeal.

Slidell, J. The stipulation for 10 per cent interest on the first loan must be enforced. The whole amount of the loan matures if the borrower fails at the end of each year to pay a twentieth part of the principal and 7 per cent interest on the balance for one year in advance. The additional loan of 15 per cent on the amount of stock was a stock loan within sec. 24 of the charter. Judgment reversed.

Cited: 10 La. Ann. 130, 602.

CITIZENS BANK OF LOUISIANA v LEVEE STEAM COTTON PRESS CO.
(1852) 7 La. Ann. 286.

Petition to collect a call on stock. The bank was incorporated by the state. To enable the bank to raise its capital, the state issued bonds; and to secure the state, all securities granted to the holders of the bonds were transferred to it. Laws were thereafter passed vesting the bank's assets in the state, there being no

law for liquidation of insolvent corporations. Under this law managers were to be appointed by the state. The law was amended so that three managers were chosen by the state and three by the stockholders. The first series of the bonds, the bank could not meet. An agreement was made with the holders extending payment to five annual instalments and of the interest to seven annual instalments. A later act made it the duty of the managers to exact from the stockholders such an annual contribution as would enable regular payments on the bonds of the state. A call of \$1 a share for seven years was made. The defendants resisted this call, contending that the acts of the legislature impaired the obligations of contracts; that they had a right to have the affairs of the bank liquidated immediately; and that mortgages given by them to secure their stock subscription should be released. Judgment for plaintiff. Appeal.

Eustis, C. J. 1. This legislation was nothing more than the exercise of the power which the government of the state has over bankrupt estates, which is inherent in all well-regulated governments. 2. The authority to prescribe the mode of administration required by the public interest cannot be questioned under the facts in the present case. Judgment affirmed.

Cited: 7 La. Ann. 319; 29 id. 44; 35 id. 428; 47 id. 554, 559.

CONSOLIDATED ASSOCIATION OF PLANTERS v CLARBORNE (1852)

7 La. Ann. 318.

To enforce stockholders' liability. Plaintiff's charter expired in 1843. Defendants were shareholders. In 1833, a law was passed authorizing the bank to postpone the payment of bonds until 1848, and granting a delay of two years for the purpose of liquidation. In 1842, the charter was declared forfeited. In 1847, an act was passed appointing a directing manager of the corporation and extending the time for the payment of state bonds. An assessment of the stockholders was authorized, to pay the interest and principal of these bonds as they fell due. Judgment for plaintiff. Appeal.

Eustis, C. J. 1. The power of liquidating its affairs, at the expiration of its charter, was one which was absolutely necessary for the protection of the interests of the stockholders. 2. The state gave the privilege of extension, and the acts of the corporation itself, and of nearly the whole of the stockholders as corporators under the law, are equivalent to the most formal acceptance. Judgment affirmed.

Cited: 34 La. Ann. 774, 776; 35 id. 428; 42 id. 734.

PALFREY, REC'R v PAULDING (1852) 7 La. Ann. 363.

Petition to compel payment of stock subscription. Art. 430, civil code, passed ten years before the bank's charter, provided that the charters of corporations be forfeited for violations of conditions in them. The charter of the bank, of which plaintiff was receiver, provided that it should never suspend specie payments. It did suspend, but subsequently, in 1839, a law was passed reinstating all banks whose charters had been forfeited, and providing that the amount actually paid in then should constitute the bank's capital. Subsequently the bank became insolvent, and the receiver brought this suit to compel payment of \$20 a share on thirty shares held by the defendant. Plaintiff contends: 1, That the act did not apply to the bank because it is said that by its charter another penalty is fixed for a suspension; and, 2, that defendant has never accepted the law of 1839. In transacting business, defendant has complied with the requirements of that act and accepted its benefits. Judgment for plaintiff. Appeal.

Rost, J. 1. The bank was one of the banks that had incurred the forfeiture of their charters by the suspension of specie payments, and the act of 1839 was intended to apply to it. 2. No clearer case of implied acceptance has ever been made out, and the capital of the bank must be limited to the amount paid in at the time of the passage of the statute, and the stockholders are not personally bound for debts contracted by the bank thereafter. 3. The acts of corporate officers are admissible evidence from which the fact of acceptance of the charter may be inferred. Judgment reversed.

Cited: 20 La. Ann. 474; 31 id. 295.

UNION BANK OF LOUISIANA v BOWMAN (1854) 9 La. Ann. 195.

Petition for the sale of land. G became a stockholder in the plaintiff bank. He mortgaged certain lands and slaves for his stock, and obtained a loan on the credit allowed him by the charter, by giving a bond. Subsequently he sold the land and stock to B, who assumed the payment of the mortgage as a part of the price. He paid two instalments on the bond. The bank sued to have the land sold for the balances, and a personal judgment against him. The court refused to allow B to prove that part of the land sold to him by G belonged to others. Judgment for plaintiff. Appeal.

Slidell, C. J. 1. The bank cannot consider as absolute, a promise, which, by the very nature of the transaction, was qualified. The promise to pay the bank was a promise to pay so much as part of the price of a sale, and justly subject to the defenses incident to such a promise. 2. The two payments do not enlarge the extent of B's liability. Judgment reversed.

Cited: 15 La. Ann. 418; 16 id. 420; 20 id. 256; 22 id. 363; 23 id. 409; 27 id. 253; 28 id. 285; 33 id. 52.

STARK v BURKE (1854) 9 La. Ann. 341.

Action to enforce payment of subscription. In 1849, the plaintiff, receiver of the A Bank, brought this action against a number of its stockholders, including the defendant. By the charter of the bank (1836), it was provided that the balance due on each share should be paid in on the first Monday of March, 1838, unless otherwise ordered by the directors. The directors did not exercise their authority. In 1842, the bank's charter was forfeited, and commissioners were appointed to take charge of its assets. Defendant pleaded the ten-year Statute of Limitations. Plaintiff alleges creditors were prevented from suing by a stay, and commissioners could not sue until deficiency was ascertained. Judgment for plaintiff. Appeal.

Slidell, C. J. 1. After the first Monday of March, 1838, each stockholder was the debtor of the corporation for the whole amount of the subscription, as the authority conferred on the directors was not exercised before that date. 2. The stockholders could not have resisted a suit by the commissioners at the instance of the creditors. 3. The plea of prescription should have been maintained. Judgment reversed.

Cited: 9 La. Ann. 346; 14 id. 819, 820; 18 id. 496; 35 id. 428, 431, 433, 434, 506; 46 id. 107; 47 id. 1470.

UNION BANK OF LOUISIANA v LOBDELL (1855) 10 La. Ann. 130.

To recover unpaid balance on stock loans. Under a stipulation contained in the bonds of the bank, the plaintiff claimed interest at 10 per cent. The defendant denied the bank's right to charge this amount, and complained that there was a compounding of interest in the plaintiff's calculation the mode of which was as follows: The principal and interest due at the time of payment were calculated. When the amount paid was less than the interest accrued at the time, no deduction was made from the gross amount of principal and interest, until by another payment the amount received was made equal at least to the accrued interest. The principal and interest up to that time were then added together, and from the total was deducted the aggregate of the several payments made since the last deduction of the interest. Defendant set up a claim in reconvention against plaintiff which at this time it was the subject of a direct action. Plaintiff pleaded the exception of litis pendency which was sustained. Judgment for plaintiff. Appeal.

Buchanan, J. 1. The stipulation in the bonds for the payment of interest at maturity is obligatory, and must be paid by the defendant. 2. The manner of calculation was a strict compliance with the provision of the law which requires that partial payments upon a debt carrying interest are first to be applied to the interest. 3. The exception was properly maintained. Judgment affirmed.

Cited: 32 La. Ann. 334.

MATTHEWS v TERRY (1855) 10 La. Ann. 344.

To enforce a penalty. Plaintiff made deposits with defendants, bankers, who accepted them in good faith. Thereafter defendants became insolvent. It is contended that defendants, although they have made a surrender, are liable to the penalties of the Act of March 28, 1840, because they have failed to pay over

money received or deposited with them for another. Judgment for defendants. Appeal.

Spofford, J. The terms of the act do not embrace the case of a banker who in good faith receives irregular deposits and becomes insolvent before they are drawn out. Judgment affirmed.

Cited: 46.

SIMMS v BEAN (1855) 10 La. Ann. 346.

Debt. The plaintiff had an account with the defendant, a banker, and deposited money, drawing checks upon the fund as he had occasion. The money was not specially deposited. The defendant failed to pay the plaintiff his balance of account, and an arrest was made under sec. 10 of the Act of 1840, which provided that a failure "to pay over money received or collected for or deposited with him for another" shall be held presumptive evidence of fraud. Judgment discharging defendant. Appeal.

Slidell, C. J. 1. The failure to pay is not, per se, fraud within the purview of the statute, when the relation of the parties is that of debtor and creditor. "Money deposited," as used in the statute, does not include money deposited with an understanding that the one receiving it may mix it with his funds and employ it in his business. Judgment affirmed.

Cited: 10 La. Ann. 344; 17 id. 264; 29 id. 856; 32 id. 661; 34 id. 578; 36 id. 261; 45 id. 1106; 46 id. 5.

UNION BANK v BEATTY (1855) 10 La. Ann. 378.

On notes against indorsers as securities. M was the cashier of the branch of the plaintiff bank at T. He defaulted, and, to shield himself, bought the banking house and assets of the T branch, giving a separate series of notes for the house and assets, indorsed by the defendants. The defense was that a large portion of the assets had been embezzled by M, and was not in possession of the bank at the time of sale. The proof showed that M's frauds were unknown to both the plaintiff and the defendants. Judgment for defendants. Appeal.

Spofford, J. 1. In the absence of any communication between the creditor and sureties, there was no privity. 2. The principal contract was valid; and therefore the sureties will be bound on their collateral obligation. 3. The consideration moves to the principal and not the surety. 4. The consideration of the sureties' contract consists in the service rendered the principal by obtaining credit for him. Judgment reversed.

S. c.: 10 La. Ann. 361.

CONSOLIDATED ASS'N v WILSON (1855) 10 La. Ann. 591.

To enforce mortgage securing stock loan. F M, a stockholder in the plaintiff, borrowed \$8,000, and mortgaged certain property to secure it. Thereafter, in 1852, J M, by mesne conveyance, became the owner of the mortgaged property, stipulating to pay the mortgage debt. In 1848, the defendant, W, purchased the same property at a judicial sale of J M's estate, the deed stating it was mortgaged to the bank. When plaintiff sought to enforce its mortgage for a balance due thereon, W pleaded prescription. Art. 3333 and an act of 1843 made reinscription of mortgages necessary every ten years; after which time any person interested could have the mortgage canceled except "mortgages in favor of property banks." In 1842, an act was passed providing that reinscription of mortgage given by stockholders to the various property banks was unnecessary. Judgment for defendant. Appeal.

Voorhies, J. 1. Under these statutes, the mortgage executed by F M as stockholder never ceased to have its effect or to be operative. 2. J M cannot be considered as a third possessor without notice. His vendee, W, must be viewed as standing in the same position toward the bank. Judgment reversed.

Cited: 10 La. Ann. 611; 20 id. 224; 30 id. 11; 33 id. 1453; 35 id. 431.

UNION BANK v SUCCESSION OF WILSON (1855) 10 La. Ann. 601.

To recover loan. W borrowed \$25,000 from plaintiff on a mortgage. On default, plaintiff sued W's succession, claiming 10 per cent interest. Sec. 9 of the bank's charter provided that no more than 7 per cent should be taken for any

loan. Sec. 24 provided that the mortgages for stock and loans granted by virtue of this act shall have 10 per cent after maturity. The defendant claimed sec. 24 only applied to stock mortgages. Judgment for defendant. Appeal.

Spoffard, J. 1. Ordinary mortgage loans, like this one, out of which this controversy grows, were among the loans granted by virtue of the act incorporating the bank. 2. Sec. 24 extended to all loans on mortgage. Judgment reversed.

Cited: 17 La. Ann. 198.

CITY OF NEW ORLEANS v LOUISIANA STATE BANK (1855) 10 La. Ann. 762.

To recover unpaid taxes assessed upon defendant's real estate. The act incorporating defendant provides that its real estate shall forever be exempt from the payment of any state tax and from the payment of any tax laid by any public or corporate body under the authority of the state. The assessment was to provide for the subscription to stock in works of internal improvement by municipal corporations. Judgment for defendant. Appeal.

Merrick, C. J. 1. The act of incorporation embraces any real estate which the bank may possess in the regular course of its business as a banking institution. 2. The contingent benefit which the taxpayer may derive from the stock does not in our opinion change the character of the assessment from that of one for a tax. Judgment affirmed.

CITY OF NEW ORLEANS v SOUTHERN BANK (1856) 11 La. Ann. 41.

To recover taxes. The Act of 1842 authorizes the Common Council of New Orleans to levy an annual tax on brokers, merchants and "all other callings, professions or business." By ordinance of January 1, 1854, a tax was levied on every bank organized and doing business under the Free Bank Law, of 1853. Sec. 35 of the Act of 1853 provided said banks "shall be taxed upon their capital stock at the same rate as other personal property." Judgment for plaintiff. Appeal.

Merrick, C. J. 1. The law of 1853 is as much a contract with the individual corporations formed under the act as would be a special act of incorporation containing like provisions. 2. This section was intended for the security of the capitalist, and an assurance to him that if he invested his money in the banks, his stock should be taxed at the same rate as other personal property, and not in any other manner. Judgment reversed.

Cited: 12 La. Ann. 421, 423; 15 id. 93; 23 id. 271; 31 id. 519, 520; 32 id. 84.

BERMUDEZ, USE OF WRIGHT, v UNION BANK (1856) 11 La. Ann. 64.

To cancel sale. Plaintiff B subscribed to stock in defendant bank, and secured his subscription by mortgage. The stock was pledged for a loan which B obtained thereon. B also borrowed other sums, which were secured by a second mortgage on the same property. After B transferred the property and stock to W, the bank seized and sold the stock and became the purchaser. No notice of seizure was given, as is required by law. Plaintiff was present at the sale. Judgment for defendant. Appeal.

Lea, J. 1. There is no reason why the bank might not seize and sell any property of its debtor for the satisfaction of its debt. 2. The bank could purchase its own stock, and extinguish the same. Such a sale cannot be attacked upon such a ground by a party having no interest in the question. 3. The objection that notice of seizure was not given cannot be raised by one who was present at the sale. Judgment affirmed.

Cited: 21 La. Ann. 693; 43 id. 370.

DAVIS v ROBERTSON (1856) 11 La. Ann. 752.

To arrest the collection of drafts. Plaintiff was surety on a note held by C Bank. The bank's charter was subsequently forfeited and defendant appointed trustee. He sued plaintiff on the note, and the latter gave two drafts to defendant in settlement. Plaintiff claimed that the trustee could collect only sufficient of the bank's assets to pay the debts. Judgment for plaintiff. Appeal.

Merrick, C. J. 1. The trustee of an insolvent bank is not limited to the collection of sufficient funds to pay the debts. 2. Error of law is not a ground for

rescission of a compromise, and it can only be set aside where there has been fraud or misrepresentation. Judgment reversed.

Cited; 33 La. Ann. 670.

CROW v MECHANICS AND TRADERS BANK (1856) 12 La. Ann. 692.

Injunction to prevent execution of a judgment. Plaintiffs allege the deposit for collection with defendants, of notes to pay the debt, and contend they should have been collected and applied to the payment of the judgment, as said notes must be presumed to be prescribed against. Judgment for defendants, with interest at 10 per cent.

Lea, J. A deposit of notes for collection only imposes upon the bank the duty of receiving the money if paid, and, if not paid, of making such demand of payment and giving such notices of demand and non-payment as might fix the liabilities of the different parties to the note. Judgment affirmed, with \$200 as damages, and one per cent additional interest on the judgment.

WIDOW AND HEIRS OF POLLOCK v CITIZENS BANK (1857) 12 La. Ann. 228.

To compel bank to give credit to stockholders. The original charter of defendant gave the stockholders a right to a credit of \$33 per share. This charter was forfeited in 1842. In 1852 defendant was relieved from the forfeiture and its charter restored "with the same rights and privileges" as if it had never been forfeited. In 1853, an act was passed authorizing an issue of \$1,000,000 in cash shares, the holders thereof to share in the profits and losses in the proportion of cash stock paid in, to the amount of the available assets, which were to be fixed by the board. This act was accepted by a majority of the stockholders, the plaintiffs among them. On the faith of this agreement all the cash stock was subscribed. The defendant pleaded it would violate the contract with the cash stockholders to allow the credit asked, the plaintiffs' stock having no market value whatever. Judgment for defendant. Appeal.

Buchanan, J. 1. The "rights and privileges" are those of the corporation, and not of the individual incorporators. 2. All the original stockholders are bound by the compact, including the plaintiffs. Judgment affirmed.

Cited: 12 La. Ann. 231; 43 id. 767.

MORGAN v LATHROP (1857) 12 La. Ann. 257.

To recover money deposited. Plaintiff deposited with defendant \$615.39. The defendant reconvened, admitting the deposit, but alleged he credited it on a bill of exchange, protested, payable to defendant's order, and drawn by plaintiff; he claimed judgment for balance due on it. Both plaintiff and defendant were residents of New Orleans. Judgment for plaintiff. Appeal.

Merrick, C. J. 1. The reconventional demand, not being connected with plaintiff's original demand, could not be maintained, and proof of the same was properly refused. 2. The depository is not authorized to apply the funds on deposit in his hands to the debts of the depositor, except there is a special mandate from him or a course of dealing which will justify such application of the funds. Judgment affirmed.

Cited: 12 La. Ann. 527; 23 id. 116; 32 id. 592, 987; 33 id. 1209; 34 id. 606; 38 id. 432.

STATE v LOUISIANA SAV. CO. (1857) 12 La. Ann. 568.

To forfeit charter. On March 3 the defendant closed its doors because of a run, resulting from false rumors about its president. On March 8 it gave notice that it was fully prepared to meet all its engagements, and on March 10 reopened for business. The state sought to forfeit its charter because it ceased paying and receiving deposits for seven days. Judgment for plaintiff. Appeal.

Cole, J. 1. Considering the circumstances of this case and the nature of the charter, the closing of the doors, the cessation of business and the temporary suspension of payment of this company for a few days are not sufficient cause for forfeiture. 2. This institution is not a "bank" in the sense of the statute, and the rigid rules relative to banking institutions are not applicable to this case. Judgment reversed.

COCKBURN v UNION BANK (1858) 13 La. Ann. 289.

Mandamus to compel the bank's officers to allow the plaintiff, a stockholder, to examine the "discount book." Defendant excepted to the petition, claiming the directors alone had the right to examine the book; that a statute authorizing stockholders to examine the "stock ledger" confined the right of examination to that alone; that the plaintiff had a remedy in damages; and that the interests of the public were protected by the Board of Currency and legislative committees. Exception sustained. Appeal.

Cole, J. 1. It is the right of everyone to see that his property is well managed and to have access to the proper sources of knowledge in this respect. 2. The declaration by the legislature that he has another and distinct right does not deprive him of that which is accorded by other laws. 3. Mandamus is the proper remedy in this case. 4. The petitioner cannot be deprived of his right by the substitution of damages. 5. He is not bound to depend on the fidelity of public agents for the protection of his own rights. Judgment reversed.

Cited: 23 La. Ann. 434; 28 id. 209; 45 id. 670; 49 id. 809, 1560; 51 id. 431; 104 La. 132.

BARDSTON v WEYMOUTH (1859) 14 La. Ann. 93.

On bond against sureties of auctioneer. The auctioneer gave the plaintiff a check for the proceeds of goods sold, it being understood there was no money in bank to meet it, but that a sufficient deposit would be made in two or three days. The check was protested for non-payment. The sureties pleaded they were released by the creditor giving time to the principal, and that the debt was novated by taking the check in payment. Judgment for plaintiff. Appeal.

Buchanan, J. 1. The receipt of the check was not a giving of time to the debtor. 2. Neither was the debt novated by the creditor taking the check. It cannot be viewed as giving a new debtor in the place of the original debtor, nor, as such, substituting a new debt in the place of the original debt. Judgment affirmed.

Cited: 29 La. Ann. 752.

HAYNES, LIQUIDATOR v HARBOUR (1859) 14 La. Ann. 237.

Hypothecary action against third possessor of mortgaged land. T A C & Co. subscribed to 202 shares of the stock of the C & P H R R & Banking Co. To secure the subscription they mortgaged certain land. Subsequently T A C & Co. borrowed on this stock, \$9,090. By the charter a mortgage given to secure a stock subscription is made to include a mortgage for the repayment of the stock loans. The \$9,090 not being paid at maturity, the plaintiff, liquidator of the bank, sold the mortgaged land to G S, subject to subscription mortgage. G S sold the same land to J A H, giving a special warranty against the subscription mortgage. Under a decree of court the plaintiff made a case of three-fifths of T A C & Co.'s subscription. J A H cited G S in warranty. G S answered, claiming that the bank, having held two mortgages of unequal rank, and having caused the property to be sold to satisfy the junior mortgage, could not be allowed to sell it a second time to satisfy his senior mortgage. Judgment for bank against J A H, and for J A H against G S. Appeal.

Buchanan, J. 1. Property banks furnish an exception to the rule that a creditor who holds under two mortgages of unequal rank on the same property, and who has caused the property to be sold to satisfy his junior mortgage, cannot be allowed to sell it a second time to satisfy his senior mortgage. 2. Property mortgaged for the subscription to the stock of the bank is liable in the hands of a third possessor. Judgment affirmed.

Cited: 44 La. Ann. 207; 46 id. 1164.

HAYNES v PIPES (1859) 14 La. Ann. 248.

To enforce a stock mortgage against a third possessor of the mortgaged property. Defendant pleaded a purchase of the property at a sale under a decree in bankruptcy. Judgment for plaintiff.

Buchanan, J. A judicial sale to enforce a mortgage for the security of stock loans did not release the mortgage for the security of the subscription of stock. Judgment affirmed.

SUCCESSORS OF KERCHEVAL (1859) 14 La. Ann. 457.

Where a creditor accepted a draft in part consideration of a sale, held, that there was no novation so as to cause the seller to lose his privilege upon the goods sold; and a creditor holding a check, there being no evidence of presentment and protest, was prevented from claiming priority on the ground that checks, being assimilated bills, a demand, protest, and notice of protest must be proved before he can have recourse upon the drawer and indorser.

VANBIBBER v BANK OF LOUISIANA (1859) 14 La. Ann. 481.

On forged check. The plaintiffs sold R & E a lot of sugar. B was sent to collect for it. R & E gave B a check to the plaintiffs' order. B forged plaintiffs' indorsement, and defendant, drawee, paid it. Plaintiffs sued to recover the amount thereof. Defenses: 1, That the plaintiffs were not the owners of the check, the duty of B being to receive money only; 2, that they were liable to the drawer only. Judgment for plaintiffs. Appeal.

Cole, J. 1. B's possession of the check was the possession of plaintiffs. 2. The banks, having consented to pay the deposits of depositors on their checks, have thus tacitly agreed to pay them to the payees, and they are bound to know that they are paid to their real payees or their agents. Judgment affirmed.

IVES v CITIZENS BANK (1860) 15 La. Ann. 83.

To set aside mortgage sale. The plaintiffs were stockholders in defendant. They borrowed on their stock, and secured their loan by a mortgage on certain property. Several instalments being overdue, defendant issued executory process, praying in its petition for a payment of the amount due, and consenting that the purchaser should become a stockholder and debtor of a stock loan to date from the sale for the balance. In the advertisement for sale it was stated it would be made on twelve months' credit for the whole amount of the mortgage; the property was adjudicated to M on these terms. The plaintiffs claimed the sale as made was void, because not in accordance with the petition, and proved that had the sale been held according to the petition, a larger price would have been realized. The defendant relied on the charter provision that the whole amount becomes due when default is made in one instalment. It was shown that plaintiffs' rights were prejudiced by the irregularity in the sale complained of. Judgment for defendant. Appeal.

Buchanan, J. 1. The forfeiture of the stockholders' rights in this respect is a penalty imposed by the law, which the bank may waive. The bank had waived that penalty in this case by its petition. 2. If the plaintiffs show injury to themselves by the sale of property under such an order, even the bona fide purchaser's title is not valid. Judgment reversed.

CITY OF NEW ORLEANS v SOUTHERN BANK (1860) 15 La. Ann. 89.

To collect taxes. On March 20, 1856, a law was passed authorizing taxation of bank capital. On February 23, 1857, a law was passed to provide a tax to pay the annual interest on bonds issued by the city. On March 25, 1857, a tax for ordinary purposes of the city was levied. On March 19, 1857, a law was passed exempting all capital in free banks from municipal taxation. The defendant bank claimed the assessments were illegal. The law required the assessment rolls to be made in a certain time and manner. In the assessment made the capital of the bank was omitted. Subsequently a supplemental assessment was made which included it. Judgment for defendant. Appeal.

Merrick, C. J. 1. The ordinance of March 25, 1857, was in conflict with the Act of March 19, 1857, and void. This tax was properly rejected. 2. The statute of March 19, 1857, only applies to the future. The ordinance of February 23, 1857, could not be held to be repealed, except by some positive provision of the law or the clearest implication. The law subjected the bank's capital to taxation for 1856, and it cannot complain that a supplemental assessment supplied and corrected an error resulting possibly from the neglect of the bank to give in its capital to the assessors for assessment. Judgment reversed.

Cited: 15 La. Ann. 107, 108, 123; 16 id. 118; 35 id. 681, 691.

SCHMIDT v BARKER (1865) 17 La. Ann. 261.

To recover the balance of a deposit. The defendant was the owner of a bank. He received a deposit from the plaintiff, which it was agreed should only be withdrawn in confederate currency. The plaintiff claimed to be entitled to the balance of his deposit in legal tender. Complaint dismissed. Motion for rehearing.

Ilsey, J. The plaintiff by his own showing has infringed the law of the land, and he cannot avail himself of the law to enforce a contract made in opposition to law. Rehearing denied.

Cited: 19 La. Ann. 165, 449; 20 id. 308; 21 id. 14, 476, 620; 24 id. 280; 50 id. 108.

STRAUS v BLOOM (1866) 18 La. Ann. 48.

Action on a draft. Plaintiff deposited with defendants a draft for collection, and it was paid by the bank, four or five days after it suspended specie payment, in confederate money. Plaintiff contended they must pay in currency. Defendants contended that the plaintiff, by suing for the amount collected and not for the draft or its value, had ratified the act of receiving confederate money. It was proved notes or drafts deposited for collection prior to the date of suspension were not paid in confederate money, unless under special instructions, and that the draft was deposited before that date. Defendants failed to prove that their principal had authorized them to give instructions. Judgment for plaintiff. Appeal.

Howell, J. 1. By receiving and using the amount of the draft, they became plaintiff's debtor and must pay in currency unless they show that plaintiff has ratified the act. 2. A suit for money received and appropriated is not a ratification. 3. Confederate treasury notes are not money. Judgment affirmed.

HUNTINGTON v CRESCENT CITY BANK (1866) 18 La. Ann. 350.

To forfeit bank's charter. The Act of March 15, 1855, provided that whenever a notice of protest of a banknote should be lodged in the district court, the attorney-general should be notified, whereupon he should file a petition setting forth the facts; and that if the bank failed to establish a defense within three days, its charter should be forfeited and a writ issued for the sequestration of its assets. Plaintiff filed a petition with a protested note of the defendant bank, and on this petition a receiver was appointed and a writ of sequestration issued. All these facts were certified to the attorney-general, who intervened, filing his petition, and the bank was given three days to answer. At the end of that time, without a previous judgment by default, a final judgment of forfeiture was entered and a writ of sequestration issued. Appeal.

Labauve, J. 1. The writ of sequestration ordered and the appointment of a receiver, on the application of H, were unauthorized by law and premature. 2. It is only on the appearance and application of the attorney-general that this writ of sequestration can issue. The only difference between this and a regular suit by the state against the bank to declare a forfeiture is, that the defendant has only three days instead of 10 to answer. Judgment reversed.

Cited: 19 La. Ann. 374.

RIGGIN v UNION BANK OF LOUISIANA (1866) 18 La. Ann. 677.

To set aside a judgment of forfeiture. In conformity with the Act of 1858 a notice of protest of one of defendant's notes was filed in the district court. The bank failed to answer within the three days allowed by statute. A judgment of forfeiture was entered without the knowledge of the attorney-general. Appeal.

Hyman, C. J. No one but the attorney-general under the act referred to was authorized to urge the forfeiture of the bank's charter. Judgment reversed.

Cited: 35 La. Ann. 199.

UNION BANK OF TENNESSEE v LOCKETT (1866) 18 La. Ann. 678.

On letter of credit and bills of exchange. Defendant gave C the following letter of credit: "C is hereby authorized to draw on us for \$15,000, in such sums as may suit his convenience, at from thirty to sixty days' date. His bills will be duly honored and paid at maturity." C drew two bills which were discounted by the plaintiff bank on the faith of the letter. They were protested for non-acceptance and non-payment. Defendant, one of the writers, denied the letter was furnished to be used as alleged. Judgment for plaintiff. Appeal.

Labauve, J. This letter was written with the intention to be produced to third parties, who might be willing to advance money or give credit to C. Judgment affirmed.

Cited: 36 La. Ann. 696.

BANK OF LOUISIANA v WILSON (1867) 19 La. Ann. 1.

To enjoin attachment. Defendant levied an attachment on cotton owned by plaintiff. Plaintiff, suing in its corporate name, alleged its insolvency and the appointment of liquidating commissioners. The bank injunction bond was executed by its attorney-at-law. Injunction dissolved. Judgment for defendant. Appeal.

Taliaferro, J. 1. By the decree of forfeiture the corporation has no longer the faculty of suing in its corporate name. 2. The commissioners are the proper representatives of the creditors, and in their names should all judicial proceedings, in relation to the rights of creditors, be taken. 3. An attorney can only execute a bond in the absence of his client and the client in this case was not absent. There is doubt whether this authority of an attorney extends to corporations. Judgment affirmed.

Cited: 44 La. Ann. 885.

**MANDEVILLE AND MONTGOMERY v BANK OF LOUISIANA (1867)
19 La. Ann. 392.**

To recover deposit. Plaintiffs deposited \$13,963.64 in defendant bank. Thereafter, money had been seized by Captain T. M. McC under an order of Major-General B, to take possession of the balances of persons who left the city on its occupation by the Union troops and who did not return. Judgment for defendant. Appeal.

Labauve, J. The defendant, having paid out these deposits under an authority it had no right to question, is no longer liable to pay them to the depositors. Judgment affirmed.

Cited: 21 La. Ann. 333; 24 id. 291.

BANK OF LOUISIANA v GREEN (1868) 20 La. Ann. 214.

Where an order was made appointing commissioners to liquidate the affairs of a bank, held, that there was no evidence that the bank had violated its corporate powers; but even if it had so done, such conduct does not, per se, produce a forfeiture of its charter; its charter must be declared forfeited by such proceedings as are required by law.

BARKER v UNION BANK (1868) 20 La. Ann. 293.

On bank notes. The plaintiff held notes of the defendant bank, which were not paid on presentment. The plaintiff did not protest the notes in the manner prescribed by the Free Banking Law of 1855. He sued the bank, claiming interest at 5 per cent, under the Acts of 1855, p. 352, regulating interest on "documents for debts." Judgment for plaintiff without interest. Appeal.

Howell, J. 1. The statute requires a formal protest. 2. The notes issued under it are not "documents for debts" and are not subject to the rules of ordinary promissory obligations. Judgment affirmed.

GUMBLE v ABRAMS (1868) 20 La. Ann. 568.

To recover deposit. The plaintiff deposited with the defendants a certain sum in gold. He sued to recover the balance on the deposit in gold. Judgment for plaintiff. Appeal.

Howe, J. 1. It was an irregular deposit, which transferred to the defendants the ownership of the money, and left them indebted to the plaintiff in the number of dollars and cents deposited. 2. We cannot recognize any distinction between a debt which springs from an irregular deposit of gold and from any other lawful money. 3. The plaintiff is not entitled to a judgment in gold. Judgment for plaintiff, amended.

CITIZENS BANK v JOHNSON (1869) 21 La. Ann. 128.

Injunction to restrain sale of mortgaged property. H J was a stockholder in plaintiff. He borrowed money from plaintiff on two notes, and deposited with

it his certificates of stock as a pledge. He also mortgaged certain property to secure the same, which came into the possession of B. The last instalment on the loan was paid in 1860. In 1867 plaintiff brought this suit for a sale of the mortgaged property. H J obtained an injunction on the ground that the notes were extinguished by prescription. Injunction dissolved. Appeal.

Ludeling, C. J. While this pledge remained in the possession of the bank, prescription against the notes which the pledge was intended to secure was interrupted, because it was a standing acknowledgment of indebtedness on the part of H J. Judgment affirmed.

Cited: 22 La. Ann. 109; 23 id. 294; 32 id. 1253; 33 id. 1452; 42 id. 733; 47 id. 1163.

NELLIGAN v CITIZENS BANK (1869) 21 La. Ann. 332.

To recover deposit. Plaintiff deposited in defendant bank \$3,500 in gold. Defendant answered it had paid the money to Captain J. W. McC in compliance with military orders. The evidence showed the payment was made in confederate notes. Judgment for defendant. Appeal.

Howe, J. If the deposit was made in lawful money, the defendant could not discharge itself from liability to the plaintiff by the delivery of confederate notes. Judgment reversed.

Cited: 24 La. Ann. 291; 34 id. 157.

ERWIN'S EX'RS v BANK OF NEW ORLEANS (1869) 21 La. Ann. 338.

To recover deposit. E bought in Nashville four drafts from C & Son and one from the T Bank. He deposited these drafts in defendant bank. E's executor sued to recover the deposit in currency. The defense was that the drafts were payable "in bankable funds" by their terms, and that defendant bank was willing to pay the amounts in confederate notes; and that the plaintiff bought the drafts with illicit currency issued to sustain a rebellion against the United States Government, and the contract was therefore void. The evidence showed that the drafts were paid by C & Co. and the T Bank, by their checks on the defendant bank; and that, at the time of the transactions, confederate money was the only currency in circulation in New Orleans and Nashville. Judgment for plaintiff. Appeal.

Taliaferro, J. 1. E tacitly and impliedly assented to receive, in payment of the checks, confederate money, because confederate money at that time constituted bankable funds in New Orleans. 2. E chose to deal with those who were trading in an illegal paper currency and to accept their conditions, and was therefore, in the matter of giving credit to that currency, *particeps criminis* and entitled to no relief from this court. Judgment reversed.

Cited: 21 La. Ann. 623, 636; 33 id. 1388.

BYRON v CARTER (1870) 22 La. Ann. 98.

Sale under Judgment. C owned stock in the C C Bank. The plaintiff obtained a judgment against C, under which C's stock was sold by the sheriff to the plaintiff. To a rule taken by the sheriff, upon the bank to show cause why the stock should not be transferred to the purchaser on the bank books, the bank averred that C owed it \$31,972, and that under a by-law the stock could not be transferred until C's debt to it was paid; and pleaded compensation. Rule made absolute. Appeal.

Wyly, J. 1. C's debt cannot be compensated by the shares of the bank stock held by him and seized by the sheriff; because the certificates of stock are not debts due by the bank; they are merely the evidences of ownership of the shares or of the title of property. 2. The corporation is merely a juridical person; it can make no regulation or by-law to deprive a judgment creditor from selling the property of his judgment debtor, and from acquiring a formal transfer of the property to himself if he becomes the purchaser. Judgment affirmed.

POLICE JURY OF WEST BATON ROUGE v DURALDE (1870) 22 La. Ann. 107.

Injunction to restrain sale of mortgaged land. P subscribed for stock in the C Bank, and obtained a loan on his stock, for which he gave notes. To secure the notes he pledged his stock. The certificate of stock had never been delivered to him by the bank. The stock subscription was secured by mortgage on land, which mortgage also, by the charter, was a security for the stock loan. More

than five years after the maturity of the notes, the mortgage was attempted to be enforced. Plaintiffs had become possessors of the mortgaged land, and enjoined the enforcement of the mortgage on the ground that the notes were prescribed. Plea, that prescription did not run by reason of the pledge of the stock. Replication, that P was never in possession of the stock and therefore could not have pledged it by delivery. Injunction dissolved. Appeal.

Wyly, J. 1. The moment P consented that the bank might retain his certificates of stock, already in its possession, as a pledge for the loan, he made a constructive delivery, and the contract of pledge was completed. 2. Having possession of their debtor's property by his consent, as security for the debt, there has been a standing acknowledgment thereof on his part, and no prescription has been acquired. Judgment affirmed.

Cited: 23 La. Ann. 294; 28 id. 126; 32 id. 1252, 1253; 33 id. 1452; 42 id. 733; 47 id. 1163.

EICHELBERGER v PIKE (1870) 22 La. Ann. 142.

To hold bank for failure to protest note. E placed in defendant's hands, for collection, a promissory note. It was not paid at maturity and defendant failed to have the same protested, the indorser, L, being thereby released. The maker was insolvent. As evidence of this, plaintiff was allowed to introduce an unsatisfied execution against him, and a certificate of the recorder that he had no property. E sued the defendant for the amount of the note. Plea: Prescription of one year. Judgment for plaintiff. Appeal.

Taliaferro, J. 1. The plea of prescription of one year is not applicable in this case. The agent's obligation to his principal is a personal one, and subject to the prescription of ten years. 2. The liability of a banking establishment that receives notes for collection, and fails to use the proper diligence to fix the liabilities of the parties to such instruments, is well settled. 3. The admission of this evidence was proper. Plaintiff was obliged to show that the indorser was his only reliance for payment. Judgment affirmed.

GREEVES, ADM'R, v LOUISIANA STATE BANK (1870) 22 La. Ann. 228.

To recover deposit. B was a depositor in defendant bank. He left with it, for collection, several notes. The bank collected them and credited his account. B died. His administrator drew a check for the balance standing in B's name, and deposited it in the same bank in his own name as administrator. No money passed. The administrator sued to recover the amount placed to his credit as administrator. Plea, that the deposit consisted of worthless confederate notes. The evidence failed to show that the notes left for collection were collected in confederate money, and that the bank was authorized to collect in that money. When they were deposited for collection confederate notes did not exist. The bank paid one check of the administrator in specie. Judgment affirmed. Appeal.

Wyly, J. The whole defense appears to be an after thought, an ingenious dodge based upon vague conjecture. A depository must show affirmatively that it was authorized to collect notes in confederate money or that such collection has been ratified. Judgment affirmed.

SCHMIDT v FIRST NAT. BANK OF SELMA (1870) 22 La. Ann. 314.

Attachment. Plaintiffs held two overdue drafts drawn by the defendant bank. They sued by attachment, garnisheeing the L National Bank. The latter admitted funds of defendant bank in its hands, but averred that they had been notified by the United States Government that it claimed a lien on all the defendant's assets, under an act of Congress giving the government a prior lien on all its assets to cover deficiencies in the payment of its notes, which were guaranteed by the government. C, receiver of the defendant bank, appeared and filed an exception to the proceeding on the ground that the bank was in liquidation prior to this suit, and he was entitled to all the assets. Judgment for plaintiffs. Appeal.

Taliaferro, J. 1. The plaintiffs acquired no right as against the United States by attaching the assets of the S Bank in the Louisiana National Bank. 2. The right of the receiver of the S Bank to the possession and control of the assets in question is fully made out. Judgment reversed.

CASE v BERWIN (1870) 22 La. Ann. 321.

On promissory note against the maker. Defendant purchased lots of the city of New Orleans, and gave his note for the purchase price. The ordinance authorizing the sale provided that the purchaser might pay one-fifth of the purchase price in cash at the time of the sale, and pay the balance in instalments, and in that event the city must take in payment her matured obligations. United States Statutes at Large, 1864, 114, sec. 50, provides that when any bank has refused to pay its circulating notes, the comptroller may appoint a receiver, who shall "collect all debts, dues and claims belonging to the bank." Under this section, C, the plaintiff, was appointed receiver of the F National Bank, which held the note. The receiver sued thereon. Defendant excepted on the ground that the United States was the real plaintiff and the suit should have been brought by the district attorney. Defendant offered to prove that the understanding of the finance committee of the common council, and of the community, was that city property for which the note was given was sold for city notes, a tender of which had been made. This was excluded. Judgment for defendant. Appeal.

Ludeling, C. J. 1. The power to collect debts embraces the right to use all necessary means to obtain the object of the agency. 2. The ordinance authorizing the sale is in the record, and its meaning cannot be explained by the understanding of individual members of the council. 3. Defendant did not avail himself of the privilege granted by the terms of sale of paying in cash, but gave his note for dollars, and he cannot now discharge it in anything but lawful money. Judgment reversed.

Cited: 22 La. Ann. 325, 622; 24 id. 502.

NUTT v CITIZENS BANK OF LOUISIANA (1870) 22 La. Ann. 346.

To recover donation. The defendant's charter provided that subscriptions to stock should be secured by mortgage on land and slaves; that the subscriber should be entitled to a loan of 50 per cent of the amount of his stock, and that this loan should be secured by the mortgaged property also. W, a stockholder, borrowed money under this provision. The origin of the plaintiff's right was a donation of a part of the price of the mortgaged property, in the sale of it by Mrs. W to H N, plaintiff's husband, who assumed the bank's mortgage. Plaintiff claimed the mortgage was void because the exact sum secured was not declared in it. Judgment for defendant. Appeal.

Howell, J. 1. This is a stipulation of the maximum to be advanced, and is valid. 2. The fact that the transfer was made at a date subsequent to that of the real estate subject to it, does not affect the mortgage rights of the bank. Judgment affirmed.

CASE, REC'R v MARCHAND (1871) 23 La. Ann. 60.

On promissory note against maker. The F Bank held a note against defendant. Before maturity, defendant tendered payment in checks and drafts on the bank, which tender was refused. Thereafter, plaintiff was appointed receiver of the bank. Defense: Defects in proceedings appointing receiver and compensation. Judgment for plaintiff. Appeal.

Wyly, J. 1. It is no defense to the maker of the note that the receiver was not regularly appointed. 2. The bank incurred no obligation to the payee by refusal to pay or accept the drafts and checks. 3. Defendant cannot compensate his debt to the bank. The bank, having refused to accept, was not the debtor of the defendant. Judgment affirmed.

Cited: 33 La. Ann. 1210; 34 id. 610.

MURDOCK v CITIZENS BANK OF LOUISIANA (1871) 23 La. Ann. 113.

To recover special deposit. Plaintiffs were depositors in defendant. Their account was balanced on September 16, 1861, and a balance of \$2,300 in plaintiffs' favor left on special deposit until after the war. Defendant pleaded that two notes held by it, indorsed by plaintiffs, were protested for non-payment in 1862, and plaintiffs' deposit was applied to the part payment of those notes under military orders, and claimed judgment for the difference. Judgment for plaintiffs. Appeal.

Howell, J. The bank cannot claim protection by a military order, for the money was not taken under such order. In the confidential contracts arising from irregular contracts of this nature, compensation does not take place, and

the depository is not authorized to apply the funds on deposit in his hands to the payment of the debts of the depositor, except there is a special mandate from him, the depositor, or a course of dealing which will justify such application of the funds. Judgment affirmed.

Cited: 32 La. Ann. 592; 34 id. 606.

LOUISIANA v SOUTHERN BANK (1871) 23 La. Ann. 271.

Suit to compel payment of license for privilege of banking. The defendant averred that it was exempt from paying a license for carrying on its business, by its charter, and the law authorizing free banks to be established. Art. 17 of sec. 3 of the Revenue Law of 1869 imposes a license on persons engaged in banking under the free banking law of the state. Judgment for plaintiff. Appeal.

Ludeling, C. J. 1. The provision in the charter is a contract binding upon the state as well as the bank. 2. This article is violative of sec. 10 of art. 1 of the Constitution of the United States. Judgment reversed.

Cited: 27 La. Ann. 246; 31 id. 519, 520; 32 id. 84; 33 id. 862.

LOUISIANA v MERCHANTS BANK (1871) 23 La. Ann. 307.

To recover state tax on capital and real estate. Defendant was chartered under the free banking law, which exempted it from a license tax. Plaintiff levied a tax on its capital and real estate. Defense, the exemption above stated. Defendant offered to prove that part of its capital consisted of bonds exempt from taxation. Excluded. Judgment for plaintiff. Appeal.

Howe, J. The free banking laws do not inhibit the imposition of a tax on capital. The testimony was properly excluded. Judgment affirmed.

Cited: 29 La. Ann. 858.

DE FERIET v BANK OF AMERICA (1871) 23 La. Ann. 310.

To recover deposit. Plaintiff sued for a balance of \$2,425.41. Defense, that the account was overdrawn, and a claim of \$1,774.59 in reconvention. Plaintiff replied denying the genuineness of his signature to two checks, one for \$2,500 and one for \$1,700. The evidence showed that plaintiff's bookkeeper and confidential clerk forged his name to the two checks; that when the first one was drawn, it caused an overdraft; that plaintiff was notified, expressed great surprise, and stated he had drawn no check on that day; that upon going to the bank to investigate, he was told the check had been made good by a deposit; that the check was handed to him, and after careful examination was returned without any remark, but that it had not been signed by him; that he continued the bookkeeper in his employ until the second forgery; that, to cover his forgeries, the bookkeeper deposited checks on other banks drawn to plaintiff's order; that the first of these deposits produced a surplus on which plaintiff drew; that the check to cover the second forgery was dishonored, and the overdraft claimed in reconvention thus produced. Judgment for plaintiff. Appeal.

Howell, J. Under these circumstances, the plaintiff cannot be heard to disavow the check for \$2,500. The peculiar facts and circumstances of this case, taken together, must relieve the bank from the stringent rule that the depository must take care to pay none but the checks or drafts of the depositor himself or his acknowledged special agent. This is a proper case to apply the equitable principle that, where one of two innocent parties must suffer, it should be he who was the cause or occasion of the confidence and consequent injury of the other. Judgment reversed.

STATE OF LOUISIANA v GASTING (1871) 23 La. Ann. 609.

Where a person was indicted for larceny of "United States currency," when he stole notes of national banks: Held, that such notes, when circulated as a medium of trade, fell within the definition of "United States currency."

LEVY v BANK OF AMERICA (1872) 24 La. Ann. 220.

To recover money paid on forged indorsement. Plaintiffs bought, from an unknown person who called himself C H M, a state warrant for \$900 drawn to C H M's order, for which they gave their check for \$720, on defendant, drawn to

C H M's order. The unknown person forged the indorsement of C H M on the check, and it was taken by J N, who indorsed it to defendant, which paid it. It turned out the warrant had been raised from \$100 to \$900. Judgment for defendant. Appeal.

Howell, J. Banks are not required to suspend payment until they are furnished with direct proof, that each indorsement preceding that of the party presenting or depositing it is genuine. They must know the party to whom they pay and the signature of the drawer. Judgment affirmed.

WELLS v CITIZENS BANK OF LOUISIANA (1872) 24 La. Ann. 273.

To annul mortgage sale. Plaintiff, who was separate in property from her husband, to secure a stock note and loan, mortgaged her plantation, which was paraphernal property, her husband authorizing the transaction. The property was sold under the mortgage, to defendant. Plaintiff claimed prescription against the claim, and that the transaction was in reality not hers, but her husband's. Defendant relied on the provision of its charter authorizing married women to bind themselves by mortgage conjointly with their husbands and in solido. Judgment for plaintiff. Appeal.

Howe, J. 1. The effect of the charter is to render the obligations of the plaintiff valid. 2. A mere allegation that the transaction inured to the benefit of the husband will not relieve the defendant from her obligation. 3. It is too late now to attempt to annul a judicial sale on the ground that the debt upon which the order of seizure and sale was granted, was prescribed. Judgment reversed.

CRESCENT CITY BANK v HERNANDEZ (1873) 25 La. Ann. 43.

On check. Defendant gave B power of attorney "to make checks and draw money out of any bank where deposited." B drew a check on the G N Bank to the order of H & B, who deposited it in their account in the plaintiff bank, and drew out the proceeds. The check was given in exchange for a check of H & B, as accommodation, at a time when defendant had no funds in the G N Bank. H & B's check was drawn on the plaintiff bank when their account was overdrawn. Defendant presented H & B's check on plaintiff bank before the latter presented defendant's check at the G N Bank. Payment of H & B's check being refused, defendant stopped payment of his check. Plaintiff bank sued. Defense, want of B's authority to draw checks when there were no funds; that H & B's account was overdrawn when the check was deposited; and notice before presentment for payment. Judgment for plaintiff. Appeal.

Kennard, J. 1. When an agent issues a commercial obligation, authorized by the terms of his mandate, the legal presumption is that it was for a valuable consideration that has actually accrued to the benefit of his principal, and that, therefore, the principal is bound by it; and third parties who, acting on the presumption, receive such negotiable obligations are protected against the equities of which they have had no notice. 2. A deposit to the credit of an overdrawn account is fully as legal and unsuspicious as one to an account already credited with a balance. 3. Plaintiff's rights vested when the check was deposited; what happened after that time between the original parties cannot prejudice those rights. Judgment affirmed.

Cited: 27 La. Ann. 677.

WATERHOUSE v CITIZENS BANK OF LOUISIANA (1873) 25 La. Ann. 77.

Action on draft drawn to the order of the plaintiff, by the O Bank, on the defendants. The basis of the O Bank's demand on defendants was a fund collected by defendants on drafts sent by the O Bank. Defendants contended that these drafts had been paid to them in confederate money to the knowledge of and without objection from the O Bank. They refused to pay plaintiff's draft. Judgment for plaintiff. Appeal.

Taliaferro, J. 1. The defendants were agents of the O Bank and bound to collect their draft in lawful currency. 2. If that were impossible, they should have given notice to their principal. Judgment affirmed.

LEVY v PIKE (1873) 25 La. Ann. 630.

For the value of a deposit. Defendants were bankers. Plaintiff carried a general account with them. He left a box containing valuables with defendants for

safe-keeping. It was stolen from them in spite of ordinary prudence and diligence. Judgment for defendants. Appeal. Judgment reversed. Rehearing.

Taliaferro, J. 1. That plaintiff was a general depositor did not render this other than a gratuitous bailment. 2. The defendants are liable only for gross or inexcusable negligence. Order of reversal annulled. Judgment of the district court affirmed.

GIOVANOVICH v CITIZENS BANK (1874) 26 La. Ann. 15.

To recover promissory notes. The plaintiff placed in the hands of D, a note broker, three notes to sell. D pledged the notes to defendant bank to secure a loan. Plaintiff alleged the bank gave no consideration for the notes, and was not a bona fide holder. Judgment for plaintiff. Appeal.

Morgan, J. 1. The burden of proof was on the plaintiff to establish the allegations of his petition, upon the truth of which he alone could recover. 2. Being the lawful possessor, D was, as to third parties, the owner; being the apparent owner, he could dispose of them; if he saw fit to place them in the hands of the bank in extinction of or as security for a lawful debt, the bank had the right to receive them, and they must remain with the bank until the debt is paid. Judgment reversed.

Cited: 35 La. Ann. 1173; 39 id. 93; 40 id. 135.

CITIZENS BANK OF LOUISIANA v JAMES (1874) 26 La. Ann. 264.

For specific performance. J J was indebted to plaintiff, a bank, in the sum of \$109,000, partly for a stock note, to secure which his plantation was mortgaged. Part of this sum, being in arrears, C L J agreed that the mortgage should be foreclosed, and that the bank should purchase the property, and sell the same back, with the mortgage stock attached, to C L J for \$50,000, payable in twenty years, on his stock note. C L J was to deposit with the bank certain notes to secure the payment of his stock note. C L J's instalments being unpaid, the bank sued for 10 per cent interest, as provided by its charter, and for specific performance. Defendant pleaded error of fact, in that he believed at the time of the contract that the land was more valuable than it really was. Judgment for defendant. Appeal.

Morgan, J. 1. Defendant's error as to the value of the property which he agreed to buy was not error of fact, but error of judgment. This is an error for which the law furnishes no relief. 2. It is not in our power to force the defendant to comply with his contract. The penalty he incurs for violating it is the damage he has occasioned. Judgment reversed, and for plaintiff for performance or damages, in alternative.

Cited: 34 La. Ann. 390.

STATE v ACCOMMODATION BANK (1874) 26 La. Ann. 288.

To forfeit charter. The "Loan and Pledge Association" was incorporated in 1868, to loan money on pledge on movable property. In 1870 an act authorizing a change of name and giving power to receive deposits and to do a general banking business was passed. This act was accepted by a majority only of the stockholders. The attorney-general sued to forfeit the charter. Judgment for plaintiff. Appeal.

Wyly, J. Legislative alterations of the charter of a private corporation, when merely auxiliary and not fundamental, may be accepted by a majority of the incorporators, and such acceptance will bind the whole; but if such alteration be fundamental, the acceptance must be unanimous. The alterations proposed fundamentally changes the character of the charter. Judgment affirmed.

Cited: 34 La. Ann. 1176.

LOUISIANA STATE BANK v HIBERNIA BANK (1874) 26 La. Ann. 399.

To recover on forged checks. A customer of plaintiff's had a cash deposit of \$314.60 with plaintiff. He deposited two forged checks drawn on defendant, one for \$9,857.63, the other for \$10,280.71. During the day he presented a check for \$5,000, which plaintiff cashed. Later in the same day he presented a check for \$10,000, which was not cashed by plaintiff. An hour later plaintiff sent the forged checks to defendant, who certified and returned them. Within six hours thereafter defendant discovered the forgeries and notified plaintiff, but the forger had made his escape. Plaintiff sued for \$4,685.40. Judgment for plaintiff. Appeal.

Wyly, J. 1. If the advance had been made to the forger after the certification of the check, or if the plaintiff had parted with its money in consequence thereof, there would be no doubt as to the defendant's liability. 2. But the plaintiff paid out its money on the faith of the forged checks at least one hour and one-half before defendant gave the certification or even had knowledge of the existence of the forged checks. Judgment reversed.

TEUTONIA NAT. BANK v LOEB (1875) 27 La. Ann. 110.

On note. Defendants drew a note for \$2,586 to G W & Co.'s order, who indorsed it to plaintiff bank. Defendants pleaded that the note was given for the accommodation of G W & Co., who pledged it to the plaintiff to secure a note of their own; that plaintiff held it on account of other indebtedness of G W & Co. to plaintiff; that after learning this, defendants went with a member of G W & Co. carrying legal tender to the amount of G W & Co.'s note, and offered to pay it. Plaintiff refused to accept the money. They notified plaintiff that defendants' note was an accommodation note and warned them not to protest it. Plaintiff refused to give up the accommodation note and protested it. Defendants claimed damages in reconvention, and received judgment therefor. Appeal.

Taliaferro, J. 1. The plaintiff had no right to hold defendants' note, pledged to secure a particular debt of G W & Co. on account of any other indebtedness of that firm to the bank. 2. When defendants, and also G W & Co. with them, offered to pay and take up the note of the last-named parties, the bank upon receiving payment in full for that note should have surrendered the collateral. 3. No formal tender was required after the money was refused by plaintiff. Judgment affirmed.

Cited: 36 La. Ann. 67; 50 id. 89.

MECHANICS & TRADERS BANK v BARNETT (1875) 27 La. Ann. 177.

On note. Defendant gave to C M & Co. his note for \$3,100. C M & Co. passed it to plaintiff bank as collateral security for three of their own notes of \$1,000 each, discounted by the bank. Plaintiff sued for full amount of the collateral note. Defendant proved that he had paid two of the \$1,000 notes, and was willing to pay the third, but not more, as his note to C M & Co. was to plaintiff's knowledge, an accommodation note only. Art. 415, C. P., exonerated one making a formal real tender of the amount due, from subsequent interest and costs. Defendant had not made such a tender. Judgment for plaintiff for \$1,000. Appeal.

Wyly, J. 1. In law and in equity the defendant ought not to be required to pay more than the amount for which the pledge was given. 2. The defendant is not entitled to the exoneration provided by art. 415, C. P. Judgment affirmed, with interest and costs added.

CITY OF NEW ORLEANS v BANK OF LAFAYETTE (1875) 27 La. Ann. 376.

Where a bank, organized subsequent to the adoption of the constitution of 1868, claimed exemption from a tax on its capital stock under the Act of 1857, No. 192, held, the constitution, not having declared the property of banks exempt, any law in conflict therewith is stricken with nullity.

LOUISIANA SAV. BANK v BUSSEY (1875) 27 La. Ann. 472.

On note. Art. 3165, revised code, as amended February 23, 1872, made it lawful for a pledgor to authorize the sale of the property pledged in such manner as might be agreed between the parties. After the amendment, defendant made a note to plaintiff and pledged stock to secure it. It was agreed in writing that on defendant's failure to pay the note, plaintiff might dispose of the stock at private sale. Defendant failed to pay. Plaintiff sold the stock. Defendant admitted in his answer that the transaction was subsequent to February 23, 1872. He contended that the stock would have brought more at a public sale and that he should have an allowance on that account. Judgment for plaintiff. Appeal.

Wyly, J. According to the judicial admissions of defendant, he cannot avail himself of the fact that the sale was a private and not a public one. Judgment affirmed.

Cited: 34 La. Ann. 220.

NEW ORLEANS v PEOPLES BANK (1875) 27 La. Ann. 646.

For taxes. An act was passed in 1857, exempting free banks from municipal taxation. Art. 118 of the constitution of 1868 annulled this act. The defendant bank was incorporated in 1869. In 1870 a law was passed authorizing a tax on all property in the city. In 1873 a tax was laid on defendant's capital stock, and this suit was brought to recover the tax. Defendant claimed it was exempt from taxation, and that the city could not tax a bank without the authority of a state law. Judgment for plaintiff. Appeal.

Wyly, J. 1. The Statute of 1857 had been stricken with nullity by the constitutional provision referred to in 1869; it therefore formed no part of the contract arising from the act of incorporation. 2. The capital of the bank is its property, and is liable to taxation unless specifically exempted. Judgment affirmed.

Cited: 31 La. Ann. 444, 827; 32 id. 84; 33 id. 857, 865; 36 id. 434; 41 id. 189, 941; 44 id. 669; 52 id. 1092.

MECHANICS & TRADERS BANK v POWELL (1875) 27 La. Ann. 647.

For proceeds of sale of mortgaged property. P borrowed from the plaintiff \$20,000 on four notes, and secured them by mortgage. P could not pay at maturity. L & L loaned him the money to do so, and took the mortgage notes by manual delivery from plaintiff's president as collateral security. P paid the plaintiff. L & L afterward pledged the notes to plaintiff to secure a loan to them. Afterward the rights of Z and B, the third opponents, arose. The bank sold the mortgaged property because of non-payment of L & L's loan. The third opponents claimed that the payment by P extinguished the mortgage. Judgment for plaintiff. Appeal.

Howell, J. L & L took the place of the original lender. This did not extinguish the mortgage, nor did the manner in which the evidence thereof was delivered to L & L have that effect. Judgment affirmed.

Cited: 105 La. 530.

NEW ORLEANS v METROPOLITAN BANK (1875) 27 La. Ann. 648.

Suit to collect municipal tax on bank capital. The defendant contended: 1, That it was a free bank, and its capital, therefore, exempt; 2, that any law by which the city assumed to tax was unconstitutional; 3, that the payment of 10 per cent of the proceeds of unredeemed pledges into the hands of the trustee of the metropolitan police district was a computation of taxes. Judgment for plaintiff. Appeal.

Howell, J. 1. The bank is not exempt because it is free. 2. The defendant, having been incorporated since the adoption of the constitution of 1868, there is no contract between it and the state, and no conflict with the constitution. 3. The payment of the 10 per cent of the proceeds of unredeemed pledges is not a computation of taxes. Judgment affirmed.

Cited: 31 La. Ann. 444, 827; 33 id. 857, 865; 36 id. 434; 41 id. 941.

SOUTHERN BANK v LOUISIANA NAT. BANK (1876) 28 La. Ann. 97.

Sequestration. Plaintiff bank held a large number of coupons of city bonds. It alleged that funds arising from taxes levied to pay said coupons, were deposited in defendant bank, and that there was danger of defendant parting with same and prayed that they be sequestered. Defendant was not the fiscal agent of the city. The funds were deposited by the city as depositor to the credit of the interest coupons. Motion to set aside writ. Granted. Appeal.

Howell, J. 1. The title to the funds is not vested in the holders of the coupons and hence such holders cannot properly sequester the same as owners. 2. The defendant bank being the depository of the city, an individual depositor of said bank, the writ of sequestration cannot properly issue against the bank on a claim against the city. Judgment affirmed.

Cited: 32 La. Ann. 291.

LOUISIANA NAT. BANK v CITIZENS BANK (1876) 28 La. Ann. 189.

To recover money paid on raised check. A check was drawn on plaintiff bank for \$27. The check was raised to \$2700, and in this condition certified by plaintiff. A second bank took it for value and sold it for value to the defendant bank

which plaintiff paid. Plaintiff discovered the forgery and sued to recover from defendant. Defendant cited the second bank in warranty. The latter set up the certification in defense. Judgment for plaintiff. Appeal.

Ludeling, C. J. The certification created an engagement to pay the check, and the plaintiff became pecuniarily liable to any innocent holder thereof for the debt which it had certified was "good." Judgment reversed.

HELWEGE v HIBERNIA NAT. BANK (1876) 28 La. Ann. 520.

Action on a raised check. The defendant certified a check for \$41. There was a blank between the words forty-one and dollars, in which the drawer, after certification, inserted the words "hundred and fifty." The plaintiff acquired it for value in the regular course of business. There was nothing in the appearance of the check to excite reasonable suspicion. Judgment for defendant. Appeal.

Wyly, J. 1. By the law merchant of this country, the certificate of the bank that a check is good is equivalent to acceptance. 2. Defendant was negligent in not crossing the blank with a pen. Judgment reversed.

HOWARD v MISSISSIPPI VALLEY BANK (1876) 28 La. Ann. 727.

To recover money paid on forged drafts. Plaintiff's customer, U, was in the habit of drawing on the plaintiff and having his drafts discounted by defendant bank. A stranger drew seven drafts at short intervals, forging U's name. Defendant discounted them without indorsement by the holder. Plaintiff paid each as it was received. Plaintiff discovered the forgeries after all had been paid. Judgment for plaintiff. Appeal.

Taliaferro, J. 1. The drawee of a bill is presumed to have a better knowledge of the signature of the drawer than the holder. 2. The loss should fall rather upon the plaintiff than upon the defendant. Judgment reversed.

NEW ORLEANS NAT. BANK v WELLS (1876) 28 La. Ann. 736.

On bond. W was paying teller of plaintiff bank. As such, he, with other defendants as sureties, gave the bank a bond, to "save the said president and directors of the bank harmless from negligence or misconduct of W." W defaulted. The bank, through its president and directors, sued on the bond. Defendants' objection that the bond was not given in plaintiff's favor was sustained and suit dismissed. Appeal.

Howell, J. The expression in the bond could only apply to the official capacity of the president and directors. It was a bond in favor of the bank. Judgment reversed.

Cited: 33 La. Ann. 733.

STATE v ACCOMMODATION BANK (1876) 28 La. Ann. 874.

Mandamus. Relator, a stockholder in defendant, a bank, sued out a mandamus to compel defendant to allow him, with experts, to examine defendant's books and papers. Defendant objected that it would be injurious to allow examination by experts. On May 13 the court rendered final judgment authorizing relator to make the examination without experts. On May 23 the court made an ex parte order appointing experts to aid relator. Appeal from ex parte order.

Wyly, J. It was not in the power of the court to make this supplemental order after final judgment. Ex parte order annulled.

BLANC v MUTUAL NAT. BANK (1876) 28 La. Ann. 921.

Negligence for failure to demand payment. Plaintiff held a note on which G & Co. were indorsers. At maturity the note was dishonored by non-payment. An extension was granted. G & Co. indorsed on the note: "We hereby waive protest and hold ourselves equally responsible" to pay the note on November 25. Plaintiff gave the note to defendant, a bank, for collection. Defendant made no demand for payment at maturity of extension. Judgment for plaintiff. Appeal.

Leonard, J. After the dishonor of the note, the situation of G & Co. was no longer that of indorsers on commercial paper, but of embarrassed debtors, obtaining time as best they could from the creditors. The waiver of protest was not necessary. They waived something to which they were not entitled, and which they had no reason whatever to expect. Judgment reversed.

MUTUAL NAT. BANK v ROTGE (1876) 28 La. Ann. 933.

On check. G drew a check on a bank, in favor of C, who indorsed it to R, who also indorsed it. The two indorsers had it certified by the drawee bank. Subsequently R delivered it to plaintiff bank for value. The drawee bank refused payment next day. Plaintiff notified R the same day, and R notified C the next day. Plaintiff sued C and R. They pleaded laches in not having the check protested; and that they were released by the acceptance of plaintiff of drawee bank's direct promise, evidenced by its certification. Judgment for plaintiff Appeal.

Howell, J. The plaintiff was not guilty of laches. That the drawee certified it and thereby became unconditionally bound to the holder did not affect the liability of the indorsers if notified in due time of the dishonor. Judgment affirmed.

BOGEL v TEUTONIA NAT. BANK (1876) 28 La. Ann. 953.

On deposit account. The plaintiff indorsed a note drawn by W. Defendant, a bank, discounted it, and gave plaintiff credit for the proceeds. W was defendant's cashier. He was also plaintiff's attorney in fact, and was authorized to transact plaintiff's bank business. Both W and the plaintiff were away from the city when the note fell due. It was not protested. W subsequently charged plaintiff's account with the amount thereof. When his account was balanced plaintiff objected to the charge, claiming he was discharged by want of protest. No correction in the account was made, which was several times afterward balanced without plaintiff's objection. Nineteen months after the first balancing he sued. Judgment for plaintiff. Appeal.

Morgan, J. As W was authorized by the plaintiff to transact his bank business, he was authorized to cause the amount of the note to be charged to the plaintiff's account; and he must be held to have acquiesced, by his subsequent conduct, in the act of his agent. Judgment reversed.

CARR v LOUISIANA NAT. BANK (1877) 29 La. Ann. 258.

To recover for selling collaterals. In 1871 plaintiff borrowed money from defendant bank and pledged legislative warrants as collateral. The note fell due August 18, 1872, but was extended for one year. Plaintiff's pledge authorized defendant to sell the warrants at any time and apply the proceeds to his loan. On February 28, 1872, an act was passed authorizing the sale of pledged property as the parties might agree, and making its provisions applicable to existing pledges. On March 21, 1872, plaintiff authorized defendant to sell the legislative warrants. Defendant exchanged the legislative warrants for auditor's warrants, which it sold. Judgment for defendant. Appeal.

DeBlanc, J. 1. Plaintiff cannot complain of the Act of February 28, 1872, which validated his invalid contract, and imparted to its last renewal a validity which perhaps it had not at its origin. That the authority to sell legislative warrants was no authority to sell the auditor's warrants is a distinction in form, not in substance. The bank sold what it held as a pledge. Judgment affirmed.

ADAMS v DAUNIS (1877) 29 La. Ann. 315.

Rule on creditors to show cause why their mortgages should not be canceled. The receiver of a national bank alone answered. He set up the bank's judgment against a former owner, recorded in 1867 as a judicial mortgage and never reinscribed. Execution had issued on this mortgage, and the property was sold thereunder. The plaintiffs were purchasers at a mortgage sale of the property under a later mortgage, which attached ten years after the bank's mortgage was recorded. The sheriff refused to complete the sale unless the claims of the creditors were paid. Rule absolute. Appeal.

Marr, J. 1. The bank's judicial mortgage was finally extinguished as to the bank and the purchaser, by the sale made under execution issued on the judgment. 2. When ten years have elapsed after inscription without reinscription, those not parties to the mortgage may safely contract with the mortgagor as if no such inscription had ever been made. 3. Sec. 57 of the National Bank Act was merely declaratory and not intended as an abridgment of the power and jurisdiction of the state courts. A national bank or the receiver thereof can be sued in a state

court. Jurisdiction depends upon the location of property and the residence of the defendant. Judgment affirmed.

Cited: 31 La. Ann. 103, 726; 34 id. 665; 35 id. 763; 45 id. 1420.

NEW ORLEANS NAT. BANK v RAYMOND (1877) 29 La. Ann. 355.

To annul adjudication. The Union National Bank sold land to R on credit, reserving a mortgage for the price. R agreed with the city to erect a market house on the property, R to get the revenue for ten years, not to encumber it, and at the end of that time to convey it to the city. The plaintiff bank obtained a judgment against R under which R's interest in his contract with the city was sold to plaintiff. Mrs. B was subsequently subrogated to plaintiff's rights under the sale. J B was subrogated to the Union Bank's rights under its mortgage, and sought to cancel the adjudication, to the plaintiff bank, of R's contract rights. Judgment for B. Appeal.

Spencer, J. 1. The contract between R and the city could not affect the legal rights of the Union National Bank. 2. Where the rights of ownership and enjoyment are vested in one and the same person, they constitute a unity and cannot be seized and sold separately. 3. There is nothing in the law preventing a national bank from selling its real estate on terms of credit, and reserving a mortgage to secure the price. Judgment affirmed.

Cited: 32 La. Ann. 699; 34 id. 665; 52 id. 1554.

THE WORKINGMEN'S BANK v CONVERSE (1877) 29 La. Ann. 369.

On bond. C was bookkeeper of plaintiff bank. He applied its funds to his own use. The bank sued C and the sureties on a bond given for his faithful conduct. Defendants excepted because plaintiff, in incorporating, failed to comply with the provisions of the act providing for the incorporation of free banks, and the general incorporation law did not include banks. Exceptions sustained. Appeal.

Manning, C. J. If plaintiff derives its existence from the free banking law, then it has not complied with the conditions which that law prescribes as essential to its vitality as a corporation, and those conditions are precedent. It does not begin to live until they are fulfilled. If it derived its existence from the general incorporation act, then it is without the power to engage in the banking business. The plaintiff cannot, therefore, sue as a political body. Judgment affirmed.

Cited: 33 La. Ann. 636; 34 id. 534; 35 id. 878; 37 id. 485, 486, 487, 488; 46 id. 1124.

NEW ORLEANS v NEW ORLEANS CANAL &c. CO. (1877) 29 La. Ann. 851.

To collect taxes. The assessors served on defendant bank printed forms to be filled in with items of taxable property. The bank returned them as not having any taxable property. The assessors assessed them at \$700,000 on its capital stock. The city sued to collect the taxes thereon. The bank averred that it held "\$175,000 in United States currency and greenbacks," but it was not proved that this was its capital. Judgment for plaintiff. Appeal.

Spencer, J. If the bank's capital was invested in United States bonds or currency and thereby exempt, the fact of such exemption should be affirmatively proved and not left to inference and doubt. Judgment affirmed.

Cited: 31 La. Ann. 827; 32 id. 160; 33 id. 1450; 37 id. 424, 851.

WORKINGMEN'S BANK v LANNES (1878) 30 La. Ann. 871.

To annul tax sale. Plaintiff bank held a vendor's mortgage on a tract of land owned by B L. In August, 1875, the tax collector sold the property for 1873 taxes to P L, defendant. The bank sued to set aside the tax sale, and for recognition of its vendor's mortgage. The Act of 1875, sec. 3, provided that all penalties for non-payment of taxes should be remitted if arrearages were settled by November 1, 1875. Judgment for plaintiff. Appeal.

Marr, J. 1. The tax collector was divested by the Act of 1875 of all power to enforce the collection of taxes by sale or otherwise before November 1, 1875. 2. B L's creditors have rights of which he cannot deprive them; and when a title, adverse to the claim set up by them, is interposed, they may oppose the absolute

nullities of that title, even if he should prefer to waive them. Judgment affirmed.

Cited: 32 La. Ann. 238; 34 id. 259, 260, 409, 706, 707; 40 id. 370; 42 id. 436; 46 id. 325, 360.

GILLESPIE, GUARDIAN *v* CITIZENS BANK (1878) 30 La. Ann. 1315.

To annul sales. H J and his children, W J and F G, wife of W G, the plaintiff, owned, in equal portions, a tract of land. On June 28, 1859, they mortgaged it to the defendant to secure a loan. F G died in 1870, leaving her husband and F and W, two children, surviving; and H J died in 1871, both intestate. The estates were never ministered upon. In February, 1872, the property was seized and sold under the mortgage to defendant for \$20,000. In June, 1872, Mrs. W J was separated in property from her husband by judgment. In May, 1875, the bank sold the property to Mrs. W J. In March, 1876, W G, the plaintiff, as guardian of his two children, sued: 1, To annul the sale from the bank to Mrs. W J; 2, to annul the judgment separating Mrs. W J and her husband; 3, to annul the mortgage sale to the actual possessor. Mention was not made of the deaths of F G and H J; 4, to annul the original mortgage to defendant. Its charter, sec. 25, enabled married women to bind themselves in solido and conjointly with their husbands, and to renounce and mortgage their property, dotal and otherwise; 5, to recover one-third of the property for F G's children as her heirs and one-sixth as heirs of H J. The court recognized the minors as heirs. Judgment annulling the mortgage sale to the bank, and the bank's sale to Mrs. W J, and judgment against W J, Mrs. W J and the bank for rent at \$1,500, until possession, delivered. Appeal.

Marr, J. 1. These minor children cannot recover possession of the property. 2. Women, married or single, may become stockholders, and may mortgage their property to the bank. 3. The plaintiff and his wards have no interest to demand the nullity of the judgment of separation. 4. They have no right to recover either the shares of the property inherited by them. It is indispensable that there should be an administration of the succession of F G and H J. Judgment amended.

Cited: 32 La. Ann. 770, 772; 35 id. 779, 780; 44 id. 205, 339.

LOUISIANA NAT. BANK *v* BOARD OF LIQUIDATION (1878) 30 La. Ann. 1356.

To compel defendant to fund an admitted claim against the State. The State of Louisiana being indebted to plaintiff, a state warrant was given in payment of the indebtedness. Afterward, school fund bonds were issued by the State, and the plaintiff subscribed for an amount equal to the amount of the warrant and gave the latter in payment. By a decision of the supreme court, the sale of the bonds was declared a nullity. Defendant claimed that as the warrant had been deposited in the public treasury and could only be taken therefrom by direction of the legislature, the plaintiff could obtain no redress in this suit. Judgment for plaintiff. Appeal.

DeBlanc, J. Defendant's claim is not tenable. The fact that the state is in possession of the evidence of its liability, is an additional reason why the unsatisfied and already surrendered warrant should be funded. Judgment affirmed.

Cited: 42 La. Ann. 654, 663.

ABRAMS *v* UNION NAT. BANK (1879) 31 La. Ann. 61.

For loss sustained by defendant's cashing an altered check. Plaintiffs alleged that they sold for B and C four state warrants made out in the name of A; that, to guard against loss from want of proper indorsement, there was an understanding with B and C that the latter, in settlement with the one, for whose account they disposed of the warrants, should make out their check to the order of A; that plaintiff paid B and C the amount realized on the bonds less commissions; that B and C made out their check for the amount in the name of A, and had it certified by defendant; that afterward the check was altered so as to make it payable to bearer, and in that form was cashed by defendant for some unauthorized person; that the warrants were stolen warrants, and the purchasers from plaintiffs were obliged to surrender them to the true owner, and that the loss sustained had fallen on plaintiffs. Defendant excepted that plaintiffs' petition did not disclose any legal cause of action. Judgment sustaining exception. Appeal.

Spencer, J. It was of the essence of plaintiffs' case that they should have al-

leged that defendant at least knew of the "arrangement or agreement" between plaintiffs and B and C. Without such allegation there is no legal cause of complaint against defendant. There was no fault on its part which rendered it liable to plaintiffs. Judgment affirmed.

Cited: 34 La. Ann. 216.

CITY OF NEW ORLEANS v METROPOLITAN LOAN SAV. AND PLEDGE BANK
(1879) 31 La. Ann. 310.

To recover a license tax of \$1,000 for doing a banking business and one of \$400 for transacting a pawnbrokerage business. Defendant claimed that its pawn department was a legitimate part of its banking business, and that it should be required to pay only the license of \$1,000. City ordinances required any person or corporation carrying on two occupations to pay a license for each. Judgment for plaintiff. Appeal.

Spencer, J. The defendant is at liberty to carry on both occupations, but they are, in commerce and in law, regarded and treated as distinct. Judgment affirmed.

Cited: 31 La. Ann. 385; 34 id. 598.

STATE v SOUTHERN BANK (1879) 31 La. Ann. 519.

To recover a license tax due under the Act of 1878. In 1870, the free banking law was passed. Defendant was incorporated under this law in 1873. It claims exemption from the operation of the Act of 1878 which provided for an annual license tax on banks. Judgment for defendant. Appeal.

Spencer, J. All general laws of the state bearing on the same subject matter must be construed together. They do not result in a contract on the part of the state to exempt the defendant from license taxes, and therefore the bank may be compelled to pay license. Judgment reversed.

Cited: 31 La. Ann. 827; 32 id. 84, 105; 36 id. 434; 41 id. 941.

CITY OF NEW ORLEANS v SOUTHERN BANK (1879) 31 La. Ann. 560.

For money had and received. By an act of assembly, the plaintiff was empowered to issue bonds to the amount of \$2,000,000 to liquidate its floating debts, the bonds being deposited with the defendant, plaintiff's fiscal agent, which was to float the bonds at par and pay the debts of the city, a full list of which was furnished by the proper city officers. Defendant disposed of the bonds and applied the proceeds to the payment of the debts, and the city officials ratified its action. Subsequently plaintiff sued defendant claiming that, under the law, certain classes of debts had been unlawfully paid, although they were included in the list furnished to defendant. Judgment for plaintiff. Appeal.

Manning, C. J. The city officers willfully, and in violation of the law, included the debts complained of in the list furnished. Defendant had no option but to pay them. The city officials ratified defendant's action, and plaintiff is thereby estopped from bringing this suit. Judgment reversed.

Cited: 32 La. Ann. 795; 35 id. 222; 39 id. 29, 1065; 40 id. 189; 41 id. 1039; 43 id. 575; 47 id. 90.

CITY OF NEW ORLEANS v LOUISIANA SAV. BANK & S. D. CO. (1879)
31 La. Ann. 637.

To recover license tax. The act incorporating the defendant provided that it should be exempt from taxation, except on real estate. By a subsequent act, plaintiff was empowered to levy a tax on traders, professionals and callings. An ordinance was thereafter passed by plaintiff taxing every bank \$1,000. Judgment for plaintiff. Appeal.

Marr, J. There is a distinction between "taxation" and a "license tax." The legislature may elect what traders and callings the license tax should be levied upon, but all such taxation must be equal and uniform, and the law forbids a special exemption and requires that all composing that class shall be subject to the same imposition. The charter provision does not exempt the bank from the license tax. Judgment affirmed.

Cited: 32 La. Ann. 84, 105; 36 id. 434.

STATE, EX REL. MOREY v JUDGE OF FIFTH DISTRICT COURT (1879)
31 La. Ann. 823.

Mandamus and prohibition to compel the granting of a suspensive appeal from order of sale. Application was made for a forfeiture of charter of X Bank. An order was signed by a judge in chambers, appointing commissioners of property. It was not, in terms, a decree of forfeiture. Issue of forfeiture vel non was put in question by the answer. The commissioners petitioned for leave to sell the bank's property. The relator was a large shareholder. Appeal from the order of forfeiture refused.

White, J. 1. These commissioners were custodians or quasi-judicial sequestrators. The forfeiture of the charter was a legal prerequisite to its liquidation, and no such decree was rendered. 2. A stockholder has an interest in preventing the sale of the property of the corporation by persons having no legal power or mandate so to do. 3. The sale of the assets without legal warrant, by liquidators so denominated, while the corporation is still in existence, might entail irreparable injury. Writs made peremptory.

Cited: 35 La. Ann. 506; 37 id. 119; 46 id. 108.

STATE v CITIZENS SAV. BANK (1879) 31 La. Ann. 836.

Suit to forfeit bank's charter. The Act of 1842 provides that suits for the forfeiture of a bank's charter must be begun by a petition presented by the attorney-general. The State of Louisiana filed a petition alleging that the defendant bank was insolvent and asking for a forfeiture of its charter. The petition did not bear the signature of the attorney-general. B, a stockholder, filed an answer. Petition granted. Commissioner appointed to take charge of the bank. Appeal by B.

DeBlanc, J. The law was not complied with. The bank's officers had no right to waive the service of the petition or any other formality of suit to the prejudice of stockholders. The court could not order liquidation and appoint commissioners until the propriety of so doing had been judicially ascertained. Proceedings annulled and action dismissed.

Cited: 35 La. Ann. 199, 201.

CITIZENS SAV. BANK v HART (1880) 32 La. Ann. 22.

On promissory notes. Defendant, J, executed to his son, M, a power of attorney, to sign and indorse notes, directed and delivered to the G Bank. M gave plaintiff certain promissory notes, signed J, per M, at the same time telling the bank that he had a power of attorney. The bank subsequently sued J and M on the notes. Judgment dismissing the action as to J. Judgment for plaintiff against M. Appeal by plaintiff.

Marr, J. An inspection of the power of attorney shows that the sole object was to enable M to represent his father in any business which he might have with the bank. Proper inquiry by the plaintiff would have established this fact, and therefore defendant is not answerable. Judgment affirmed.

Cited: 37 La. Ann. 262.

CITY OF NEW ORLEANS v PEOPLES BANK (1880) 32 La. Ann. 82.

To collect license tax for nine years. The defendant pleaded that it was a free bank under the Law of 1853, and therefore exempt from payment of this license. Judgment for plaintiff. Appeal.

Manning, C. J. The defendant is a free bank and not subject to a license tax. The constitutional provision that taxation shall be free and uniform does not prohibit or prevent the legislature dividing the objects of taxation into classes. Judgment reversed.

Cited: 43 La. Ann. 960; 52 id. 1092.

CITY OF NEW ORLEANS v NEW ORLEANS CANAL & BANKING CO. (1880)
32 La. Ann. 104.

To collect license tax. The tax was for \$9,000, the amount of municipal licenses for the years 1870-1878. Defendant contended that under its charter it was not liable for license taxes. Its first charter would have expired upon the last day of the year 1870, but in March, 1870, the charter was renewed. The tax was first levied in 1870. Judgment for \$8,000, the court holding that the bank was

not liable for the tax under its old charter for its whole term, and that taxes were not due for 1870. Cross appeal.

Manning, C. J. Exemptions are construed strictly. No act or charter can exempt any particular bank or company from license taxation under the constitution of 1868. If any exemption be claimed it must be of a class. Judgment reversed and judgment rendered for \$9,000.

Cited: 32 La. Ann. 1001; 34 id. 892; 52 id. 1092.

CITY OF NEW ORLEANS v CANAL & BANKING COMPANY (1880)
32 La. Ann. 157.

To recover tax on bank stock. Prior to 1878, a tax was assessed against the capital stock of the defendant. By the Act of 1878, the tax for that year was levied against the shares of the stockholders, and the assessment against the defendant was annulled. The claim was for the sum of \$11,925, being the amount assessed against the stockholders on their shares. Judgment for plaintiff. Appeal.

Spencer, J. 1. This is not a case of double taxation. The bank or its shareholders are not prejudiced by the Act of 1878. If the tax were levied on the bank, it would be paid out of its funds, and the shareholders would receive that much less. If levied on the stockholders, and paid by the bank, or by them, the result is precisely the same. 2. It was not unconstitutional for the legislature to levy the taxes of 1878 on an assessment made in that year. Judgment affirmed.

Cited: 39 La. Ann. 208; 41 id. 437, 1047; 47 id. 1505; 50 id. 1058.

CITIZENS BANK v BOUNY (1880) 32 La. Ann. 239.

To enjoin collection of bank tax. By a provision of its charter the capital of the plaintiff was exempted from taxation. Under the Act of 1878, taxes were assessed on the capital of the bank. Defendant, the tax collector, demanded payment of the assessment. Plaintiff had him enjoined from collecting the tax, on the ground of the exemption contained in its charter. Assessment declared void and injunction made perpetual. Appeal.

Marr, J. The exemption in the bank's charter being based on a valuable consideration, forms a binding contract. The assessment was not made in accordance with law, and is therefore a nullity. Judgment affirmed.

Cited: 48 La. Ann. 36; 52 id. 1088.

CITY OF NEW ORLEANS v NEW ORLEANS SAV. INSTITUTION (1880)
32 La. Ann. 527.

To recover license tax. The sum claimed was \$9,000, being the annual license tax at \$1,000 per year from 1870 to 1878 inclusive. Defendant contended that it was not a bank within the meaning of the statute imposing the tax. After the suit was brought, defendant went into the hands of the receivers appointed by the federal court. The receivers were made parties to the suit, and set up a plea to the state court's jurisdiction. Judgment for plaintiff. Appeal.

Levy, J. 1. The receivers are properly before the court. 2. While not combining all the powers which may be exercised by banks, the defendant is a bank of deposit, receiving deposits and paying interest thereon, and so comes within the statute and is liable for the tax. Judgment affirmed.

HANCOCK v CITIZENS BANK OF LOUISIANA (1880) 32 La. Ann. 590.

To recover deposit. Plaintiff kept a deposit account with the defendant. In 1869, his account was balanced. He withdrew the balance. In 1871, he opened a new account. In the mean time defendant discovered that it had made a mistake, in overcrediting plaintiff's account, to the extent of \$1,730. Defendant never notified plaintiff of this mistake, and he remained in ignorance of it until defendant debited his new account with this amount. Plaintiff brought this action to recover it against defendant. Judgment for defendant. Appeal.

Fenner, J. It was the duty of the bank to notify the plaintiff of the error at once. The plaintiff never authorized the application of his deposit in 1871 to the payment of the debt claimed by the bank. To permit the bank to do so would involve a deception. Judgment reversed.

Cited: 32 La. Ann. 987; 34 id. 606; 35 id. 42; 38 id. 432; 41 id. 432.

LOUISIANA ICE CO. v STATE NAT. BANK (1880) 32 La. Ann. 597.

To recover proceeds of a check. Plaintiff deposited with O Bank a certified check drawn on defendant. On that day the O Bank suspended. It was customary for the banks to exchange checks at the clearing house each morning. The plaintiff had the O Bank and the clearing house served with an injunction restraining them from passing this check. This injunction was disregarded by the defendant, who, with notice of its existence, exchanged the check for one drawn on the O Bank, which was worthless. U. S. R. S. sec. 5228 provides that the assets must remain in statu quo; only special deposits in an insolvent bank may be withdrawn. Judgment for plaintiff. Appeal.

Bermudez, C. J. 1. By the certification the defendant assumed the obligation of paying this check to the plaintiff, and a privity existed. 2. The depositor remains the owner of checks so deposited; the bank is merely the agent for collection. 3. Where a principal invokes the interference of a court of justice to prevent his mandatory from continuing in the performance of his duties, he revokes the agency. 4. A third party is bound by notice of such a revocation. 5. Depositors are not charged with knowledge of the customs adopted by banks in dealing with the clearing house. 6. The statute refers to the assets of the bank which suspends, and not to the property of a customer which may be in its custody for a special purpose. Judgment affirmed.

STATE v LOUISIANA SAV. BANK (1880) 32 La. Ann. 1136.

To recover taxes. Defendant's charter exempted it from taxation on its capital stock. In 1876, it was assessed on its capital stock for five years previous. The Revenue Act of 1871, sec. 28, provided that property omitted from assessment should be assessed for the current and omitted years. The Act of October 12, 1875, constituted a board of assessors, and clothed them with "the powers, duties and responsibilities heretofore prescribed by law." Judgment for plaintiff. Appeal.

Fenner, J. 1. The nullity of defendant's exemption has been previously declared by this court. 2. The legislative authority given to tax the property for the omitted years is not exhausted by the failure of the party or the assessor to place it on the roll, and such assessments are valid. 3. In the absence of proof to the contrary, the assessors must be presumed to have performed their duty. Judgment affirmed.

Cited: 35 La. Ann. 22; 36 id. 434.

TEUTONIA NAT. BANK v WAGNER (1881) 33 La. Ann. 732.

On bond. W was cashier of plaintiff bank. Defendants and three others made a bond, each binding himself for a certain amount specified, for the faithful conduct of W. Three of the bondsmen were discharged by the act of plaintiff. W defaulted. He had used his official position for the purpose of allowing overdrafts on a depositor's account. Plaintiff attached a copy of the bond to its petition. Judgment for plaintiff, not including drafts mentioned. Appeal.

Bermudez, C. J. 1. The bond became a part of the petition. 2. The sureties, by executing the bond, are estopped to deny that the bank was then a living corporation. 3. Although the sureties have stipulated and bound themselves in the same act, they must be considered as having bound themselves each one separately by independent contracts, evidenced by distinct acts. 4. The sureties of an officer are liable, not only for the acts done by him by virtue of his office, but also for those done under color or by means of the office which he holds. Judgment affirmed for plaintiff, and amended to include drafts.

Cited: 34 La. Ann. 57; 35 id. 468; 38 id. 101, 102; 40 id. 240; 51 id. 1959.

STATE v SOUTHERN BANK (1881) 33 La. Ann. 957.

To recover a trust fund. The opponent sent checks to the defendant for collection. Defendant collected them and mingled the proceeds with its own funds, giving credit therefor on the opponent's account, which displayed a balance in opponent's favor. The opponent subsequently drew a check on defendant for more than it was then credited with. The check was presented to defendant. It was not paid. Defendant failed. Opponent contended that it was entitled to a

preference over the other creditors to the extent of the proceeds of the notes. Judgment for defendant. Appeal.

Levy, J. Where a party, for whose benefit a check is collected by a bank to which it is given for collection, subsequently draws against the amount so realized, the relation existing between them is that of debtor and creditor, and not that of trustee and cestui que trust. Judgment affirmed.

Cited: 43 La. Ann. 426.

AIREY v OKOLONA SAV. INSTITUTION (1881) 33 La. Ann. 1346.

To recover special deposit. Plaintiffs deposited with defendant \$4,990.63, subject to the order of plaintiffs' agent, W. W drew many checks which defendant paid and the plaintiffs sanctioned. W finally drew checks aggregating \$2,490.33 which were not for plaintiffs' purposes, but which defendant paid, and charged to plaintiffs. Plaintiffs sued for difference between the amount deposited and the checks rightfully drawn. Judgment for defendant. Appeal. On appeal plaintiffs urged a new and additional demand.

Poche, J. 1. The plaintiffs' conduct concludes them and estops them from subsequently denying the agency of W in the premises. 2. Under the evidence, W's breach of confidence cannot possibly be brought home to the defendant. 3. A demand not embraced in the pleadings cannot be urged on appeal. Judgment affirmed.

LATIOLAIS, ADM'R'X v CITIZENS BANK (1881) 33 La. Ann. 1444.

Injunction. In 1837, D mortgaged to defendant a large tract of land to secure a loan on stock, which he pledged to defendant. Subsequently D sold the land to S, who assumed the payment of D's debts to defendant. S sold part of the land to G and C. In 1875, defendant issued executory process, citing S, G and C as owners and third possessors. D was not made a party. This suit was discontinued on bond given. Subsequently defendant sued D's succession for the balance due under the mortgage and for calls on his stock. The plaintiff, administrator of D's succession, enjoined the suit: 1. Denying the bank's corporate existence; 2, pleading novation; 3, prescription; 4, want of reinscription of the mortgage; 5, lis pendens. Injunction dissolved. Appeal.

Bermudez, C. J. 1. One who contracts with what he acknowledged to be and treats as a corporation, incurring obligations in its favor, is estopped from denying that it was then a corporation. 2. The mere indication by a debtor of a person who is to pay in his place does not operate as a novation. 3. The stock pledged as a security constitutes a standing acknowledgment, during the existence of which prescription did not run. 4. Mortgages executed in favor of property banks are released from reinscription. 5. The proceedings instituted by the bank cannot be pleaded as lis pendens. Judgment affirmed.

Cited: 34 La. Ann. 776; 35 id. 878; 42 id. 734; 44 id. 206; 51 id. 1267.

BENNETT v MECHANICS & TRADERS BANK (1882) 34 La. Ann. 150.

Debt. The C Bank had a balance with the defendant of \$4,000. The C Bank issued a draft to the plaintiff, on the defendant for \$3,000 which he lost, and it was never paid. Under order of the commanding general of the United States Army, which then occupied the state, the defendant paid the balance owing to the C Bank to an officer of the Union Army in confederate notes. The C Bank had knowledge of the payment, and acquiesced in it for nine years after the close of hostilities. The plaintiff then procured from the C Bank an assignment of the balance owed by the defendant to it at the time of the occupation, to the extent of \$3,000. Judgment for plaintiff. Appeal.

Poche, J. The C Bank, having full knowledge of the settlement made of its balance by its debtor, has, by its omission to repudiate such settlement, and by its silence, lasting more than nine years, fully acquiesced in and ratified such settlement, and is now debarred of any right to claim an account of the defendant, its former debtor. Judgment reversed.

Cited: 35 La. Ann. 1164; 36 id. 621; 41 id. 435.

BROWN v PIKE (1882) 34 La. Ann. 576.

Action on a deposit. Plaintiff's mother deposited money with the defendants who formed a private unincorporated partnership, doing a banking business. She

demanding it shortly before suit. Plaintiff's deposit book contained but one entry, that of the deposit, which was admitted to be correct. Civil code, sec. 2248, provides that the books of merchants cannot be given in evidence in their favor. Defendants pleaded the three years' limitation from the date of the credit. Defendants' books were not admitted in evidence. Judgment for plaintiff. Appeal.

Fenner, J. 1. The irregular deposit of a customer with a bank is controlled by the implied convention of the parties, and is modified by the clear, legal understanding that the money will be paid only on demand of the depositor. 2. Defendants' books were inadmissible, for they are "merchants," within the meaning of sec. 2248. Judgment affirmed.

Cited: 41 La. Ann. 1022.

GORDON v MUCHLER (1882) 34 La. Ann. 604.

Action on a deposit. Three creditors of the defendant claimed a balance of deposit due him from the U Bank. The U Bank held a dishonored draft of defendant on which it contended it was entitled to apply the balance. The L Bank held a check on the U Bank for the amount of the credit, which had been presented and protested and written notice given to the U Bank that this was an assignment of the credit. Plaintiff claimed it by virtue of an attachment executed after the above proceedings. The by-laws of the U Bank provided "that all notes discounted, which were not taken up before the last day of grace, should be charged to the parties having the amount to their credit at the time." Judgment for the L Bank. Appeal.

Fenner, J. 1. By-laws, to be valid, must be consistent with the general law. They cannot interfere with the rights and privileges of third parties, not members of the corporation, without their consent. 2. The check and notice operated as a legal assignment. 3. The Louisiana National Bank acquired title to the fund. Judgment affirmed.

Cited: 35 La. Ann. 899; 38 id. 874; 41 id. 432; 43 id. 56, 59.

IN RE LOUISIANA SAV. BANK & SAFE DEPOSIT CO. (1883)
35 La. Ann. 196.

Liquidation of bank. At a stockholders' meeting of the bank, three commissioners were appointed to liquidate its affairs, and a resolution was passed authorizing the officers to have their action confirmed by the court. The officers filed a petition setting forth the facts, and the court passed an order forfeiting the charter and confirming the commissioners. Subsequently the court removed one of the commissioners, who was out of the state and did not file the bond required, and appointed another in his place. Certain creditors excepted to these proceedings. Exceptions overruled. Appeal.

Fenner, J. 1. The forfeiture must be reversed for two reasons: It is ultra petitionem; and the charter of a corporation can only be forfeited at the instance of the state. 2. Courts have jurisdiction over the subject matter of appointing receivers to corporations, and have power to make such appointments in proper cases. 3. The court committed no error in appointing receivers to this corporation on petition of creditors and upon consent of stockholders. 4. The effect of the first judgment of the court was to invest the entire control of the liquidation thenceforward in the court. It had power to remove one and appoint a new receiver. Judgment reversed in part. Affirmed in part.

Cited: 49 La. Ann. 1000; 50 id. 794; 51 id. 1259; 105 La. 177.

BLAFFER v LOUISIANA NAT. BANK (1883) 35 La. Ann. 251.

To recover on checks. The M Bank and the defendant each sent checks on the other to the clearing house at 9 o'clock. The clearing house balance showed that the defendant bank was indebted to the M Bank. But the general balance was against the M Bank, in favor of all the banks. By the clearing house rules all errors in exchanges were to be adjusted before 11 a. m., and if a debtor bank was not able to pay the balances against it, it was to inform the managers before 10 a. m. The M Bank was unable to pay, but did not so notify the manager. Defendant bank credited its depositors with the amount of the checks against the M Bank. Commissioners, subsequently appointed to liquidate the affairs of the M Bank, sought to recover by this suit the full amount of the checks against the defendant bank, although the general clearing house balance had not been paid

and although defendant had paid plaintiffs the actual balance due it as found by the clearing house. Judgment for defendant. Appeal.

Manning, J. 1. The defendant cannot object to plaintiff's capacity to sue as liquidating commissioners after filing its answer. 2. The M Bank tendered the checks it held on the defendant against the counter checks held by the defendant on it, thereby declaring, in effect, to the defendant that the checks it held were treated as paid by the like amount of checks upon it. These mutual credits could not thereafter be recalled by either of the parties, to the detriment of the other. Judgment affirmed.

STATE v MECHANICS & TRADERS BANK (1883) 35 La. Ann. 562.

Proceeding to forfeit a bank's charter. A creditor brought this proceeding in his own name, and without the intervention of the attorney-general. His petition did not allege facts showing defendant's insolvency. Defendant's answer filed by its attorneys alleged it had suspended payment and that it could not meet its cash liabilities. There was no citation of defendant. Judgment for plaintiff. Appeal by the president and directors of defendant, who made objections not raised before judgment.

Fenner, J. 1. A creditor could bring an action for forfeiture of defendant's charter without the intervention of the state or the use of its name. 2. Admissions of fact in defendant's answer may cure defects in the petition. 3. Defendant established its legal insolvency, which justified the forfeiture of its charter under R. S. sec. 284 and C. C. art. 447. 4. The answer must be deemed to have been filed with due authority, and dispensed with the necessity of citation. 5. Objections to matters arising before judgment must, to be available on appeal, be made before judgment. Judgment affirmed.

Cited: 36 La. Ann. 368.

UNION NAT. BANK v LEGENDRE (1883) 35 La. Ann. 787.

Petition against sureties. Defendants L B and E L were indebted in solido in \$5,000 as sureties on the bond of L, a bookkeeper for the plaintiff. During L's employment, M, the teller, embezzled \$15,000. L connived at and concealed the acts of M. By reason thereof plaintiff contended that L and his sureties and M and his sureties became liable in solido for the \$15,000; that the sureties on M's bond paid \$10,000 to effect their release, leaving a balance of \$5,000 for which defendants are liable. It did not appear that M had been discharged. Judgment for defendants. Appeal.

Fenner, J. 1. The relations of solidary obligors did not exist between the discharged sureties of M and the defendants. 2. The discharge of M's sureties did not discharge defendants. 3. Payment by M's sureties did not entitle them to subrogation to the rights of the plaintiff against defendants on L's bond. Judgment reversed.

KENNEDY v NEW ORLEANS SAV. INSTITUTION (1884) 36 La. Ann. 1.

Petition for sequestration of promissory notes. Plaintiff was indebted to defendant, a bank, on promissory notes held by defendant. Plaintiff, knowing defendant had suspended, bought, for less than their value, claims against defendant from defendant's depositors and offered them in payment of the notes. Defendant refused to surrender the notes. Judgment for defendant. Appeal.

Bermudez, C.J. 1. The rights of third parties are fixed at the date of failure, and compensation cannot take place so as to give a preference to one creditor over another. The depositors could not have sold to the plaintiff greater rights than they possessed. 2. It is not necessary that an insolvency of a debtor be judicially declared; it is sufficient that he is unable to pay his debts, and that the party who claims to be benefited had knowledge of his circumstances. Judgment affirmed.

Cited: 38 La. Ann. 366; 42 id. 850.

LEASSIER v KENNEDY (1884) 36 La. Ann. 539.

Action on stockholder's liabilities. Plaintiffs sold stock of a national bank to defendant. Plaintiffs signed the transfer book, leaving a blank for the name of the transferee. The bank refused payment of checks, March 14. On March 15 defendant sold the stock and at the vendee's request filled the transferee blank with

the name of an irresponsible person. On March 17 the bank's circulating notes went to protest. The National Banking Act provided that national banks might do business until their circulating notes were dishonored. A receiver was appointed who sued and recovered against plaintiffs as though they had not sold the stock. Plaintiffs paid the judgment and sued defendant for the amount thereof. Defendant's vendee was a responsible person. Judgment for plaintiffs. Appeal.

Manning, J. 1. The bank was a going concern until March 17. 2. A shareholder in a national bank, while it is a going concern, has the absolute right, in the absence of fraud, to make a bona fide and actual sale at any time to any person capable in law of purchasing and holding the same and of assuming the transferor's liabilities in respect thereto. Judgment reversed.

CROSSLEY v LOUISIANA SAV. BANK (1886) 38 La. Ann. 74.

For deposits and money loaned. Plaintiffs had on deposit with the defendant \$50,000, for which they held certificates of deposit. Afterward they advanced to the bank \$100,000 and also granted it a letter of credit for £20,000. The latter sum was to be used only to restore and maintain the bank in an emergency or financial panic. After \$22,000 had been drawn on the letter, it was countermanded by the plaintiffs. As security for the loans, but not for the certificates of deposit, the bank pledged certain warrants valued at \$300,000. These warrants had been transferred to the bank, to plaintiffs' knowledge, by one who held them merely as pledges. The president of the bank was its creditor to the amount of \$400,000, in which debt the plaintiffs had an interest. In payment of this sum, the corporation issued stock to its president to the value of \$350,000. At the time of the recall of the letter of credit, the bank was so insolvent that the balance of the credit could not restore and maintain it. There was no special emergency. Plaintiffs sued for the amount of the deposits, and loans claiming a lien on the pledged warrants for the latter. Defendant claimed in reconvention \$350,000, the unpaid price of the stock issued to its president, and \$78,000 balance due under the letter of credit. Judgment for defendant. Appeal.

Bermudez, C. J. 1. The plaintiffs are entitled to interest on their balance from the date of demand. 2. The bank could give plaintiffs no better title to the warrants than it had itself. 3. Plaintiffs are not liable for the price of the stock issued to the president, in the absence of any agreement by them to pay for it. 4. Plaintiffs had a right to recall the letter of credit. Judgment reversed.

Cited: 40 La. Ann. 520; 49 id. 734.

SEIXAS v CITIZENS BANK (1886) 38 La. Ann. 424.

Petition to have transfers declared void. C & Sons were private bankers. The firm went to protest on June 10, 1884 and on July 18 following made a cession of their property under the insolvent laws. C, the senior member of the firm, was, up to March 9, 1884, president of the defendant. C & Sons owed defendant money and had transferred to it certain securities for their debt in order to maintain their credit with defendant. The plaintiff, as syndic of the insolvents, sought to have these transfers annulled as illegal preferences. Some of the transfers were made more than three months before the failure, others within three months next preceding the protest of the firm's paper. The revised statutes made void all contracts giving preferences, if made within three months next preceding failure. The plaintiff claimed that the bank had constructive knowledge of the condition of C & Sons, because C was its president; and that the failure of the firm, in the meaning of the statute, occurred on June 10, 1884. Judgment for plaintiff. Appeal.

Todd, J. 1. Where an agent seeks his own personal advantage, without benefit to his principal, his knowledge is not the knowledge of the principal. 2. "Failure," in the revised statutes dates from actual cession or insolvency judicially recognized and declared. Judgment reversed.

Cited: 42 La. Ann. 851; 45 id. 452, 927; 46 id. 1343; 49 id. 12, 940, 944; 50 id. 590; 51 id. 1396, 1658.

KNOOP v BLAFFER (1887) 39 La. Ann. 23.

Action to enforce director's liability. Defendants were directors of the M and T Bank. At no time between the first day of January, 1878, and the 19th of March, 1879, did they have on hand one-third of their cash liabilities, in addition to their

securities for circulation, and an equal amount in specie, but they still kept making loans and discounts. They furnished the state treasurer statements representing that the bank was solvent, when in fact it was insolvent. The revised statutes, sec. 301, provides that when a bank is in such condition it must not for ten days loan any money or make any discounts, and every director or manager shall be liable individually for all its debts and obligations. The bank failed and the plaintiffs brought this action. The defendants pleaded the Statute of Limitations. Judgment for defendants. Appeal.

Watkins, J. 1. Action for damages resulting from an offense or quasi-offenses are prescribed by one year. 2. Plaintiff's action is on *ex quasi delicto*, and not *ex quasi contractu*. The marked distinction between a quasi-contract and an offense is that the act which gives rise to a quasi-contract is a lawful act and is therefore permitted, while the act that gives rise to an offense is unlawful and therefore forbidden. Judgment affirmed.

Cited: 41 La. Ann. 113, 1039; 43 id. 575, 1167; 47 id. 90.

SALOY v HIBERNIA NAT. BANK (1887) 39 La. Ann. 90.

Petition to recover certain bonds from defendant. Plaintiff executed title to a piece of property to M before a notary, and, as a guarantee that a mortgage thereon would be erased, deposited with the notary the bonds in controversy. The notary became indebted to defendant and pledged, as security, the bonds, which were payable to bearer, and negotiable and transferable by delivery. There was no evidence of bad faith on the part of the bank. Judgment for defendant. Appeal.

Watkins, J. The transferee, for value, of negotiable securities not due, from the possessor and apparent owner, gets a title which cannot be defeated without proof of actual or constructive notice of the imperfect title of the transferrer, amounting to *mala fides*. Judgment affirmed.

Cited: 40 La. Ann. 132; 42 id. 1068.

LOUISIANA SAV. BANK & SAFE DEPOSIT CO. (1888) 40 La. Ann. 514.

Accounting. The commissioners for the liquidation of the Louisiana Sav. Bank, filed an account in which the heirs of R P were placed as ordinary creditors. The distributive share of the heirs, who were minors, was \$9,000, which sum was deposited in the bank, subject to the control of their mother. Afterward an order of court directed the withdrawal of the fund from the bank, and its investment in United States bonds. The mother presented this order to the bank's president, who told her that he would send the money to Washington and there buy the bonds for the heirs. The mother agreed, surrendered her bank book, and received certificates of deposit for the money. The investment was never made and the bank failed shortly after this transaction. The heirs claimed that the last transaction converted the original deposit into a special deposit and entitled them to preference. The liquidators made some payments under *ex parte* orders. Judgment sustaining the commissioners' account. Appeal.

Todd, J. The issuing of the certificates of deposit in this case cannot be regarded as changing, in any wise, the character of the deposit. The claim was properly construed to be an ordinary debt of the bank. The orders, although irregular, must be deemed *prima facie* correct. Judgment affirmed.

Cited: 43 La. Ann. 426.

FISK v GERMANIA NAT. BANK (1888) 40 La. Ann. 820.

For value of depositum. A box was deposited by F in the name of A C with defendant, receiving a receipt therefor, which entitled the bearer to obtain possession of the box. On F's death a messenger sent by A C presented the receipt to the defendant and received the box. It was never returned. The plaintiffs, the wife and son of F, claimed that the box contained securities of a specified value and sued the bank therefor. Judgment for defendant. Appeal.

Poche, J. The bank was bound to restore the thing deposited only to the person who delivered it, or in whose name the deposit was made, or who was pointed out to receive it. This is precisely what was done by the bank in the premises. Judgment affirmed.

FIRST NAT. BANK OF SHREVEPORT v BOARD OF ASSESSMENTS (1889)
41 La. Ann. 181.

Petition to reduce tax assessment. The bank returned to the assessor a statement showing the valuation of the capital stock to be \$200,000, deducting therefrom the amounts then invested in United States bonds, \$150,000, and in state bonds, \$25,000, aggregating \$175,000, leaving a difference of \$25,000 as representing the value of the shares which had been assessed at \$100,000. Sec. 28 of Act 98 of 1886 provided that the bank's property should be assessed to the bank, and the pro rata of such direct property taxes and of all exempt property, proportioned to each share of capital stock, should be deducted from the amount of taxes assessed to that share. The bank contended that under this section the United States and state bonds, being exempt property, should be counted out, and the shares assessed at the difference. Judgment for defendants. Appeal.

Bermudez, C. J. 1. Shares in banks, whether state or national, are liable to taxation by the state, although the capital of the bank may be entirely invested in United States bonds. 2. The statute means all exempt property, which does not form part of the capital of a bank represented by shares. Judgment affirmed.

Cited: 42 La. Ann. 610, 1133, 1177.

STATE OF LOUISIANA AND CITY OF NEW ORLEANS v TRADERS BANK
(1889) 41 La. Ann. 329.

Petition for recovery of a license tax. The plaintiffs claimed \$600 as due each for licenses for the year 1888. The defendants alleged that the licenses were not equal and uniform and not graduated, and therefore the act imposing them was unconstitutional. Licenses of \$600 were imposed on all banks whose capital was less than \$800,000. The constitution provided that the legislature might levy a license tax, and in such case should graduate the amount of such tax, to be collected from persons pursuing the several trades, professions and callings. Judgment for plaintiffs. Appeal.

Bermudez, C. J. 1. The licenses are the same on all banks in the same class; they are, therefore, equal and uniform. 2. As no restriction was placed by the constitution on the legislature, this body has the exclusive right of determining the method in which the graduation should take place. Judgment affirmed.

Cited: 41 La. Ann. 521; 43 id. 143.

CITIZENS BANK OF LOUISIANA v HYAMS (1890) 42 La. Ann. 729.

On stock calls and loan. H H subscribed to stock in the plaintiff bank, and secured his subscription by mortgage. He pledged his stock with the bank to secure a loan. Subsequently proceedings were instituted against H H under acts of Congress of July 17, 1862, to confiscate the property. A judgment of condemnation only was rendered and the property was sold to the bank, which applied the proceeds to H H's indebtedness. Subsequently the bank attempted to convey the property to I H in fee. I H failing to keep his engagements, the bank had the property sold again, and became the adjudicatee. Afterward a United States court recognized defendants, H H's heirs, as owners of the property. The bank demanded calls on the stock and the balance of the loan, and sued. Defendants pleaded confusion and prescription and that they were only beneficiary heirs. Judgment for defendants. Appeal.

Bermudez, C. J. 1. The fee never was divested from the confiscatee. The sale of the ownership of the property and of the stock to I H was an empty and idle ceremony, so that the bank, never having united the qualities of creditor and debtor, its claims were not extinguished by confusion. 2. The possession of the pledge was a constant recognition of the debt, which prevented prescription from ever beginning to run. 3. As beneficiary heirs the defendants are not liable beyond the assets of their author. Judgment reversed.

MOORE v LOUISIANA NAT. BANK (1892) 44 La. Ann. 99.

For negligence. Plaintiff shipped goods to a firm and transmitted a draft for the price to defendant, a bank, for collection. To the draft were attached the warehouse receipts. Defendant delivered the draft and receipts to the drawees, who accepted and returned the draft, but kept the receipts, which they subsequently sold. The draft was not paid. Defendant had no instructions as to the receipts. It did

not know that the insolvency of the drawees was imminent. Judgment for defendant. Appeal.

Breaux, J. In the absence of instructions the collecting agent was authorized to infer that the receipts were to be surrendered on acceptance. The duty of the collecting bank was to obtain the acceptance. The indorsement for collection does not pass title to the proceeds of the paper, but makes the indorsee or collecting agent the trustee of the holder, and as such he cannot be rendered liable, if he complies with the agreement. Judgment affirmed.

MERCHANTS & FARMERS BANK v HERVEY PLOW CO. (1893) 45 La. Ann. 1214.

Execution on defendant's property to pay plaintiff's judgment. On the day of the sale the F National Bank filed a third opposition, claiming the proceeds of the real estate by right of mortgage. Prior to plaintiff's judgment, defendant had executed to the F National Bank a mortgage on its real estate to secure an indebtedness to the bank. At the same time the bank agreed not to apply any deposits made by defendant to the payment of the mortgage debt. Deposits were subsequently made and checked out by the company in the transaction of its business. Judgment in favor of the F National Bank against the proceeds of the real estate for the amount of its claim. Appeal.

Breaux, J. In accordance with the agreement, the F National Bank became a depository of defendant's money, and could not transfer it to its own account in satisfaction of the secured indebtedness. The agreement was legal and unobjectionable. Judgment affirmed.

Cited: 47 La. Ann. 204.

CLASON v CITY OF NEW ORLEANS (1894) 46 La. Ann. 1.

For an injunction. Plaintiffs were a firm domiciled in Manchester, England, and doing business in New Orleans, through an agent. They deposited in a New Orleans bank. The city taxed their deposits, and plaintiffs enjoined collection of the tax. Injunction granted. Appeal.

Nicholls, C. J. 1. The relation between the plaintiffs and the bank were those of creditor and debtor. Debts due to a non-resident of a state are not liable to be taxed by a state in which he does not reside. 2. The fact that the plaintiffs have a resident clerk acting for them in the city of New Orleans, and that they have an office and pay a license there, is unimportant. They are non-residents. Judgment affirmed.

Cited: 49 La. Ann. 46, 1175; 51 id. 1032; 52 id. 1332.

AUGUSTI v CITIZENS BANK OF LOUISIANA (1894) 46 La. Ann. 529.

For an injunction. On July 16, 1836, H C and A C mortgaged a lot to defendant bank to secure a stock loan. In 1890 the mortgage was foreclosed and the lot adjudicated to the defendant. In 1883 the property was sold for taxes to H, who conveyed it to L. In 1887 it was sold for taxes to the plaintiff, who enjoined defendant from slandering his title, and prayed to be quieted in his possession. From 1870 to 1885 taxes were assessed against the estate of A C, while the property was owned by H and A C. From 1886 to 1888 they were assessed to S, and thereafter to plaintiff. Sec. 24 of the bank's charter provided that mortgages given to secure its stock loans could be closed in whosoever possession the property might be found, notwithstanding any alienation or change of possession. Judgment for plaintiff. Appeal.

Breaux, J. 1. Nothing in the charter prevents a tax sale of the property of a mortgage shareholder. 2. The defendant, an interested party, permitted the tax deeds to remain on record, and it did not devolve upon the assessor to test their validity in determining in whose name to make the assessment. 3. The assessment was made according to the record, and became the basis of a valid sale. Judgment affirmed.

Cited: 49 La. Ann. 1475; 51 id. 809, 978; 52 id. 1158, 2048; 104 La. 715.

CITIZENS BANK v JANIN (1894) 46 La. Ann. 995.

Seizure and sale under judgment. The Third National Bank of New York intervened. It had loaned to defendant, J, a large sum, to secure which J executed to it

a chattel mortgage on a steamboat in Louisiana. J remained in possession of the boat, under an agreement, as agent of intervenor. J leased it to C without intervenor's knowledge. Intervenor subsequently discovered the lease, and C consented to hold the boat as its lessee. Plaintiff obtained a judgment against J, and sold the boat thereunder. The bank of New York intervened and claimed the proceeds, relying on the chattel mortgage as a pledge. Judgment against intervenor. Appeal.

Breaux, J. 1. Possession is essential to complete a real right to movables. It must be real and effective at all times; it must be apparent and well known. In this case the pledgee, during the pledgor's active operations, was not in possession. 2. Delivery of possession to the pledgee must be given by the pledgor, and not by his lessee. Judgment affirmed.

SUCCESSION OF THOMSON (1894) 46 La. Ann. 1074.

To recover calls on stock. T died owning stock in the C Bank. The bank accepted to the homologation of the account of T's executrix, claiming \$17,080 in calls on T's stock, less a credit of \$8,040, the amount derived from the sale of property T had mortgaged to secure his subscription. At this sale the bank purchased the property and the stock. It was contended that T assumed no personal responsibility when he subscribed, the mortgaged property only being liable, and that the mortgage sale amounted to a forfeiture of the stock, which released T. Exception overruled. Appeal.

Nicholls, C. J. 1. A subscription for shares implies a promise to pay for them. We see nothing to take this particular subscription out of the general rule. 2. The judicial proceedings taken by the bank were by way of direct enforcement of the contract and not by way of forfeiture. The rules relative to forfeiture are not applicable to this case. 3. In cases of transfer by judicial sale, the transferee is not liable for the balance of defaulted calls unsatisfied by the sale. The bank occupies no worse position than any other purchaser. Judgment reversed.

CITIZENS BANK v IRVINE (1894) 46 La. Ann. 1158.

To recover stock calls. McC mortgaged to plaintiff bank certain property to secure his stock subscription. He died in 1852; and, at a sale of his succession, the mortgaged property was sold to C, from whose succession the defendant bought it. McC left surviving him several minor heirs. To collect certain calls the bank, under process against C, sold the property, together with the stock secured by it, under its mortgage. Defendant bought it. McC's heirs were not parties to this proceeding. In the present suit, the bank sued defendant, as a stockholder, for further calls, claiming a privilege under the mortgage. Judgment for defendant. Appeal.

Nicholls, C. J. 1. The bank, by its course, exhausted its rights against the property; and the purchaser, by paying the purchase price, complied fully with all the legal obligations flowing from his purchase. 2. The sale of the stock was that of a third person without due process of law, and the stock remains to-day as it was before, the property of the McC heirs. Judgment affirmed.

CITIZENS BANK OF LOUISIANA v HEIRS OF GAY (1895) 47 La. Ann. 551.

For sale of defendants' property, to satisfy contributions on shares of stock secured by mortgage. G, from whom defendants inherited the property involved, held this property subject to a mortgage to the bank given to secure certain shares of its stock. An act of 1836 provided "that for the guaranty of bonds to be emitted by the state for the aid of the bank, and for which the state pledged its faith, all securities of the bank are transferred to the state and to the holders of the bonds." The bonds were issued and H & Co. became the holders thereof. In 1880 H & Co., by an agreement, discharged the bank from liability on the bonds. Defendants claimed that, as mortgage stockholders of the bank, they were sureties for the bonds, and that the discharge of the plaintiff bank, as principal, discharged them as sureties. Judgment for plaintiff. Appeal.

Breaux, J. 1. Under the Act of 1836 the securities of the bank were pledged for the purpose of guaranty, but no person was given as guarantor. 2. As property pledged, the mortgages given for stock remained the property of the pledgor. 3. The shareholders by whom these mortgages are due are original debtors to the bank. A discharge of the latter does not inure to their benefit. Judgment affirmed.

Cited: 47 La. Ann. 1378.

BREARD v CITIZENS BANK OF LOUISIANA. (1895) 47 La. Ann. 1374.

To restrain foreclosure of mortgage given to secure share of stock in defendant bank. Plaintiff's shares of stock, upon which payments were made and which were secured by the mortgage in question, were deposited with defendant bank as security for money borrowed. Afterward, a statute (Act 246 of 1853) was passed authorizing the reduction of the shares of mortgage shareholders by converting certain shares to cash shares, and providing that the indebtedness of such stockholders should not thereby be discharged pro tanto, but that the contributions due from them should remain as before. By virtue of this statute, plaintiff's stock was reduced to twelve shares, and the latter sold by the bank. Plaintiff claimed that he should not be compelled to pay contributions on stock sold to another. Judgment for defendant. Appeal.

Breaux, J. 1. The plaintiff's premises are wrong. His shares are not paid-up shares; they represent an indebtedness of the shareholder to the bank, instead of a credit. His indebtedness was not changed in any manner by a reduction of his shares, and it is right to require him to make the same contributions in payment as before the reduction. 2. A creditor holding a special mortgage cannot be compelled to foreclose on one of two properties covered thereby. All the property is liable for payment of the debt. 3. The act did not secure the shareholders from future calls. 4. Prescription is no bar to defendant's claim. The act did not pro tanto discharge the mortgage indebtedness. Judgment affirmed.

STATE, EX REL. CITIZENS BANK v BOARD OF ASSESSORS (1896)
48 La. Ann. 35.

For cancellation of assessment against plaintiff's property. The property, which the plaintiff bank attempted to relieve from taxation, was certain real estate mortgaged to the bank to secure the payment of certain shares of its capital stock. The bank foreclosed the mortgage and purchased the property. By law the shares of capital stock of the bank were exempt from taxation. The bank claimed that the purchase substituted for stock the mortgaged property, which thereby became exempt from taxation. Judgment for plaintiff. Appeal.

McEnery, J. The shares of stock and the property mortgaged to secure it are distinct and different things. In relation to this mortgaged property, the bank stands in no more favorable position than if it went into the market as a speculator and purchased property. If it should do so and become the owner of property, it would not be exempt from taxation thereon. Judgment reversed.

STATE, EX REL. HUSON v BANK OF MANSFIELD (1896) 48 La. Ann. 1029.

To recover taxes. The plaintiff, sheriff and tax collector, brought this action against defendants for the collection of license tax for the years 1895-6. The defendant's capital was \$15,000 and no surplus. The defendant contended that the legislature had not imposed any license tax on incorporated banks with a capital of less than \$50,000. Judgment for defendant. Appeal.

Breaux, J. Under the law authorizing the collection of a tax from a bank having \$50,000 capital or more, we find no warrant to collect a tax from a bank having less than that amount of capital. A license law cannot be extended by construction; and an omission cannot be supplied by the court. Judgment affirmed.

PARKER v SHAREHOLDERS OF CITIZENS BANK OF LOUISIANA (1897)
49 La. Ann. 105.

Rule to surrender shares of stockholders to be sold for taxes. Plaintiff attempted to proceed against the shareholders of the Citizens Bank to compel the production of their shares to be sold for payment of taxes. The bank was not made a party to the rule, and no mention was made of it as the one upon whom the duty devolved of producing the shares or paying the taxes. The service of the sheriff showed that a copy of the rule was served "on the shareholders Citizens Bank, defendant, by leaving the copy in the hands of the cashier." A subsequent notice, signed by the tax collector, was served on the bank, notifying it to deliver up to the state tax collector shares in the capital stock liable for state taxes. Judgment directing the bank to surrender the shares. Appeal.

Breaux, J. The rule did not make the bank a party to the proceeding, nor the

service of the copy of the rule by the sheriff; it follows that the service of the tax collector's notice did not have the effect of calling the bank as a party. Judgment reversed.

STATE, EX REL. ST. AMAND v BANK OF COMMERCE (1897)
49 La. Ann. 1060.

For reduction of charges in liquidating commissioners' account. Plaintiff, a creditor of defendant bank, brought suit for the forfeiture of defendant's charter, and commissioners were appointed to liquidate the bank's affairs. Attorneys were employed by the commissioners in conducting the liquidation. A provisional account was filed showing certain receipts and certain charges thereon. Among the latter was \$9,487 for services of the commissioners and \$12,000 for attorneys' fees. The creditors claimed that these amounts were excessive. There was no statute fixing liquidating commissioners' fees when appointed by the court upon petition of a creditor. Judgment allowing the liquidators \$2,000 and the attorneys \$5,000. The creditors took no exception to these allowances. Appeal by commissioners.

Watkins, J. The judge a quo made a full and very liberal allowance to commissioners and lawyers for the work performed, and we adopt his decision. Judgment affirmed. On rehearing. The relation between the drawee and drawer of a check is not changed prior to acceptance. Judgment modified.

Cited: 51 La. Ann. 604.

ALLEN v LOUISIANA NAT. BANK (1898) 50 La. Ann. 366.

Mandamus to compel payment of a check. C, S and plaintiff were the three executors of the estate of R A. They opened an account as such with defendant. Subsequent thereto, plaintiff asked S for his signature to a check drawn on the account, in her favor. S refused, and plaintiff then presented the check signed by C and herself, to defendant bank. The latter declined to cash it. Judgment for defendant. Appeal.

Watkins, J. The bank should not disburse the funds on deposit for the account of the succession of R A on a check signed by only two of the three executors. Judgment affirmed.

PEOPLES STATE BANK v ST. LANDRY STATE BANK (1898) 50 La. Ann. 528.

For return of a certificate of deposit. Plaintiff alleged that a certificate of deposit issued by defendant had been sent it for collection; that the certificate was handed to defendant's cashier by its runner for payment; that the cashier, instead of paying, kept the certificate and refused to give it up; that the plaintiff made demand for the certificate and that defendant claimed the ownership of both certificate and deposit and refused to surrender either. Judgment dismissing the suit. Appeal.

Nicholls, C. J. The action will lie. Plaintiff having received the certificate for collection was under obligation to account to his principal either for the certificate itself or the money which it called for. Judgment reversed.

STATE OF LOUISIANA v NICHOLLS (1898) 50 La. Ann. 699.

Motion to quash indictment for embezzlement. Defendant, president of a bank, chartered under the general laws, was indicted for embezzlement under sec. 907, R. S. This section was originally an act of the Legislature of 1821, when all banks were chartered by special act. Subsequently, special charters were prohibited and all banks were required to obtain charters under the general laws. Defendant claimed that the Act of 1821 must be deemed to refer to banks chartered by special act. The Act of 1821 was incorporated in the crimes act applicable to all banks in 1852, and re-enacted in 1855, and again in 1870. Judgment against defendant. Appeal.

Miller, J. We must presume that the legislature of 1821 meant to punish embezzlement by bank officials, not only of banks then existing, but of all banks for all time. In this view the Act of 1821 applied to all banks coming into existence afterward by the changed methods of later years. In addition, the incorporation of the Act of 1821 into the Crimes Acts of 1852, 1855, and 1870 is conclusive against defendant's contention. Under sec. 907 the indictment need only follow the words of the statute. Judgment affirmed.

STATE, EX. REL. BURKE, EX'R v CITIZENS BANK (1899) 51 La. Ann. 426.

Mandamus to compel defendant bank to permit plaintiff to inspect its books. Plaintiff, executrix of a deceased stockholder of defendant bank, made demand on the legal custodian, but was refused permission to examine the bank's books. Plaintiff contended that under the constitution of 1879 she was entitled to examine the bank's books. Defendant claimed that plaintiff, in her capacity as executrix, did not have the right of inspection; and that a by-law of the bank forbade such inspection, except on consent of the board of directors. Judgment for plaintiff. Appeal.

Watkins, J. 1. The plaintiff, representing the deceased stockholder, should have the same right of inspection, *pro hac vice*, as the latter had while living; she is therefore entitled to mandamus. 2. The demand was sufficient. 3. The by-law cannot prevail against the plaintiff. Judgment affirmed.

Cited: 104 La. Ann. 136.

NOTT, SYNDIC v STATE NAT. BANK (1899) 51 La. Ann. 871.

To set aside a pledge of certain demand notes made by an insolvent to the defendant within three months preceding his *cessio bonorum*. The value of these securities depreciated, and the bank notified B of its intention to sell the pledged property. To prevent the sale, B pledged additional securities to the bank. B had no reason to believe, then, that he would become an insolvent within 90 days. The insolvent laws provided that any pledge or mortgage by an insolvent, within three months preceding his failure, should be null unless the pledgee proved that the property was pledged in good faith and for ample consideration. Plaintiff, who was syndic of the creditors, claimed that the pledge of the additional securities to defendant was void. Judgment for defendant. Appeal.

Breaux, J. 1. The additional securities were pledged to the bank in good faith and for ample consideration. 2. The pledge, valid at the time it was made, did not become invalid by the unexpected reverse which compelled the pledgor to resort to proceedings of insolvency. 3. The notes being payable on demand did not affect their negotiability; and they were free from all prior equities. Judgment affirmed.

LOUISIANA v COMPTOIR NAT. D'ESCOMPTE DE PARIS (1899)
51 La. Ann. 1272.

For collection of a license from defendant for carrying on the business of a bank. An act of 1890 imposed upon all corporations doing a banking business a license tax. Defendant established an office in New Orleans in 1895, and thereafter transacted through it a business restricted entirely to the lending of money and dealing in exchange. No license tax was ever demanded or paid. An act of 1898 imposed upon all corporations conducting "the business of lending money or dealing in exchange" a license tax different from that imposed by the Act of 1890. The suit is brought under the Act of 1890. Judgment for defendant. Appeal.

Monroe, J. The general assembly, in the adoption of the Act of 1890, did not have in contemplation persons or corporations engaged in the peculiar business carried on by defendant and hence did not intend that act to apply to it. It was because the existing law was inapplicable that the Act of 1898 was passed. Judgment affirmed.

RICHARDSON, REC'R, v WATSON (1899) 51 La. Ann. 1390.

On promissory note. The president and cashier of the A N Bank used funds of the bank for speculation. In order to enable withdrawal of funds without the knowledge of the directors, the cashier obtained from defendant a note signed in blank. This was filled up by the cashier, entered in the discount book as paper acquired with the bank's money, and retained among the bank's assets. Defendant claimed that the note was accommodation paper, and that knowledge of the president and cashier was knowledge of the bank as to this fact. Judgment for plaintiff. Appeal.

Watkins, J. 1. Where an agent seeks his own personal interest or advantage, without benefit to his principal, his knowledge cannot be held to be the knowledge of the principal. Therefore, the knowledge of the president and cashier was not knowledge of the bank. 2. The bank parted with its money in return for the note, and defendant is liable to it for the amount thereof. Judgment affirmed.

Cited: 51 La. Ann. 1658.

VALDETERO v CITIZENS BANK OF JENNINGS (1899) 51 La. Ann. 1651.

For damages sustained by defendant's refusal to honor plaintiff's check. B, president of defendant bank, disappeared and plaintiff went to New Orleans in search of him. He there met the cashier of defendant bank who had a direct interest in the return of B, the latter having taken bank funds to which he had no right. B was located in Florida, and the cashier agreed to honor plaintiff's check for \$300 on condition that the latter should go to Florida and try to bring B back. Plaintiff drew the check and started on the trip, but B died. The cashier returned to the bank at Jennings and refused payment of the check on presentment. However, he directed the drawee to draft on defendant for the amount and forward it to the bank. This was done and the bank's check was sent by the cashier in payment. Before presentment of this check payment was stopped. Judgment for plaintiff against defendant bank and its cashier in solido. Appeal.

Breaux, J. 1. The agreement between plaintiff and defendant cashier, entered into in New Orleans, was complete, and the latter is liable for loss sustained by reason of the breach thereof. 2. This agreement, at its date, was not binding upon defendant bank, but the transactions in regard thereto subsequent to the cashier's return, and when he was acting within the scope of his authority, show a ratification by the bank. Judgment affirmed.

STATE v CITIZENS BANK (1900) 52 La. Ann. 1086.

For collection of a license tax. Defendant claimed that by its charter it was exempt from the payment of any tax on its capital. In order to enable it to make compromises with its mortgage stockholders, the Act of 1880 was passed for its benefit. That act provided that it should confer no rights upon defendant unless accepted by the latter and under the conditions of art. 234 of the constitution. Defendant filed its written acceptance with the secretary of state. Art. 234 provided that the legislature should pass no special law for the benefit of any corporation, except upon condition that such corporation should hold its charter subject to the provisions of the constitution. The constitution authorized the legislature to require the payment of a license tax. In pursuance of this authority the Act of 1890 imposed the license tax in controversy. The bank contended this act was unconstitutional. Judgment for defendant. Appeal.

Nicholls, C. J. 1. The license tax was not one on capital. 2. The act is constitutional. 3. The bank, by accepting the Act of 1880, deliberately entered into a contract with the state to hold itself subject to the provisions of the constitution. Defendant can therefore claim no exemption from license taxation under the Act of 1890. Judgment reversed and judgment for plaintiff.

**COMPTOIR NAT. D'ESCOMPTE DE PARIS v BOARD OF ASSESSORS (1900)
52 La. Ann. 1319.**

For collection of an assessment. Plaintiff claimed that all "credits" for "money loaned on interest" were not taxable at the domicile of its debtors in New Orleans. Plaintiff loaned, through its agent, money on collaterals, for which the borrower gave the agent his non-negotiable promissory notes. Plaintiff did not send its own moneys to New Orleans for these loans, but its agent obtained the same through foreign bills of exchange. The notes received by the agent were taken up at maturity by payment by the debtor, or through exhaustion of the collateral. The moneys so received were reinvested in other loans. Judgment for defendants. Appeal.

Nicholls, C. J. 1. The moneys loaned by plaintiff were, for the purposes of loans, the plaintiff's moneys, and the non-negotiable promissory notes given by the borrowers represented an equivalent amount of money received from plaintiff. 2. These notes being kept in Louisiana, the state has a right to subject them to taxation. Judgment affirmed.

**RICHARDSON, REC'R v SYNDICS OF SCHWARTZ & CO. (1900)
52 La. Ann. 1613.**

For order of court to sell pledged securities. Plea: Res adjudicata. S & Co. pledged to the A N Bank certain securities for their indebtedness. After failure of the firm, plaintiff, as creditor and receiver, attended a meeting of the creditors, proved the bank's claim and voted to accept the cession and for the appointment of defendants. Laws of the United States provided that receivers of national banks

could not sell pledged collaterals without an order of court. The defendants claimed that plaintiff could not bring an independent suit to fix the indebtedness due the bank and have its lien or pledge recognized against defendants, without obtaining the consent of the comptroller of currency; and that plaintiff had forfeited the bank's rights as pledgee by participating in the creditors' meeting. Judgment for plaintiff. Appeal.

Blanchard, J. 1. It was not necessary to get an authorization from the comptroller. 2. The suit was properly brought against the syndics. 3. A creditor may take part in insolvent proceedings, and by doing so, if he have a pledge, privilege, or mortgage, he does not forfeit same. This is so even though he make no statement or declaration concerning the security he holds, and stipulates no special reservation of his rights therein. 4. The fact that the process verbal of the meeting was homologated without opposition of the creditor, does not have the force of an adjudication on the questions of privilege and pledge. Judgment affirmed.

NEW ORLEANS v COMPTOIR NAT. D'ESCOMPTE DE PARIS (1900)

104 La. 214.

To recover license tax. A city ordinance provided that all corporations engaged in lending money or dealing in exchange should pay a license of 2½ per cent on the gross profits. Defendant proved that its profits from exchange transactions for 1898 were \$16,268 and that it had collected interest during that year to the amount of \$44,638, but had paid out in discount interest \$43,960. Defendant, therefore, asserted that its gross profits were \$16,268 plus \$678, the difference between interest received and interest paid out by it; and that it had in fact paid a tax on a much larger sum. The plaintiff claimed that the proper amount of the tax was 2½ per cent on \$16,268 plus \$44,638, or \$1,522. Judgment for defendant. Appeal.

Watkins, J. The gross profits of the defendant in loaning money were the charges paid by the borrower over and above the amount defendant expended in negotiating the loan. The decision supporting defendant's contention was correct. Judgment affirmed.

PENROSE v CHAFFRAIX (1901) 106 La. 250.

For recovery of tax on shares of bank stock. By a prior decision it was held that the C Bank was not liable to pay taxes on shares of its stockholders. In this action it was sought to tax the shares in the hands of the stockholders. The bank was incorporated in 1833, and by the Act of 1836 its capital and property were exempt from all taxes. This exemption was never abrogated. The bank's charter was extended by the Act of 1874. Judgment for defendant. Appeal.

Blanchard, J. 1. The Act of 1836 exempted the capital—the shares in the hands of those who subscribed to its stock. 2. The rights of exemption were not surrendered by the extension. Judgment affirmed.

BASTROP BANK v LEVY (1901) 106 La. 586.

To recover for overdrafts. The defendant, a customer of the plaintiff, was permitted by A, its cashier, to overdraw his account. A was a defaulter and committed suicide. Plaintiff produced the checks of the defendant to prove the amount paid out. To show the amount of the deposits, it proved that such amounts were always credited by the dead cashier, and proved his handwriting. The defendant kept no passbook, and refused to testify in his own behalf. Judgment for plaintiff. Appeal.

Blanchard, J. 1. The plaintiff has made a prima facie showing of the extent and state of defendant's deposit account with the bank for the period covered by the account sued upon. 2. When a defendant can by his own testimony throw light upon matters at issue necessary to his defense, and particularly within his own knowledge, if the fact exist, and fails to go upon the witness stand, the presumption is raised and will be given effect to, that the facts do not exist. Judgment affirmed.

MAINE

LINCOLN AND KENNEBEC BANK v RICHARDSON (1820) 1 Me. 79.

Assumpsit on a stock note. Plaintiff was incorporated June 23, 1802, to continue 10 years. June 1, 1812, an act was passed which extended the existence of plaintiff till October, 1816. In December, 1816, another act was passed extending the time three years. Action was brought in 1818. On agreed facts.

Mellen, C. J. 1. The Act of December, 1816, was operative when accepted by plaintiff to revive the corporate existence; and it is immaterial whether the extending act was passed before or after the expiration of the original charter. 2. Bringing the action was sufficient acceptance. 3. The defendant, being a stockholder, is bound by the acceptance of the officers. Judgment for plaintiff.

Cited: 2 Me. 329.

ADAMS v WISCASSET BANK (1821) 1 Me. 361.

Assumpsit. The writ was served by a deputy sheriff, who at that time was a stockholder in the plaintiff bank. Plea: That the officer being a stockholder, and so a party to the suit, the writ should have been served by a coroner under a provision of R. S. ch., 93, providing that the coroner should serve writs in suits in which the sheriff or his deputies were parties.

Mellen, C. J. An execution against a banking corporation cannot be satisfied except out of the corporate fund; neither the person nor private property of a stockholder or incorporator can be taken. We are of opinion that the plea is bad and insufficient. Plea overruled.

Cited: 21 Me. 482; 47 id. 281; 52 id. 123; 65 id. 405; 77 id. 217.

CASE OF ROGERS (1823) 2 Me. 303.

Indictment for bringing into and having in possession within the state counterfeit bills of the Bank of the United States. The prosecution read in evidence the act of Congress incorporating the bank. The act provided penalties for its violation, and for punishment of those who might be convicted of counterfeiting bills of the bank, passing them, or having them in possession. Motion to set aside verdict of guilty on the ground that the incorporating act was a private statute.

Mellen, C. J. Though a statute be of a private nature, yet if it contains provisions for forfeitures and punishments, it is a public statute. Motion denied.

STRAFFORD BANK v CROSBY (1832) 8 Me. 191.

On promissory note. The defendant, a director of the plaintiff bank from its organization in 1804 to 1821, except one year, and during two years president, signed the note jointly and severally with W, as surety for V. The custom of the bank known to defendant was to extend the time of accommodation notes at maturity, by taking interest in advance for 60 days, without renewal of the notes or consultation with the sureties. The defendant claimed release by reason of the extension of credit to the maker without his consent. He never requested the bank to call upon the principal and secure payment. On agreed statement.

Mellen, C. J. 1. The defendant knew and recognized the usage of the bank, and the extension did not amount, under the usage, to the giving of new credit to the principal in such a manner as to discharge the defendant as surety. 2. Mere delay in prosecuting the principal debtor will not discharge a surety. Defendant defaulted.

Cited: 28 Me. 286.

CENTRAL BANK v ALLEN (1839) 16 Me. 41.

On a note indorsed by the defendant, and payable at B Bank in Portland. Before its maturity the bank ceased to have a place of business in that city, and the C Bank occupied the rooms formerly occupied by the B Bank. The note was presented there by a notary of the plaintiff to whom the note had been sent for collection, and the notary was informed that the B Bank had no place of business in Portland. The notary then endeavored to find the maker, and, failing to do so, left a written demand at his last known residence in Portland. The de-

defendant contended that the note was not duly presented. Judgment for plaintiff. Exceptions.

Weston, C. J. 1. The B Bank having ceased to operate, if the banking house had not been occupied by a similar institution, presentment would have been excused; but this being the place of demand, there was a sufficient presentment. 2. The notary used such diligence as excused personal demand upon the maker. Exceptions overruled.

WARREN v GILMAN (1840) 17 Me. 360.

On draft against indorser. The draft was indorsed by defendant, and also "Pay M. S. Parker, cashier, or order, John Wyman, cashier," of P Bank, where it was left by plaintiff for collection. The defendant contended that he had not received proper notice. The draft was payable 30 days from June 30, 1836. The testimony of the cashier of the P Bank showed that his bank had forwarded the draft to the S Bank on July 19. The notary of the S Bank testified that he duly presented and protested the note, and mailed notices of protest addressed to all parties to the cashier of P Bank. The cashier of P Bank testified that he received such notices on August 5, and the same day mailed to defendant the notice addressed to him. Judgment for plaintiff. Exceptions.

Weston, C. J. 1. A bank with which a bill is left for collection is considered as real holder for the purpose of transmitting notices. 2. The cashier is the authorized organ of the bank. 3. Notices, coming from a notary, are sufficient if left at the post office properly addressed. 4. It was not necessary to notify defendant that the holder looked to him for payment. Exceptions overruled.

Cited: 19 Me. 234; 26 id. 51.

PALMER v YORK BANK (1841) 18 Me. 166.

On bills issued by the defendant bank. The plaintiff claimed to be allowed fourfold interest by way of damages for their non-payment under the Act of March, 1836, ch. 233. No reference was made to the statute in any count in the declaration. Defendant paid the amount of the bills with legal interest into court and defaulted. Motion to amend the declaration.

Weston, C. J. 1. As this action falls within the class of penal actions, the facts charged should be averred to be against the form of the statute upon which it is based. 2. We do not feel justified in allowing an amendment after default on the original declaration. Motion denied.

Cited: 25 Me. 36; 30 id. 493.

BRYANT v DAMARISCOTTA BANK (1841) 18 Me. 240.

On bills issued by the defendant bank. A demand was made on the bank for specie for bills presented, by a third party. The action was brought under an act of 1836, providing for damages at the rate of 2 per cent per month, if payment of the bills was delayed or refused beyond 15 days after demand. The defendant pleaded the Statute of 1838, ch. 326, relative to demand and payment of bills as a bar. The jury found for the plaintiff, with two per cent per month damages. Exceptions.

Weston, C. J. 1. The Statute of 1838 is prospective in its operation, and to be applied only to bills, the payment of which might be subsequently demanded. 2. A bank bill may be sued and the action sustained with proof of a simple demand, and it is not necessary that the holder demand payment in gold or silver, gold and silver money being the only currency which can amount to a legal tender. 3. The demand may be made by an agent. Judgment on the verdict.

Cited: 57 Me. 391.

FREEMAN'S BANK v PERKINS (1841) 18 Me. 292.

On bill of exchange. The defendant was the indorser of a bill drawn on a Boston bank indorsed to the plaintiff, an Augusta bank, and it was sent for collection to the bank where payable. Notice of non-payment was made by a notary and sent to the plaintiff by first mail for all of the parties. The notices were received by the cashier two hours before the closing of the last mail to the town where the indorser lived. The cashier mailed the notice sent by the notary too late for the mail of that day. The defendant contended that the notice was not

seasonable to hold him as an indorser. Protest was admitted in evidence. Verdict for plaintiff. Exceptions.

Weston, C. J. 1. This, being a bill drawn in one state and payable in another, is a foreign bill, and the protest is admissible in evidence. 2. The cashier of the plaintiff had nothing to do but to put the proper direction upon the notice and leave it in the post office, and it should have been sent by the mail of the day it was received. Exceptions sustained.

Cited: 19 Me. 234; 23 id. 397; 24 id. 463.

MAKIN v INSTITUTION FOR SAVINGS (1841) 19 Me. 128.

On a deposit in defendant savings bank. Plea: That the corporation had discharged its duty; had invested the money as it agreed to do; that plaintiff should take his share of the stock; that an action of law could not be maintained; that plaintiff's remedy was in equity. Notice of withdrawal of the deposit was given according to the bank's rules which provided for repayment of deposits on notice. Payment of the deposit was refused. Defendant had invested the deposit in funds which depreciated in value. Plaintiff nonsuit. Exceptions.

Shepley, J. Though a savings bank is regarded as a trustee for the depositors, defendant is not held merely to a trustee's liability, in that by its by-laws it has absolutely agreed to repay deposits on proper notice. Exceptions sustained.

Cited: 23 Me. 380.

BURNHAM v WEBSTER (1841) 19 Me. 232.

Assumpsit by an indorsee against the indorser of a promissory note. Defense, that no legal demand was made upon the makers. A, cashier of a bank in Newburyport, Mass., put the note, which was left there for collection, into the hands of a notary three days after the due day. Demand, conformable to law, was made on that day by the notary. The note was indorsed by F, cashier, to A. By the laws of Massachusetts, the place of the contract, bills of exchange were entitled to grace. The defendant was defaulted, with the stipulation that if the full court decided the action could not be maintained, the default should be stricken off.

Tenney, J. 1. Whatever is done by the cashier of a bank in his official capacity, is the act of the bank. 2. When a bill is left in a bank for collection, although the bank has no interest in it, yet for the purposes of receiving and transmitting notices, they are to be considered the real holders. 3. The indorsements are to be considered as made at the date of the note, and the note is to be treated as having been in the bank from its origin. 4. It is, therefore, a bill of exchange and entitled to days of grace. Default to stand.

Cited: 26 Me. 435; 30 id. 490.

SNOW v THOMASTON BANK (1841) 19 Me. 269.

Assumpsit to recover \$600 for the transportation of money for defendant bank between Thomaston and Boston for a series of years. K transferred his stock in the bank unconditionally to entitle him to be a witness. There was an understanding that the purchaser might retransfer the stock if he chose within a limited time. The plaintiff's objection to the witness was overruled. The entries of the cashier were admitted to show the appropriation of money which was to be applied to payment of the plaintiff's indebtedness to the bank. These entries had been shown to plaintiff, who had made objections to their accuracy. The defendant proved the receipt of the plaintiff for transporting money to a certain date, and evidence that the balance had been set off against damages for non-payment of a draft by the plaintiff. Defendant held real estate as collateral security for plaintiff's indebtedness. Verdict for defendant. Exceptions.

Weston, C. J. 1. The transfer of his stock, without condition, made K a competent witness, and the contingency that he might again become the owner at the option of the purchaser did not disqualify him. 2. The entries of the cashier were properly admitted to show the plaintiff's account with the bank. 3. The acceptance of collateral security did not prevent defendant from making the principal security available in any manner in its power. Exceptions overruled.

FARRAR v GILMAN (1841) 19 Me. 440.

On promissory note. The paper payable to the Penobscot Bank was indorsed by the cashier of the bank to the plaintiff. The signatures of the signers and of

the cashier were admitted. The defendant consented to be defaulted, subject to the opinion of the full court, whether such indorsement by the cashier, without any other proof of his authority, passed the property in the note to the plaintiff so as to enable him to maintain the action.

Weston, C. J. As the cashier acts as the organ of the bank in the transfer of negotiable paper when he indorses such paper, it is *prima facie* evidence of a legal transfer. Judgment for plaintiff.

Cited: 30 Me. 490; 61 id. 512; 72 id. 438.

THE STATE *v* WALDO BANK (1841) 20 Me. 470.

To recover state taxes. The Act of March 25, 1838, accepting the surrender of the charter of defendant bank, provided that the bank should continue its corporate capacity for two years to collect its debts and close its affairs. It continued to transact ordinary business to March 25, 1838, and no longer. The state treasurer received taxes to October 1, 1837, and by mistake took a less sum than the amount due, but gave a receipt in full. This action was for the balance unpaid, and for a tax from October 1, 1837, payable April 1, 1839. On agreed statement.

Emery, J. 1. If the treasurer takes from a bank less than its proportion of tax, and receipts in full, the state is not thereby barred from recovering the just amount. 2. Though the charter was surrendered, defendant was still continued a corporation for the purpose of paying its debts. Judgment for plaintiff.

Cited: 29 Me. 365; 66 id. 245.

THOMASTON BANK *v* STIMPSON (1842) 21 Me. 195.

Writ of entry. An absolute deed of the land was made to the plaintiff bank by the defendant to secure the payment of a loan obtained by S. Defendant contended that the bank could not take real estate by a deed other than for its particular use. The bank sold the land after the maturity of the loan for the amount due, and the purchaser agreed to convey to S upon payment of the money paid the plaintiff. The defendant insisted that this was a redemption, as of a mortgage, and revested the title in the original grantor. The land was afterward conveyed to the bank by the grantee of the person to whom the bank conveyed. One who had been a stockholder of the bank, three months previous to the action, was allowed to testify. The defendant consented to a default subject to the opinion of the full court.

Whitman, C. J. 1. A deed absolute in form given to secure payment of a loan is not a mortgage within our statutes. 2. The real estate in question was in the first instance received as a security for a loan, and finally in payment of a debt, and the bank acted within the scope of its legitimate powers. 3. Before the transfer by the bank, the estate had become absolute in the plaintiff, and irredeemable by our law, and the vendee of the plaintiff acquired a perfect title. 4. The witness was not disqualified. Judgment on the default.

Cited: 43 Me. 211, 213; 69 id. 303; 71 id. 158, 553, 571; 75 id. 268, 269.

NORTHERN BANK *v* WILLIAMS (1842) 21 Me. 217.

On drafts. Defense: No notice of non-payment. The drafts were accepted by S, indorsed by the defendant, and, being indorsed by the cashier of the plaintiff bank, sent to B Bank for collection. The cashier of B Bank indorsed them, and forwarded them to the home of the acceptor for collection. Being dishonored and protested, the notary put notices for the drawer, acceptor, and indorsers into the post office on the same day, directed to the cashier of B Bank; but they were postmarked as mailed on the next day. The protest and drafts were posted on the next day, and postmarked as mailed on the day following, and were received before the other notice. The day following the receipt of the notices, the notices, drafts, and protests were sent to the plaintiff at H, and on the day of arrival notice was delivered to the defendant. On facts agreed.

Whitman, C. J. The protest must be regarded as containing ample notice of the dishonor of the drafts, and keeping it on hand until the second day after its receipt, without forwarding any notice of its contents to the defendant, was an unreasonable delay, which discharged the defendant from his liability. Plaintiff nonsuit.

TICONIC BANK v JOHNSON (1842) 21 Me. 426.

On promissory note. No demand on the makers was proved. The plaintiff bank contended that the defendant waived notice by indorsing under the indorsement of the payee, over whose name was written, "holden without demand or notice." There was oral evidence of waiver. The note was discounted by the bank for the payee, and the money deposited by him. The bank did not apply the part remaining on deposit toward payment of the note at its maturity. The books of the bank showed that the note was discounted prior to its indorsement by the defendant. The cashier was allowed to testify that the entry was conditional and without authority, and that the note was not in fact then discounted. Defaulted, to await the decision of the full court.

Whitman, C. J. 1. The agreement to waive demand and notice may be proved orally, or be inferred from circumstances. 2. It was optional with the plaintiff to retain any balance that might remain in the bank to the credit of the first indorser or not. 3. The testimony of the cashier was competent. Default to stand.

BANK OF OLDTOWN v HOULTON (1842) 21 Me. 501.

On promissory note. Plaintiff, a bank, sued in its corporate name. The defendant introduced an act of the legislature repealing the bank's charter, but reserving to the bank the right of closing up its business. Motion for a nonsuit. Refused. The defendant called a stockholder as a witness. Upon his refusal to answer questions, the judge declined to direct him to testify. The default of the defendant was to be stricken off, if the judge should have directed the witness to testify.

Whitman, C. J. The witness was a party in interest in the suit, and he could not be compelled to testify. Judgment on default.

FRONTIER BANK v MORSE (1842) 22 Me. 88.

Assumpsit to recover of the defendant the amount of bills of the C Bank exchanged by the defendant with the plaintiff bank after the failure of the C Bank. The exchange was at the request of the cashier, who wanted bills of a large denomination to remit to B, and he gave current bills in exchange therefor, which the defendant deposited the next day with the plaintiff. Neither plaintiff nor defendant knew of any defect in the bills at the time of the exchange. As soon as it learned of the failure, plaintiff notified defendant who refused to have anything to do with the bills. Thereupon the bills were tendered to the defendant. They had never been presented to C Bank for payment. The judge ordered the jury to find for the plaintiff, if they were satisfied that the exchange was made after the failure of the C Bank. Verdict for plaintiff. Exceptions.

Whitman, C. J. 1. The rule *potior est conditio defendentis* applies to this case no more than to any case of money wrongfully paid by mistake. 2. As the bills were received as currency, plaintiff was not bound to present them for payment. 3. After defendant's declaration that he would have nothing to do with the bills, plaintiff was excusable in not making tender. Judgment on verdict.

Cited: 66 Me. 195; 75 id. 318.

CROSBY v WYATT (1843) 23 Me. 156.

Assumpsit. Pleas: General issue and Statute of Limitations. The plaintiff and V were partners. V, as security for a balance due on a partnership debt, made a note dated March 28, 1825, on which the plaintiff and defendant were sureties. The parties to the action had prior to the year 1821 been residents of N. H., but during that year the plaintiff removed to this state. V had made payments on account of the interest. The bank, by which the note was discounted, brought suit on this note against the plaintiff in Maine, in 1830, and recovered judgment in 1832 which was paid in N. H. in 1833. The bank was in the habit of discounting accommodation notes, and when the notes became due, the custom was to receive checks and interest for the next 60 days, and indorse the same on the notes, and so continue to do, without releasing the sureties. All the parties had knowledge of the custom. Defendant contended: 1, That the extension of time to V discharged the sureties; and, 2, that payment in N. H. in 1833 relieved defendant from no liability, as the Statute of Limitations could successfully have been interposed at that time. In 1830 the statute would have been

a defense in Maine, but not in N. H. The defendant was in this state with attachable property within six years after the payment of the judgment. This was unknown to plaintiff. This action is to recover from the defendant cosurety one-half of the amount paid on the judgment. Defendant defaulted.

Shepley, J. 1. Whether or not the facts authorize the inference that the joint interest of the partners was extinguished, it does not establish the fact that the plaintiff was the principal upon the note. 2. The parties, having knowledge of the custom, would not be discharged by the extension of time to V. 3. The implied contract between sureties is that each will pay his share on default by the principal, and will save his co-surety harmless from injury by being obliged through the neglect of the other surety to pay the latter's share. It is not sufficient defense to show that defendant could not be compelled by law to pay the debt when it was paid by plaintiff. 4. The evidence that defendant, unknown to plaintiff, was within the state with personal property, was not sufficient to take the case out of the exception contained in ch. 62, sec. 9. Judgment on default.

WHEELER v FRONTIER BANK (1843) 23 Me. 308.

Action to recover dividends. The plaintiff owned stock in the defendant bank, and also stock in the Washington County Bank in the same state. The latter bank was indebted to the defendant who, in an action on the debt, attached the plaintiff's stock in the defendant bank; the attachment was made under the provision of the statute of the state, passed in 1836, to regulate banks, and banking before the dividend was declared. The plaintiff owned his stock in the Washington County Bank before the passage of the act, which provided that the individual stockholders in banks should be liable for debts of the bank in which they were stockholders to the amount of the stock by them owned. R. S., ch. 77, sec. 41, revising the act of 1836, described attachable shares as those acquired after the passage of said act. Defendant defaulted, subject to the opinion of this court.

Whitman, C. J. 1. The Act of 1836 could not have been intended to subject the owners of shares in banks before its passage to liability to have their shares seized for the debts of the corporation. 2. The plaintiff's shares in the defendant bank were not liable to attachment. Judgment for plaintiff.

READ v FRANKFORT BANK (1843) 23 Me. 318.

Assumpsit against indorsers of notes. The defendant bank contended that the action could not be maintained because its charter had been repealed, and that the repealing Act of April 16, 1841, required all claims to be presented and proved before receivers appointed to take charge of the effects of the bank prior to July 1, 1842. Action was commenced in February, 1841, and a copy of the writ was served on the receivers in July, 1841. Plaintiffs contended that the act was unconstitutional. The court ruled that such service was not presentation within the provision of the act. Nonsuit. Exceptions.

Tenney, J. 1. The legislature by the banking act reserves the right to dissolve banking corporations. The creditors of the bank cannot object to the constitutionality of the act dissolving the corporation, and such dissolution abates any action pending against the bank. 2. The receivers are the successors of the bank and take all the property for the purposes specified in the act of repeal, and it is by an equitable proceeding against them that the property is to be available in payment of the debts against the bank. 3. The service of the writ by a copy was not such an act as would take the case from the effect of the limitation. Nonsuit confirmed.

Cited: 26 Me. 340; 33 id. 510; 35 id. 18; 55 id. 295; 60 id. 174, 77 id. 486.

FRANKFORT BANK v JOHNSON (1843) 23 Me. 322.

On bonds. One defendant was cashier of the plaintiff, a state bank, and gave bonds upon which the other defendants were sureties. The first bond was given in 1836. The Act of 1838 required the annual renewal of bank cashier's bonds. The cashier being re-elected gave a new bond under the act. The first suit was on the bond given prior to the act, the second on the bond given subsequent to it. No default took place until after a third election, and after a third bond was given. These suits were for defalcations which took place subsequently. Verdict for defendants in the first action, and nonsuit in the second. Exceptions.

Whitman, C. J. 1. The plaintiff, when it made a new appointment and took a new bond, could not have contemplated holding the former bondsmen responsible for defalcations which might thereafter accrue. 2. The legislature could not have contemplated that the bondsmen of each year should be responsible for the fidelity of cashiers, except for the year for which the bonds were taken. In the first suit, judgment upon the verdict; in the second suit, judgment upon the nonsuit.

RICH v SHAW (1843) 23 Me. 343.

Action against the directors of bank under Act of 1831, "to regulate banks and banking." Plaintiff, a stockholder, alleged that he had lost the value of his shares through the misconduct of the directors in making investments. On agreed statement.

Tenney, J. 1. The act is intended to afford thereby a protection to the creditors of a bank against losses arising from a deficiency in the capital stock, but not to furnish a remedy to stockholders for injuries occasioned by want of judgment or fidelity in the directors of their own appointment. 2. A loss or deficiency in the capital stock creates a liability in the stockholders as well as in the directors in event of the inability of the directors. Plaintiff nonsuit.

MAKIN v SAVINGS INSTITUTION AT PORTLAND (1844) 23 Me. 350.

Assumpsit. M deposited money in defendant savings bank according to the defendant's prescribed regulations. Defendant's charter provided that deposits could be withdrawn on notice. The plaintiff proved his marriage with the depositor; the required notice to withdraw the money; a demand and refusal of payment. The defendant's offer to prove that its liabilities were more than double its assets, and that the losses were not through its fault, was rejected. Defendant contended that the action should have been in equity as against the trustee. Verdict for plaintiff, subject to the opinion of the court.

Shepley, J. 1. The action at law is the proper remedy, and the defendant's insolvency was not a legal defense to an action to recover a deposit. 2. The provisions of defendant's charter made it assume additional and more onerous and responsible duties than attach to a common trustee. 3. Depositors in a savings bank are not partners, nor is there any partnership relation between the corporation and a depositor. Judgment on the verdict.

SAVINGS INSTITUTION v MAKIN (1844) 23 Me. 360.

Bill to have the assets of the plaintiff, a savings bank, sequestered and distributed among the depositors. The complainants were the duly appointed trustees of the bank, and alleged that, by reason of losses on loans and otherwise, the assets had been impaired. One depositor answered that he had obtained judgments at law before March 18, 1842, against the plaintiff; and another demurred to the bill. The Act of March 18, 1842, permitted the trustees to bring such suits. A proviso saved the rights of depositors whose claims had been reduced to judgment. It was claimed that the act was unconstitutional in providing for sequestration.

Shepley, J. 1. A corporation may be empowered to act in the character of a trustee for persons other than its stockholders and creditors. 2. The court may compel the execution of a trust, but has no power, independent of statute, to sequester the funds of a corporation. 3. Authority to sequester the funds is given by the Act of March 18, 1842. 4. The bank, by contracting to deliver funds to depositors, assumed greater responsibilities than those which attach to a common trustee. 5. The Act of March 18, 1842, is not unconstitutional as impairing the obligation of the contract between a depositor and the bank. It does not prevent an action to recover any balance due after payment of a dividend thereunder. 6. The proviso is valid, though in conflict with the general enactment. The demurrer is overruled; the defense under it fails. Decree providing for payment first to judgment creditor, and for sequestration of the balance and distribution pro rata among other depositors.

Cited: 56 Me. 511.

MENDOMAK BANK v CURTIS (1844) 24 Me. 36.

On promissory note, given by defendant's intestate to plaintiff. The estate was insolvent, and the defendant claimed to set off a claim on a post note issued

by a company in N, payable at the United States Bank, Philadelphia, and placed by the intestate with the cashier of the plaintiff, pursuant to an agreement made by him, as collateral security. The post note was to be accounted for on his note, if collected, or to be returned to him if payment was refused. The plaintiff neither presented the post note for payment nor returned it to the intestate. The intestate waived presentment. Verdict for defendant. Motion for new trial.

Whitman, C. J. 1. The death of the intestate, insolvent, gave a right to defendant to file the claim for breach of contract as to the post note in setoff. 2. The prosecution of this claim operates as an adoption of the acts of the cashier, even if there was an original want of authority for the purpose. 3. The duty of the plaintiff to present the post note for payment, having been waived by the intestate, is not chargeable. Granted.

AGRICULTURE BANK v BURR (1844) 24 Me. 256.

Action on note. Payee against maker. The defenses were: 1, Want of consideration, the supposed consideration being shares of stock; no certificate was issued for the stock, but it was transferred on the books of the corporation requiring payment of the capital in specie; 2, that the defendant was merely the agent of the bank, and that it, by a written contract, agreed to hold defendant harmless from this note; but the persons signing the contract did not profess to be the bank, or to be acting for it.

Shepley, J. 1. The transfer on the books gave title to the stock, and a certificate would be but additional evidence. 2. The statute providing how the fact of paying for the stock should be ascertained—that fact will be presumed after the bank has operated several years. 3. The signers of the indemnity contracts cannot be held agents of the bank, and the contract being between individuals does not bind it.

Whitman, C. J. 4. The contract was illegal, but banking corporations are in business of public interest, and the defendant cannot be allowed to invoke the rule in *pari delicto potior est conditio defendentis*. 5. The harm to the promisee in interest was sufficient consideration, and defendant cannot, as against the interest of the public, be allowed to set up the defense. Defendant ordered defaulted.

AGRICULTURAL BANK v WILSON (1844) 24 Me. 273.

On promissory note. On the day the note was given, certain stock of the plaintiff bank was transferred to one of the defendants upon the books of the bank, as a consideration for the note, and continued to stand in his name until a receiver took possession of the bank. No certificate was issued to the defendants. The directors promised the defendants that they would not be called upon to pay the note, but no formal vote was passed upon the subject.

Shepley, J. The defendants were liable on the note given for stock, though the certificate was not issued. Defendants defaulted.

AGRICULTURAL BANK v ROBINSON (1844) 24 Me. 274.

On promissory note. Persons owning stock in the plaintiff bank transferred part of their stock to W, and the remainder to the bank. The only consideration for defendants' note was the transfer of the stock to the bank. There was a verbal agreement that defendants should not be called upon to pay the note, but no agreement that plaintiff should hold the stock as trustee for defendants. The directors desired to use the note in making up a statement of plaintiff's condition. On report.

Shepley, J. 1. Defendants, by such transfer and arrangement, could obtain no legal or beneficial interest in the stock; there being no consideration for the note at the time it was made, the bank cannot recover. 2. The purpose of giving the note did not overcome the lack of consideration. Plaintiff nonsuit.

EMERSON v WASHINGTON COUNTY BANK (1844) 24 Me. 445.

Objection to report of a referee. The plaintiff made a claim against the defendant bank which had surrendered its charter. The submission to the referee was signed, on the part of the defendant, by the persons appointed by the governor as directors to settle the affairs of the bank. The defendant objected to the report:

1, Because the directors who signed the submission had no authority; 2, because all the demands between the parties were not submitted; 3, because there were no particular demands made out and signed by either of the parties; 4, because an acceptance of the report and execution thereon would operate as an unequal distribution of the assets of the bank. The Act of 1841 gave such directors power to terminate the affairs of the bank. There was no evidence that all the demands were not included. Report accepted. Exceptions.

Tenney, J. 1. The directors, appointed by the governor, possessing power to close the affairs of defendant, had the power to sign the submission. 2. The facts exhibited in the report did not sustain the second objection. 3. The objection that no demands were made out and signed by the parties is valid. 4. After judgment, it is the duty of the court to prevent diversion of the assets by a stay of execution. Exceptions overruled. Judgment for plaintiff. No execution to issue.

FRANKFORT BANK v JOHNSON (1844) 24 Me. 490.

Debt on cashier's bond against principal and sureties. Breaches: 1, Failure to account for money; 2, making improper entries in the books in his own favor. The president and directors audited defendant's accounts, the bond being then and there canceled by the president. Plaintiff claimed fraud in the cancellation, participated in by officers, and mistake on their part, and denied their power to compromise and release. The president testified for the defendant against objections to his competency, based on his liability to the bank for negligence. The court instructed that the directors would be presumed to know of deficiency if it appeared on the books, that it might be paid without any entry on the books, and that fraud must be proved and not presumed; that the settlement was valid unless obtained by fraud or mistake in which the cashier participated. He refused to charge that if one or more of the directors acted under a mistake, and the others did not constitute a majority, the vote was not binding. Verdict for defendant. Exceptions.

Shepley, J. 1. The president's contingent liability affects only his credibility as a witness, not his competency. 2. The fraud must relate to the settlement and must be participated in by the obligee. The officers had the authority to settle and cancel the bond. 3. The instructions given were proper. 4. The instruction refused was erroneous, as a mistake must be mutual. Exceptions sustained.

Cited: 35 Me. 204; 63 id. 146.

WHITMAN v COX (1846) 26 Me. 335.

Trespass de bonis asportatis. The defendant was a sheriff. An execution issued on a judgment against the F Bank; and, as he could not find any corporate property, he took the property of the plaintiff, who was a stockholder of the bank. Before the service of the writ upon which execution issued, the charter of the bank was repealed, and a receiver appointed. On facts agreed.

Whitman, C. J. The bank had ceased to exist as a corporate body, and a judgment entered on a suit against it after the repeal of the charter, and the appointment of a receiver, must be regarded as nugatory. Judgment for defendant.

Cited: 31 Me. 61; 33 id. 510; 38 id. 275; 55 id. 295; 60 id. 174.

BADGER v BANK OF CUMBERLAND (1847) 26 Me. 428.

Assumpsit. Plaintiff and N owned a ship. To secure a note, N gave defendant bank a bond and agreed to pay it in part of the ship's earnings. Subsequently N ceased paying the interest and allowed the bank to take the earnings. There was no formal abandonment or bill of sale of the ship by N. At the request of defendant's president, plaintiff rendered accounts for repairs and earnings, and defendant had the ship insured. The cashier received the earnings and entered them on defendant's books. Plaintiff sued for a balance due for repairs. To show title, plaintiff proved the acts of the defendant's president and cashier. Verdict for plaintiff. Exceptions.

Tenney, J. 1. A sale and delivery of a vessel may be good between the parties, so as to change the property, without a bill of sale or other written instrument, and the accounts kept of the receipts and expenditures of the vessel prove a use and possession equivalent to a formal delivery at the time of transfer. 2. The authority of the president and cashier of a bank need not be proved by record

or any writing, but may be shown by acts and the general course of business. Exceptions overruled.

Cited: 32 Me. 437; 64 id. 561; 80 id. 38.

STEVENS v HILL (1848) 29 Me. 133.

On a note, made by defendant payable to the L Bank. By a vote of the stockholders, the plaintiffs were appointed trustees of all the property belonging to the bank in trust for the benefit of the stockholders; and the president authorized to assign to said trustees all the notes belonging to the bank, indorsed the note in suit. Ch. 76, R. S., authorized stockholders or creditors to apply to the court upon dissolution of a corporation for the appointment of trustees, who could use the corporation's name to prosecute actions. There was no such application to the court. The note was assigned before, but the action was commenced after the time limited for winding up the bank's affairs. The defendant submitted to a default to be stricken off if the plaintiffs are not entitled to recover.

Wells, J. 1. The directors, having control of the financial affairs of the bank, may direct the transfer of a note belonging to the bank. 2. The legal interest was vested in the trustees, and the beneficial interest in the stockholders, and the defendant was liable on the note. 3. By R. S., ch. 76, the property belonging to a corporation on its final dissolution vests in its stockholders or members as tenants in common, who can dispose of it as they think proper, without the aid of the corporate name or powers. Default to stand.

Cited: 30 Me. 490; 68 id. 252.

PIERCE v WHITNEY (1848) 29 Me. 188.

On promissory note against indorser. It was dated at Boston, but no place of payment was designated. Both maker and indorser lived in C, Maine. At maturity the note was presented at the C Bank in Boston, where it had been deposited for collection, and notice of non-payment was given the indorser by addressing him a letter and depositing the same in the post office. The maker addressed a letter to the holder before maturity asking for an extension. The holder also wrote the maker before maturity informing him where the note was. Plaintiff showed the usage of the banks in Boston in giving demand and notice, where a note was dated at Boston, and maker and indorser lived out of the state. It was not shown what the usage of the C Bank was. Counsel for plaintiff was not permitted to argue to the jury that the note, by the understanding and agreement of parties, was to be paid in Boston. The court refused to admit the letter of the maker asking for an extension of time. The jury returned a verdict for defendant, and found there was no such usage in the C Bank as had been testified to as to other Boston banks. Exceptions.

Shepley, J. 1. The place of payment must be stated in a note to make it payable at the place. 2. Plaintiff's counsel was properly denied the privilege of arguing differently. 3. The letter of the maker was not admissible to excuse presentment of the note at maturity at the maker's residence or place of business. 4. Usage to have any effect upon the contract must at least have been shown to be the usage of the bank where the note was deposited. Exceptions overruled.

LIME ROCK BANK v McCOMBER (1849) 29 Me. 564.

On a note payable to the bank for the benefit of W, under an agreement between W and the defendants, that the bank should hold the property as trustee of W. The note was not discounted or accepted by the bank, but the president, cashier, and general attorney knew of the pendency of the suit without objecting to it. The jury were instructed that with the consent of the bank the action might be maintained, and that such consent might be inferred from the acts of the officers. The bank's assent by formal vote was not proved. Judgment for plaintiff. Exceptions.

Per curiam. Formerly the assent of the bank, in such a case, was required to be proved by record; more recently the consent of the officers has been held sufficient. Exceptions overruled.

Cited: 39 Me. 190; 43 id. 369; 47 id. 44; 61 id. 513; 68 id. 250; 71 id. 275.

COOPER v CURTIS (1849) 30 Me. 488.

On note and bill, formerly the property of C Bank, which purported to have been indorsed by that bank through its cashier to the plaintiff. By the Act of 1842, accepting the surrender of the charter of the bank, the bank continued in its corporate capacity for three years for the purpose of closing up its affairs. The session ended March 18. A statute provided that every statute shall take effect in 30 days after the recess of the legislature passing it, unless it is otherwise prescribed. The directors by vote authorized the cashier to transfer and assign to the plaintiff, as trustee for the stockholders, all paper belonging to the bank, which would be unpaid on April 13, 1845. The note in suit was so assigned. Defendant contended the transfer was made after the three years had expired; that the cashier was not authorized to make the indorsement; that the directors had no power to appoint a cashier. On report.

Tenney, J. 1. The act accepting the surrender of the charter of the bank did not take effect earlier than April 17, 1842; and the transfer was made within the three years allowed for closing up the bank's affairs. 2. The indorsement of the cashier was sufficient to transfer the paper in suit to the plaintiff. 3. The debtors of the bank cannot object if the cashier and directors were not chosen according to the charter. Defendant defaulted.

Cited: 48 Me. 273; 79 id. 445.

MERRILL v SUFFOLK BANK (1849) 31 Me. 57.

To reverse a judgment recovered by defendant in error, a bank, against the F Bank. Judgment in the original action was recovered after the revocation of the charter of the F Bank by an act of the legislature. The plaintiff, in error, a stockholder in the F Bank, contended that there was no such corporation in existence as the F Bank at the time the judgment was rendered. Plea: In nullo est erratum. The Act of March 29, 1836, ch. 233, made private property of bank stockholders liable to attachment in a suit commenced against the bank by a holder of its bills on which payment had been delayed for more than 15 days. The property of the plaintiff in error was taken by virtue of this provision to satisfy the judgment.

Shepley, C. J. 1. The plea operates as a demurrer, and admits the facts stated and assigned as error. 2. The dissolution of a corporation by act of the legislature, deprives it of its corporate existence and no legal judgment can be rendered against it. 3. When a statute makes provision that the estate of a person, not named as a party to the judgment, may be taken to satisfy the judgment, and the estate is accordingly taken, it makes him a privy in law to the judgment. He can therefore maintain the writ without making parties other stockholders who had not been prejudiced by the judgment. Judgment reversed.

Cited: 33 Me. 510, 511; 39 id. 40; 49 id. 529; 55 id. 295; 77 id. 219.

TICONIC BANK v JOHNSON (1850) 31 Me. 414.

On promissory note. In payment of an execution the defendant gave the plaintiff bank three notes; interest was reckoned on them at 7 per cent. Part payments were made in cash, and part in new notes at the same rate of interest. To discharge the final balance the note in suit was given reserving the same rate of interest. The judge ruled that the jury should deduct the amount of interest, which had been reserved above 6 per cent in the note from the sum apparently due on the note. Plaintiff contended that a bank could deduct interest in advance. Exceptions.

Tenney, J. 1. The taking of interest in advance upon loans made by banks is proper. 2. All interest above 6 per cent, whether reserved in the note itself or growing out of the original usurious transactions, should be deducted. Exceptions sustained.

LEWIS v EASTERN BANK (1850) 32 Me. 90.

On a deposit. The plaintiff, a depositor in the defendant bank, introduced his bank book in the handwriting of the cashier. After making the entry the cashier, claiming that he had credited the plaintiff with \$100 too much, altered the credit. The bank directors discharged the cashier, without consideration, by giving him a release under seal, and he was admitted as a witness over plaintiff's objection. The plaintiff contended that the cashier was the real party in interest, and his

evidence was inadmissible, and that the directors without a vote of the stockholders had no authority to grant him the discharge.

Wells, J. 1. The directors had authority to release the cashier. 2. The entry in the bank books is a receipt of the money on deposit, and the cashier is a competent witness to explain any mistake in making the entry. Judgment for defendant.

RANKIN v SHERWOOD (1851) 33 Me. 509.

Writ of error by the stockholders in the F Bank to reverse a judgment recovered against the bank. The error assigned was that the judgment was rendered against the president, directors and company of the bank after its charter had been revoked by the legislature, and that there was no such corporation in existence against which the judgment could be rendered.

Shepley, C. J. Any judgment rendered against the bank after repeal of the charter must be erroneous. Judgment reversed.

Cited: 55 Me. 295.

FRANKLIN BANK v COOPER (1853) 36 Me. 179.

Debt upon the official bond of the cashier of plaintiff bank, against the executor of one of the sureties. The charter of the bank expired and the Act of June 9, 1849, extended it two years for the purpose of closing up its affairs, and gave the stockholders power to appoint trustees to prosecute suits to final judgment in the bank's name. This action was commenced within the time limited, but was not prosecuted to judgment. The testator became a surety on October 1, while he was a director of the bank, and ceased to be a director October 5. The bond was approved by the directors, October 11. Defendant contended that the bond was not valid because not in conformity with ch. 77, sec. 24, R. S., and that the testator's signature was procured by fraud, by withholding from him knowledge of the deficiency. The statute did not provide any form. The terms of the bond differed from those prescribed by statute. Declarations of one of the directors at a meeting after the bond was executed, were received, and declarations of one of the trustees in regard to past transactions were rejected in evidence. If the testimony of the director would have any effect upon the case, the action was to stand for trial.

Shepley, C. J. 1. The trustees, by the provision of the Act of June 9, 1849, might commence suits at any time prior to and on the last day of the two years, and might prosecute actions commenced within that time to final judgment, execution, and satisfaction. 2. The bank did not violate any law, by receiving the testator as a surety, since he ceased to be a director before the bond was accepted. 3. As no form is prescribed by statute, a bond in any form is good. If the conditions do not conform to those prescribed, the bond is not void, but will be upheld as a contract, though not as a statutory bond. 4. The declarations of the trustee were admissible. 5. If the directors knowingly concealed from the testator that there was a deficiency, the bond is void. 6. The declarations of the director were not admissible. Case submitted to a jury.

Cited: 39 Me. 550.

AUGUSTA BANK v AUGUSTA (1853) 36 Me. 255.

To recover back taxes paid on stock, held by the plaintiff bank as collateral for the payment of a loan given by P Co. The certificate was in the usual form, with the right to sell. The shares were assessed to the plaintiff in May, sold by it in October, and the proceeds applied to the payment of the loan. It was taxed as making part of the capital stock of the bank. By ch. 76, R. S., corporations were required to give the name of stockholders and the number of shares held by them, and such returns were the basis of taxation. Parol evidence that the title was conditional was received. On report.

Shepley, C. J. 1. The shares so held must be considered liable to taxation for personal property, not composing a part of the bank's capital, but as coming within the provisions of ch. 76, R. S. 2. The parol evidence was inadmissible. Plaintiff nonsuited.

Cited: 56 Me. 177; 60 id. 201.

FRANKLIN BANK v STEWARD (1853) 37 Me. 519.

On promissory note. Defense: Payment. F was allowed to testify that he called at plaintiff bank, at the request of one of the sureties upon the note, a few

days after it matured, and inquired of the cashier whether the note had been paid, and was told by him that it had been. Plaintiff contended that the declaration of the cashier should not have been admitted as evidence. Verdict for defendant. On report.

Shepley, C. J. The declarations of the cashier made under such circumstances cannot be regarded as legally admissible in evidence against the bank. New trial granted.

Cited: 47 Me. 419; 92 id. 394.

MERRILL v SHAW (1854) 38 Me. 267.

On covenant. The plaintiff's testator sold defendant S shares in the F Bank. Defendants agreed under seal to hold all of the vendors harmless from all liabilities incurred as stockholders, or from any loss, except the depreciation of the stock. The charter of the bank was repealed and the plaintiff's testator was appointed one of the receivers. Upon the judgment in a suit against the bank the testator's property was taken in part satisfaction, as a former stockholder. The judgment was afterward reversed. The present claim of the plaintiff was for time and expenses in obtaining a reversal of the judgment. On report.

Tenney, J. 1. The action against the bank, after the charter was repealed, having had no foundation, could have been successfully defended. 2. The expense, not being on account of any liability of the testator, constituted no breach of the defendant's covenant. Plaintiff nonsuit.

FRANKLIN BANK v BRYAM (1855) 39 Me. 489.

Money had and received on checks of the defendant. The evidence showed that defendant had in his possession the funds of the bank which the cashier had permitted him to overdraw. Defendant contended that payment of the check was an admission that the funds on deposit were sufficient to meet it; and that if an overdraft had been permitted, it amounted to a loan, but was not secured as prescribed by R. S., ch. 77, sec. 19, and therefore no recovery could be had thereon. It was agreed that if the action could be maintained, an auditor was to be appointed to audit the accounts between the parties; if otherwise, a nonsuit to be entered. On report.

Appleton, J. The plaintiff may recover the amount shown to have been overdrawn. Auditor to be appointed.

FRANKLIN BANK v STEVENS (1855) 39 Me. 532.

On bond. Defendants were the cashier and his sureties on his official bond given plaintiff bank. The bond was conditioned for the faithful performance of the cashier's duties, and that he should account for all moneys theretofore intrusted to him, while he held the office. The court instructed that, if the bank's agents did know at the time that bonds had not been taken in former years, they were not bound to tell the sureties, unless they knew there had been a deficiency; that the bond did not extend to the cashier's neglect in keeping the books, and the directors' omission to communicate such fact was not fraud; that the directors' misconduct prior to the bond was no defense unless they knew of the deficiency; that fraud in getting one surety to sign would not release the others, unless their signatures were on condition of his signing. There was no evidence that the sureties depended on the signing of any one of their number. Verdict for plaintiff. Exceptions.

Rice, J. 1. No error is perceived in the instructions given. 2. That the signature of one surety was obtained by fraud was no defense. Exceptions overruled.

Cited: 51 Me. 508; 65 id. 134.

FRANKLIN BANK v COOPER (1855) 39 Me. 542.

Debt on bond against defendant's testator, a surety, requiring a bank cashier to account for all property heretofore intrusted to him, since he has held said office. Defense: Fraud in obtaining the bond and in concealing past defalcations, which were known. The charter having expired October 1, 1847, the bank was authorized to continue business for three years and to choose trustees to sue and defend. The president and a director were made trustees. The cashier died before trial. Testator's son testified to a conversation had with officers of the bank while transacting business with them in their official capacity. Evidence was also given of the

admissions and declarations of directors respecting past transactions. The court instructed: If, when the bond was given, the president and directors knew, and the testator did not know or was not told, of the cashier's defalcations, there was fraud and the bond was void. The court refused to instruct: 1, That the finding of specified facts would negative the fraud; 2, that, if the president did not communicate verbally or in writing with the testator, there was no ground for the presumption that the latter was deceived. Verdict for defendant. Exception.

Tenney, J. 1. What influence facts, assumed in the request, might have upon the question of fraudulent concealment was beyond the power of the court to state as a rule of law. 2. What would constitute a reasonable opportunity for the president and directors of the bank to give defendant's testator information of the cashier's defaults, was a proper question for the jury. 3. The second refused instruction was improper, inasmuch as verbal and written communications are not the only modes of communicating. 4. The conversation was admissible, inasmuch as C went to the bank for the purpose of settling his father's account. 5. The declarations of a director of a bank as to past transactions are inadmissible. 6. The given instruction was proper. Exceptions sustained.

Cited: 52 Me. 533.

VEAZIE BANK v WINN (1855) 40 Me. 60.

On bank check drawn upon a bank in Boston, and indorsed in blank by defendant, the payee. The check was dated at Boston, November 4, and the protest showed that it was presented to the bank upon which it was drawn, at the request of another Boston bank, November 7. There was no evidence that plaintiff bank held the check prior to the time it was presented. On report.

Tenney, J. 1. The burden of showing a demand, within a reasonable time, in order to hold the indorser, is upon the plaintiff. The presentment cannot be regarded as having been made within a reasonable time. Plaintiff nonsuit.

VEAZIE BANK v WINN (1855) 40 Me. 62.

On promissory note. The note was payable at either bank in Boston. There is no evidence of a previous demand or that the suits were commenced after the expiration of business hours at the bank. On report.

Tenney, J. An action cannot be maintained if brought on the last day of grace unless demand has been made; or, if payable at a bank, unless it is shown that the action was commenced after business hours. Plaintiff nonsuit

VEAZIE BANK v PAULK (1855) 40 Me. 109.

On promissory note. Defense: Usury. The note was an accommodation note discounted by plaintiff bank with knowledge of its true character. Evidence was offered to prove that in discounting, the plaintiff reserved interest of at least 1 per cent per month. If the evidence was admissible, it was agreed that the case should stand for trial; otherwise defendant to be defaulted. By the Act of 1841, no bank in the state was permitted to take any greater rate of interest or discount on a note or draft than 6 per cent a year. By ch. 69, R. S., the penalty provided for usurious contracts was a forfeiture of the excess over and above the legal rate of interest. Case reversed.

Rice, J. 1. Banking companies being within the provisions of the statute against usury, and liable to forfeit the excess over and above legal interest, the evidence was admissible. 2. The defense of usury may be interposed where accommodation paper is discounted with knowledge of its true character, and excess over the legal rate of interest deducted. Defendant defaulted.

LEATHERS v SHIPBUILDERS BANK (1855) 40 Me. 386.

To recover the amount of bank bills. The action was brought by a creditor of defendant bank on March 16, 1855, and the writ served March 31. A receiver, appointed for the bank in December previously, had entered upon the discharge of his duties, and the time had not elapsed for the discharge of his trust. The Act of March 16, 1855, provided that "no action shall be maintained against any bank after the appointment of a receiver thereof." On facts agreed.

Shepley, C. J. 1. Although the suit was commenced on the day the act was approved, no lien was created on the estate of the bank until the service of the writ

on the thirty-first of the same month. 2. The Act of 1855 was constitutional. Plaintiff nonsuit.

Cited: 55 Me. 296.

FOSTER v PAULK (1856) 41 Me. 425.

On a bank check made by defendant payable to the plaintiff by his initials, or to bearer. At maturity the defendant had no funds in the bank. No demand or presentation had been made of the check. The defendant offered a check made by the plaintiff to the defendant at the same time, and indorsed by him to the bank, upon which it was drawn, for the one in suit, and proved that, when it was presented for payment two months after its maturity, the maker had no funds, and payment was refused. At the time it matured, the plaintiff had a large deposit, which was drawn out shortly before the check was presented. Defendant contended that there was no consideration for the check, and offered to surrender it. Verdict for plaintiff. Exceptions.

Tenney, C. J. 1. As between holder and drawer, a demand at any time before suit brought will be sufficient, unless it be shown that the drawer has sustained injury by the delay. 2. A check drawn on a bank in which the drawer has no funds need not be presented at all in order to sustain an action. 3. The plaintiff, being holder of a check, was prima facie the owner thereof. 4. The check of the plaintiff, indorsed by the defendant without date, in blank, must be treated as negotiated on the day of its date. 5. Funds sufficient to meet it, belonging to the plaintiff, having been in the bank on which it was drawn at maturity, and withdrawn so long afterward, the indorser was exonerated from liability. 6. The defendant's check was a good consideration for the one sued on, and the holder of a check payable to bearer need not prove consideration. The offer to surrender was no defense. Exceptions overruled.

Cited: 92 Me. 146.

LUMBERMAN'S BANK v BEARCE (1856) 41 Me. 505.

On promissory note. Plea: Usury. Defendant was the indorser of a note, discounted by plaintiff bank, after the payee had obtained defendant's indorsement. By ch. 69, R. S., a person, taking usurious interest, forfeited the excess over 6 per cent. The court refused to instruct for defendant that the bank could not maintain the action if it discounted the note at a usurious rate, and instructed that the same penalty applied to banks as to individuals, and that defendant might avail himself of the excess over 6 per cent; but such proof would not otherwise affect the validity of the note. The defendant himself did not testify in regard to usury, in order to tax the costs against the bank. Verdict for plaintiff. Exceptions.

Goodenow, J. 1. The instruction was correct, and there was no error in refusing defendant's instruction. 2. Defendant is not entitled to costs. Exceptions overruled.

LIME ROCK BANK v MALLETT (1856) 42 Me. 349.

On promissory note discounted by the plaintiff bank. Defense: That the defendant was only surety upon the note; that this was well known to the plaintiff bank at the time the note was discounted; and, that by an agreement with the principal, the time of payment was extended without defendant's knowledge or consent. The defendant paid the interest and a small amount on the note, after it was extended, but with money furnished by the principal for that purpose. Plaintiff contended that defendant could not show that the note was an accommodation note, and that defendant was bound by the rule of the bank making all notes joint and several. Verdict for defendant. Exceptions.

Tenney, C. J. 1. Defendant was merely a surety, and his liability was terminated by the extension of time of payment without his knowledge. 2. Part payment made by the defendant with money furnished by the principal did not make him liable. 3. The usage of the bank gave it no power to alter the note by putting off the time of its maturity. 4. Defendant's liability was not revived by the payment on the note by defendant. Exceptions overruled.

Cited: 51 Me. 204; 58 id. 542.

LINCOLN v FITCH (1856) 42 Me. 456.

Assumpsit by the receiver of a bank upon a draft. The defendants accepted a draft of S, signed in blank, without date or amount to be filled and used by S, if

required for a purpose stated. The insolvent bank obtained possession of the draft without consideration and exhibited it as an asset of the bank. The defendants pleaded that they were never parties to the paper; that it was made, indorsed, and put into the bank in fraud of their rights, without consideration, consent, or privity on their part. The testimony of S was admitted to show that the acceptance of the draft was without consideration. S indorsed the draft before the bank took it, and before maturity. The court refused to instruct for the plaintiffs, receivers of the bank, that if S accepted in blank, and agreed the draft should be held and exhibited as the bank's property, and it was so exhibited, the defendants, through S, are parties to the fraud, and such fraud could not be a defense to a suit by persons becoming creditors after such exhibition; and also that, if the draft was filled in, but no consideration paid, and was discounted and exhibited as a bank asset, as alleged, and the bank continued to pay bills and receive deposits, the plaintiffs could recover. Verdict for defendants. Exceptions.

Taney, C. J. The indorser of negotiable paper, who has put it into circulation, is incompetent as a witness to show that it was void at its inception, when it was indorsed before maturity. 2. The purpose for which S's evidence was received was not indicated in the pleadings as a defense and cannot be received. 3. The bank can stand in no better condition than the one who obtained the draft from S, who had misappropriated it. 4. The instructions were properly refused. Exceptions sustained.

Cited: 52 Me. 522; 62 id. 199.

RICHMOND BANK v ROBINSON (1856) 42 Me. 589.

On promissory note, made by defendant and discounted by the plaintiff bank. Defense, that the note was received by the bank in violation of a statute, providing that the debts due from any one director, as principal, indorser or surety, should not exceed 8 per cent of the capital stock. One of the directors indorsed the note in suit at a time when he was liable to the bank for a sum exceeding that amount. On report.

Rice, J. The defendant cannot avail himself of the failure on the part of the directors to observe these requirements of statute; as to him, the violation was entirely collateral and did not affect the contract. Defendant defaulted.

Cited: 64 Me. 113.

ALLEN v AVERY (1859) 47 Me. 287.

On a note made by F payable at a bank in Boston to defendant, who indorsed it to plaintiff and left it at the C Bank for collection. C Bank sent it to G Bank for collection. When the note was presented there were no funds to meet it, and it was protested by the notary. The demand for payment was made after business hours, but before the officers of the bank had left. Notice of demand and non-payment was sent to the cashier of C Bank by next mail, and he at once sent it to defendant. Defendant contended: 1, That protest after banking hours was too late; 2, that the protest did not show sufficient notice to charge the indorsers. On report.

Appleton, J. 1. Presentment at the bank on the day of its maturity, but after banking hours, and a refusal of payment because the acceptor has not provided funds, is sufficient demand to bind the indorser. 2. Each indorser to a bill has one day in which to notify his preceding indorser, and the notice was sufficient. Defendant defaulted.

WASHBURN v BLAKE (1859) 47 Me. 316.

Action against a cashier of a bank, for not selling shares of bank stock, owned by plaintiff, as agreed. Before the sale was completed, the bank was enjoined from doing business, and a receiver was appointed. Defendant had notified the plaintiff that he had sold the shares, and plaintiff contended that he was estopped from showing the facts in regard to the sale. Defendant failed to return plaintiff's certificates within the time limited, and the receiver was appointed during that time. Judgment for plaintiff. On report.

Appleton, J. The defendant may have reasonably expected a sale; but, as none was effected, no reason is perceived why he should be charged. Judgment for plaintiff.

WISWELL v STARR (1860) 48 Me. 401.

Bill to close up the affairs of the H Bank. The charter of the bank expired by reason of an injunction, issued on the application of the bank commissioner, under a statute, and the complainants in this bill were appointed receivers. By the charter, stockholders were liable for losses to the amount of their stock. The bill was against all the stockholders. Some shares were transferred after the bank was dissolved. One of the receivers, W, was a stockholder in the bank, and was declared against as such. The only defendant who appeared, filed a general demurrer. On report.

Cutting, J. 1. Stockholders are liable for losses of the bank equal to the amount of their stock. 2. W, at the time of his appointment as one of the receivers, was a stockholder in the bank, and he cannot be both a complainant and a respondent; the latter he must be. 3. Though the bill is against all stockholders jointly, each may answer separately. 4. Transferring shares subsequent to the dissolution of the bank did not relieve the prior holders. Demurrer sustained.

Cited: 50 Me. 273, 279, 283; 54 id. 221; 61 id. 166; 66 id. 244; 92 id. 451.

SKOWHEGAN BANK v CUTLER (1860) 49 Me. 315.

Case by plaintiff bank, charging the defendant with aiding his father in fraudulently concealing property from his creditors. The writ alleged the transfer, by L to the defendant, of six shares of stock of the P Bank. By amendment, the writ alleged that the father had transferred to defendant a note he obtained as security for a debt due from X, who was also a debtor of the bank. It was not alleged that defendant aided. Defendant admitted that he accepted the stock, when he learned that it had been indorsed to him. Plaintiff proved by parol that the transfer had been recorded on the bank books. Judgment for plaintiff. Exceptions.

Davis, J. 1. The amendment was improper. 2. No transfer of bank stock can be perfected until the vendee accepts it and it is recorded. 3. The record of the transfer cannot be properly proved by parol testimony. 4. A fraudulent transfer of bank stock recorded is not valid, as to creditors, so long as the fraudulent purchaser holds the property. Exceptions sustained.

Cited: 73 Me. 239.

MARINERS BANK v SEWALL (1861) 50 Me. 220.

Assumpsit on promissory note. March 17, 1858, the plaintiff bank surrendered its charter. The law of 1858 continued the bank's corporate capacity for three years, with powers of collecting debts and closing up its business. Twelve days after the surrender of its charter, the bank took the note in suit in part payment of a note it held against the makers; and the defendant, who was not indorser of the first note, indorsed the one in suit. On report.

May, J. The bank, within the scope of its authority to collect debts, might take the new note in part payment of the old one, and the change of indorsers did not take the transaction out of such authority. Defendant defaulted.

JESE v HEWETT (1861) 50 Me. 248.

Writ of entry. Both parties claimed the premises under L, who was president and director of the S Bank. He gave his bond to the sureties on the cashier's bond, to induce them to become sureties, conditioned to save them harmless. The state law forbade a director to be surety on the cashier's bond. The cashier defaulted and L gave the sureties a mortgage of the premises in question, to secure his personal bond to them, and also gave his bond to the bank, conditioned to convey to the directors the real estate mortgaged to the cashier's sureties. The conveyance was made. H brought suit, attached and levied on the property thus conveyed, and the plaintiff held it as administrator of H. The bank went into the hands of receivers, who sold the property to a tenant, against whom this action was brought. On report.

Cutting, J. 1. L, being a director, could not sign the cashier's bond, and he could not evade the spirit of the law, by doing indirectly what the law of the state forbade him to do directly, and the contract was void. 2. The conveyance to the bank was without consideration and voluntary, and fraudulent in law as to prior creditors. Tenant defaulted.

LIME ROCK BANK v HEWETT (1861) 50 Me. 267.

Assumpsit on promissory note, payable to the plaintiff bank, against maker. Pleas: Want of consideration; that the note was given for an illegal purpose and in violation of the statutes; viz., to exhibit to the bank commissioner as assets; and that it was agreed that it should be given up to the defendant. Defendant's offer to prove his plea was refused. The plaintiffs were permitted to put in books kept by a previous cashier; and the present cashier was allowed to point out note transactions so kept "by his inference and presumption" arising therefrom. Verdict for plaintiffs. Exceptions.

May, J. 1. The testimony offered by the defendant would have tended to show a want of consideration for the note, and that it was given in fraud of law and for an illegal purpose and should have been admitted; and the defendant is a competent witness to prove these facts. 2. The books of the former cashier and the evidence of the present cashier were inadmissible. Exceptions sustained.

LIME ROCK BANK v HEWETT (1861) 52 Me. 51.

Assumpsit on two promissory notes, one payable at the bank and the other not. The plaintiff bank was an indorsee of the notes, and defendant indorser. On the day the notes became due, the cashier, according to the custom of the bank, deposited notice of dishonor, addressed to the defendant, in the post office in the town where the bank was located and where defendant resided. The defendant, who was a director in the bank previous to the date of the notes, had transacted a large amount of business with the bank. The judge instructed that the defendant should have reasonable notice of the dishonor and that the notice given would not be sufficient, unless there was a custom or usage of the bank to so notify indorsers who lived in the town, of which usage the defendant must be cognizant. Verdict for plaintiff. Exceptions.

Appleton, C. J. 1. A bank may establish usages variant from the general usage and not adverse to positive law, and those doing business with such bank and cognizant of its usages will be regarded as assenting thereto. 2. The defendant was cognizant of and is bound by such usage. 3. Notice through the post office would not be binding upon defendant on the note not payable at the bank. Exceptions sustained.

HEWETT v ADAMS (1862) 50 Me. 271.

Bill by the receivers of a bank, in behalf of creditors, against stockholders, for contributions to the payment of claims. Demurrer, upon the ground that one of the receivers was a stockholder; for want of uncertainty in the allegations as to the liability of the defendants; and because some of the defendants were cestuis que trust, and the plaintiffs their trustees. The court allowed the bill to be amended by striking out the name of the receiver who was a stockholder and making him a defendant, and making it more certain as to the grounds of the defendants' liabilities by making a general statement of the matter in fact. On report.

Rice, J. 1. Amendments are in the discretion of the court, and one co-plaintiff may be stricken out and made a defendant. 2. An amendment may be allowed that makes more certain the grounds upon which the plaintiffs base their claims. 3. A bill may be maintained against cestuis que trust, even if the trustees are parties. 4. If the liability of stockholders extended to the amount of the stock held by them, but no specific ground for liability was alleged, an amendment alleging loss by mismanagement, may be regarded as a specification of the claim. (R. S. 1841, ch. 77, sec. 44.) Demurrer everruled.

Cited: 54 Me. 220, 221; 93 id. 397.

WISWELL v STARR (1862) 50 Me. 381.

Bill in settlement of the affairs of the H Bank by the receivers. One of the receivers being a stockholder was disqualified and his name was stricken out. By Act of 1841, the persons and number of receivers were left in the discretion of the court. Defendant contended that a new receiver should be appointed before proceeding, and suggested that, as to certain defendants, who were not residents of the state, the court did not have jurisdiction. There was no allegation or evidence that such stockholders did not have real estate within the state. Demurrer.

Appleton, J. 1. It is not necessary to appoint a new receiver. 2. The bill cannot be dismissed on a mere suggestion. Demurrer overruled. (S. c. : 48 Me. 401 ante p. 474.)

SKOWHEGAN BANK v CUTLER (1864) 52 Me. 509.

Case for aiding a debtor in the fraudulent transfer of his property. L was indebted to plaintiff bank. He owned six shares of stock in the People's Bank, and it was alleged that he fraudulently transferred them to the defendant, who knowingly assisted him. L held two certificates, one for five and the other for one share. In transferring them to the defendant, he indorsed upon the certificate of five shares a transfer of the "within share," and upon the certificate for one share "the within shares." The transfer appeared on the books of the bank. The defendant contended that the transfer on such an indorsement was invalid. He surrendered the certificates and took one for six shares in his own name, and transferred it. Defendant contended that plaintiff could not show a transfer of the stock by the unattested record in the stock-ledger of the bank, and that the transfer was invalid, because the ledger did not show the number of the shares. It did not show the names of the holders. To show fraudulent intent, acts of the debtor, and written declarations accompanying them, were received in evidence. Plaintiff was allowed interest. Verdict for plaintiff. Exceptions.

Davis, J. 1. Shares may be transferred by indorsement and delivery or in other modes. 2. If there is ambiguity in the indorsement, arising from the use of the singular number instead of the plural as between the parties, it would be construed against the vendor. 3. The unattested record in the stock-ledger was properly received. 4. The shares were properly designated on the ledger. 5. The acts of the debtor were admissible to show fraudulent intent. 6. Interest was given to which the plaintiff was not entitled. If this is remitted, the verdict will stand. (S. c. : 49 Me. 315 ante p. 474.)

LIME ROCK BANK v HEWETT (1864) 52 Me. 531.

Assumpsit on promissory note, against the maker. The defendant claimed the right to show that the note had but one signer; conversation with the president of the bank that the note was without consideration; that the former cashier was a defaulter, and failed to enter on the books large deposits of the defendant. Plaintiff was allowed to prove by his attorney, who refreshed his memory by his notes, the testimony of a deceased witness at a former trial. The attorney swore that he stated the substance of the witness. The court instructed that taking the note for the purpose of increasing the apparent assets of the bank and deceiving the bank commissioners would be fraud of the highest character. Verdict for plaintiff. Exceptions.

Walton, J. 1. The charge of the court as to the nature of the fraud, affords no ground of complaint on the part of defendant. 2. The declarations of the president of the bank, relative to past transactions, were inadmissible. 3. The fact that a former cashier of the bank might not have entered upon the books deposits of the defendant, was a circumstance too remote to authorize a legitimate inference favorable to the defendant upon the matter at issue. 4. The testimony of the deceased witness was properly received. Exceptions overruled.

Cited: 75 Me. 160. (See 50 Me. 267, ante p. 475.)

HOLLAND v LEWISTON FALLS BANK (1864) 52 Me. 564.

Assumpsit to recover for services as president of the defendant bank. The plaintiff showed no agreement or vote of the directors, of the year for which pay was claimed, by which he was to receive compensation. During other years he received regular compensation. The statutes authorized the directors to make the president such compensation as they thought reasonable. On report.

Appleton, C. J. The plaintiff accepted his position knowing that he was entitled only to such compensation as the associate directors should think reasonable, and the law does not authorize any other tribunal to make him such compensation as the directors shall think unreasonable. Plaintiff nonsuit.

Cited: 76 Me. 416; 82 id. 509.

SPRAGUE v STEAM NAV. CO. (1864) 52 Me. 592.

Attachment. The defendant S, as treasurer of the defendant, a navigation corporation, deposited its money in his name as treasurer in the bank of which he was cashier. The writ described the trustee as cashier. The judgment discharged the trustee. Exceptions.

Appleton, C. J. The contract arising from the deposit is between the defendant corporation and the bank, and not between the corporation and the cashier of the bank, and the trustee is not chargeable as cashier. Exceptions overruled.

Cited: 60 Me. 175, 183; 73 id. 572; 74 id. 585.

NORTON v KIDDER (1866) 54 Me. 189.

Assumpsit for money had and received. The plaintiff sent the money by J to the defendant, then cashier of the bank, to be applied on the payment of a \$200 note not yet due. The defendant told J that he was not in the habit of receiving money before it was due, but would apply it on another note then overdue; but if any objection was made he would return it. A return of the \$200 note or the money was demanded. The court refused to instruct for the defendant: 1, That defendant was not liable if he received the money as cashier, with the plaintiff's knowledge, and received no use or benefit therefrom; 2, that, if the money should be regarded as a payment of the \$200 note, the payment of the balance by plaintiff, even under protest, the plaintiff knowing the facts, would defeat a recovery; and, 3, that, if plaintiff knew that defendant received the money for the bank and not for himself, there could be no recovery, and instructed that, if plaintiff sent the money for a particular purpose and defendant applied the money contrary to the instructions given him, and plaintiff did acquiesce therein, there could be no recovery. Verdict for plaintiff. Exceptions.

Danforth, J. 1. The defendant was personally liable for the money. 2. The refused instructions were properly withheld. 3. The given instruction was proper. Exceptions overruled.

Cited: 65 Me. 116; 75 id. 464.

HEWETT v ADAMS (1866) 54 Me. 206.

Bill by the receivers of a bank against stockholders, for the bank bills issued and remaining unpaid at the expiration of the charter. By law of 1855, the stockholder's liability could only be enforced after the amount of the liabilities and assets of the bank had been determined. The assets of the bank were insufficient to pay its debts; but there was no record that the receiver's report, establishing that fact, had been adjudicated by the court. There was no evidence that the bank was a party to the proceedings. On report.

Danforth, J. To enforce the liability of a bank stockholder, all the statutory requirements must have been fulfilled. Bill dismissed. See 50 Me. 271, ante p. 475.

AMERICAN BANK v COOPER (1867) 54 Me. 438.

Assumpsit on promissory note. Plea: That the bank had surrendered its charter, and that receivers were appointed before the action was commenced. Defendant was the indorser of the note held by plaintiff bank. By a special law, the time for closing up the affairs of the bank, by the receivers, was extended to January 5, 1869, and the note was put in suit before that time. Objection was also made that the receivers had never been sworn. On report.

Dickerson, J. 1. Notwithstanding the surrender of the charter, the legal capacity of the bank to maintain actions for the collection of its assets, within the time specified, remained unimpaired. 2. The bank could maintain the action in its own name, at the instance of the receivers, and the omission of the receivers to be sworn did not vitiate the proceedings. Defendant defaulted.

FOXTON v KUCKING (1867) 55 Me. 346.

Assumpsit to charge a deposit with the amount of necessities furnished a minor by plaintiff. The trustees of the State Reform School allowed an inmate under 21 years of age to enlist in the army. The bounty received by him was deposited with defendant savings bank by the trustees under the following agreement: "The deposit to remain until the depositor obtains his majority. No part of such deposit

is to be withdrawn without consent of trustees of the Reform School." Judgment for plaintiff. Exceptions.

Tapley, J. 1. The fund is due to the depositor upon his obtaining his majority, and the consent of the Reform School trustees at that time is not necessary. 2. The fund may be attached before it has become payable, and the bank compelled to pay at the time appointed by the contract. Judgment affirmed.

PACKARD v LEWISTON (1867) 55 Me. 456.

Assumpsit for money had and received. The plaintiff, under protest, paid taxes upon shares of stock in the F Bank, situated in Lewiston. The plaintiff owned no other property in that city, and he resided in Auburn, when the tax was assessed. The Act of 1867, ch. 126, provided that national bank shares should be assessed where the bank is located, for the use of the towns where the stockholders resided, and the Act of Congress of June 3, 1864, made the banks taxable where located. On report.

Danforth, J. 1. The word "place" in the Act of Congress of June 3, 1864, refers to the location of the bank, and not to state authority under which the tax is assessed. 2. The plaintiff was properly taxed in Lewiston. Our laws for the assessment of taxes, taken together, in effect adopt the limitation imposed by the act of Congress. 3. The latter part of the Act of 1867 is void. Plaintiff nonsuit.

Cited: 56 Me. 313; 59 id. 417; 78 id. 538.

AMERICAN BANK v WALL (1868) 56 Me. 167.

Assumpsit against the indorser of a note by the receivers of the plaintiff bank for the benefit of its stockholders and creditors. Plea: In setoff of the bills of the bank. \$100 of the bills were held by the defendant when the receivers were appointed, and \$75 worth was purchased subsequently. Under R. S. 1857, ch. 47, sec. 24, every bank shall receive its own bills, if offered, in payment of its dues. On report.

Appleton, C. J. 1. The debtors are to be protected in their right of paying the debts of the bank with the bills in their possession at the time of its failure. 2. If debtors of a bank purchase bills, after the receivers are appointed, they hold them with the same rights as other billholders. Defendant defaulted for the note in suit after deducting \$100.

AUGUSTA SAV. BANK v AUGUSTA (1868) 56 Me. 176.

Assumpsit to recover back a tax assessed on national bank stock and city bonds, in which the plaintiff savings bank had invested money received on deposit. The tax was paid under protest. On report.

Danforth, J. The bank was not liable for the tax. Judgment for plaintiff.

STETSON v CITY OF BANGOR (1868) 56 Me. 274.

Assumpsit to recover taxes paid under protest. The plaintiff, a stockholder in a national bank, paid a tax levied by the city on his shares of stock. R. S., ch. 6, sec. 5, authorized taxes to be assessed upon all shares in moneyed corporations. Plaintiff maintained that the bank having been organized under act of Congress, the stockholders could not be taxed by the state. Plaintiff nonsuit. On report.

Dickerson, J. 1. The state has power to tax shares of stock in any moneyed corporation, which includes shares in national banks. 2. The act is constitutional. Nonsuit affirmed.

Cited: 57 Me. 75; 60 id. 198.

ABBOTT v THE INHABITANTS OF BANGOR (1868) 56 Me. 310.

Assumpsit to recover money paid for taxes. The plaintiff was the owner of shares of stock of the bank located at Bangor, where he was assessed on the stock. Plaintiff was an inhabitant of Castine, and paid the tax under protest to prevent the collector from selling the stock. Laws of 1863, ch. 193, authorized the assessment in the place where the bank is located of stock held by persons out of the state or unknown, and that had not been certified according to the provisions of ch. 46, sec. 21, R. S., in any city or town in this state; or of stock appearing

by the books of the bank to be held by persons residing out of the state. The latter part of the Act of 1863 was repealed after the tax was paid and the suit was commenced.

Barrows, J. 1. The plaintiff, by paying these taxes, was not precluded from maintaining a suit to recover them. 2. The presumptions arising tend to show that the stock could not have been rightfully taxed under the Act of 1863, and it was incumbent on the defendants to rebut these presumptions. 3. The right of the party making the payment to recover it back, must be tested by an examination of the laws at the time of the assessment. Judgment for plaintiff.

Cited: 59 Me. 417; 91 id. 515.

BANK OF MUTUAL REDEMPTION v HILL (1868) 56 Me. 385.

Bill against a bank's directors for official mismanagement. The bill was in behalf of the creditors of the S Bank. The defendants discounted notes on pledge of stock of the S Bank, in violation of the law of the state, and loaned to irresponsible persons. All of the defendants demurred except H, who answered denying mismanagement. Defendants contended that they were not liable for the mismanagement of their predecessors. On report.

Appleton, C. J. 1. If the directors knew the character of the paper discounted and its utter worthlessness, they were guilty of fraud upon the stockholders, and if they did not know its character, they were guilty of gross neglect in not making inquiries. 2. They are only responsible for the mismanagement occurring during the year for which they were chosen. Decree for plaintiffs.

Cited: 61 Me. 166.

SULLIVAN v LEWISTON INSTITUTION FOR SAVINGS (1869) 56 Me. 507.

Assumpsit to recover money deposited with the defendant, a savings bank. At the time of the deposit, the plaintiff received a deposit-book, containing the rules of the institution, which provided that in case of loss of the book, notice must be given, or there would be no liability in case of payment to the wrong party. The plaintiff's book was stolen, presented, and payment made, no notice having been given. On facts agreed.

Barrows, J. If the officers of the savings institution used care and diligence, but lacked present means of identification, and paid on presentation of the book, the institution has a right to rely upon the contract of the depositor safely to keep the evidence of his claim, or make known its loss before it was presented for payment. Judgment for defendant.

Cited: 88 Me. 345.

BAKER v STINCHFIELD (1869) 57 Me. 363.

Assumpsit on two promissory notes indorsed by the payee, payable to bearer, and in the plaintiff's possession. There was evidence that he held them for collection, and that the suit was for the benefit of the creditors of the A Bank, at the request of its receivers. The defendant filed an account in setoff, which the jury allowed in part only. Defendant claimed that the suit could not be maintained by the plaintiff, and that the whole of the account in setoff should have been allowed. On report.

Walton, J. 1. An action on notes like these may be commenced in the name of any one who will consent to have his name used. 2. The jury acted on the setoff, and the defendant is precluded from offering proof again on that subject. Defendant defaulted.

BAKER v COOPER (1869) 57 Me. 388.

Forcible entry and detainer brought in the name of the receivers of a bank. The plaintiffs, over defendant's objection, offered in evidence the order appointing them, and a judgment against defendant, with proof of levy under execution. The defendant contended that the action should have been brought in the name of the bank; that it was prematurely brought; that it should have been stayed for a year to give him time to redeem it from the bank's levy; that the defendant had no right to the possession of the real estate of the bank; and that the action could not be maintained because the defendant was never the tenant of the plaintiffs. Judgment for plaintiffs. Exceptions.

Walton, J. 1. A suit in the name of the bank would be circuitous. 2. When real estate is legally levied upon, the creditor may forthwith maintain an action

for it. 3. The plaintiffs have the right and duty to take immediate possession of the real estate of the bank. 4. It is not necessary that the defendant should have been a tenant of the plaintiffs. Exceptions overruled.

DEARBOURN v UNION NAT. BANK (1870) 58 Me. 273.

Trover for the alleged conversion of bonds of the United States. The bonds were left by plaintiff with the defendant bank either as security for notes discounted or on deposit. Before demand was made, the bonds had ceased to be in defendant's custody.

Appleton, C. J. 1. The bank would not be liable in trover for a loss of plaintiff's bonds through negligence or larceny. 2. The demand and refusal were not sufficient evidence of a conversion to maintain trover. Plaintiff nonsuit.

Cited: 62 Me. 443.

JENKINS v NATIONAL VILLAGE BANK (1870) 58 Me. 275.

Assumpsit on a receipt for bonds pledged for the payment of plaintiff's note discounted by the defendant bank. The receipt was given by the defendant's cashier. The bonds were stolen with the contents of the vault of the bank. The bank used diligence in trying to recover the property, but without success. Plaintiff contended that the receipt was a special contract to keep the bonds at all events, and that the cashier had the right to so bind the bank. On report.

Kent, J. 1. The receipt of the cashier was not a contract increasing the bank's common law liability. It was simply a pledge of collateral security, to be given back when the debt was paid. 2. The law only required the bank to take ordinary care of the bonds. Judgment for defendant.

MURETT v BRACKETT (1872) 60 Me. 524.

Assumpsit on promissory note. The defendant, the maker, remitted to O & Co. the amount of the note in question, requesting him to pay it. O & Co. gave their check in payment of said note to plaintiff on Monday morning. Plaintiff deposited this check same day, and it was presented through the clearing house. The drawee did not receive it until after 11 a. m. on Tuesday, when payment was refused as drawer had failed after 11 a. m. Tuesday. Defendant contends that he is discharged, because: 1, The check was evidence of payment; 2, that plaintiff did not use due diligence in presenting it. There was no evidence that plaintiff intended to take the check in payment of the note. On facts agreed.

Dickerson, J. 1. The acceptance of the check does not discharge the debt, unless it is taken with that intent. 2. Where a usage exists, contracts within its purview are presumed to be made with reference thereto. 3. The check having been presented without delay, according to the usage of the bank where payable, the plaintiff was not guilty of laches. 4. O & Co. were not plaintiff's paymaster for taking the check. Judgment for plaintiff.

DANE v YOUNG (1872) 61 Me. 160.

Bill by the receivers of S Bank against stockholders for contribution for payment of bills issued by the bank. An injunction was made perpetual against the bank, as insolvent, in May, 1861, according to a statute authorizing the appointment of receivers. By law of 1857, stockholders, at the expiration of the charter, were liable for the redemption of bills issued by the bank and remaining unpaid. Several of the defendants had assigned their stock, but the objection was made that the transfers were not in accordance with the by-laws, which provided that they should be transferred by indorsement in writing by the holder in the presence of the cashier or two other witnesses. The transfers in question were not attested by either the cashier or by two witnesses in writing. On demurrer, and answer by those, claiming to have transferred their stock.

Dickerson, J. 1. The charter expired in May, 1861, when the injunction was made perpetual by operation of law, and the defendants then became liable. 2. The meaning of the by-laws of the bank, as to transfer of stock, was not only that the holder of the stock should indorse the certificate when either the cashier or two other witnesses were present, but that he or they should subscribe their names thereto in attestation of the fact. Demurrer overruled. Bill sustained as to those who had not legally transferred their stock.

Cited: 66 Me. 244.

DEARBORN v UNION NAT. BANK (1873) 61 Me. 369.

Assumpsit to recover the value of bonds left in the defendant bank as collateral for loans. The bonds were lost or misplaced. Plaintiff's evidence showed that he went to the bank for a loan July 1, 1868, and that, the bonds were not to be found. The court refused to instruct for defendant that if the bonds were not found by the bank when the note of July 1 was offered, and were not afterward found, they were not taken as collateral for that note. Defendant's cashier testified for plaintiff that other bonds had been misplaced. Verdict for plaintiff. Exceptions.

Dickerson, J. 1. The instruction was properly refused. Whether the bonds were left as security, or a special deposit without compensation, was a question for the jury; it was not material which theory the jury predicated their finding upon. 2. The evidence was admissible as to the degree of care used by the bank. Exceptions overruled.

CHASE v HATHORN (1873) 61 Me. 505.

Assumpsit on a promissory note payable to a savings bank. The note was made by defendant S with H as surety, and was thereafter discounted by plaintiff. The bank had no interest in the note, and indorsed it by its treasurer without recourse to the purchaser. Two signatures upon the note were forged. H, one of the sureties defended, upon the ground that he signed upon the strength of the two names upon the note which preceded his, and which proved to be forgeries; and that the bank could not indorse the note to the plaintiff, and that he did not consent to the transfer. The evidence showed that the money was to be obtained from the bank or any one who would advance it. On report.

Peters, J. 1. The defendant was holden as surety, notwithstanding the two names which preceded his were forgeries. 2. The right to transfer the note by indorsement can be exercised by a savings bank as well as by any other kind of a banking institution. The treasurer had the authority to make the indorsement. 3. A surety cannot be held upon a note sold, without his consent or subsequent ratification, to any other than the payee, but consent may be implied from the dealings between the parties. Defendant defaulted.

Cited: 71 Me. 275, 276; 72 id. 438.

BAKER v ATKINS (1873) 62 Me. 205.

Bill to enforce statutory liability of stockholders. The plaintiff was the receiver of a bank, the assets of which were insufficient to pay the debts. This deficiency was reported to the court, and plaintiff was ordered to bring this bill to collect it. All of the stockholders were not made parties. Some had died, and their estates had been settled long prior to the action. Some resided out of the state and had no property within the court's jurisdiction. Some had been discharged in bankruptcy and others had already paid the assessment. Demurrer, that: 1, The bill was inserted in a writ of attachment instead of filed, and it was not verified; 2, the deficiency should have been collected from officers of the bank; 3, the several classes of stockholders omitted should have been made parties; 4, that all the assets were not realized upon before this action was brought; 5, that the limitation provided by R. S. of 1857, sec. 46, had run against defendants' liability.

Appleton, C. J. 1. The bill is properly inserted in the writ, and verification is not necessary. 2. The bill is to be filed against the stockholders and not the officers. 3. The defendants are not injured by the non-joinder of certain other stockholders, for the assessment was made by the court upon all the shares alike, and no increased liability resulted from such failure. 4. The judgment of the court shows the amount of the actual deficiency. 5. There was no allegation that notice of the expiration of the charter had been given in the state paper, as required by R. S. of 1857, sec. 46, and the limitation commences to run only from the giving of such notice. Demurrer overruled.

EMERY v HOBSON (1873) 62 Me. 578.

Assumpsit. The defendant's father gave his check for money borrowed of plaintiff. This check, at request of plaintiff, was payable to defendant. Subsequently the drawer told the defendant what he had done, and defendant, at his and plaintiff's request, indorsed the check "waiving demand and notice." The defendant had no pecuniary interest in the check. The plaintiff held the check for over a year

before presenting. The drawer having failed, payment of check was refused. Defendant contended that the action could not be maintained; that this was a loan, not a payment; that notice of non-payment and demand was not given. On facts agreed.

Appleton, C. J. 1. The loan to the maker of the check is alike the consideration for his signature as for that of the indorser. Payment of money to a third party at request of defendant, express or implied, supports this form of action. 2. An indorser who waives demand and notice is not entitled to any demand on maker and notice of non-payment. Defendant defaulted.

EMERY v HOBSON (1873) 63 Me. 32.

On a bank check, dated June 11, 1870, payable to H, and by him indorsed. It was not presented to the bank upon which it was drawn until July 14, 1871, on the sixth day of which month the defendant wholly withdrew the deposit. Defendant contended that he was released by the plaintiff's delay in presenting the check, and that the contents of plaintiff's letter to H in regard to the presentment that the defendant desired the delay was improperly admitted. There was no evidence that defendant had been injured by the delay. Judgment for plaintiff. Exceptions.

Per curiam. The defendant was bound to keep funds in the bank to meet the check. Not having any funds, no presentment was essential, and he suffered no injury from the delay in presenting, therefore this testimony was immaterial. Exceptions overruled.

Cited: 90 Me. 478.

HAGAR v UNION NAT. BANK (1874) 63 Me. 509.

To recover dividends declared by the defendant bank upon shares of the capital stock owned by the plaintiff. The defendant had a suit pending against the plaintiff on a note discounted for him, and his stock was attached before the dividends were declared. Plaintiff paid the note before bringing this action, but made no demand after the attachment was dissolved. Plaintiff invoked sec. 35 of the Act of Congress of 1864 (13 Statutes at Large 102), which forbids national banks from loaning on the security of their own shares or from holding or purchasing such shares. On facts agreed.

Virgin, J. 1. A bank has a right to hold a cash dividend as a pledge for the indebtedness of the shareholders of the bank. 2. The bank had a special lien created by the attachment of the plaintiff's shares, which continued until after the attachment was dissolved. 3. An attachment or sale of shares on execution does not imply a purchasing or holding, within the meaning of sec. 35 of the Act of Congress of 1864. Plaintiff nonsuit.

ROBERTS v LANE (1874) 64 Me. 108.

On a promissory note. The defendant made and indorsed the note, payable to his order, which was procured from him by fraud. It was discounted by a bank of which the plaintiff was president. The note bore only defendant's indorsement, and was in good faith discounted by a bank of which plaintiff was president, without being indorsed by two persons as required by ch. 47, R. S. After maturity and learning of the alleged fraud, plaintiff, to save the bank from his negligence, bought the note. On report.

Burrows, J. 1. The bank became a bona fide owner of the note, and as the plaintiff derived his title from it, he is entitled to recover against the defendant, although he purchased the note after maturity, and with knowledge of its infirmity between the original parties. 2. The restrictions of ch. 47, R. S., relative to banks, are designed for the protection of their stockholders, and cannot relieve their debtors. 3. As between the bank and its officers, no vote was necessary to transfer the note in suit to the plaintiff. Judgment for plaintiff.

Cited: 66 Me. 142; 71 id. 53, 54; 77 id. 465; 84 id. 357.

JONES v WINTHROP SAV. BANK (1876) 66 Me. 242.

Bill by the trustees of the defendant savings bank for a sequestration and distribution of the assets. A decree of sequestration was made and a receiver appointed. A claim made by the state for taxes, after the decree of sequestration, was rejected by the commissioners who received claims against the bank. Under an

Act of 1872, savings banks were required to pay a tax on the averaged deposit to the state. On exceptions.

Danforth, J. This charter had expired before the tax claimed had accrued, and as there was nothing left upon which the tax could rest, the state had no valid claim. Exceptions overruled.

Cited: 68 Me. 521; 73 id. 530.

FRANKLIN CO. v LEWISTON SAV. BANK (1877) 68 Me. 43.

Claim against an insolvent savings bank. The defendant's trustee subscribed for shares of the capital stock of a manufacturing company. The plaintiff, agreeing to pay for it, took the notes of the defendant, and held the stock as security. The amount was paid and the certificate of stock was issued to the plaintiff. The certificate was never in the possession of the defendant, and the defendant had no interest in or benefit from the stock. The claim was rejected. On report.

Walton, J. 1. It is not competent for the trustees of a savings bank, at the time when there were no funds in the bank for investment, to agree to take shares in a manufacturing company, and thereby create a debt binding upon the bank. 2. Plaintiff, having participated in the illegal transaction, cannot recover. 3. As the bank received no benefit from the stock, it can set up the defense of ultra vires. Decree affirmed.

Cited: 7 Me. 98; 79 id. 212.

TICONIC NAT. BANK v BAGLEY (1878) 68 Me. 249.

On a promissory note discounted by the plaintiff bank. Plea: The general issue, and that the note had been assigned by the plaintiff since the suit was commenced. The assignment gave full authority to the assignee to prosecute the suit in the name of the bank. On report.

Barrows, J. It is no defense to an action on a promissory note, that the property in it is in a third person, unless the possession of the plaintiff is mala fide. Defendant defaulted.

Cited: 72 Me. 348; 78 id. 167.

NEWPORT SAV. BANK CASE (1878) 68 Me. 396.

Petition under ch. 218 of Act of 1877, to reduce an insolvent savings bank's deposits and divide the loss pro rata among the depositors. The statute gave the court power to reduce the deposits and divide the loss among the depositors if the bank had not exceeded its powers and had followed the rules and conditions, prescribed by law, in conducting the business. A preliminary order of the court showed that the bank's rules in regard to making investment had been violated. It was contended that the violations were the acts of the trustees and not of the bank. By the report the court was required to determine whether the court had authority and jurisdiction, and could order the amount to be paid to a depositor to be paid in instalments. On report.

Libbey, J. 1. In making investments and managing the affairs of the bank, the trustees represent the corporation, and the acts of the trustees are the acts of the corporation. 2. The acts found by the report are palpable violations by the corporation of the rules, restrictions, and conditions provided by law for the management of its affairs, and the court has no power to reduce the deposits. Petition dismissed.

MAINE v WATERVILLE SAV. BANK (1878) 68 Me. 515.

To recover tax on deposits in defendant, a savings bank, from May, 1876, to November, 1878. In April, 1876, the bank being insolvent, an arrangement was made to scale down the deposits, and in November business was resumed. The treasurer returned the amount as reduced to the state treasurer, upon which a tax was assessed. The action was not commenced until after the repeal, in 1877, of the act under which the assessment was made. On report.

Appleton, C. J. There was a sum of money due the State for taxes which the defendant was legally bound to pay, and the Act of 1877 did not repeal nor annul existing and vested rights. Judgment for the State.

GIBSON v NORWAY SAV. BANK (1879) 69 Me. 579.

Writ of entry. Plea: General issue. Both parties derived their title from D, the plaintiff, under a deed of quitclaim, from the assignee in bankruptcy of K, to whom D conveyed. The defendant, a savings bank, had possession and claimed title under a mortgage from K, before he became bankrupt. The mortgage described the same premises mentioned in the deed and referred to the deed. The mortgage was found in the bank's possession. The mortgage was set up as a defense. Plaintiff claimed that the premises were not the ones described in the mortgage. On report.

Virgin, J. 1. The plea of the general issue admits the possession to be in the defendant. 2. Possession being prima facie evidence of title, the plaintiff must show a better one, or he cannot recover. 3. The premises are prima facie identical. 4. Execution, delivery, and acceptance of the mortgage are prima facie established by the defendant's possession of the mortgage. 5. Setting up the mortgage as a defense is evidence of ratification on the part of the bank. Judgment for defendant.

FARMINGTON SAV. BANK v FALL (1880) 71 Me. 49.

On a promissory note. Defendant was the maker of a note which plaintiff bank took in good faith, without notice of any equities between the prior parties. The defendant objected to the note on the ground that its indorsement varied from the allegations in the writ, which stated that the note was indorsed M, agent, to the plaintiff, and the indorsement read, "Granite Agricultural Works, M, Agent"; he also claimed a nonsuit on the ground that the plaintiff savings bank was prohibited by law from purchasing notes secured by names alone, and that the plaintiff was bound by the equities between the original parties alone. Verdict for plaintiff. Exceptions.

Barrows, J. 1. The indorsement upon the note is that of M, agent, and it was placed there to transfer the note to the indorsee as alleged. 2. The statute which prohibits savings banks from loaning on names without other security, will not prevent them from enforcing payment of a note, whether it was purchased in conformity with the statute or not. 3. The defendant, having issued the note, is bound to the holders, taking it without notice of any equities between the original parties. Exceptions overruled.

DUNN v WESTON (1880) 71 Me. 270.

On promissory note payable to the W Bank or order, and indorsed by the bank to the plaintiff. The note was a renewal of one made by defendants for the accommodation of a corporation not a party to it. The original note was to have been discounted by the bank, but the plaintiff advanced the money instead. The money was appropriated to the intended purpose. The note was without restrictions. The note in suit was given to the bank and indorsed to the plaintiff, who surrendered the original note. The indorsement was by the treasurer in his official capacity. On report.

Appleton, C. J. 1. The note first given was valid in the hands of the plaintiff, and the giving up of the first was a good consideration for the note in suit, and the makers are liable thereon. 2. The indorsement by the bank was valid, and its assent may be inferred from the acts of the officers. Judgment for plaintiff.

Cited: 71 Me. 376; 72 id. 438; 87 id. 526.

ROBINSON v RING (1881) 72 Me. 140.

Petition. The application was to compel the administrator to distribute a sum of money not included in the inventory of the estate. The intestate deposited the money in question in a savings bank in the name of B, but made no declaration at any time that the deposit was for B, and he retained possession of the deposit book. There was no proof of the intestate's intention by making the deposit in the name of B. Decree for plaintiff. On report.

Appleton, C. J. No trust was declared when the deposit was made, and it is not a gift causa mortis. Decree affirmed.

Cited: 73 Me. 69, 72; 83 id. 379; 88 id. 125, 149; 90 id. 554; 91 id. 237; 94 id. 458.

FAIRFIELD SAV. BANK v CHASE (1881) 72 Me. 226.

Writ of entry. It was averred by defendant that at the time of the execution of the mortgage under which the plaintiff, a savings bank, claimed the attorney who wrote the mortgage, was a trustee thereof, and prior to that time he had written a deed of half of the same land to the defendant, which had not been recorded when the mortgage was given, and that the fact of his having written the deed when he was trustee, was notice to the bank of the prior conveyance to the defendant. The attorney obtained part of his information before his employment by the bank. The court ruled pro forma that the knowledge of the attorney of the existence of the deed at the time the mortgage was executed was imputable to the bank. Verdict for defendant. Exceptions.

Peters, J. 1. The pro forma ruling that the knowledge of the attorney was sufficient notice to the bank irrespective of whether he was acting as the attorney of the bank when the mortgage was made, was erroneous. 2. The knowledge of the attorney, although obtained before his employment by the bank, could not have been forgotten by him, and was so material to the transaction that it was his duty to communicate it and therefore was implied notice to the bank. Exceptions sustained.

Cited: 78 Me. 545; 81 id. 71; 83 id. 157.

NORTHROP v HALE (1881) 72 Me. 275.

Bill to obtain the amount of deposits made by the defendant's intestate in a savings bank in the name of the plaintiff, a nephew of the depositor, with a memorandum that they could be paid to her. The intestate retained possession of the book, and drew the dividends and a part of the principal. It was contended that evidence, aliunde as to the intention of the depositor, was admissible to vary the effect of the entries. On report.

Walton, J. The evidence is admissible. Case to stand for trial.

Cited: 73 Me. 71; 75 id. 31; 83 id. 377; 88 id. 126.

NORTHROP v HALE (1881) 73 Me. 66.

Bill claiming a deposit made in a savings bank by R in the name of the plaintiff, without her knowledge, subject to the depositor, who retained possession of the passbook, and drew the dividends and portions of the principal. On facts agreed.

Appleton, C. J. Here was no gift inter vivos or trust in favor of the plaintiff. Bill dismissed.

Cited: 73 Me. 72; 75 id. 32; 77 id. 152; 83 id. 379; 85 id. 146; 88 id. 125, 149; 90 id. 554; 94 id. 458.

NORTHROP v HALE (1881) 73 Me. 71.

Bill claiming a deposit in a savings bank, made in the name of the plaintiff, by R, without the knowledge of the plaintiff. R retained the passbook till her death, and drew the dividends, and portions of the deposit for her own use. On agreed statement.

Appleton, C. J. The deposit was not made in trust for the plaintiff and she had no title to it as a gift. Bill dismissed.

Cited: 83 Me. 379.

BARKER v FRYE (1883) 75 Me. 29.

Bill to recover possession of a savings bank book, showing a deposit in favor of the plaintiff. F made deposits for plaintiff, taking a book for him. The book provided that it should be subject to the depositor during her lifetime. She afterward informed the plaintiff of what she had done. Subsequently the treasurer, at her request, erased from the book the provision that it should be subject to her order, and also erased the same entry from the books of the bank. She notified the plaintiff, and wrote him that, when they met, he should have the book. Before F died, she delivered the book to the defendant, with a written order to enable him to draw the deposit. He knew all the circumstances, when he took the book. On report.

Danforth, J. 1. After the change in the books, no condition remained attached to the deposit. 2. The intention that the gift was then to take place, cannot be disputed, and after this change F was a trustee for the plaintiff. 3. It was not

necessary to deliver the deposit book to the plaintiff to pass the title to him.
4. The defendant took the book with notice of the facts. Bill sustained.

Cited: 88 Me. 127, 152, 518.

ATKINSON v MINOT (1883) 75 Me. 189.

Assumpsit on town orders. The plaintiff received from S the treasurer of the defendant town in payment of its orders, a check, and a note signed by S, as treasurer. Later S discovered that the plaintiff had not drawn the money on the check, and induced him to take a private note in exchange for it and a treasurer's check on the C Bank. The treasurer absconded, and the municipal officers took possession of the funds in the C Bank. When the plaintiff presented his check, payment was refused. On report.

Barrows, J. 1. The act of the municipal officers in withdrawing the money, which would otherwise have gone to pay the plaintiff's check, defeated the payment which was attempted to be made thereby, and the town holds the money thus withdrawn to the amount of the check as money had and received to the use of the plaintiff. 2. Although plaintiff was induced by the fraud of the treasurer to take the private note, he must be regarded as having realized so much of the check first given. Judgment for plaintiff for the check.

Cited: 79 Me. 68; 91 id. 379.

HALL v OTIS (1885) 77 Me. 122.

Bill to construe a will. H, legatee under the will of D, had a right to consume the estate of the testator; but what she did not consume, was to go to others. After the death of D, she made deposits from time to time in a bank. The earlier deposits were from the funds of the testator. Subsequently she drew out a portion of the total deposit, leaving a portion at the time of her death. There was no evidence as to which fund was drawn upon. A party in interest was not allowed to testify to facts happening before the intestate's death, except those testified to by the administrator. The master to whom the case was referred, ruled that the amount drawn out was from her own funds. Exceptions.

Emery, J. 1. The presumption is, when one makes a draft from a fund composed partly of his own money, and partly of the money of another, that the draft was intended to be made and was made from the drawer's own funds. 2. Where an administrator testified to facts happening before the intestate's death, a party in interest, who testifies, is limited to the same facts. 3. Exceptions to the exclusion of evidence will not be sustained if the excluded evidence could have no weight. Report accepted.

Cited: 92 Me. 208.

DEXTER SAV. BANK v COPELAND (1885) 77 Me. 263.

On note. Defendant was the executor of the deceased treasurer of plaintiff. He demanded credit for the amount of a note. The testator made the note to the bank, secured by an assignment of a policy of life insurance, to make up in part for a loss, for which the maker was neither legally nor morally responsible. The note was not delivered to the bank in the lifetime of the maker, and was payable only from the insurance. The bank's trustees paid the note from the insurance and paid the balance to defendant.

Danforth, J. 1. The note was without consideration and could not be collected by any legal process. 2. The assignment of the policy was void for want of delivery. 3. The amount paid on the note should be allowed as a credit on any indebtedness due from the testator. Plaintiff nonsuit.

Cited: 85 Me. 146.

HOBART v BENNETT (1885) 77 Me. 401.

Bill for the redemption of mortgages held by the defendant. The defendant contended that the suit could be maintained in the name of the receiver of a savings bank to which the mortgage was given at a judicial sale, on an execution in favor of the bank, and that the sale for the two mortgages at the same time for a gross amount was void. On report.

Walton, J. 1. Receivers of savings banks may commence suits in the name of the bank, or in their own names as receivers. 2. If a receiver improperly purchases

property on an execution in favor of an estate which he represents, the proper remedy is to hold him responsible for the injury, if any, which the estate thereby sustains. 3. A sale upon execution of an equity of redemption of property, on which there are two or more mortgages at the same time for a gross sum, is not void. Case to stand for trial.

Cited: 83 Me. 164.

PARCHER v SAVINGS INSTITUTION (1886) 78 Me. 470.

Action by the administrator of P for a deposit entered upon the bank ledger by order of P, "payable also to Mrs. L, in case of the death of P." There was no other evidence to show a gift. Plaintiff contended that this did not amount to a gift *causa mortis*. On agreed statement.

Emery, J. The deposit belonged to the estate of the depositor. Defendant defaulted.

Cited: 81 Me. 243.

DREW v HAGERTY (1889) 81 Me. 231.

Action for money collected upon three savings bank books after the death of the defendant's husband, who made the deposits. Plaintiff was the administrator of the husband's estate. The defendant claimed that the books were given to her by her husband, *causa mortis*, on the day of his death. The deposits were joint savings of the husband and wife. There was an agreement between them that the survivor should have the money. The defendant had possession of the deposit books, but there was no evidence of the delivery of the books to the defendant by her husband. The deposits were made by the husband. Verdict for plaintiff. Exceptions.

Walton, J. To constitute a gift *causa mortis*, there must be an actual delivery, and delivery must be made for the express purpose of consummating the gift. A previous and continuing possession by the donee is not sufficient. Exceptions overruled.

Cited: 85 Me. 146, 233; 88 id. 127, 153, 518.

SAVINGS BANK v FOGG (1890) 82 Me. 538.

Interpleader by a savings bank to ascertain the legal title to a deposit made by H, and claimed by F, representative of the estate of H, and by D. In his lifetime H deposited the fund in the name of D or himself. A few days before his death, H gave the executor a small box with directions to give the bank book, which was in the box, to D. The book was not delivered to D until after testator's death. D contended that this amounted to a gift *inter vivos*. On report.

Haskell, J. A gift *inter vivos* must be complete between the living. It cannot be consummated after the death of the supposed donor. Such a disposition would be inoperative under the statute of wills. *Donatio perfectur possessione accipientis*. Decree for H's estate.

Cited: 85 Me. 146; 88 id. 125, 153.

KENNEBEC SAV. BANK v FOGG (1891) 83 Me. 374.

Interpleader as to the ownership of a deposit in the plaintiff savings bank. The claimants were the executors of H, and the administrator of M the wife of H. The deposit book had the heading "in account with M." There was evidence of the ability of the husband to earn money and of the inability of the wife in this respect, and of transfer of the husband's account from another bank to this one, and that he had prior accounts to the limit in this bank. The wife died first and the husband continued the account as his own. The wife never had the deposit books, nor did she know of the deposit. On report.

Emery, J. 1. The entries upon the books of the bank and the deposit book are not conclusive evidence of ownership, and evidence may be introduced to vary the effect of such entries. 2. The money on deposit belonged to H. Decree accordingly.

Cited: 90 Me. 548; 94 id. 458.

AUGUSTA SAV. BANK v FOGG (1891) 83 Me. 374.

The facts and decision are the same in this case as in the foregoing case of *Kennebec Savings Bank v Fogg*, 83 Me. 374, with the exception of the headings to three passbooks.

FIRST NAT. BANK v MAXFIELD (1891) 83 Me. 576.

Action to obtain possession of mortgaged property. The mortgagor, at the time of giving the mortgage, had title. Plaintiff bank discounted a draft, payable in Boston, for the indorser and sent it to a Boston bank for collection. On the last day of grace the acceptors gave a check on a bank in which they had funds, and the draft marked "paid" was given to them. Before the check was presented on the next day, the acceptors failed. No notice of protest was given and there was no written waiver. Plaintiff recovered possession of the draft, told the indorser that it had not been paid, and the latter gave a mortgage. Defendant, having knowledge of the mortgage, trusted the property covered by it. Defendant contended that there was no consideration for the mortgage; that by the laws of the United States the bank could not hold such a mortgage; that the draft was not paid by the check. On report.

Haskell, J. 1. The indorser was not liable on the draft, without notice of protest, or a written waiver thereof. 2. The draft was paid and was evidence of the amount of the debt. 3. The acceptors paid the draft. 4. There was a good consideration for the mortgage. 5. The bank could hold such a mortgage. Judgment for plaintiff.

Cited: 92 Me. 150.

FIRST NAT. BANK v KINGSLEY (1891) 84 Me. 111.

On two promissory notes made by defendant. The declaration alleged that the notes were dated, indorsed, and delivered to the plaintiff on Sunday. Demurrer. Judgment for plaintiff. Exceptions.

Foster, J. 1. A contract made on Sunday, where the transaction of such business is prohibited, is an illegal contract, and void as between the parties. 2. The defendant, before he can defend such an action, must restore whatever consideration he had received for the note. Judgment affirmed.

Cited: 93 Me. 562, 563.

MANUFACTURERS NAT. BANK v HALL (1893) 86 Me. 107.

Assumpsit by the plaintiff, a national bank of Boston, on a promissory note payable there. Plea: A discharge in bankruptcy granted by a Massachusetts court. The defendant's real estate in Maine was attached in the suit. Plaintiff contended that the decision of the Massachusetts court could not affect property in Maine. On report.

Emery, J. 1. The plaintiff, although a national bank, is subject to the jurisdiction of the state courts of Massachusetts. 2. The decree of the Massachusetts court has full effect on the parties, even when they come into Maine. Plaintiff nonsuit.

MUSTARD v UNION NAT. BANK (1893) 86 Me. 177.

To recover a sum of money to which the plaintiff's intestate, as a stockholder in defendant national bank, was entitled by the reduction of the capital stock. Before the reduction, the intestate's stock had been attached, and the reduction took place during the pendency of the suit in 1882. The attachment was released in 1891, and on that date the plaintiff made his demand for payment. Plaintiff contended that the bank was liable to pay interest from the date of the reduction of the stock. The court rejected the claim for interest prior to the date of demand. Exceptions.

Peters, C. J. The bank was not liable to pay interest. It has been always ready and willing to pay the money to the plaintiff, or his intestate, except for the existence of the attachments. Exceptions overruled.

HATCH v CAINE (1894) 86 Me. 282.

Bill to recover money in a savings bank as a part of the estate of the plaintiff's testator. The testator left the rest of his estate to his wife for life, with power to sell, convey, and use the principal, if required for her comfort. The re-

remainder was to go to a designated society. A portion of the remainder consisted of the deposit made by the widow in her own name, separate from her own funds. On report.

Walton, J. The plaintiff is entitled to the money as a part of his testator's estate. Decree for plaintiff.

Cited: 92 Me. 545.

BANGOR SAV. BANK v WALLACE (1894) 87 Me. 28.

Trespass by a savings bank, as assignee of a mortgage, to recover the value of crops removed by the defendants after possession was taken by the plaintiff. The defendants justified as agents of the mortgagor and contended that the treasurer of the bank had no authority to direct B to take possession of the premises or institute the suits, without instructions by vote of the directors being shown, and that possession had not been taken by plaintiff. In reply to B's letter asking plaintiff to send the mortgage for foreclosure, the plaintiff's treasurer sent the mortgage, and B then entered upon the land announcing that he did so to take the crops. On report.

Strout, J. The treasurer of the plaintiff, in the absence of evidence to the contrary, may be presumed to have had authority to take possession of the mortgaged property for the bank to secure the crops, and to institute suits to foreclose the mortgage, and such possession was taken. Judgment for plaintiff.

Cited: 89 Me. 458.

BATH SAV. BANK v HATHORNE (1895) 88 Me. 122.

Interpleader to determine the title to a deposit in the plaintiff bank. The deposit was made by the depositor in "trust for A" and remained intact during his life. The depositor stated to several witnesses that he intended the deposit for A, but such intention was never communicated to her. The bank book was not delivered. The depositor's administrator and A claimed the deposit.

Haskell, J. There was no gift of the deposit, but the declarations and conduct of the donor are consistent with the presumption arising from the entry itself, and show a completed trust in favor of the donee. Decree for A.

Cited: 88 Me. 150, 434; 90 id. 476.

NORWAY SAV. BANK v MERRIAM (1895) 88 Me. 146.

Interpleader to determine the ownership of deposits in the plaintiff bank. R, having a deposit standing in her own name, surrendered her deposit book and opened new accounts in the names of "R and M" and "R and M M, or their survivor, in joint tenancy." Both books were retained by R during her life, and M and M M had no notice or knowledge of it until after her death. R made declarations, tending to show her intention to give the deposits to M and M M, and never drew any portion of the deposits. On report.

Wiswell, J. There was no gift, and no trust was created. Decree for the estate.

Cited: 90 Me. 476, 554; 94 id. 458.

WHITE v CUSHING (1896) 88 Me. 339.

Assumpsit on the following order: "P Savings Bank. Pay L, or order, \$120, and charge to my account on book No. —, J N Cushing. Witness —." The words, "The bank book of the depositor must accompany this order," were printed below on the order. This order was indorsed by L, in blank, and the plaintiff claimed to recover upon it. The book was not presented. Defendant contended it was not a negotiable instrument. Judgment for plaintiff. Exceptions.

Foster, J. The order is payable only upon the production of the drawer's bank book, and, to make it negotiable, it must be accompanied by the book. Exceptions sustained.

Cited: 90 Me. 520.

LARABEE v HASCALL (1896) 88 Me. 511.

Action by the administrator of L, to recover money drawn from a savings bank by the defendant after the death of L. The money was drawn on an order signed by L, who instructed the defendant to pay his funeral expenses, and that the rest was the defendant's. The order was for part of the deposit. L, who was

a very old man, died six weeks after making the order. The bank book was delivered to defendant, and he performed all the conditions of the trust. On agreed statement.

Foster, J. 1. This was a gift coupled with a trust, which the defendant has executed, and the sum remaining from the order belongs to him. 2. All the requirements of a valid gift *causa mortis* have been fulfilled. Judgment for defendant.

BATH SAV. INST. v SAGADAHOC NAT. BANK (1897) 89 Me. 500.

Action to recover dividends. The defendant bank went into voluntary liquidation. Prior to the vote to liquidate, the plaintiff bank made a loan and acquired shares in the defendant, recorded in the name of W, as collateral. The loan remained unpaid. W signed the transfer in blank. Plaintiff did not present the certificates for transfer, and the defendant did not know that the plaintiff held them until 70 per cent of the dividends had been paid to W, either in cash or by a credit on paper held against him. The shares were transferable only on the bank's books and on a surrender of the certificates. On report.

Haskell, J. The holder of the certificates acquired a good title to the shares, and the bank could not set off any claims against the original holder, and the assignor could not transfer them to the bank by receiving liquidation dividends. Defendant defaulted.

WHITEHOUSE v WHITEHOUSE (1897) 90 Me. 468.

Assumpsit on a bank check. The defendant's testator, in consideration of plaintiff renewing a contract for marrying him, agreed that if he died without marrying, he would provide for her support. Being in failing health, he made the check, and placed it in an envelope addressed to an uncle of the plaintiff, in trust for her. He informed the uncle that it was in the safe, and told him to deliver it; that he had made no provision for the plaintiff in his will, for the check would take the place of such provision. The uncle assented, communicated the fact to the plaintiff, and she assented. Verdict for plaintiff. Exceptions.

Peters, C. J. A check may be the subject of a *donatio mortis causa*, when it is a contract founded on a full consideration, as in this case, and the plaintiff was the owner of the check. Exceptions overruled.

SAVINGS BANK v SMALL (1897) 90 Me. 546.

Interpleader to determine the ownership of a bank deposit. Both S and the executor of his wife claimed the deposit. The husband made the deposit in the name of the wife, kept the bank book, and withdrew money from time to time. His wife's signature did not appear on the books of the bank, and it was understood that the deposit belonged to the husband. The husband's testimony was received. By R. S., ch. 82, a party could not testify in regard to transactions with a deceased person in a suit by the administrator.

Whitehouse, J. 1. The testimony of the husband was not admissible. 2. There was no gift of the deposit to the wife. Decree for the husband.

FRENCH v BANKING CO. (1898) 91 Me. 485.

Assumpsit to recover the amount of an alleged deposit. The plaintiff made a deposit which was credited to him in his passbook and upon the books of the bank. Under the same date an entry of another item of the same amount was made by the manager in the passbook, to the plaintiff's credit. The plaintiff did not claim that the second sum was deposited by him on that day, but he claimed that a year later he sent the same amount by his wife to be deposited and that it was never credited to his account. Neither plaintiff nor his wife could swear positively in regard to the deposit, and the bank had not discovered the mistake at the time of the alleged deposit. Verdict for plaintiff. Motion for a new trial.

Wiswell, J. The verdict was not warranted by the testimony. Motion sustained.

SAVINGS INSTITUTION v EMERSON (1898) 91 Me. 535.

Interpleader to determine the title to deposits in the plaintiff bank. E, a resident of California, made the deposits. Before he died, he assigned his deposits

to his son without consideration. He left property in California sufficient to pay his creditor in Maine, but at the date of the gift a large part of the creditor's claim was barred by the Statute of Limitations in force in California. The money was not paid into court. The son and an administrator of E, appointed in Maine, were the claimants. Decree for administrator. Appeal.

Savage, J. 1. In interpleader, the money should be paid into court. 2. The necessary effect of the assignment was to defeat, hinder, and delay creditors in Maine, and the fund should be administered in this state, as the estate of a non-resident. Decree set aside.

NEAL v COBURN (1898) 92 Me. 139.

Assumpsit to recover money paid to the defendant for a check which was afterward found to be a forgery. A check purporting to be that of H, payable to C, was indorsed to the defendant, and by him indorsed to plaintiff. It was paid by drawee. Three days later it was found to be forged, and was returned to the plaintiff, who demanded the amount of the defendant. Defendant contended that the loss fell on the bank. On agreed statement.

Emery, J. The loss falls upon the bank which accepted the paper as genuine and paid it as the check of its depositor. Plaintiff nonsuit.

Cited: 94 Me. 541.

MAINE TRUST & BANKING CO. v SOUTHERN LOAN & TRUST CO. (1899)
92 Me. 444.

Bill to enforce the liabilities of stockholders of a loan company. The plaintiff bank loaned money to defendant and, after exhausting the security, there remained \$12,000 due, upon which judgment was obtained. The defendant had no assets, and answered that the remedy was not in equity; that the defendant commenced business before one-half of its capital stock had been subscribed and paid in, in cash, as required by its charter. On report.

Strout, J. 1. The remedy is in equity. 2. That the defendant's company commenced business, before one-half of its capital stock was subscribed and paid in, cannot avail the stockholders. 3. The stockholders are liable individually for a sum equal to the par value of the shares owned by them. Bill sustained.

HATCH v NATIONAL BANK (1900) 94 Me. 348.

On a certificate of deposit payable in current funds to the depositor's order with interest, if on deposit six months. The certificate was issued to O by the defendant bank, and claimed by the plaintiff as a gift by indorsement and delivery. The defendant contended that the certificate was non-negotiable. Verdict for plaintiff. Exceptions.

Savage, J. The certificate of deposit is a negotiable instrument, and where no time of payment is named, it is payable on demand. Exceptions overruled.

COBURN v NEAL (1901) 94 Me. 541.

Action, to recover a payment made on a check. The plaintiff indorsed a forged check to defendants. The defendants indorsed it to others, and it was subsequently paid by the drawee bank, and charged to its depositor, the alleged drawer. After the forgery was discovered, it was returned through the several parties, until it came to defendants, who paid it, and demanded payment of the plaintiff, who paid part. Having successfully resisted a suit by the defendants for the collection of the balance, he brought this suit for the payment made by him. On agreed statement.

Savage, J. A voluntary payment made under mistake of law cannot be recovered back. Plaintiff nonsuit.

See 92 Me. 139 supra.

HALLOWELL SAV. INSTITUTION v TIBCOMB (1901) 96 Me. 62.

Interpleader to determine ownership of a deposit made by B in his lifetime in plaintiff bank. B surrendered the book at the bank, and requested that the deposit should be transferred to his brother M. A new account was opened; a new book issued in M's name, which was delivered to B. B wrote M of what had been done, and that he wanted the interest on the deposit as long as he lived; but in case of his death he wanted M's children to have it, and that he had trans-

ferred the money with that understanding. M had signed an order on the bank and sent it to B, to draw the deposit. B died without presenting the order or drawing the money. M contended that the deposit was a gift inter vivos.

Savage, J. The depositor's intention was for his brother to hold it in trust for his benefit as long as he lived, and after his death to go to claimant's children. Decree accordingly.

MARYLAND

BANK OF THE UNITED STATES v NORWOOD (1803) 1 Har. & J. 423.

Assumpsit. For accommodation, the defendant indorsed a note drawn in his favor to the plaintiff. The drawers were known to the defendant at that time to be insolvent. Not being paid on presentment by a notary public as the bank's agent, it was protested by the notary, and a letter to the defendant, merely informing him of the protest, was mailed on the same day. The defendant lived seven miles from the city, beyond which the penny post did not then deliver; but the defendant knew this was the customary way of sending notices. The notary was not appointed by the bank by deed.

Chase, J. 1. The bank may act as a natural person, by agent, not appointed by deed. 2. The custom of the place decides the question. 3. The notice is legal, and in itself sufficient notice of default.

Cited: 3 Bland 421; 7 Gill. 225.

WOODS v SCHROEDER (1817) 4 Har. & J. 276.

On check. Defendants made a check to bearer, on the M Bank, to the order of M, who delivered it to the plaintiff for value. M, in consideration of the defendants' check, gave defendants his check for part, paid part in cash, and the balance by check of U & S. Plaintiff notified defendants that he presented the check and payment was refused because they had no funds and had stopped payment. M's check, given in exchange to defendants, was not paid. The check was not indorsed. Defendants contended that the check was not negotiable unless indorsed. Plaintiff contended that it passed by delivery. Judgment for plaintiff. Appeal.

Per curiam. A check payable to bearer passes by delivery. The bearer may sue on it as on an inland bill of exchange, and is entitled to recover in this form of action. Judgment affirmed.

Cited: 38 Md. 492; 56 id. 534.

WHITTINGTON v FARMERS BANK (1823) 5 Har. & J. 489.

Assumpsit on promissory note. Plaintiffs, the president and directors of a bank, held a note indorsed to them by defendant, also an indorsee and a stockholder. The plaintiffs proved the note, the protest not in the corporate name, an order of the board of directors authorizing a compromise with defendant, and an oral rescission of the order, by the president and directors. Defendant was not permitted to prove that a sufficient number of directors were not present to make the order legal, or to ask who the creditors were. The court refused to instruct for the defendant that the plaintiffs should set off any stocks or funds belonging to defendant in their hands; that the plaintiffs must prove they were a body corporate; that defendant could avail himself of any fraud; that any funds in the vaults of the bank belonging to defendant should be applied on the claim; that the true value of the bank stock should be taken as a setoff in estimating the damages. Judgment for plaintiffs. Appeal.

Dorsey, J. 1. The protest of a promissory note is not of itself evidence in chief of the fact of demand. 2. The protest was not fatal because not made in the plaintiffs' corporate name. 3. The plaintiffs' evidence was properly received. 4. The defendant cannot set off, against any claim of the bank on the note, any stock he has therein. 5. Defendant can have any money in possession of the bank deducted from the amount of the notes. 6. The instructions were properly refused. 7. Defendant's evidence was properly rejected. 8. The rescission of the order was properly proved by parol evidence. Judgment reversed.

Cited: 7 H. & J. 50; 1 H. & G. 413, 414, 428; 2 id. 493; 4 Md. 510.

BEND v THE SUSQUEHANNA BRIDGE & BANK CO. (1823) 6 Har. & J. 128.

Assumpsit to recover stock assessment. P was the owner of 100 shares of stock in the plaintiff. He authorized C, by power of attorney, to transfer the stock to B by an assignment commencing "I, P, by my attorney, C, do hereby transfer," and signed "C, attorney for B." Plaintiff sued B for three assessments of five dollars each on each share. The defendant offered to prove the stock was only assigned to him by way of mortgage to secure a loan. Judgment for plaintiff. Appeal.

Buchanan, J. 1. The superaddition of the words, "Attorney for B," cannot have the effect to defeat the assignment. 2. The charter necessarily creates a privity, and raises an assumpsit on the part of such as choose to become stockholders by accepting transfers, to pay all such calls as may be regularly made. 3. The evidence was clearly inadmissible. Judgment affirmed.

JACKSON v UNION BANK OF MARYLAND (1823) 6 Har. & J. 146.

Case to recover damages for failure to collect note. Plaintiff was the holder of an accepted bill of exchange, indorsed to him by H, the payee. The drawee lived in Washington. The bill was due May 2. On May 1, plaintiff placed it in defendant for collection, in accordance with his regular custom. The defendant mailed it to its regular Washington correspondent on May 3. The latter presented it for payment on May 6. It was dishonored, protested, and notices sent, the drawer and drawee being insolvent. The indorser was discharged. It was proved that in the District of Columbia it was the universal custom to present bills for payment the fourth day after due. H was a resident of Maryland, where only three days are allowed. Judgment for defendant. Appeal.

Buchanan, J. The placing of the bill with defendant for collection was equivalent to an agreement that it should be sent by them for that purpose to some bank in the District of Columbia, thus virtually constituting the latter bank the plaintiff's agent in that transaction. If the agent did, in conformity with the custom in the District of Columbia, neglect to cause demand and protest to C to be made on the proper day, the defendant is not chargeable with any negligence, or other improper conduct. Judgment affirmed.

Cited: 1 G. & J. 148; 4 Md. 402; 8 id. 547.

CITY BANK OF BALTIMORE v BATEMAN (1826) 7 Har. & J. 104.

Assumpsit to recover money had and received. Plaintiff owned \$11,000 which was taken to the defendant without his consent. He offered to prove by G, a clerk of the bank, that H, the president, and B, the cashier, who were stockholders, told G to pay the plaintiff's money in discharge of the bank's debts, which he did; that E brought into the bank a bag of dollars, which H told witness was the plaintiff's money, obtained in the same manner as the other, and directed him to pay it away, which he did. The plaintiff offered G, a stockholder, as a witness. Judgment for plaintiff. Appeal.

Buchanan, C. J. 1. The president and cashier of the bank could legitimately direct an inferior clerk to pay out moneys in the bank, in discharge of the debts due by the bank and there is no principal which goes to exclude evidence of such directions being given in a case in which they are pertinent to the issue. 2. Declarations of H to G, not making a part of the *res gestae*, could not be received in evidence against the corporation. 3. The evidence of G was admissible. Judgment reversed.

Cited: 2 H. & G. 170; 1 G. & J. 376; 4 id. 277; 11 id. 34; 3 Gill. 437; 21 Md. 514; 32 id. 146; 37 id. 102, 103; 45 id. 193; 69 id. 402; 88 id. 377.

EICHELBERGER v FINLEY (1826) 7 Har. & J. 381.

Assumpsit. Defendant paid for labor and services with two checks on the C Bank for \$1,500 each, and which in the regular course of business came to the plaintiffs. The checks were presented, but defendant had not sufficient funds in the bank to meet them, and was indebted to the bank in stock transactions larger than the amount of the check. Payment was refused. Defendant contended that he should have been notified of the non-payment of the checks. Judgment for plaintiffs. Appeal.

Dorsey, J. The drawer could not have been injured by the want of notice

The object of notice is to let the drawer know that the bill has been dishonored, which defendant already knew. It was an act, the omission or performance of which as to him was wholly immaterial. Judgment affirmed.

Cited: 1 H. & G. 470; 36 Md. 602; 38 id. 491, 492; 78 id. 589.

UNION BANK v RIDGELY (1827) 1 Har. & G. 324.

Debt against surety on a bond. Defendant was surety on the bond of R H, cashier of plaintiff. Plaintiff's charter expired February 6, 1817. It was renewed. R H remained in office until 1819. Subsequently suit was brought on the bond. There was nothing in the records of the bank to show that the bond had been accepted. The defendant by amendment pleaded special non est factum, under which evidence was admitted to show that the bond had been delivered as an escrow on a condition not performed. The court instructed the jury that there was no legal evidence of any bond. Judgment for defendant. Appeal.

Buchanan, C. J. 1. General issue and tender are the only pleas disallowed for inconsistency. 2. Although the testimony of an interested corporator cannot be received generally for the corporation, he may be a competent witness for some purpose other than to prove himself a stockholder. 3. A corporation may act without its corporate seal, and acts or contracts of corporations may be proved otherwise than by writing. 4. The plea of non est factum makes the issue conclude to the country, and throws the whole proof of the execution of the bond on the plaintiff, who asserts the affirmative. The issue is upon the matter specially alleged in the plea. 5. The plea of escrow admits signing and sealing, but denies the delivery as a deed. The issue is upon the special matter of delivery and the burden upon the defendant. 6. Corporate acts may be inferred from other facts and circumstances than seal or writing. 7. In the absence of evidence respecting the execution of the bond, the jury ought to have been permitted to infer that it was duly executed and delivered by defendant and accepted by plaintiff. The acceptance need not be in writing. 8. The bond is only coextensive with the limitations of the original charter. Judgment reversed.

Cited: 3 Bl. 421; 1 Md. C. 398; 8 G. & J. 518; 1 Md. 11; 3 id. 228; 4 id. 435, 449; 7 id. 196, 198, 201, 130; 14 id. 367; 31 id. 107; 33 id. 507; 37 id. 101; 44 id. 63; 46 id. 331, 387; 49 id. 400; 54 id. 668; 70 id. 277; 72 id. 328, 329; 74 id. 451.

FARMERS BANK OF MARYLAND'S CASE (1830) 2 Bland. 394.

Bill by administrator to compel transfer of stock. Plaintiff's intestate held certain shares in the defendant bank. After his death, defendant recovered a judgment against plaintiff, as administrator, binding a due proportion of the assets of the intestate. Plaintiff wished to sell the stock, apply the proceeds to the debt and settle up the estate. Defendant refused to allow a transfer, and claimed the stock as forfeited. Defendant's charter provided that all debts, actually due to the company by a stockholder offering to transfer, must be discharged before the transfer shall be made.

Bland, C. The security arising by operation of the charter must be considered as a lien on the stock of the debtor of the bank which stands as a mortgagee. Judgment for plaintiff.

STATE OF MARYLAND v BANK OF MARYLAND (1834) 6 G. & J. 205.

Bill. The state deposited funds in the Bank of Maryland, which subsequently conveyed all its property to trustees for the settlement of its affairs. The state then sought to have its claim paid in full, as a preferred claim. The Act of 1650, ch. 28, gave all debts due the Lord's proprietaries of the province priority. Bill dismissed. Appeal.

Buchanan, C. J. 1. The priority was not denied to the state by the Act of 1650, ch. 28, which was not in force at the time of the revolution. It is too late, at this day, to deny the state's right at common law to have its debt paid first out of the property of its debtor. 2. The state's claim was not a lien, but was only a mere priority. But it must be resorted to before other vested rights to the property sought to be subjected to the claim are acquired. 3. The preference which the state had, is defeated by the deed of trust. Decree affirmed.

Cited: 1 Md. Ch. 174; 4 id. 356; 7 G. & J. 459, 461, 491; 4 Gill. 46; 5 id. 51; 6 id. 116; 7 id. 469; 9 id. 117, 215; 10 Md. 515; 16 id. 67; 34 id. 374, 655; 47 id. 239; 51 id. 42; 82 id. 436; 85 id. 410.

UNION BANK OF TENNESSEE v ELLICOTT (1834) 6 G. & J. 363.

Injunction. The Bank of Maryland conveyed to trustees all its assets, to collect and divide among the creditors. Three deeds were executed, the last one increasing the trustees to three. The plaintiff bank, a creditor, sought to enjoin the trustees from receiving in payment of debts, notes and certificates of deposit of the bank, which had depreciated in value by reason of resolutions passed by the directors. Acts passed in 1818 and 1824 gave debtors of the defendant bank the right to discharge their debts in the bank's notes and certificates at par. Injunction refused. Appeal.

Buchanan, C. J. 1. The Bank of Maryland was authorized and had the right to provide for the payment of its debts by a transfer in trust of all its property, and the last deed is a good, valid, and effective deed for the purpose therein expressed, notwithstanding the prior deeds. 2. Antecedent to the execution of either of those deeds, it was the right of the debtors to pay their debts in the notes and certificates of deposit issued by the bank at the nominal value thereof, which right was not extinguished by operation of any of the deeds. 3. The trustees were bound to receive such notes and certificates independent of the resolutions. Decree affirmed.

Cited: 7 G. & J. 459, 461; 8 Gill. 69.

HODGES v PLANTERS BANK (1835) 7 G. & J. 306.

Injunction. M was president of the defendant. He was indebted to it on two notes as drawer, one of which was indorsed by H. After the other note was due, M transferred to plaintiff, stock of the bank owned by him as security for the note indorsed by plaintiff. The bank stopped payment, and was authorized by legislative act to receive its own stock in payment of debts due it by stockholders, at a valuation placed upon it by the directors. That valuation was 80 cents on the dollar. The bank's charter gave it the privilege to prevent the transfer of its stock by any holder whose debt to it was due and unpaid. This bill was filed for an injunction and relief against a judgment obtained against the plaintiff as indorser, the bank having refused to allow him credit for 80 cents on the dollar on the stock transferred to him. Temporary injunction dissolved. Appeal.

Chambers, J. 1. The bank, and not the transferee, must abide the loss, if a loss is sustained by any act of the proper officer of the bank, arising either from a misconception of his duty, or a want of judgment. The bank may waive this privilege. 2. Whenever an injunction is granted upon the ground that the defendant at law is entitled to a credit for a sum less than the whole amount of the judgment, it ought to be with the proviso that the plaintiff at law may proceed by execution to collect the undisputed balance. Order reversed.

Cited: 1 Md. Ch. 411; 5 Gill. 76; 14 Md. 281; 57 id. 365.

CONOCOCHEAGUE BANK v RAGAN (1835) 7 G. & J. 341.

Bill to distribute bank assets. The stockholders of the C Bank having resolved to discontinue business, the directors, in 1820, authorized the debtors to pay their debts in the bank's stock, at \$16 per share, and to make dividends at the same rate when able. Soon after, many debtors paid their debts in stock. Between 1821 and 1831, dividends were declared to the other stockholders amounting to \$16 per share. In 1833 the bank had on hand from \$8,000 to \$13,000. This bill was filed by the stockholders who had not paid in their stock for debts, against those who had done so, and prayed that the assets be distributed among the former exclusively, until the latter placed themselves on an equal footing by paying interest. The court decreed the assets to be paid complainants not to exceed \$16 per share with interest from 1820, the surplus to be paid in ratable proportions among all stockholders. Appeal.

Dorsey, J. All the stockholders should be placed upon an equal footing. Those who had paid off their debts with stock are to be regarded as if they had received interest on their stock from the time of its payment to the bank in discharge of their obligations then due. We will not assume all payments of stock were made on the last day of 1820. Decree reversed.

FARMERS BANK OF DELAWARE v BEASTON (1836) 7 G. & J. 421.

Attachment. In 1829 the United States obtained a judgment against the E Bank. In 1830 the plaintiff obtained a judgment against the E Bank. In 1828

the E Bank obtained a judgment against the garnishee in this action. In 1829 an act was passed authorizing the stockholders of the E Bank to appoint two trustees to wind up the affairs of the bank. The meeting was held on a different day than that named in the statute, and the trustees appointed. No public notice of the meeting, as provided for by the act, was given. In 1830, on a bill filed by the United States, two receivers were appointed for the E Bank. Thereafter, on September 24, 1830, the plaintiff issued this attachment on its judgment, and laid it in this garnishee's hands. After judgment of condemnation against him, the garnishee paid the United States in a subsequent attachment by the latter the amount of the E Bank's judgment against him, and it was entered as satisfied by the United States. After 1829, the E Bank became insolvent. The following acts of Congress, to wit: 1789, ch. 5, sec. 21; 1790, ch. 53, sec. 45; 1792, ch. 27, sec. 18; 1797, ch. 74, sec. 5, as construed by the Supreme Court of the United States, provide that the United States shall obtain a priority by such a general divestment by a debtor of his property as would be equal to insolvency in its technical sense. Judgment for defendant. Appeal.

Archer, J. 1. The inability of the E Bank to pay her debts could not, per se, give to the United States the preference contended for. 2. The proceedings under the act were inoperative. 3. Until taken in charge by the receivers, summary jurisdiction by the United States courts could not be used to punish such as might cover it by execution or attachment. The judgment of condemnation was not pleaded and should not operate to bar the plaintiff's recovery. The plaintiff had a prior attachment which operated as a lien. Judgment reversed.

Cited: 4 Md. Ch. 413; 2 Md. 18, 478; 12 id. 129, 16 id. 206; 19 id. 233; 23 id. 150, 152; 86 id. 389; 88 id. 243.

BANK OF MARYLAND v RUFF (1836) 7 G. & J. 448.

Injunction. The Bank of M, being insolvent, conveyed to trustees all its assets, to collect and divide among its creditors. The plaintiff, a creditor, sought to enjoin the trustees from receiving in payment of debts, notes and certificates of deposit of the bank. The acts of 1818, ch. 177, and 1824, ch. 199, provides that in payment of any debt due to a "bank or banks in this state," the note or certificate of deposit of such bank shall be received. Injunction granted. Appeal.

Buchanan, C. J. 1. The legislature intended to extend this privilege to the debtors of all banks in the state, whether solvent or insolvent. 2. It was not in the power of the bank to deprive them of the privilege, and it was not extinguished or lost to them, by the deed to the trustee. Injunction dissolved.

MARYLAND SAV. INSTITUTION v SCHROEDER (1836) 8 G. & J. 93.

Injunction to restrain distribution of assets converted into stock. Plaintiff was a weekly depositor in the defendant, a bank. In May, defendant notified all the depositors that no more weekly deposits would be received, and that such deposits would cease to bear interest or to be entitled to any dividend of profits after December, unless converted into permanent stock. Plaintiff agreed to this, received his dividends and voted on the stock of his converted deposits. Thereupon special deposits were taken. Plaintiff alleged that defendant was insolvent, that the present board of directors was wrongfully giving preferences by paying the certificates of deposit in full, and that the act of conversion was beyond the charter powers of the bank. The directors answered that they had not gone beyond the powers of the charter, that the bank was not insolvent, and that, when plaintiff consented to the conversion of his deposit, he knew the purpose of the bank was to increase its special deposits by the means of this greater capital. Judgment for plaintiff. Appeal.

Stephen, J. If an injunction is to be sustained, it must be upon the case as made upon both bill and answer. Complainant's counsel is bound by an equitable estoppel from questioning the right of the corporation to make the conversion, at least from an attempt to shield the fund so created from a liability to the payment of the debts contracted with the institution upon the faith of its responsibility. Order reversed.

Cited: 1 Md. Ch. 370; 5 Md. 160; 41 id. 304.

PLANTERS BANK v FARMERS AND MECHANICS BANK (1837) 8 G. & J. 449.

Assumpsit. Plea: Statute of Limitations. Plaintiff and defendant were correspondents. Business between them terminated, and five years later the plaintiffs

brought this suit to recover a balance due. There was no evidence of a subsequent acknowledgment. The parties and the court proceeded upon the assumption that certain usages existed among banks without proof of the same. There was no proof of demand within the statutory period. Plaintiffs did not produce their running account and prove all the items thereof. Judgment for plaintiffs. Appeal.

Dorsey, J. 1. Not being heretofore established by the court, these usages cannot be judicially known to us, or sanctioned as general mercantile usages. 2. The Act of Limitations is a conclusive bar to the action whether the defendants have refused to settle or allow the claim asserted by the plaintiffs or not. 3. There is in a court of law no such bar to the operation of the Act of Limitations as "trusts." 4. Plaintiffs were at liberty to produce any isolated receipt of money and claim a verdict for the amount thereof. Judgment reversed.

Cited: 9 G. & J. 461.

UNION BANK OF MARYLAND v JOHNSON (1837) 9 G. & J. 297.

Assumpsit. E P, on March 23, conveyed to the plaintiffs all his property in trust, to sell and apply the proceeds to the payment of certain indebtedness to the defendant. This deed was recorded. On May 8, another like deed was made by E P to the same trustees and recorded on the same day. On March 24, E P's agents mailed him a draft for \$5,000. E P received it April 7, and the same day indorsed it to P E & Co., who deposited it with defendant. The latter forwarded it to New York for collection, and received the proceeds April 14. The trustees on June 2 notified defendant by letter that they would claim the proceeds of the draft. After the receipt of this letter defendant, on July 5, paid the proceeds to P E & Co. P E & Co. were indebted to E P on the date of the deed of March 23, and on April 7 had knowledge of the execution of the deed. Up to April 7 the plaintiffs had paid no money, nor suffered any loss on account of E P. They subsequently collected and paid various sums under the deed. The trustees brought this suit on July 5 to recover the amount of the draft. Plaintiffs are entitled to recover. Judgment for plaintiffs. Appeal.

Per curiam. Judgment affirmed.

KEY v KNOTT (1837) 9 G. & J. 342.

Injunction. M loaned S \$1,100 on a single bill. Part of the money loaned was a stolen United States bank note, the indorsement on which was forged. Subsequently S notified M that the forged note had been dishonored. S sued the United States Bank upon it, but could not recover; M sued S on the single bill, and obtained judgment. S filed this bill for an injunction and relief. Bill dismissed.

Stephen, J. The complainant was clearly warranted in appealing to a court of equity for that relief which he could not obtain in a court of common law jurisdiction. The complainant was clearly entitled to a credit upon his single bill for the forged note. Being a bank note, the rules as to demand and notice applicable to bills of exchange and promissory notes do not apply. Therefore the objection founded on timely notice of dishonor is not sustained. Decree reversed.

Cited: 11 G. & J. 470; 4 Gill. 486; 33 Md. 169; 35 id. 496; 36 id. 204.

UNION BANK v PLANTERS BANK (1838) 9 G. & J. 439.

Assumpsit. Plea: Statute of Limitations. Plaintiff and defendant were correspondents. Their transactions stopped when the defendant suspended payment. Prior thereto, the plaintiff had rendered an account, to which the defendant did not object for three years. This suit was brought five years after the defendant suspended payment. The plaintiff proved a usage of banks to infer from the lack of any report of differences of an account rendered, the correctness thereof, and proved that a suspension of specie payment made no difference in the usage. Judgment for defendant. Appeal.

Archer, J. The jury were at liberty to infer from the silence of the defendant their acquiescence in the correctness of the account rendered. The time from which limitations would commence running, would be the period when the plaintiff first had knowledge that the defendant had suspended specie payments, and not the period when the transactions between the parties terminated. But whether the one period or other be assumed, the plaintiff is equally barred, as more than three years elapsed from the date of their knowledge of suspension of payment. Judgment affirmed.

Cited: 2 Md. 74, 216; 6 id. 466; 20 id. 233.

DUNCAN v MARYLAND SAV. INSTITUTION (1838) 10 G. & J. 299.

Assumpsit. Plea: Usury. The plaintiff loaned the defendant \$150 on his note for six months, and on the day of the loan deducted \$4.60 discount. By the Act of 1826, ch. 90, Rowlett's Interest Tables were legalized. It was proved that by those tables the interest on \$150 for six months was \$4.58. The court refused to instruct the jury that the transaction was usurious. Judgment for plaintiff. Appeal.

Dorsey, J. 1. The authority in the charter to invest in "other securities," clothes the institution with the power of making loans by way of discount. 2. The taking of interest in advance upon the discount of notes in the usual course of business by a bond is not usury. 3. Whether the intentional exactions of a larger amount than is authorized by Rowlett's tables be the result of mistake or accident, or of a corrupt usurious design, is a matter of fact to be submitted to the jury. 4. A promissory note in which the negotiable words are omitted is within the Statute of Ann, and on it three days of grace are allowed according to mercantile usage. 5. The overcharge of two cents is too trifling and inconclusive a circumstance to warrant the jury in finding a corrupt and usurious intention on the plaintiff. Judgment affirmed.

Cited: 7 Md. 87; 57 id. 136, 137, 139, 140, 144.

**FARMERS AND MECHANICS BANK v PLANTERS BANK (1839)
10 G. & J. 422.**

Assumpsit. Plea: Statute of Limitations. The defendant suspended payment, and subsequently the plaintiff rendered its accounts showing a balance due it from the defendant. Whereupon the defendant gave notice of the suspension of payment. Five years later the plaintiff brought this suit to recover the balance due. In answer to the plea, the plaintiff cited Act of 1715, ch. 23, sec. 22, which exempted from the Act of Limitations accounts concerning merchandise, between merchant and merchant. The court held the act did not apply. Judgment for defendant. Appeal.

Dorsey, J. 1. The plaintiff was relieved by the notification from the necessity of demanding payment as preliminary to its right of action; and from the moment its authority to sue at law was complete, the Act of Limitations began to run. 2. The claim of the plaintiff was not exempted from the operation of the act cited. Judgment affirmed.

Cited: 3 Md. 187.

MERCHANTS BANK v MARINE BANK (1845) 3 Gill 96.

Assumpsit. V deposited a sum of money in the plaintiff and received therefor a certificate of deposit payable to S. It was mailed to S, but fell into the hands of another, who forged S's name and indorsed it to G, through whom it came to W & J. They deposited it in the defendant which collected from the plaintiff. Subsequently, the forgery was discovered, and the plaintiff notified the defendant, whose cashier promised to return the money, but failed to do so, whereupon this suit was brought. The funds of W & J on deposit with the defendant covered the amount of the certificate. Judgment for plaintiff. Appeal.

Spence, J. 1. To enable the defendant to prevent recovery, it must show itself to be a bona fide holder for value of the certificate. 2. If W & J had received credit on the books of the defendant bank for the amount of the certificate, the defendant was not concluded thereby from correcting this account; when the forgery was discovered, it had funds of W & J adequate to that purpose. 3. The defendant was not, however, bound by the promise of its cashier. Judgment affirmed.

Cited: 11 Md. 396; 27 id. 210; 30 id. 18; 33 id. 157.

GORDON, EX'R v MAYOR OF BALTIMORE (1847) 5 Gill 231.

Assumpsit to recover back taxes. The plaintiff's testator died owning shares of the stock of the U Bank of Baltimore. The defendant assessed and taxed this stock. The tax not being paid, the defendant obtained a judgment against the plaintiff. The plaintiff paid the judgment under protest. By defendant's charter the power of taxation was granted without limitations as to the objects of taxation. The Act of 1817, ch. 148, sec. 4, provided that the mayor and city council should have power to lay and collect taxes on the assessment of private property. Under

the contract between the state and the banks in 1821, the latter were subject to a school tax of 20 cents on every \$100 with the stipulation that no further tax would be imposed during the continuance of their charters. The tax was imposed under the Act of 1841, sec. 1 of which provided that all stocks or shares in any bank incorporated by the state shall be chargeable according to their valuation. Sec. 59 provided that all acts passed, relating to assessment and collection in conflict with this act are repealed. Sec. 60 provided that all county, district, and city taxes shall be assessed on the property. The plaintiff contended that the Act of 1841 was unconstitutional, on the ground that it impaired the obligation of the contract of 1821. Judgment for defendant. Appeal.

Martin, J. 1. The intention of the Act of 1821 was to relieve the banks from taxation for state purposes. The taxing power of the city was unfettered by any constitutional restrictions, and the tax imposed on the bank stock was in accordance with the Act of 1841, and must be maintained. 2. Money paid on an execution issued upon a judgment of a court of competent jurisdiction cannot be recovered back, although it afterward appears that the money was not due. Judgment affirmed.

Cited: 5 Gill. 247; 6 id. 296; 42 Md. 177; 44 id. 179, 181; 47 id. 293; 48 id. 93, 97, 101, 119; 50 id. 396.

FARMERS AND MECHANICS BANK v WAYMAN (1847) 5 Gill 336.

Bill to recover for loss of trust fund. Certain stock in the defendant was held by the complainant as trustee. He was directed under the trust to pay the dividends thereon to A J, wife of S J, during her life. Upon her death, the principal was to go to her children. The complainant permitted A J and S J to draw the dividends on the stock, and by mistake the stock became marked on the books of defendant in the name of A J. Afterward S J and A J transferred the stock to others. This was not known to complainant till after the death of S J. A J and others refunded to the complainant property to make good the trust fund. Complainant sought to hold defendant for any deficiency needed to complete the trust fund, and for the dividends secured after the date of transfer. The chancellor decreed that defendant was liable, but that A J, by participation in the fraudulent transfer, had forfeited all right to dividends between the date of the wrong and the date of restitution; and that such amounts should be added to the principal for the benefit of the cestuis que trust. Appeal.

Archer, C. J. 1. The bank became responsible for any injury which proceeded from the neglect to keep a stock list. 2. A J, being a feme covert under the dominion of her husband, ought not to be visited with forfeitures. Interests in the trust estate should not be forfeited for the purpose of swelling the interests of the cestuis que trust in remainder. Judgment reversed.

Cited: 1 Md. Ch. 410, 415; 4 id. 362; 53 Md. 578.

FARMERS BANK OF MARYLAND v IGLEHART (1847) 6 Gill 50.

Bill to enforce the transfer of stock. R, by his will, left his widow a life interest in stock of the defendant, and the residue of his estate to be divided among his eight children, of whom D was one. D assigned his interest to the plaintiff. Upon the death of the widow, the bank refused to transfer D's portion to the plaintiff, claiming a lien on it by virtue of certain debts due the bank by D, against which debts the Statute of Limitations had run. The bank's charter provided that all debts due it by the holders of stock must be discharged before transfer thereof. D's debts to it were due when the transfer to plaintiff was made, but the stock then stood in R's name. This bill was filed to enforce transfer to plaintiff. Decree for plaintiff. Appeal.

Martin, J. 1. The power conferred upon the bank by this clause of its charter is too clear to be questioned, and in this respect the predicament of the plaintiff is precisely that of D, under whom he claims as legatee. 2. The Statute of Limitations is regarded as operating upon the remedy only, and not as extinguishing the debt. The bank, when called into a court of equity, may hold to any equitable lien or other means in their hands till the debt is discharged. Decree reversed.

Cited: 4 Md. Ch. 245; 14 Md. 281; 26 id. 327.

BELL v HAGERSTOWN BANK (1848) 7 Gill 216.

Assumpsit. D B drew a draft on G W, which was indorsed by S B, F B, and E B, cashiers. On the day it was due, it was presented to G W, and payment being refused by him, it was protested, and separate notices to the drawer and each indorser made out, and mailed to S B, cashier of the plaintiff. Plaintiff sued F B as indorser, and was allowed to prove by its cashier, over defendant's objection, that he had received the notices; that there was no instance where such notices were not received in due time; that on the same day he sealed and directed them to the drawer and indorsers at their respective post offices; that the plaintiff had a messenger who came to the bank daily about the closing hour, when the cashier delivered to him all letters and notices for the post office. The messenger testified that he never failed to perform his duty of mailing the letters at night. The court instructed the jury that the testimony was evidence to prove notice of non-payment to defendant in due time. Judgment for plaintiff. Appeal.

Frick, J. 1. The usages of banks have grown up as a part of the settled law of the land. In obedience to this usage, it is that the law dispenses with personal notice, and charges the indorser by the bare deposit of the notice in the post office, if in due time, even if the notice never comes to hand. The course and practice of the bank as proved is entirely consistent with what the law requires. 2. The law requires of every holder of negotiable paper reasonable diligence in conveying notice of the dishonor of a bill; and the facts being undisputed, the court decides whether due diligence has been used. 3. The possession of the note is prima facie evidence of property in the plaintiff. Plaintiff is to be regarded as the bona fide owner notwithstanding the subsequent indorsements, and is entitled to sue thereon. Judgment affirmed.

Cited: 3 Md. 256; 11 id. 490; 15 id. 159, 293; 25 id. 141; 30 id. 471; 54 id. 289; 79 id. 319.

MERRICK v TRUSTEES OF THE BANK OF THE METROPOLIS (1849) 8 Gill 59.

On promissory [note.] Defendant borrowed from the Bank of the Metropolis \$1,200 on his note. The bank's charter was about to expire, when, at a stockholders' meeting, resolutions were passed authorizing the conveyance of all the bank's property to the plaintiffs as trustees, and directing the cashier to indorse the bank's paper to the trustees. The deeds were executed, but, in accordance with authority conferred upon him by a subsequent meeting of the directors, the president indorsed the note in suit. Judgment for plaintiffs. Appeal.

Frick, J. 1. If the object and purposes of the trust were attained in the absence of mala fides on the part of the directors, the objection that the indorsement of the president was not authorized, is one of form alone and not material. 2. The power which the cashier has to indorse, for any specific purpose, may at any time be revoked by the board, and conferred upon another. 3. The authority to indorse conveys, per se, the authority to deliver. 4. Unless mala fides be proved or alleged, the court will not inquire into the consideration of the indorsement. Judgment affirmed.

Cited: 8 Md. 296; 17 id. 393; 29 id. 74, 531; 38 id. 114, 163; 57 id. 457, 464; 59 id. 245; 61 id. 363; 68 id. 461; 80 id. 592; 82 id. 436.

ALBERT v SAVINGS BANK OF BALTIMORE (1849) 1 Md. Ch. 407.

Bill for relief. T J died in 1834, and left part of his estate to S J and A J in trust for Mrs. A, the complainant. On November 6, 1841, the court adjudged that the trustees named should hold certain city stock in trust for complainant. On November 20, 1841, S J and A J, who were also executors, transferred the stock to themselves as trustees, the certificate reading: "The city of B is indebted to S J and A J, trustees," but not naming the nature of the trust nor the cestui que trust. On October 16, 1845, the certificates were indorsed by the trustees to the defendant and surrendered to the city, and new certificates therefor issued to the defendant. The trustees then deposited th m with the defendant to secure a loan to S J of \$5,500. There was no evidence showing the bank or the city knew for whom they had been held, or of the decree of November 6, 1841. From 1842 to 1845, the dividends were paid to complainant under an authority from the trustees. From 1845 to 1847, they were paid to the defendant without objection from complainant. On January 19, 1847, the defendant sold the stock to cancel S J's then overdue loan. A surplus remained in the hands of defendant after the sale. S J was a director of the bank, which, by its charter, was pro-

hibited from making loans to its directors. After the proceeds had been applied to repaying the loan, complainant filed this bill for relief against the city, the bank, and its president.

Johnson, C. 1. The trustees had the legal capacity to transfer this stock, though they may have committed a breach of trust in doing so. 2. The bank, a bona fide purchaser, and without notice, will be protected. The performed contract cannot now be opened, and the money taken away from the bank. 3. The defendant can avail itself of the want of authority to make the contract sought to be enforced against it, though it has received the consideration upon which it was made. 4. The contract being executed, plaintiff could not deprive defendant of benefits derived from it on the ground that it was interdicted by the charter. 5. The entry upon the books of the city was not, standing by itself, sufficient to put the city on inquiry. 6. There has been negligence, if not acquiescence, on the part of the cestui que trust, quite equal to that imputed to the city. Bill dismissed as to city and the president, and decree against bank for surplus.

Cited: 1 Md. Ch. 505; 59 Md. 71.

ALBERT v MAYOR OF BALTIMORE (1852) 2 Md. 159.

Bill to set aside transfer of stock. Certain Baltimore city stock was held by S J and A J, trustees, in trust for complainant. The stock was entered on the city's books in the name of S J and A J, trustees. The trustees transferred the stock to the S Bank, as security for a loan made to S J. At the time S J was a director in the S Bank, and its charter prohibited loans to any of its directors. A J died, and S J became insolvent. The complainant asked that the transfer to the S Bank be declared void, and that the city and the bank be decreed liable for the dividends that had accrued on the stock after its transfer. Judgment for the defendants. Appeal.

Le Grand, C. J. 1. The mere designation of the parties as trustees, without a specification of the trust, or designation of the cestui que trust, could not give the city officer any information. The act of permitting the trustees to transfer the stock could furnish no grounds of complaint against the city. 2. A corporation has no power to do what it is inhibited by its charter from doing, and, if in violation of it injury should be done to the property of a third party, it is liable, Bill dismissed as to the city of Baltimore, and decree reversed, so far as the savings bank is concerned.

Cited: 5 Md. 230; 16 id. 54; 31 id. 403; 33 id. 567; 53 id. 574, 576; 57 id. 142; 72 id. 212, 213, 215, 216; 84 id. 454, 455, 456.

CITIZENS BANK v HOWELL (1855) 8 Md. 530.

Assumpsit on a note made by W in favor of E, who indorsed it to the plaintiffs, and was by them deposited with the defendant for collection. Plaintiffs contended that a notary, defendant's agent, was negligent in failing to give proper notice to the indorser; it proved that the notice for the indorser was left at the maker's house. Defendant proved that it was the universal custom of banks to cause demand, protest, and notice of bills and notes to be made by a notary. The Act of 1837, ch. 253, makes protests of inland bills of exchange and notes prima facie evidence. The court instructed the jury that if they believed from the evidence that, in receiving the note for collection, the bank undertook to do all that was necessary to be done by the plaintiffs themselves, in order to secure plaintiffs' interest as to the responsibility of the drawer and indorser, then the bank was liable to the plaintiffs for any loss incurred by their negligence or the person employed by it. Exception. Judgment for plaintiffs. Appeal.

Eccleston, J. 1. We see no evidence tending to prove any undertaking or agreement whatever, on the part of the bank, that can render it liable to the plaintiffs for the alleged negligence of the notary, or for insufficient action; and, for want of proof to sustain such responsibility, there was error in giving the instruction. 2. The Act of 1837 makes protests of inland bills of exchange and notes prima facie evidence; and, for the purpose of securing its benefit to the owners of such instruments, it is the duty of banks, receiving them for collection, to give them to a notary to be protested in due time. In the absence of any special agreement, the bank was not liable for the negligence of the notary. Judgment reversed.

FARMERS AND MECHANICS BANK v NELSON (1857) 12 Md. 35.

Bill for specific performance of contract. The directors of defendant passed a resolution to open the books for the subscription of a certain number of its shares, remaining unsubscribed, under the direction of M and W, its president and director, or either of them, and that five dollars be required at the time of subscribing. Plaintiff proposed to subscribe for 100 shares, provided M and W would raise the money for the subscription upon a promissory note for \$1,000, which plaintiff held against certain parties. To this M and W agreed, and in accordance with the agreement the subscription was made. The plaintiff then demanded his certificate of stock, which defendant refused to issue, contending that the plaintiff was not a stockholder. Decree for plaintiff. Appeal.

Eccleston, J. Were it conceded that the defendant had the right to pass the resolution authorizing M and W or either of them to receive additional subscriptions, in taking that of the plaintiff in the manner they did, they exceeded the authority conferred upon them, and there is no proof that the act was ever ratified by the bank. Judgment reversed.

REESE v BANK OF COMMERCE (1859) 14 Md. 271.

Bill to compel sale of stock to pay claims of the plaintiff bank. B and K owned stock in plaintiff. Its charter provided that its stock should be transferable on its books only, but that all debts due to the bank by a stockholder requesting a transfer, should be satisfied before such transfer should be made. B and K were indebted to plaintiff and requested a transfer of shares to defendants and F. The plaintiff refused to transfer, unless its debts were first satisfied. A second time the defendants requested a transfer. Meantime other overdrafts and notes had become due, and plaintiff refused the transfer, unless all their indebtedness was first paid. The debts greatly exceeded the value of the stock. The certificate was transferable only at the bank, personally or by attorney. Defendants contended that the lien was waived by the form of the certificate; that, if not waived, it does not attach to overdrafts or unmatured bills. Decree for plaintiff. Appeal.

Tuck, J. 1. A stockholder takes his equitable assignment of stock subject to the rights of the bank under the act of incorporation, of which he is bound to take notice. 2. The lien does not attach to the paper not due. 3. The words, in which this privilege is given, are obligatory, and require payment before the transfer can be made. A second demand makes payable all debts due to the bank. Cause remanded without affirming or reversing decree.

CHEW v BANK OF BALTIMORE (1859) 14 Md. 299.

Bill to compel transfer of stock. The complainant was the only child of S C. He had been of unsound mind from infancy and was incapable of managing his affairs. S C died in 1840, and C S was appointed administrator of the estate. In 1844, C S obtained from the complainant a bill of sale for certain shares of stock in the Bank of B, without consideration. He also obtained a power of attorney to transfer the stock. The bank allowed C S to transfer the stock himself. Afterward it was transferred to others. In 1849, the complainant, by his committee, filed a bill against the bank, asking to have the stock replaced, and payment of the dividends which had accrued after the transfer. Judgment for defendant. Appeal.

Tuck, J. 1. The acts of lunatics are voidable, not void. 2. Transfers may be made under power of attorney, but this means a valid power, and the bank takes the risk in depending on its execution. 3. In cases of forged powers, the bank is liable, and so as to the acts of infants. The acts of lunatics are analogous, and, in this view of the present case, the transfer may be avoided. Judgment reversed.

Cited: 24 Md. 320; 35 id. 257; 52 id. 610; 76 id. 595; 88 id. 371, 374, 376.

FELLS POINT SAV. INSTITUTION v WEEDON (1862) 18 Md. 320.

Money had and received. Plea: Statute of Limitations. A deposited \$500 with the defendant and received a certificate, payable to A, or order on demand. A died, and plaintiff was appointed administrator of his estate. M, in New York, wrote the bank that he was in possession of the certificate, but did not claim that it was indorsed or assigned. Defendant asked for an instruction that recovery

could not be had without the production of the certificate. Refused. Judgment for plaintiff. Appeal.

Goldsborough, J. The statute cannot be held to run until a demand is made. The certificate of deposit is a negotiable instrument, and is in the possession of a third party, who may have a legal right to demand payment of it. The defendant, therefore, is entitled to be protected against the danger of being compelled to make more than one payment of the same debt, by requiring the plaintiff to produce the certificate. Judgment reversed.

Cited: 54 Md. 531; 78 id. 394.

CECIL BANK v FARMERS BANK OF MARYLAND (1864) 22 Md. 148.

On a bill of exchange. The bill was drawn by J A D & Co., to their own order, on D M S, and, being indorsed by them, was delivered to plaintiff. Plaintiff sent it to J L & Co. after indorsing it, "Pay to J L & Co., or order, for collection." J L & Co. sent it to the defendants for collection. The bill was paid by D M S before maturity, and was credited to J L & Co., on defendants' books. J L & Co. failed, which the defendants knew on the next day. On the following day, plaintiff claimed the draft and demanded that it should be held for his account by defendants. Defendants claimed the right to retain a balance due them by J L & Co. Judgment for defendants. Appeal.

Bartol, J. The words, "for collection," in the indorsement, had the legal import and effect to notify the defendants that the plaintiff was the owner and J L & Co. merely agents for collection. With such notice, the defendants had no right to detain the proceeds for the general balance of their account. Judgment reversed.

Cited: 30 Md. 401; 77 id. 417, 420.

BOWER v HOFFMAN (1865) 23 Md. 263.

Where the payee in a certificate of deposit had acknowledged its receipt, but failed to demand payment until about fifteen days thereafter, at which time the bankers who issued the same had become insolvent, held, the acknowledgment of the receipt of the certificate by the payee operated as an acknowledgment of payment, and there was a want of due and reasonable diligence in making the demand.

MERCHANTS BANK v BANK OF COMMERCE (1866) 24 Md. 12.

Action for damages for negligence in collecting a draft. H & Co. sold to the plaintiff their sight draft on L & Co. The plaintiff remitted it for collection to the defendant. The defendant presented the draft to L & Co. about 1 p. m., and received a check on the M Bank for the amount. The M Bank was in the same square with L & Co., but defendant did not have it cashed or marked "good." After the draft was presented to L & Co., and on the same day, they stopped payment. L & Co. returned the draft to the defendant. It was protested and returned to the plaintiff, who demanded and received payment from H & Co., who were ignorant of the negligence of defendant. H & Co. brought suit in the name of the plaintiff against the defendant for the loss sustained. The doubtful credit of L & Co. was submitted as a fact to the jury, bearing on the question of care without requiring them to find that defendants had knowledge of it at the time of presenting the draft and receiving the check. Judgment for plaintiff. Appeal.

Cochran, J. 1. The amount of the draft was paid by H & Co. under a mistake, that entitled them to a return of the money. 2. This payment did not affect or change any previous liability of the defendant. 3. Negligence, in the ordinary legal sense, imports an absence or want of such care as the law requires in the performance of any given undertaking, and, generally speaking, is a fact. The question was properly submitted to the jury in this case. The words, "doubtful credit," when used without qualification or limitation, signify reputation or standing in the community. The doubtful credit of L & Co. was therefore a fact of which defendant presumptively had knowledge, and it was not necessary that such knowledge should be otherwise ascertained. Judgment affirmed.

Cited: 29 Md. 440; 36 id. 377; 79 id. 321, 325.

CHESAPEAKE BANK v SWAIN (1868) 29 Md. 483.

Assumpsit. Plaintiffs delivered to defendants a deposit of \$3,000 in gold. They claimed that the deposit was made under a special agreement with the defendants, whereby the latter were to return a like sum in gold on demand. Defendants asserted that if there was such a special contract, it had been waived by the subsequent checking on and balancing of the account. The balance was always larger than the special deposit. The court instructed the jury that, if they found the existence of the special contract, the plaintiffs were entitled to recover a sum equal to the value of \$3,000 in gold, on the day of demand, with interest. Judgment for plaintiffs. Appeal.

Alvey, J. 1. A single entry in plaintiffs' bank book was admissible to verify the testimony of a witness, the defendants being at liberty to use the other entries. 2. Evidence was admissible to show that, according to the general custom, an entry in plaintiffs' bank book imported an agreement on the part of defendants to return the deposit in kind. 3. But the existence of such usage cannot be established by proving a few particular instances in one or two banks. It must appear to be well established. 4. The subsequent payment of checks and the striking of balances do not necessarily extinguish the special deposit. 5. The contract to pay coin could be specifically enforced, notwithstanding the legal tender acts of Congress. Judgment reversed.

Cited: 34 Md. 247; 55 id. 240.

MILLER v FARMERS AND MECHANICS BANK (1868) 30 Md. 392.

Assumpsit. To recover collection made by defendant. Plaintiff sent two notes, payable to his order, to L & Co., bankers, for collection, indorsed absolutely. L & Co. indorsed them to R, cashier of defendant, for collection. The notes were collected and the proceeds credited to J and L, who subsequently failed, being indebted to defendant on the general balance between them. The court refused to instruct the jury that plaintiff was entitled to recover, unless defendant after receipt of the notes gave some new credit, or extended some existing credit, or made some new advances to L & Co. upon the faith of the notes. Verdict for defendant. Appeal.

Alvey, J. 1. Defendant was the sub-agent of L & Co. for the collection of the notes. Plaintiff's right to recover depends upon the dealings between L & Co. and defendant. 2. Indorsement of the notes by plaintiff was unqualified, and with such indorsements imported property in the holder. 3. Without notice to the contrary, defendant had a right to treat L & Co. as bona fide owners, and were not bound to inquire whether they held them as agents or otherwise. 4. But the right of defendant to retain the proceeds against their general balance depended upon whether it had given new credit on the faith of the notes before they had any knowledge that they belonged to the plaintiff. The court erred in not giving the instruction asked by plaintiff. Judgment reversed.

Cited: 40 Md. 566.

COMMERCIAL AND FARMERS NAT. BANK v FIRST NAT. BANK (1869)
30 Md. 11.

Assumpsit. On December 20, 1866, J H presented to defendant a check drawn on the plaintiff, purporting to be signed by H A, dated December 18, and payable to order of J H, and opened an account, having indorsed and deposited the check. The amount of the check was put to his credit in cash in his bank book. The check was sent to the plaintiff where it was passed as genuine, charged to H A's account, and credited to the defendant. J H then presented a check to the defendant for \$4,500, payable to self or bearer, and defendant paid it. The original check signed H A, in favor of J H, was a forgery. The plaintiff refunded to H A the amount of the check, and sued the defendant to recover the loss sustained. Judgment for plaintiff. Appeal.

Miller, J. 1. A bank which receives money on deposit is justly held to know the signature of its depositors. 2. If it pays in mistake a forged check, there is no reason why the loss should be shifted to another innocent party. The fact that J H was a stranger to defendant—a fact that defendant did not communicate to plaintiff—is not such gross negligence as will throw the loss upon defendant. Judgment reversed.

Cited: 40 Md. 569; 51 id. 585; 68 id. 255, 601; 70 id. 518.

SHOEMAKER v NATIONAL MECHANICS BANK (1869) 31 Md. 396.

Injunction to restrain prosecution of suits at law. The complainant, a stockholder, alleged that the defendant violated its charter in making certain loans; that the loans being illegal and void, no title or interest passed to the defendant in the collaterals given to secure the loans; that the defendant was expending money in conducting sundry suits, involving its pretended title to the collaterals. No exhibits were filed. The averments rested solely upon the oath of the complainant. Judgment for defendant. Appeal.

Robinson, J. 1. The failure to file copies of the pleadings or proceedings, as exhibits, in support of the averments in regard to the object and purposes of the suits sought to be enjoined, must be considered a fatal defect. Without this evidence, the complainant failed to present a case such as would justify the granting of an injunction. 2. Even if the contract of loan was void, being executed, the bank had acquired an absolute interest in the securities. Judgment affirmed.

Cited: 40 Md. 207; 46 id. 74; 52 id. 450; 57 id. 142; 69 id. 58.

HORWITZ v ELLINGER (1869) 31 Md. 492.

Attachment under ch. 306 of the Act of 1864. The plaintiff deposited with P & Co., bankers, \$5,335.22 on April 2, 1867, on which day the banking house finally closed. P & Co., being unable to meet their liabilities, made a general assignment for the benefit of their creditors to the defendant. Under the Act of 1864, the plaintiff laid an attachment in the hands of the defendant, claiming that P & Co. had fraudulently accepted the deposit of April 2. Judgment for plaintiff. Appeal.

Alvey, J. 1. The fact that there was fraud upon the part of the defendants in receiving the money, does not alter the relation of debtor and creditor between the depositor and defendants. 2. The assignment, to constitute a sufficient ground of itself to maintain the attachment, under the Act of 1864, must have been made with an intent to defraud creditors. An assignment for the benefit of creditors is not fraudulent. 3. Ch. 306 of the Act of 1864 is only a remedial act and gives the creditor no lien. 4. The fraudulent making of the previous contract did not prevent defendants from making the assignment in question. Judgment reversed.

LEPPOC v NATIONAL UNION BANK (1869) 32 Md. 136.

Attachment. A committee of the defendant entered into a contract with D to purchase a tract of land, provided the board of directors assented to it. D executed the deed, and having induced M, the cashier of defendant, to put revenue stamps on it, recorded it. Plaintiff, a judgment creditor of D, laid an attachment in the defendant's hands. After the deed had been recorded by D, the matter was laid before defendant's counsel, who advised that the transaction was against the bankrupt law. The board of directors did not sanction the purchase; it was disapproved, and the property reconveyed to D. Judgment for defendant. Appeal.

Alvey, J. 1. Whatever was said or done by the president or cashier of the bank or either of them, not being authorized, does not bind the bank. The conditional agreement was never consummated, and defendant never assumed any liability under it. 2. Evidence was admissible to show the understanding on which the deed was made, and to show that it never had any binding force for want of due delivery. 3. The recording of the deed by the grantor, without legal sanction of the bank, cannot charge the bank as grantee. Judgment affirmed.

Cited: 75 Md. 261, 264; 78 id. 335.

STATE OF MARYLAND v NATIONAL BANK OF BALTIMORE (1870) 33 Md. 75.

To recover bonus under the Act of 1853, ch. 441, which re-chartered the Bank of B and provided that the bank should pay 20 cents on every hundred dollars of the capital stock for the free school fund. The bank, in 1865, became a national bank, under the provision of the act of Congress of 1864. The governor of the state, by proclamation, announced that the charter of the Bank of B had been surrendered, and that its corporate powers would thenceforth cease. Afterward the state sued to recover the tax for the free school fund provided by the Act of 1853. Judgment for defendant. Appeal.

Maulsby, J. The money was payable to the state under the Act of 1853 as a

price for exercising the powers and enjoying the immunities of the state charter. When that charter was surrendered and annulled, the money could no longer be payable for that right. Judgment affirmed.

LESTER v HOWARD BANK (1870) 33 Md. 558.

Bill to distribute proceeds of sale. The defendant sold to J P, one of its directors, certain property. Afterward, J P borrowed money from the bank to be used in improving the property. He agreed not to demand a conveyance of the legal title until this sum, in addition to the unpaid purchase price, was paid. Before this loan, complainant agreed to purchase of J P one-half interest in the property, but it was stipulated that, as J P had improved the property, he should sell enough to reimburse himself. Complainant paid no part of the purchase price. J P became insolvent. The property was sold and the proceeds brought into court for distribution. Complainant claimed that the loan to J P was void, as the bank's charter prohibited loans to its directors. Exceptions. Overruled. Appeal.

Robinson, J. 1. The fact that the transaction was illegal under the act will not operate to exempt defendant from liability. 2. The bank acquired a lien upon the property, which attaches to the proceeds. 3. Whether or not illegal contracts will be enforced, is a question of public policy. Order affirmed.

Cited: 50 Md. 26; 52 id. 121.

MOSES v FRANKLIN BANK (1871) 34 Md. 574.

Assumpsit. A check in favor of defendant, drawn on the Cecil Bank, was indorsed by defendant and cashed by the plaintiff. The check was sent to the Cecil Bank, and returned not paid. The Cecil Bank had funds in the plaintiff bank, and the check had been debited to that account. There were sufficient funds of the drawer in the Cecil Bank to have paid the check. Plaintiff sued the defendant as indorser. The defendant excepted to the admission of the protest of the check in evidence and the testimony of the messenger of the bank proving such protest. Judgment for plaintiff. Appeal.

Alvey, J. 1. A check, until it has been accepted, does not operate as an assignment of the drawer's funds. The protest was properly admitted. 2. The fact that the check was debited to the Cecil Bank on the supposition that it would be paid on presentation, can make no difference in the right of the plaintiff to recover against the defendant as indorser. 3. A check is within the meaning of secs. 6 and 7, art. 14, of the code, an inland bill of exchange. Judgment affirmed.

Cited: 38 Md. 490; 56 id. 534; 64 id. 487; 66 id. 129; 78 id. 585, 586, 587.

NORRIS v DESPARD (1873) 38 Md. 487.

Attachment on short note alleging the non-payment of a check which was drawn by defendant on the Bank of Philippi, payable to D, and by him indorsed to plaintiff for value, and which was unpaid by the bank. There was evidence that the check was never presented to the bank, by reason of the interruption of communication caused by the civil war. There was no proof of presentation after the war, and no notice of non-payment to the defendant. The court instructed the jury that there was no evidence upon which the plaintiff could recover. Judgment for defendant. Appeal.

Stewart, J. The holder of the check, to charge the drawer, was bound to present the check for payment, and to give notice to the drawer within a reasonable time, unless these requisites are waived. If due diligence is not used by the holder of a check, he must suffer any loss occasioned thereby. If for some inevitable accident, delay occurs, it will be excused; but presentment must be made at the earliest possible moment after the impediment is removed. There is no evidence of presentation after the war or of notice to the defendant. The instructions were correct. Judgment affirmed.

Cited: 78 Md. 588.

FIRST NAT. BANK v NATIONAL EXCHANGE BANK (1873) 39 Md. 600.

Assumpsit. The plaintiff employed B & Co. to procure and deliver certain United States bonds. Not having funds to pay for them, plaintiff sent its president, W, with a certificate of deposit, purporting to have received the same on deposit from B & Co. The certificate was indorsed by B & Co., and deposited with

defendant for a call loan made to B & Co. The plaintiff later deposited in New York a sufficient sum to pay the same, and received notice from B & Co. that the certificate was discharged, but did not apply for its surrender. B & Co. failed, and plaintiff was notified by the defendant that it held a certificate of deposit for value and demanded the delivery of the bonds. In order to avoid suit, W bought several hundred shares of railroad stocks from the defendant, held as collateral from B & Co., which had greatly depreciated in value, and some shares of plaintiff's own stock, thereby settling the claim and receiving back the certificate of deposit. Plaintiff set up want of authority under the National Banking Act to make this compromise, and seeks to recover the money so paid. Judgment for defendant. Appeal.

Robinson, J. There is nothing in the letter or spirit of the banking act to prevent a transfer of the stocks to the plaintiff, if they were acquired to avert an apprehended loss and not merely for speculation. Judgment affirmed.

CHESAPEAKE BANK v FIRST NAT. BANK (1874) 40 Md. 269.

Attachment. Plaintiff, in a suit in the state court, attached the property of the defendant, as a non-resident debtor, in the hands of the F Bank of B, as garnishee. Motion to quash writ of attachment alleging that under the act of Congress relating to national banks, the attachment is illegal and void. The act provides that no attachment shall issue against a national bank before final judgment in any action in a state court. Judgment quashing the writ. Appeal.

Miller, J. Congress has the power to make any provisions which tend to promote the efficiency of the banks in performing the functions by which they were designed to serve the government, and to protect them against suits and proceedings in state courts, by which that efficiency would be impaired. Judgment affirmed.

Cited: 47 Md. 255.

WECKLER v FIRST NAT. BANK (1875) 42 Md. 581.

Deceit in making false representations in the sales of railroad bonds. The court instructed the jury that the selling of railroad bonds on commission was beyond the scope of the bank's corporate powers and the defense of ultra vires was therefore open to it, and it was not responsible for any false representations which its teller might have made to the plaintiff, and by which she was induced to purchase the bonds. Judgment for defendant. Appeal.

Miller, J. 1. The business of selling bonds on commission is not within the scope of the powers of the corporation, and the bank could not, under any circumstances, conduct it. The defense of ultra vires is available. 2. The bank is not responsible for any false representations made by its teller to the plaintiff, by which she was induced to purchase the bonds in question. Judgment affirmed.

Cited: 44 Md. 60; 52 id. 124.

THIRD NAT. BANK v BODY (1875) 44 Md. 47.

Negligence; to recover the value of bonds deposited with defendant and stolen from its custody. The plaintiff deposited the bonds as collateral security for present and future indebtedness, and on the strength of such security borrowed "call money" from time to time from the defendant, when his deposit was overdrawn. The plaintiff alleged negligence on the part of the defendant in caring for the bonds. When the bonds were stolen the plaintiff was not indebted to defendant. Judgment for plaintiff. Appeal.

Bartol, C. J. 1. This was not a mere gratuitous bailment. 2. A national bank has power to make a contract of this kind. 3. The fact that the plaintiff's debt had been paid at the time of the theft did not alter the nature of the contract or the defendant's liability. 4. The measure of damages is the value of the bonds at the time of the theft, for the cause of action arose then. It is a question for the jury, whether the degree of care and caution which the laws requires, has been exercised. Judgment affirmed.

MAGRUDER v COLSTON (1875) 44 Md. 349.

By receiver, to enforce stockholder's liability under sec. 12 of the National Banking Act. Defendant C lent B \$8,000, payable on call, and took as security 50

shares of the M Bank, standing in the name of B, and indorsed in blank. Defendant called the loan, B made default, and instructed defendant to sell the collateral. Defendant then sold the whole of the stock to W for one dollar and delivered to him the certificate. The bank became insolvent, and plaintiff, the receiver, brought this suit against defendant as a stockholder of the bank to recover the value of the 50 shares transferred by him to W. The court instructed the jury that there could be no recovery if C had, under his agreement with B, the right to sell upon default of the latter. Judgment for defendant. Appeal.

Grason, J. 1. Persons holding stock in pledge, standing in the name of the pledgee, are, in contemplation of the National Banking Act, stockholders, and as such are responsible to the creditors of the bank, in proportion to the amount held. 2. The transfer to W by the defendant was not a fraud upon the bank's creditors. Nor in avoidance of sec. 12 of the National Banking Act. Judgment affirmed.

Cited: 66 Md. 484; 86 id. 79.

THOMAS v FARMERS BANK (1876) 46 Md. 43.

Scire facias on judgment. The F Bank recovered a judgment against defendant, Thomas and others. Subsequently, the bank was converted into a national bank with the name "The Farmers National Bank of Annapolis." The Maryland Legislature passed an act in 1865, authorizing Maryland banks to become national banks under the United States Statutes, and giving them the right to continue their corporate names in any pending litigation. The bank issued a scire facias on this judgment, using its original corporate name. Defendants pleaded nul tiel corporation, claiming that the corporation named in the writ had been dissolved and its charter surrendered. Demurrer to the rejoinder to the replication to defendants' plea. Sustained. Motion of arrest in judgment was made and denied. Appeal.

Alvey, J. 1. It was competent for the bank to issue a scire facias under its original corporate name, thus taking advantage of the act of the state legislature permitting it. 2. It is competent for the state to regulate the manner of prosecuting suits in her own court, provided such laws do not impair the rights of the bank under the laws of the union. 3. There was not sufficient description of the land appearing on the record, either by the sheriff's return or in the pleading. Judgment reversed.

Cited: 59 Md. 384, 388, 389; 65 id. 557, 558; 87 id. 23, 118.

SECOND NAT. BANK v WESTERN NAT. BANK (1878) 51 Md. 128.

On promissory note. Plaintiff held, by indorsement of the payee, a promissory note of T at four months to the order of C, payable at defendant, where the drawer had an account. The day the note was due, it was presented to the defendant and there certified as "good." The runner so reported to the plaintiff. A few minutes thereafter, a message from the defendant informed the plaintiff, that the certification by its cashier was an error, to which the president of plaintiff replied that it would be "all right." Afterward T failed. Plaintiff sent the note through the clearing house, with the certificate unerased and debited to the defendant, and received the money for it. The plaintiff subsequently refunded the money to the defendant at its demand. Evidence was offered to show a custom among banks not to revoke an error in certification. Rejected. Judgment for defendant. Appeal.

Brent, J. 1. An error of fact may be corrected in any reasonable time, before it is acted upon by the other party. 2. The evidence was properly rejected, inasmuch as the custom sought to be shown was unreasonable. Judgment affirmed.

Cited: 78 Md. 387.

HARDY v CHESAPEAKE BANK (1879) 51 Md. 562.

To recover balance of \$611.30 due on bank account. Plaintiffs, having been notified that their account was overdrawn, discovered that a considerable sum had been paid out on their account on forged checks. Fourteen checks had been forged by H, the plaintiffs' confidential clerk. Five of these checks, amounting to \$860, were entered in the bank book, when it was balanced on July 13, 1873, and the remaining nine, amounting to \$1,296, were dated and paid subsequently, and the account was again balanced on October 6, 1873. On each occasion, the canceled checks were returned to the plaintiffs, and balance carried forward to their

credit. On October 10, 1873, plaintiffs first learned that their account was overdrawn, and that the checks had been forged. H had charge of the bank book, check book, and returned checks. Verdict for plaintiffs for \$1,032.50. Appeal by plaintiffs.

Alvey, J. 1. Banks are bound to know the signatures of their customers. 2. After the lapse of a reasonable time for examination after return of the checks, no objection being made, a prima facie presumption arose that the account as balanced and the checks as charged were correct. 3. There was no estoppel in pais as matter of law. 4. The burden of proof was on plaintiffs to show forgery of the checks returned. 5. Plaintiffs' check book was admissible for the purpose of showing that there was nothing therein disclosed which, upon ordinary inspection, was calculated to excite suspicion that a fraud had been committed by the party in whose custody it remained. But it was inadmissible to show an error in a memorandum, testified to have been made by one of the plaintiffs, to show how his account stood at the time the forged checks were issued and the book balanced, and sent to defendant, since it did not appear the memorandum was made exclusively from the showing of the check book. 6. Evidence was properly excluded that an examination of plaintiffs' books failed to show that the amount of the checks passed into plaintiffs' funds, and what was the result of that examination. 7. The confession of the supposed forger was inadmissible against defendants. 8. The death of a partner who was coplaintiff, does not render the testimony of his co-partner incompetent. It was error to allow a witness to express his opinion as to the degree of care that would likely have influenced the conduct of the party drawing the checks, if they had been forged. Judgment reversed.

Cited : 56 Md. 165; 72 id. 436, 437; 80 id. 391; 83 id. 322.

LAZEAR v NATIONAL UNION BANK (1879) 52 Md. 78.

On notes against guarantor. Plaintiff discounted six notes of L at 7½ per cent, and purchased one other note of L's from a broker at 9 per cent, using the surplus funds on hand that day for this purpose. At this time, plaintiff held the written guaranty of defendant to the extent of \$25,000 for all paper of L held by the bank. United States Statute allows national banks to charge the same rate as state banks, and gives a remedy to one paying usurious interest. National banks have all the incidental powers of a banking business. Defendant offered evidence tending to show that six notes were not taken by plaintiff on the faith of the guaranty. Excluded. Exception. The judge charged as to the seventh note, that if it was discounted at a rate greater than 6 per cent, plaintiff could only recover the sum actually advanced. Judgment for plaintiff. Appeal.

Grason, J. 1. Parol evidence was inadmissible to show that the guaranty was only intended to cover certain paper not specified in the contract. The rule should be more rigidly enforced in a case where the Statute of Frauds required the contract to be in writing. Where that statute requires the contract to be in writing, it cannot be partly in writing and partly in parol. 2. The receipt of usurious interest does not avoid the contract between plaintiff and defendant. 3. No one but he who paid the interest can recover the usurious interest paid. 4. The notes were purchased, not discounted, by the bank, and such purchase was without authority. The bank acquired no title to the note, and could not sue thereon. The bank had no authority to use such surplus funds as remained from day to day for the purpose of buying notes. 5. The discounting of paper subsequent to the guaranty was prima facie proof that the discount was on the faith of the guaranty. Whether the money was parted with on the faith of the guaranty, is a question for the jury. Judgment reversed.

Cited: 57 Md. 142, 147, 148, 149, 150; 69 id. 411; 89 id. 562.

FRANKLIN BANK OF BALTIMORE v LYNCH (1879) 52 Md. 270.

On a draft. Defendant sent a telegram to B & Co., stating, "You may draw on me for \$700." B & Co. drew their draft for the amount in favor of themselves on defendant. On the day it was made and indorsed by B & Co., it was received by the plaintiff, and its amount credited to the drawers, on the credit of the telegram, which had been shown plaintiff. The draft was sent to a bank in W and presented to defendant. It refused to pay, and the draft was then protested. The court instructed the jury that, if they found that the draft was never presented to

defendant for acceptance, and there was no other acceptance except that inferred from the telegram, plaintiff could not recover. Exception. Judgment for defendant. Appeal.

Bartol, C. J. 1. The telegram cannot be deemed as an acceptance of the draft since the bill was not sufficiently described. 2. The action cannot be maintained on an accepted draft, and for the same reason plaintiff is not entitled to recover on the general money counts. 3. The telegram implied a promise to accept the draft upon presentation and pay it at maturity. 4. The promise to accept and pay inured to the benefit of any bona fide holder of the bill taking it on the strength of the promise. Judgment reversed.

Cited: 54 Md. 143; 61 id. 405, 406, 407; 66 id. 396, 398.

UNITED GERMAN BANK v KATZ (1881) 57 Md. 128.

On promissory note, indorsed by the defendant and discounted by the plaintiff. The plaintiff was a savings bank under the Act of 1868, ch. 189. By its charter it had only power to receive and invest deposits. Defendant contended that it had no authority to discount notes, and therefore there could be no recovery. The court so instructed the jury. Judgment for defendant. Appeal.

Irving, J. 1. While the bank exceeded its authority, yet it does not follow that no recovery can be had. 2. This fact is not available as a defense. The court erred in granting the instruction given. Judgment reversed.

Cited: 64 Md. 606; 76 id. 438; 82 id. 523; 83 id. 159.

ECKER v FIRST NAT. BANK (1882) 59 Md. 291.

On promissory note. Defendant Ecker, S and H, partners, trading as J. Ecker & Co., were indebted to the plaintiff on two notes to the extent of \$4,200. After Ecker's death, S and H, surviving partners, paid the bank \$200 in cash and gave the bank a note for \$4,000, and thereupon the cashier delivered to them the two old notes. The new note was signed in the firm name and by the survivors individually, and not being paid when due, the bank sued the executors of Ecker for \$4,000. Defense, three-year limitations, and that Ecker's estate had been discharged from liability on the note. The executor within the period of limitations admitted and promised to pay the plaintiff's claim. Plaintiff's president knew that the new note had been taken and the directors ratified the cashier's act. Judgment for plaintiff. Appeal.

Miller, J. 1. The ruling on limitations was correct. 2. The partnership was dissolved by the death of Ecker, and the surviving partners could not use the firm name so as to bind the estate for the new notes. The cashier, as such, had no power to accept the new note in discharge of the old note, thereby releasing Ecker's estate; but it was competent for the bank to make such a contract, and the bank officials ratified the action of the cashier. Whether or not the facts are sufficient to spell out an agreement on the part of the surviving partners to hold Ecker's estate free from liability, is a question for the jury. Judgment reversed.

Cited: 81 Md. 640.

PARKHURST, ADM'R v CITIZENS NAT. BANK (1883) 61 Md. 254.

In an action brought by a national bank under the Procedure Act of 1864, ch. 6, the cashier of the bank is the proper officer to make the affidavit required by such act; and an error made by the docket clerk in noting the filing of "a copy of the promissory note," and not the note itself, as required by the act, will be corrected by the court.

CARMAN v FRANKLIN BANK OF BALTIMORE (1883) 61 Md. 467.

On deposit. The plaintiffs were duly appointed examiners of Edmonson Avenue, with power to make and collect assessments on property on the avenue. A new board of examiners were appointed in their places, and their duties and powers ceased. The defendant, a bank, paid a balance of a deposit which plaintiffs had in defendant, and which was deposited in their names as "Examiners of Edmonson Avenue," to the new board. Plaintiffs contended that the deposit did not pass to the new board and they were entitled to it, with interest. Judgment for defendant. Appeal.

Robinson, J. 1. The deposit of money in a bank by one in his own name and own right creates the relation of debtor and creditor. 2. This was a deposit

in an official relation, and in which they had no beneficial interest. When they were superseded in office, the money belonged not to them, but to their successors in office. Judgment affirmed.

SECOND NAT. BANK v WRIGHTSON (1884) 63 Md. 81.

Bill to enjoin a suit at law and to re-form a certificate of deposit. Complainant, a bank, issued the certificate, payable to S or wife. With knowledge of S's death, complainant's teller paid the amount to the wife. Part of the money was used to pay S's funeral expenses and debts. Defendant, S's executor, had commenced suit for the amount deposited. There was no evidence that the agreement was other than that expressed by the certificate. Complainant contended that the certificate was payable to the wife after S's death, and that the agreement should be re-formed. Defendant contended that plaintiff, having had notice of S's death, was liable for having paid over the deposit to the wife. Order for defendant. Appeal.

Stone, J. 1. The bank was not authorized to pay the amount represented by the certificate to the surviving payee. 2. Notice to the teller was notice to the bank. 3. The bank must suffer the consequences of the mistake of the teller. 4. The agreement cannot be re-formed. 3. The bank was properly allowed a credit for the amount used by the wife to pay the debts and funeral expenses of S. Order affirmed.

THE STATE v CENTRAL SAV. BANK (1887) 67 Md. 290.

Action to recover from the defendants a state tax on the deposits invested in ground rents, under a lease for 99 years' renewal, forever, under the Act of 1874, ch. 483, sec. 85, which provides, "the president or other officer of any savings bank, institution, or corporation, which shall receive deposits and allow interest thereon, shall furnish to the comptroller on or before the first day of July in each year the aggregate of deposits, and shall pay to the treasurer on or before the first day of January, succeeding, out of the interest due depositors, the state tax on said deposits." The leasehold owner had paid the taxes on the ground rents. Defendant contended that the deposits thus invested were not within the act; that the imposition of such tax would subject the same property to double taxation, and thus be unconstitutional. Judgment for defendant. Appeal.

Robinson, J. 1. Deposits of this kind, where the taxes have been paid by the leasehold owner, are not within the operation of the Act. 2. The defendant's contention as to the constitutionality of the assessment is well founded. Judgment affirmed.

MANUFACTURERS NAT. BANK v SWIFT (1889) 70 Md. 515.

On a check, drawn by V, as cotrustee with W, in favor of the defendant. The payment of the check was at first refused for the reason that the cotrustee's signature did not appear on the check. V thereupon altered the check by adding the signature of W, and in its altered condition it was paid by the plaintiff. At the time the check was paid, V had no funds in the bank to his credit. Plaintiff knew the nature of the fund on which the check was drawn, as well as the fact that the indorsement was defective. Defendant had no such knowledge until some months later; the matter having been attended to by his attorney. Judgment for defendant. Appeal.

Bryan, J. 1. It is the duty of the bank to know the state of the depositor's account. 2. The presentation of a check is a demand for payment; if paid, the rights of the payee are satisfied. 3. The alteration of the check was a nugatory act. 4. This having been done with the bank's knowledge, it cannot recover. Judgment affirmed.

REGISTER v MEDCALF (1889) 71 Md. 528.

On contract for services. The defendants, proposing to organize a national bank, engaged the plaintiff as cashier for one year. The articles of association were not filed in compliance with the National Banking Act, and after a month the plaintiff was discharged. The defendants requested a charge that they were justified in discharging the plaintiff, in that the plaintiff swore falsely that all the capital was paid in, whereas only uncertified checks had been received. This request was based on the act above, requiring reports to show the capital actually paid in,

in money or certified checks. The request was rejected. There was no evidence in the record to show any false oath. Judgment for plaintiff. Appeal.

Irving, J. 1. Where there is no evidence in the record to support a rejected prayer, it will be assumed that the court rejected the prayer because of insufficiency of evidence to support it. 2. The provisions of the statute, in respect to false oaths, do not apply where the bank had not filed its articles of association. Judgment affirmed.

FIRST NAT. BANK OF BALTIMORE v TALIAFERRO (1890) 72 Md. 164.

For conversion of bonds. V, having a power of attorney from plaintiff to sell certain bonds, hypothecated them with defendant, a bank, under a contract. Defendant had notice at the time of V's power of attorney. Defendant's offer of the printed part of its contract with V rejected. To the bonds were attached unmatured coupons, which defendant claimed it received as negotiable instruments. Defendant offered to prove the usage among banks to regard these bonds as negotiable instruments. Rejected. Judgment for plaintiff. Appeal.

McSherry, J. 1. No custom or usage can change the legal character of a power of attorney and convert it into a totally different instrument. 2. V's contract with the bank had no effect upon the plaintiff's rights. 3. Moreover, a contract, if admissible, must be offered in its entirety. 4. The notice, which affected the bank, extended to every part of the securities. Judgment affirmed.

Cited: 78 Md. 388, 487, 488, 490.

McSHANE v HOWARD BANK (1890) 73 Md. 135.

On a cashier's bond, obligee against surety. The charter of plaintiff bank provided that it could require bonds from its officers; that the officers should take oath for the faithful performance of their duties; and that the officers should not borrow from the bank. R, as cashier, took such oath and gave a bond for duties required by the charter and by-laws. The charter and by-laws did not describe the duties. R was paid a salary. To conceal the defalcations of R and plaintiff's president, prior to 1883, R procured accommodation notes from directors, entered them on the discount book without deducting a discount, checked against this discount, and took up the memorandum of each default left with the teller as cash. Only three directors learned of the defalcations in 1885, and before 1889. In 1886 defendant was released from his liability from that day by plaintiff's president. A check and collateral, given by R as security for one loan, were surrendered when the accommodation notes were given. Defendant contended that the fictitious credit and the checks drawn thereon amounted to a payment by R; that the release of the president from liability for his misconduct was a release of R; that the failure of the directors to give defendant notice of R's indebtedness, and the president's release of defendant, discharged him; that the plaintiff should have applied R's salary, and any money or securities given by him to the bank, toward payment of the debt. Interest was allowed on each item making up the defalcation from the respective dates thereof. Judgment for plaintiff. Appeal.

McSherry, J. 1. The cashier, whose sworn duty it was to discharge his trusts honestly, violated that duty by embezzling the funds of the bank, even though the charter and by-laws contained no provision forbidding him to steal. 2. The transactions in regard to the accommodation notes furnished no defense to the sureties, unless the notes were discounted for the bona fide purpose of extinguishing the cashier's debt. 3. R's sureties not being answerable for the president's dishonesty, any adjustment made by the bank with him did not affect their liability for R's wrongful acts. 4. Defendant's liability was fixed before the president released him. 5. The failure of one set of officers to discharge their duty will not release the sureties of another delinquent officer. 6. The cashier being a creditor to the amount of his deposit or securities, the plaintiff was not bound to set off these sums for the benefit of the surety. 7. Where the principal has fraudulently abstracted the collateral which he previously pledged to the creditor, his claim against the surety is not thereby impaired. 8. The interest was properly allowed. Judgment affirmed.

Cited: 73 Md. 217; 77 id. 459; 81 id. 169; 84 id. 623.

TYSON & RAWLS v WESTERN NAT. BANK (1893) 77 Md. 412.

Trover. Plaintiffs, private bankers, forwarded to N & S of Baltimore a check and a sight draft, which had been indorsed by them, "For collection for account

of T & R." The check and the draft were credited to T & R's account as cash, and indorsed to the defendant, a bank, which collected them, retained the proceeds, and credited them on an overdrawn account of N & S. N & S subsequently failed, whereupon this suit was brought to recover the proceeds of the check and draft. Judgment for defendant. Appeal.

Bryan, J. 1. The indorsement was not adequate to pass title to N & S. 2. The terms of the indorsement of the check and draft gave legal notice to all persons receiving them, that T & R were owners of the papers, and that N & S were merely agents for collection. The defendant could therefore acquire no title by the indorsement made to it, and is responsible to T & R for the proceeds collected. Judgment reversed.

Cited: 79 Md. 204, 205, 210, 212, 221; 84 id. 302.

EXCHANGE BANK OF WHEELING v SUTTON BANK (1894) 78 Md. 577.

Assumpsit. The defendant, being indebted to the plaintiff, mailed to it a draft, headed with the bank's name, signed by a person, described as cashier, made to the order of X and drawn on N & S. Both parties kept accounts with N & S. The plaintiff indorsed the instrument, "For collection and credit account," and sent it to N & S, with whom the defendant then had on deposit more than the amount. On the day it was received, N & S made an assignment. Before the assignment, the defendant's account was debited, and after the assignment the trustees credited the plaintiff's account. N & S had not then, or afterward, that amount on deposit in cash. No notice of protest or of non-payment was sent to plaintiff or defendant. This suit was brought upon the original indebtedness. Judgment for defendant. Appeal.

Page, J. 1. A transfer of credit from the defendant to the plaintiff would have been a mere delusion. After the assignment N & S ceased to be a going concern, and neither the firm nor their trustees had the right to make a transfer of credit which was wholly worthless. The plaintiff was therefore responsible for any omission of duty on the part of N & S, in their capacity as collectors. The transaction did not operate as an assignment pro tanto. 2. We can perceive no way by which, on account of the want of notice, injury to the defendant, either "actual or presumptive," could take place. The paper was a check. Judgment reversed.

DITCH v WESTERN NAT. BANK (1894) 79 Md. 192.

Interpleader. The plaintiff deposited in the Bank of N & S a check indorsed in blank "for deposit." N & S indorsed it to the defendant. S, the maker of the check, stopped payment thereon, and filed this bill of interpleader, as N & S had become insolvent, and both the plaintiff and the defendant claimed the check. A witness testified that he regarded all checks deposited by him as having been deposited for collection. Decree for defendant. Appeal.

Bryan, J. 1. It is extremely difficult to see on what principal or by what process the plaintiff could retain any interest in this check, after he had delivered it to a blank indorsee. 2. It will not be alleged that the banker did not give a consideration, when he made an absolute and unconditional contract with the depositor to pay his checks to the amount of the deposit. 3. The witness' testimony, being the expression of an opinion, was incompetent. Decree affirmed.

ANDERSON v GILL (1894) 79 Md. 312.

Assumpsit. The defendant paid a debt to the plaintiff by check drawn on N & S. The plaintiff indorsed it and deposited it for collection in the O Bank, whose runner presented it for payment on the day after it was drawn, and accepted N & S's check on the W Bank in payment. Two hours thereafter N & S failed. Up to this time, their check on the W Bank would have been paid; but it was not presented until four hours after, though it might have been presented in two minutes. The plaintiff sought to hold the defendant for the original debt. Judgment for plaintiff. Appeal.

McSherry, J. 1. When the payee of a check, or his agent, takes a check of the drawee on some other bank or banker, instead of money, he must use the utmost diligence to present the substituted check for payment. 2. The O Bank, as the agent, failed to use due diligence and skill to collect the check given to it by N &

S. The plaintiff was responsible for the agent's negligence, and the defendant cannot be held. Judgment reversed.
Cited: 80 Md. 477.

FIRST NAT. BANK v BUCKHANNON BANK (1895) 80 Md. 475.

Attachment against non-resident. Voucher, running account. The defendant, being indebted to the plaintiff, mailed to the plaintiff a check on N & S, of Baltimore, for the amount. The plaintiff received the check on the 12th, but it was not presented for payment by its Baltimore correspondent until one o'clock on the 14th, when N & S gave their check on X Bank, and failed before it was presented early that afternoon. The original check had been sent to Philadelphia and then to Baltimore. If plaintiff had sent it directly to Baltimore on the 12th, it would have been paid. It was admitted that, if the check had been presented before noon on the 14th, it would have been paid. Judgment for defendant. Appeal.

McSherry, J. 1. If the check be drawn on a bank situated in another place, it should, at the latest, be mailed for presentment on the day after it is received, and should be presented at the place of payment on the day after it reaches there. 2. The plaintiff had until the close of business hours on the 15th to present the check for payment; it was obviously guilty of no negligence in not presenting it prior to noon on the 14th. 3. No act done by the plaintiff or by its agents caused any injury to the defendant. Judgment reversed.

GRAY v FARMERS BANK (1895) 81 Md. 631.

Bill to restrain the collection of a judgment. Complainant was the surety on a note held by defendant, a bank. A deed of trust had also been given as security. Defendant refused to renew the note, and to release complainant unless certain conditions were performed. These conditions were not filled. After the maturity of the note, defendant's cashier applied deposits made by the maker to the discount and interest of the note to be used as the renewal. The cashier was not authorized to do this. Defendant had notified complainant that it would foreclose the deed of trust and sell the land. Over two years elapsed before the sale. The proceeds thereof were not sufficient to pay the note. Defendant sued and obtained judgment on the original note signed by complainant. Decree for defendant. Appeal.

Page, J. 1. The condition for the release, not having been filled, the defendant was liable on the original note. 2. By a mere technicality resulting from an unauthorized act of the cashier, the bank could not be held to have entered into a valid contract for a renewal, so as to disable it from suing upon the original note. 3. The bank's action amounted to no more than inaction or passive delay, and when that is the case there is no impairment of the creditor's right to resort to the surety. Decree affirmed.

Cited: 88 Md. 518.

DUCKETT v MECHANICS BANK (1897) 86 Md. 400.

Bill against a bank for misappropriation of funds. C, as trustee, came into the possession of two checks, one reading, "For deposit to credit of C, being due as trustee," and the other reading, "To deposit to the credit of C, trustee." C misappropriated the funds, both checks being credited by the defendant bank to his individual account. He was removed as trustee, and the plaintiffs, who were his successors in the trust, sought by this suit to hold the bank responsible. Defendant pleaded the Statute of Limitations to the first check. Bill dismissed. Appeal.

McSherry, C. J. 1. There is no liability on the part of the bank to pay the first check. The memorandum was neither an instruction to the bank as to the account in which these funds should be credited, nor a notification to the bank that the funds were impressed with a trust that would be invaded by their being carried to C's individual credit. 2. As to the second check, knowing that the money was not C's, but that it was payable to him as trustee, the bank had no authority to place it to his individual credit, and therefore the bank is liable. 3. No ratification by the trustee of the bank's participation in the breach of trust can affect in any way the bank's accountability to the new trustees. 4. A participant in a breach of trust cannot, any more than the trustee himself, invoke the defense of limitations. Decree reversed.

Cited: 88 Md. 21, 26, 33, 199, 201.

DUCKETT v BANK OF BALTIMORE (1898) 88 Md. 8.

Bill to recover amount of check. The plaintiff's predecessor, as trustee, held certain certificates of indebtedness of the G County. To cancel all the county debts, an act was passed for the issue of bonds, some of which were issued to the plaintiff's predecessor as trustee for the certificates. He deposited these bonds with the defendant, a bank, as collateral for a personal loan. The bonds were not legally issued, and defendant agreed to surrender them to C, plaintiff's predecessor, on payment of his debt. Subsequently, the county redeemed these bonds by paying to the bank a check, on which was written, "Due as assignee of C, sole trustee," and a statement was attached showing the items of the county's indebtedness to C, as trustee. The bank applied the proceeds of the check to C's loan, and allowed him to draw on the balance. The plaintiff sought to hold the bank liable for the misappropriation. Demurrer. Overruled. Bill dismissed. Appeal.

Pearce, J. 1. The case is one of equitable cognizance, and the demurrer was properly overruled. 2. The words were used for the express purpose of controlling the destination of the proceeds, and constitute an explicit instruction to the bank that it could not accept and receive the proceeds otherwise than in full discharge of the amount due by the county to C as trustee. 3. The moment the proceeds were collected, they were held by the bank in trust to be applied to the discharge of the debt due by the county to C as trustee. 4. Defendant, knowing the bonds were illegally issued, was not a bona fide holder. Decree reversed.

COLTON v DROVERS BUILDING ASS'N (1899) 90 Md. 85.

Bill for a receiver. Plaintiff was appointed receiver of a bank, which held defendant's note payable to it. Defendant contended that his deposit should be set off against the note. By agreement, the question was to be determined in the original receivership proceedings. Defendant had made no demand for his deposit. Plaintiff contended that he stood as bona fide holder, and that a setoff could not be allowed. Decree for defendant. Appeal.

Boyd, J. 1. No previous demand would be necessary in order to enable the defendant to set off the amount of the deposit against a claim made by the receiver. 2. By reason of the fact that the note was payable to, and held by, the bank, it was an asset that became vested in the receiver, and he took it subject to the equities existing between defendant and the bank. 3. The receiver cannot avoid the right of setoff on the theory that he occupies the position of a bona fide holder for value. Decree affirmed.

JAMES CLARK CO. v COLTON (1900) 91 Md. 195.

Bill to set aside preferences. Plaintiff was the receiver of a bank, the officers of which, knowing its insolvent condition, had given defendants preferences. The bank's president was the principal owner of one defendant, and the other defendants were officers and directors in the bank. The insolvent law provided that the property of a corporation declared to be insolvent should be distributed according to the insolvent laws, and the receiver should have power to commence suits to set aside preferences, as though he were the trustee of an insolvent debtor. Decree for plaintiff. Appeal.

Fowler, J. 1. Though defendants deny having knowledge that the bank was insolvent, the law, nevertheless, imputes that knowledge to them on account of their official positions. Their willful negligence does not give them a better standing than they would have had if they had performed their duties. 2. The payments thus made were unlawful preferences under the insolvent law. 3. Such payments apart from the insolvent law will not be declared to be equitable. Decree affirmed.

MASSACHUSETTS

GRAY v PORTLAND BANK (1807) 3 Mass. 364.

Indebitatus assumpsit against co-stockholders. Defendants organized the P Bank, and let the plaintiff have 70 shares of stock. At an annual meeting the stockholders voted to increase the capital stock. Plaintiff applied for his proportion of the increase. Defendants contend that the plaintiff cannot recover in this

form of action; that the increase required a new subscription; and that the articles of incorporation provide no means of enforcing payment from the stockholders for an increase. Verdict for plaintiff, subject to court's opinion upon the evidence; and if he is entitled to recover, whether his damages should be estimated at the value of the dividends or at the advance in value upon those shares.

Sewall, J. 1. A share in the stock is a share in the power of increasing it. The plaintiff had the right to his proportion of the increase without a new subscription, and on refusal could sue for its value. 2. The plaintiff's loss will be compensated by allowing him the market value of the shares he was entitled to at the time he demanded his certificates, and was refused. Judgment accordingly.

Cited: 8 Mass. 332; 10 id. 401; 8 Pick. 100; 10 id. 423; 1 Metc. 285; 8 Cush. 181; 9 id. 11; 11 id. 384; 12 Allen 361.

PORTLAND BANK v STORERS (1811) 7 Mass. 433.

Assumpsit on promissory note by indorsees against maker. An order was drawn by defendant for the amount claimed as interest on the notes. The notes were payable in Boston money, and, on renewal, plaintiff took a premium to make the money paid equal to Boston money. The charter of the bank prohibited it from using its money or effects in trade or commerce. Defendant pleaded usury, and that the transaction was prohibited by its charter. Verdict for plaintiff. Exceptions.

Per curiam. 1. There was no usury. 2. Defendant might have discharged himself by paying the money due by his promise. 3. There is no ground for claiming the transaction to be one prohibited by the charter. Judgment for plaintiff.

Cited: 11 Metc. 360.

BROWN v PENOBSCOT BANK (1812) 8 Mass. 445.

On bank bills issued by defendant. Plaintiff alleged that the bills were presented and payment refused. A penalty of 2 per cent per month was claimed, under Act of 1809, ch. 37, sec. 1. Defendant pleaded that the statute was unconstitutional. On agreed statement.

Per curiam. The incorporation of a banking company was a privilege conferred by the legislature. The provision made by the act, requiring promptness in payment of its circulating medium, was equitable and wise. It was not in conflict with any constitutional provisions, state or federal. Judgment for plaintiff, including penalty.

BOND v APPLETON (1812) 8 Mass. 472.

To enforce liability of stockholders. An act of New Hampshire, incorporating the H Bank, provided that, if the corporation refused or neglected to pay its bills on demand, the original stockholders, their successors, assigns, and members of the corporation should be liable. Plaintiff held some of the bills, presented them to the corporation, and payment was refused. Defendant had been one of the original stockholders, but was not at the time the bills were presented. On agreed statement.

Per curiam. The reasonable construction of the statute provision is that only such members of the corporation as are such when the demand and refusal of payment of its bills are made, shall be holden for their payment. Plaintiff nonsuit.

Cited: 23 Pick. 113, 114.

MAINE BANK v BUTTS (1812) 9 Mass. 49.

Ejectment. To recover possession of lands mortgaged to plaintiff as collateral security for the payment of notes. Plea: The statute against usury; that plaintiff made a corrupt agreement to receive more than legal interest. Plaintiff contended that banking corporations were not within the provisions of the statute against usury. Judgment for plaintiff. Exceptions.

Sewall, J. Banks are not distinguished from individuals, as to the provisions of the statute of usury. There was in the sense of the law a corrupt agreement. Ignorance of the law will not excuse it. New trial granted.

Cited: 5 Allen 136.

LINCOLN & KENNEBEC BANK v PAGE (1812) 9 Mass. 155.

Assumpsit, payee against indorser of a note. The cashier testified to the practice of the bank to make out notice to indorsers on the day of maturity, and notice to makers on the day previous. A usage, to send notice by a director living where the maker lived, was proved, but the witness had no distinct collection of making and sending the notices. It was proved that the defendant had agreed that notices directed to him should be left, as was done. A by-law required notices to all promissors one day before maturity. Defendant was accustomed to do business with the bank. The judge instructed that if the cashier was at the bank at the usual bank hours the day the note fell due, and no money was paid, demand and notice according to the custom was not necessary.

Sewall, J. The known usages, customs, and by-laws of a bank have the same force in dealing with it as if inserted in a contract. The law requiring notice was not altogether dispensed with by the usage, and the judge's direction was error. New trial ordered.

Cited: 19 Pick. 375; 1 Cush. 188.

LINCOLN & KENNEBEC BANK v HAMMATT (1812) 9 Mass. 159.

On promissory note against indorser. The notice was given to defendant by letter, put in the post office where plaintiff was located, directed to the indorser at his place of residence, according to the custom of the bank. The court decided that such notice was sufficient and directed a verdict for plaintiff. Motion for new trial.

Sewall, J. The notice given, being in accordance with the custom of the bank, was sufficient. Whether it was received by defendant at the time or not, whether the demand was made, and notice given, are questions of fact for the jury. New trial granted.

Cited: 19 Pick. 188; 1 Cush. 188.

WORCESTER BANK v REED (1812) 9 Mass. 267.

Debt on a bond. The condition of the bond was that B should faithfully perform the duties of accountant in plaintiff, and should truly account for all moneys which might be intrusted to his care, and should also continue in said service for the term of two years, unless sooner discharged, then the obligation to be void. Defendant pleaded in bar that D had faithfully served the bank for the period of two years. Plaintiff demurred.

Per curiam. The condition of the bond protected the plaintiff so long as D should continue to serve them under that appointment. The clause respecting his continuance for two years in the service of the plaintiff, was independent of the other parts of the condition, and its effect was only to prevent his quitting the service before the expiration of that period. Demurrer sustained.

Cited: 130 Mass. 245.

NORTHAMPTON BANK v ALLEN (1813) 10 Mass. 284.

Assumpsit on promissory note against indorser. Defense: Usury. Plaintiff loaned on the note at a discount of 6 per cent. The borrower agreed to redeem the same bank bills received on the loan, should they be returned to the bank before the loan was paid in specie; also, to purchase of plaintiff, during the loan, a certain amount of other bills not current, at par, and to pay in specie for them. This agreement was exacted by the bank as a precaution against a run. Verdict for plaintiff.

Per curiam. The arrangement made by plaintiff, in order to secure itself against a run, it had a right to make. It was not prohibited by its act of incorporation, nor was the contract usurious. Judgment for plaintiff.

Cited: 11 Metc. 284.

BLANCHARD v HILLARD (1814) 11 Mass. 85.

Assumpsit on promissory note against indorsee. The note was payable in 57 days with grace. Demand and notice was left at the U Bank, where the note was payable, for the promissor in 56 days without grace, and three days thereafter a similar notice was left for the defendant at the place designated for such purpose. This demand was in accordance with a custom of the bank. Defendant

contended that no legal demand had been made on the promissor. The jury was instructed that, if they believed the defendant was cognizant of that usage, their verdict must be for plaintiff. Verdict for plaintiff. Motion for new trial.

Per curiam. The evidence established an assent by the parties to the usages of the bank. It was competent for the indorser to waive due notice and consent to receive it at an earlier date. The defendant is chargeable with due notice and demand. Judgment on verdict.

Cited: 6 Metc. 24; 10 Allen 240.

SPEAR v LADD (1814) 11 Mass. 94.

Where the president of a bank, with authority of the board of directors, transferred a note by his individual indorsement, held, sufficient to pass title; and that no assignment under seal, nor note of the banking corporation, was essential.

NORTHAMPTON BANK v PEPOON (1814) 11 Mass. 288.

On promissory note. Defendant made the note in question payable to the B Bank. The directors of the B Bank executed a power of attorney to L, authorizing him to assign over any notes payable to the bank. L assigned the note to the plaintiff. The defendant contended that the meeting at which the directors, who appointed L the attorney of the bank, were elected, was held in accordance with a vote of the stockholders, but was not advertised in the newspapers, and was therefore illegal, inasmuch as a statute provided for such an advertisement. Verdict for plaintiff, subject to opinion of the court.

Parker, C. J. 1. Directors of a bank may, by their vote or power of attorney, authorize the president, or any other officer, to assign over the promissory notes payable to the corporation. 2. The true construction of the statute as to advertisement is that notifications of meetings should be published when a meeting is called by the directors, and not when the annual meeting is called by the stockholders themselves. Judgment for plaintiff.

Cited: 6 Cush. 56; 16 Gray 80; 9 Metc. 551.

PORTLAND BANK v APTHORP (1815) 12 Mass. 252.

Trespass on the case. The plaintiff bank was incorporated by statute in 1799, with the powers and privileges usually granted to corporations. By statute of 1812, ch. 32, it was enacted that the corporation of every bank which should be in operation in October, 1812, should pay to the treasurer of the commonwealth a tax of 1½ per cent on the amount of the original stock within 10 days after each semi-annual dividend. The plaintiff neglected to pay such tax, and the property of the bank was levied upon. Submitted to the court.

Parker, C. J. The tax upon the bank was an excise which the legislature had power to levy upon the plaintiff for the privilege of carrying on the banking business, and it did not relinquish this right when it incorporated the plaintiff. Plaintiff nonsuit.

Cited: 7 Pick. 463; 5 Allen 431; 11 id. 275; 12 id. 305; 99 Mass. 152; 118 id. 389; 123 id. 495; 126 id. 594, 595; 133 id. 163; 134 id. 425; 162 id. 119, 127.

INGRAHAM v MAINE BANK (1816) 13 Mass. 208.

Money had and received. H, cashier of the M Bank, was guilty of a defalcation. He was reappointed cashier and the plaintiff became surety on his bond. After this appointment, H borrowed money from other banks by means of checks drawn by him as cashier of the M Bank, and placed the money in the vaults of the bank to conceal his previous defalcations. After examination of his accounts, he returned the money to the banks that loaned it. The fraud being suspected, the plaintiff paid \$15,000 to the M Bank, with the agreement that it should be returned if upon examination the plaintiff should not be found liable. The plaintiff contended that the condition of the bond, which was that H should faithfully perform all the duties of his office, according to law, had not been broken.

Parker, C. J. The fact that H took the money from the vaults of the bank to repay the loan was a breach of the condition of the bond. Nonsuit.

Cited: 10 Gray 553; 147 Mass. 278.

HALLOWELL & AUGUSTA BANK v HOWARD (1816) 13 Mass. 235.

On promissory note. Plea: Setoff, in that the defendant held notes issued by the plaintiff bank and payable to bearer.

Per curiam. The notes cannot be set off, as they are nothing more than evidence of a right of action. Defendant was afterward defaulted.

Cited: 5 Pick. 320.

WYMAN v HALLOWELL & AUGUSTA BANK (1817) 14 Mass. 58.

Assumpsit on bank notes. The notes in question were issued by an old bank of the same name as the defendant, but before the defendant bank was incorporated. They were paid out by the new corporation on checks and loans, the directors frequently declaring that there was no distinction between the notes issued before and those issued after the incorporation of the new bank. Plaintiff nonsuit. Motion to set aside nonsuit.

Parker, C. J. No action can be maintained against the present defendant without proof that the notes in question were issued by the new corporation as their own notes, and with a view to adopt them as such, instead of issuing notes of their own; and perhaps not then, unless it was proved that the corporation, by some vote or other legal act, had authorized the officers of the corporation to bind them in this unusual way. Motion denied.

Cited: 17 Mass. 29.

HALLOWELL & AUGUSTA BANK v HAMLIN (1817) 14 Mass.^{*} 178.

On promissory note. The note was made by the defendant payable to the X Bank, and assigned by the president of the X Bank to plaintiff. Authority was given to the president by the stockholders, but the copy of the vote of the stockholders was evidenced only by a copy certified, not sworn to, by the secretary of the X Bank. At the time of the assignment of the note, the charter of the X Bank had expired, and a statute forbade banks whose charters had expired to issue any securities for money. Verdict for plaintiff. Motion for new trial.

Parker, C. J. 1. The president of a bank has no power, ex officio, to transfer its securities. 2. The secretary of a bank is not a certifying officer, and the vote of his stockholders should have been verified by his affidavit. The vote was inadmissible as evidence. 3. The assignment of a note, for the purpose of paying a debt, does not come within the prohibition of the act. Motion granted.

Cited: 24 Pick. 276; 2 Metc. 544; 121 Mass. 516.

SPRINGFIELD BANK v MERRICK (1817) 14 Mass. 322.

On promissory note. A statute of 1809, ch. 38, made it unlawful for any bank to loan, negotiate, receive in payment, or otherwise deal in the bank bills of other states. Defendant discounted his note at the plaintiff bank, and the words "in facilities" were written by an authorized agent of the bank across the face of it, which was understood to mean notes of certain Connecticut banks. The statute had been repealed at the time of the action. Verdict for plaintiff, subject to opinion of the court.

Parker, C. J. 1. The note was received in violation of the law, and there can be no recovery on it. 2. The act of the agent is binding on the stockholders. 3. The evidence tending to show the intended effect of the instrument was admissible. Plaintiff nonsuit.

Cited: 17 Mass. 281; 1 Pick. 55; 4 id. 340; 13 id. 169; 17 id. 152; 22 id. 184; 4 Metc. 231; 8 id. 226; 3 Cush. 450; 127 Mass. 294.

KING v DEDHAM BANK (1819) 15 Mass. 447.

Assumpsit on a bill or note. The bill in question was as follows: "Dedham Bank, to the cashier of the W Bank. Pay to C, or bearer, on demand \$10 on account of the President, Directors and Company of the Dedham Bank. G, President; J C, Cashier." No presentment of this bill was made to the W Bank. A statute, passed after this bill was issued, provided that every incorporated bank, which has issued or shall issue any bill, note, check, or draft payable at any other place than at such bank, shall be liable to pay the same in specie to the holder thereof, on demand at such bank, without a previous demand at the place where the same is made payable. Verdict for defendants. Motion for new trial.

Per curiam. 1. The bill sued upon is a draft, or order, on a third person, containing only an implied conditional promise to pay, in default of the drawee, and the action cannot be maintained upon the principles of the common law. 2. No act of the legislature can alter the nature and legal effect of a pre-existing contract to the prejudice of either party. Motion denied.

VOSE v GRANT (1819) 15 Mass. 505.

Trespass on the case sounding in tort. The plaintiff came into possession of bills of the X Bank. Prior thereto the charter of the bank had expired, and the stockholders had divided 75 per cent of the capital stock among themselves, leaving the bank insolvent. The defendant was a stockholder and received his proportionate part of the capital stock. Plaintiff nonsuited. Motion to set aside nonsuit.

Jackson, J. The right of action, if there were any, accrued to those who held the bills at the time of the misconduct complained of; and such a right could not be assigned to the plaintiff, who took the bills after the charter expired. Motion overruled.

Cited: 16 Mass. 12; 23 Pick. 113; 5 Cush. 594; 140 Mass. 502.

SPEAR v GRANT (1819) 16 Mass. 9.

To enforce liability of stockholder. The plaintiff alleged that the defendant was a stockholder in the H Bank. The plaintiff became the holder of the notes of the bank upon which it refused payment. The plaintiff contended that the defendant thereupon impliedly promised to pay the note. Submitted to the court.

Parker, C. J. The note itself is evidence of an express promise to the bona fide holder, and cannot be the basis of an implied promise by the stockholders individually. Plaintiff nonsuited.

Cited: 23 Pick. 113.

FOSTER v ESSEX BANK (1819) 16 Mass. 245.

Money had and received. After the action was commenced, the charter of the defendant expired. An act, passed after the charter of the bank was granted, provided that "all bodies corporate and politic, which now are, or hereafter may be, established, and whose powers would expire, shall be continued bodies corporate and politic for the term of three years for the purpose of prosecuting and defending suits. The defendant contended that this act was unconstitutional.

Parker, C. J. The act does not impair the obligation of contracts, and there is no other principle upon which it can be decided that the statute is void. Action may be continued.

Cited: 23 Pick. 194, 346; 15 Gray 148; 121 Mass. 79; 123 id. 34; 129 id. 564; 143 id. 494; 178 id. 477.

NEW ENGLAND MARINE INS. CO. v CHANDLER (1820) 16 Mass. 274.

Assumpsit. C was indebted to the X Bank and transferred to B, the cashier of the bank, 50 shares of stock, by a written assignment, absolute in form, and 10 shares of bank stock, by indorsement in blank to B. The understanding was that both species of stock should be held by B until the directors of the bank should order it sold; and that, after paying the debt to the bank, the surplus, if any, should be paid over to C. In an action brought against C by another creditor, garnishment process was served on B, as trustee of C. The plaintiff claims that the transfer was fraudulent as against creditors of C. The defendant contends that the bank should have been made trustee. Heard on the answer of B.

Parker, C. J. 1. B alone had the legal control of the stock and could give title to it by assignment. 2. He was therefore rightly served as trustee. 3. Failure to have a transfer of personal property conditional on its face is not fraud in itself, or conclusive evidence of fraud. B should be charged as trustee with the surplus after paying the debt of the bank. Judgment accordingly.

Cited: 2 Pick. 611; 20 id. 566; 21 id. 162; 3 Metc. 338; 104 Mass. 276; 151 id. 72.

SALEM BANK v GLOUCESTER BANK (1820) 17 Mass. 1.

Assumpsit on promissory notes. The notes were issued by the defendant, printed on its own paper, and were signed by the cashier. They were stolen before the

president had signed them. The signature of the president was then forged, and the notes came into the possession of the S Bank, which presented them to the defendant for payment. The officers and directors of the defendant, while refusing to pay them, did not declare them forgeries, but returned them to the holder. Verdict for defendant. Motion for new trial. Denied. Plaintiff, bringing an action based on the negligence of the defendant in placing the notes in the desk instead of in a vault, was nonsuited. Motion for new trial.

Parker, C. J. 1. The signature of the president was essential to the validity of the notes. 2. The directors of the bank had no authority to bind the bank by an adoption of the notes. The evidence does not show such an adoption. 3. The injury complained of was not the direct and immediate consequence of the negligence of the defendant, and the bank is not liable. Motion in each case denied.

Cited: 24 Pick. 120; 6 Gray 173; 133 Mass. 21.

GLOUCESTER BANK v SALEM BANK (1820) 17 Mass. 33.

Assumpsit for money had and received. Notes of the plaintiff bank were stolen and the name of the president forged upon them. They then came into the possession of the defendant bank for value. On being presented to plaintiff, they were honored and placed in the vaults of the bank, where they remained for 15 days. The plaintiff then made an offer to the cashier of the defendant bank to examine them, but he declined. Sometime later, the plaintiff discovered them to be forgeries and instituted this action. Plaintiff nonsuit. Motion to set aside nonsuit.

Parker, C. J. A party receiving forged notes must examine them as soon as he has opportunity and return them immediately. If he does not, he is negligent, and negligence will defeat his right of action. Motion denied.

Cited: 106 Mass. 444; 151 id. 283; 177 id. 395.

HARTFORD BANK v BARRY (1821) 17 Mass. 94.

Assumpsit against indorser of a promissory note. The note was signed by E, payable to B, and indorsed by him and discounted by the plaintiff. The cashier of plaintiff bank put his official signature upon it and sent it to a Boston bank, which caused demand to be made on the maker and notice of dishonor given to the defendant, as indorser. No express authority of the cashier was shown for doing this. The evidence of E, to the effect that the note was made by him and indorsed by B, for accommodation, and then discounted by the plaintiff at a usurious rate of interest, was ruled out. Verdict for plaintiff, subject to the opinion of the court.

Parker, C. J. 1. To admit the maker to prove usury, would be to defeat the salutary principle by which a party to a note is precluded from disparaging it by his testimony. 2. A cashier has implied power to do what is necessary in the collection of a note. Judgment on verdict.

Cited: 9 Metc. 583; 8 Allen 461.

FOSTER v ESSEX BANK (1821) 17 Mass. 479.

Assumpsit for money had and received. A delivered a chest containing \$50,000 to the defendant for safe-keeping. The charter of the defendant gave it no special power to receive such deposits, although it was frequently done by the bank. The money was kept in the vaults of the defendant in the parcel as left, and the defendant received no compensation for keeping it. A large part of the money was stolen by the cashier, who was under \$10,000 bonds for the faithful discharge of his office. Special verdict found by the jury.

Parker, C. J. 1. The action was properly brought against the bank; although no power was given it to receive such deposits, a contract was established. 2. There was a mere naked bailment for the accommodation of the depositor. A gratuitous bailee is liable only for gross negligence or fraud. 3. The cashier of the bank was not acting within the scope of his employment, and the bank is not liable for his act. Judgment for defendant.

Cited: 23 Pick. 140; 4 Metc. 10; 8 id. 93; 7 Cush. 489; 16 Gray 454; 2 Allen 6; 99 Mass. 611; 109 id. 456; 111 id. 376, 380.

UNION BANK v KNAPP (1825) 3 Pick. 96.

Breach of contract for money had and received. Pleas: The general issue, and the Statute of Limitations. The plaintiffs alleged that the bank, by mistake, had

credited defendant with \$1,000 more than he had deposited. This mistake, if any, occurred before the balance was struck for November, 1817. The bank struck a balance of defendant's account every month thereafter, and this item of \$1,000 was included and carried forward until February, 1824, when defendant withdrew his deposits. Plaintiffs offered in evidence the blotter kept by the receiving teller, who had become insane, and proved by a witness that it was in the teller's handwriting. They called the clerk, who was thought to have made the mistake, to testify; when asked if he expected to be damnified by a verdict against plaintiffs, he said he intended making good any loss they might suffer. Plaintiffs offered the journal of 1817, and called a witness to testify that it was in the handwriting of the clerk, since deceased, who had kept it. Judgment for plaintiffs. Motion for new trial.

Putnam, J. 1. The books should be given in evidence, the furnishing of transcripts to the depositors being a reason therefor peculiar to this case. 2. The clerk's opinion, that he is bound in honor to compensate plaintiffs for his innocent mistake, if any, does not disqualify him as a witness. 3. The handwritings of the two clerks were properly proved. 4. The defendant is not liable for any of the charges and disbursements made more than six years ago, from which the balance carried over into the statutory period arose. Motion granted.

Cited: 13 Pick. 471; 14 id. 12; 18 id. 564; 6 Cush. 217; 7 id. 147; 3 Allen 224; 2 Metc. 544; 8 id. 221; 8 Gray 178; 118 Mass. 488; 133 id. 355; 137 id. 496; 176 id. 587.

DEDHAM BANK v CHICKERING (1825) 3 Pick. 335.

Debt on a bond. The defendants became sureties on a bond conditioned that the principal, the bank's cashier, should faithfully perform his official duties so long as he should remain cashier. The records of the directors' meeting showed that they voted to accept the sureties, and that, at irregular intervals thereafter, they had "chosen" or "appointed" the principal as cashier; but there was nothing in the bank's records or regulations, or in the bond, requiring that the cashier should be elected annually. Nine years after the date of the bond, the cashier absconded. The bond was produced by the bank's president and put in evidence. Verdict for plaintiffs, subject to the court's opinion.

Parker, C. J. 1. The vote to accept the sureties, and the president's possession of the bond, are a sufficient acceptance thereof. 2. The sureties were responsible so long as their principal continued to be cashier. Judgment on the verdict.

Cited: 2 Metc. 534, 555, 3 id. 137; 11 id. 37; 8 Allen 376; 7 Gray 6; 105 Mass. 60; 129 id. 75; 130 id. 245; 175 id. 255.

STATE'S BANK v WELLES, EX'R (1826) 3 Pick. 394.

Debt on a bond. The defendants were sureties on a bond, conditioned for the faithful performance of the duties of the second teller of the bank. He owed it a balance which he paid to the cashier in currency. Plaintiffs offered to prove that a part thereof had been stolen by him from the first teller's drawer for the purpose of making this payment. It was agreed that, if this evidence was admissible, judgment should be rendered for plaintiffs.

Per curiam. The teller's taking the money from another teller's drawer, and delivering it over to the cashier, does not amount to a payment. Defendants defaulted.

DEDHAM BANK v CHICKERING (1826) 4 Pick. 314.

Debt on a bond, conditioned that the principal should faithfully perform his duties as cashier of plaintiff's bank. The sureties were defendants. The penalty had been declared forfeited and the auditor's report showed: 1, That the principal, C, had withheld \$12,746 of the bank's funds paid into his hands as cashier; 2, that the plaintiff had violated Statute of 1816, ch. 91, prohibiting a bank from issuing bills not payable at the bank; 3, that he had converted the proceeds of two notes given him to collect as attorney for the bank; 4, that he had pledged his stock to the bank and afterward wrongfully obtained and sold it.

Parker, C. J. 1. To withhold the funds was an official misdemeanor, for which the defendants are answerable on the bond. With respect to the illegal bills, the cashier cannot be considered as acting within his official duties, but only as the plaintiff's agent or broker in an illegal traffic. 2. The defendants are not liable for

losses resulting from their principal's misconduct as the bank's attorney. 3. The debts secured by the pledge were merely personal debts, for which the sureties are not liable. Judgment for plaintiff for \$12,746.

NESMITH v WASHINGTON BANK (1828) 6 Pick. 324.

Breach of contract for failure to pay dividends. Plaintiffs were original subscribers to two shares of the bank's stock. They paid all but the last instalment, and transferred them to B, who in turn transferred them to P within a year after the incorporation of the bank. The last instalment being due, P notified defendants of these transfers and paid the instalments on two shares. Before the bank declared the dividend, but after it had notice of the transfers, plaintiffs became indebted to it. When the dividend was declared, P demanded that upon the two shares. The bank refused to pay it. The act incorporating the bank prohibited the transfer of the capital stock by the original subscribers until a year after its passage. A by-law of the bank stipulated that the bank might retain dividends on shares owned by stockholders indebted to it until the indebtedness should be discharged. The suit was brought in plaintiffs' names for P's benefit. Judgment for defendants. Error.

Parker, C. J. 1. The act of incorporation interposes no obstacle to the plaintiffs' recovering the dividends for the use of those to whom they have been equitably transferred. 2. The by-law is inoperative, because the note was discounted after defendants had notice of the transfer and had received the last instalment upon the shares. Judgment reversed.

Cited: 9 Pick. 204; 22 id. 256; 7 Cush. 187; 114 Mass. 43.

HUSSEY v MANUFACTURERS & MECHANICS BANK (1830) 10 Pick. 415.

Action for damages for refusing to issue certificates of ownership of shares. Ninety of the bank's shares of \$100 each were held by M, an original subscriber. He paid an instalment of \$80 on a share, \$2,750 in cash, the remainder in the form of a draft, to secure which he transferred his stock to the bank, "excepting and reserving \$2,750 in said stock." The draft was never accepted or paid. Plaintiff afterward attached 34 of the shares as M's property and bought them at the sheriff's sale. She tendered the bank the instalments due upon them, displayed the evidences of her title, and demanded title of ownership. The bank refused to give certificates. The defendants were defaulted, subject to the court's opinion.

Shaw, C. J. 1. The giving of a negotiable instrument and collateral security therefor is prima facie to be deemed a payment as against third persons. 2. An amount equal to 34 shares at \$80 per share remained the property of M and liable to attachment. An action on the case is the legal and appropriate remedy. 3. The rule of damages is the market value of the shares at the time of demand and refusal, with interest to the time of judgment. Judgment on default.

Cited: 10 Pick. 460; 7 Cush. 188; 8 id. 180.

PLYMOUTH BANK v BANK OF NORFOLK (1830) 10 Pick. 454.

Action for not transferring shares of stock. The defendants held L's capital stock as a pledge for his indebtedness to them. L then assigned the shares in good faith and for a valuable consideration to D L & C, and executed a power of attorney to D L for transferring them. D L, having complied with all the rules of the bank, duly presented the power and certificate, and demanded a transfer. This the defendants refused. The plaintiffs subsequently attached the shares in a suit against L and bought them at the sheriff's sale. They brought this action. Verdict for defendants, subject to the opinion of the court.

Shaw, C. J. The transfer by L to D L & C divested his interest and left nothing for the attachment to operate upon. Judgment on the verdict.

Cited: 7 Cush. 188.

AMERICAN BANK v ADAMS (1831) 12 Pick. 303.

Debt on bond, conditioned for the faithful performance of his duties during the principal's term of office as teller. Plaintiffs alleged that the principal had received \$2,638, for which he had not accounted. The defendant, surety, asserted that the loss was due to accidental overpayments by the teller, or that the money had been

stolen from him; and offered to prove that the teller was honest and vigilant; that plaintiffs had expressed their conviction that this loss was due to overpayments; and that they had continued to employ him, and had recommended him to others as trustworthy. The case was withdrawn from the jury by consent, subject to the opinion of the court.

Per curiam. 1. The allegation that the teller has received moneys for which he has not accounted, is a sufficient assignment of a breach of the bond, which, if not justified or excused, will amount to a forfeiture. 2. The defendant must prove affirmatively the truth of the justification pleaded. Penalty of the bond adjudged forfeited. Defendant may be heard in chancery.

AGRICULTURAL BANK v BISSELL (1832) 12 Pick. 586.

Breach of contract for money had and received. The plaintiffs, on discounting defendant's note, took the interest in advance, and on the first discount of the note and at several subsequent renewals, the cashier took \$21 as the interest of \$200 for 63 days. This sum a little exceeds the legal rate of 6 per cent for one year as fixed by the statute. Defendant contended that the contract was void for usury. A nonsuit or default was to be ordered, according to the opinion of the court.

Shaw, C. J. 1. When the interest is to be computed in days or months, it is not possible to follow the prescribed rule without taking fractions of a day; this is not required. 2. Taking interest in advance is not usurious. Defendant defaulted.

Cited: 105 Mass. 333.

DROWN v PAWTUCKET BANK (1833) 15 Pick. 88.

Assumpsit for money had and received. A firm, being indebted to the defendants on several notes, deposited a note with defendants' cashier, indorsed in blank, with the direction that its proceeds should be applied upon the other notes. Three days afterward, the firm assigned to the plaintiff in trust for their creditors. Plaintiff demanded the note immediately, and after it became due, demanded its proceeds. The defendants collected the note and applied its proceeds upon the firm's indebtedness to them. Judgment to be entered according to the court's opinion.

Per curiam. Inasmuch as the note was not deposited for the specific purpose of being discounted immediately, defendants had a right to elect the mode of raising the proceeds, and did not so violate the trust, by keeping it for collection, that the firm or their assignee could reclaim it. Judgment for defendants.

STATE BANK v FEARING (1835) 16 Pick. 533.

Assumpsit on promissory note against indorser. Defendant was the second indorser from whom plaintiffs took title. Defendant offered to prove that the signature of the first indorser on the note was forged. Judgment withheld subject to the court's opinion as to the merits of this defense.

Shaw, C. J. It is not good defense. It is not necessary for the holder to prove the signature of any party prior to the party whom he sues. Defendant defaulted. Cited: 6 Gray 92; 125 Mass. 29.

FRANKLIN BANK v FREEMAN (1835) 16 Pick. 535.

Assumpsit to recover the amount of checks drawn by the defendant. The two checks in suit were in this form: "Market North Bank. Memo. \$1,000. cts. Boston, August 27, 1833. Pay to X. Payable Friday 30th inst., or bearer, one thousand dollars, cents. To the cashier." They were signed by defendant, and the word "North" had been canceled on each by defendant before he signed them. Plaintiffs' cashier testified that he had lent money on them to B, who absconded. The checks were not presented at the Market Bank for payment, or to the defendant. Judgment withheld subject to the court's opinion.

Putnam, J. 1. The cashier was a competent witness. 2. These were memorandum checks, and presentation at the bank or demand on the defendant were unnecessary. 3. The erasure, having been made without fraud and before signing, is of no consequence. Judgment for plaintiffs.

THE ADAMS BANK v JONES (1835) 16 Pick. 574.

Assumpsit on promissory note. The defendants made the note payable to the order of the president and directors of the A Bank. The proceeds were to be paid

to S & C. In April, defendant J purchased goods from S & C on a credit of 12 months. Thereafter defendants J and S formed a partnership. J proposed to S & C to give them the joint note of the defendants in payment of his debt. The note was made to pay the debts of J & S. S & C agreed to accept the note if the A Bank would discount it. Subsequently H, a director of the bank, informed S & C that the note was good and the bank would discount it when in funds. The bank refused to discount the note. S & C then requested the bank to indorse the note or authorize them to commence a suit on it, in the name of the bank, which was refused. A bond of indemnity was sent to the bank and filed, but no action by the directors was taken thereon. Plaintiffs claim S & C are bona fide holders for a valuable consideration, and have a right to maintain the action in the bank's name without its consent. If not so, there is sufficient evidence from which the bank's consent may be implied.

Wilde, J. 1. There is no consent to the bringing of the action either express or implied. 2. There was no privity of contract between the bank and S & C. 3. If the bank had consented to allow its name to be used, this action could not be maintained because it refused to discount the note. 4. There never was any valid contract between the bank and the makers. The mere signing of the note did not make it a valid contract. 5. The note was appropriated by J to pay his individual debt, and the appropriation was not binding on other defendants. Plaintiffs nonsuit.

Cited: 6 Cush. 234; 5 Allen 163.

FOLGER v CHASE, EX'RS (1836) 18 Pick. 63.

Assumpsit on promissory note. Defendants' testator indorsed two notes to the plaintiff. Defendants set up: 1, No demand on the makers, and no diligence used to collect; 2, the L Bank had no authority to indorse these notes after its charter had expired, as the statute provides that corporations, whose powers expire, should continue to close up, but not to continue, the business. 3, the indorsement was made by "F, cashier;" 4, the indorsement of one note was upon a paper attached to the back of the note by a wafer, and was only an equitable transfer. Default, subject to opinion of the whole court.

Wilde, J. 1. The testator, by his indorsement, guaranteed that the makers would be at the bank and pay the notes according to their tenor, and it was for defendants to show they called. 2. The bank had a right to transfer the notes. 3. The indorsement by the cashier in his official capacity shows the indorsement was made in behalf of the bank. 4. The paper thus attached had become a part of the note, and the indorsement was valid. Judgment for plaintiff.

Cited: 8 Allen 461.

SHOVE v WILEY (1836) 18 Pick. 558.

On promissory note by indorsee. Plea: Statute of Limitations. Defendant, the indorser, admitted indorsement, but set up failure of legal notice. An officer of the L Bank testified to an entry in a book, kept by the bank for that purpose, certifying that on the day the note fell due he notified drawer and defendant. He testified that he was a clerk in the bank, and his practice was to carry notices personally to the residence or place of business, and had no doubt he did so this time; that he was careful to give notice and make a record, and had no doubt it was left, although he could not recall the circumstances. Both the drawer and defendant knew the custom of the bank to give notice instead of sending the note to the promissor. Judgment reserved for opinion of the whole court.

Shaw, C. J. 1. The book would become admissible on proof of the clerk's handwriting, in case of his death or other incapacity to testify, and it is none the less so when authenticated by himself. 2. Promissor and indorser were so far familiar with the custom of the bank, by transacting business there, that their assent to it may be presumed. Judgment for plaintiff.

Cited: 8 Metc. 153; 10 Gray 324; 13 Allen 352; 133 Mass. 355.

MERRILL v THE BANK OF NORFOLK (1837) 19 Pick. 32.

Assumpsit on the common money counts. L, as plaintiff's agent, sold a consignment of lumber to E, who paid partly in cash and partly by note. Out of the cash he deducted his entire commission. He took the note only after informing the plaintiff that he took no notes on his own responsibility, and after being instructed to take this note, and to get it discounted. L indorsed the note and sent his son

to get it discounted at defendant bank. The note was discounted to L's credit at 10 o'clock a. m., and about 1 o'clock p. m. the proceeds were attached in defendant's hands in a suit against L. The next day L, being notified, told the bank the note belonged to plaintiff, and later exhibited a power of attorney from plaintiff and demanded the proceeds, which defendant, on account of the attachment, refused to pay. Judgment for plaintiff. Appeal.

Morton, J. L, as plaintiff's agent, bound the plaintiff by the sale, and the proceeds thereof became vested in the plaintiff. The bank is therefore liable for the amount with interest from the time of demand. Judgment affirmed.

Cited: 132 Mass. 163.

COMMONWEALTH v DREW (1837) 19 Pick. 179.

Indictment for getting money by false pretenses. Defendant deposited in the X Bank. When he had only \$10 to his credit, he drew a check for \$100, which the X Bank paid him. Defendant had deposited and drawn in the assumed name of C A. The X Bank had another depositor named C A, but it is not contended that the check was paid because of any mistake as to which one drew the check. Defendant made no representations when opening his account or at any other time. The statute provides that all persons who knowingly and designedly by false pretenses, obtain money with intent to cheat, shall be punished. Judgment for plaintiff. Appeal.

Morton, J. The case cannot properly be brought within the statute. Judgment reversed.

Cited: 11 Allen 267; 108 Mass. 312; 126 id. 469; 127 id. 448, 449; 128 id. 86; 167 id. 148; 169 id. 95.

CHURCHILL v MERCHANTS BANK (1837) 19 Pick. 532.

Assumpsit on a bank bill. The defendant made a bank bill payable to X or bearer on demand. The plaintiff became the lawful bearer, justly entitled to receive payment. He made a presentment "at the usual place of business" and "within the usual hours," and demanded payment, which defendant refused, whereby it became liable to plaintiff for \$300 and interest "at the rate of two dollars for each \$100 and for each month." Demurrer. Default, subject to opinion of the whole court.

Dewey, J. 1. It is always proper to declare on a written instrument according to its legal effect. A general demurrer is the only demurrer that, by our law, can be filed to a pleading. 2. It is sufficient to allege that the plaintiff is the lawful bearer and entitled to demand payment. 3. There is substantially an averment of a refusal by the officers of the bank. 4. "Month" signified calendar month. Judgment for plaintiff.

COMMERCIAL BANK v CUNNINGHAM (1837) 24 Pick. 270.

Writ of entry. The E's mortgaged certain premises to plaintiffs to secure three notes. At the same time plaintiffs delivered to them an instrument under seal acknowledging the notes were security for other notes and liabilities, and stating that the notes and mortgage should be given up when the E's had settled everything with plaintiffs. The mortgage was recorded; the agreement was not. As the notes fell due, new ones were given. In a few months, the Es took P into the firm, and the notes were indorsed E P & Co. Later the firm—and also W, a director of plaintiff's bank, by whom most of the notes were indorsed or made as W P & Co., being insolvent—mutually agreed to assign for the benefit of such of their respective creditors as should become parties to their assignments, and release their respective claims, but neither executed the assignment made by the other. W then assigned, and the plaintiffs "released and discharged all their debts" against W. Then E P & Co. assigned their property to the tenant and L, and conveyed the premises in suit in due form. Among the notes upon which the plaintiffs claim were several for the accommodation of W; but plaintiffs had no notice of this, except it be from the fact that W was a director of the plaintiff bank. W's assignee paid to plaintiffs a certain sum to be applied to the claims against him. Plaintiffs applied this to the claims against W, under the assignment, and not to the claims of E P & Co., as they received no special direction from W's assignees how to apply this. The court was to determine whether plaintiff could recover on the mortgage or not; if so, tenant defaulted without prejudice to his filing a bill in equity.

Wilde, J. 1. A mortgage made bona fide for the purpose of securing future debts, expected to be accrued in the course of dealings between the parties, is a good and valid security. 2. The knowledge of W that certain notes were accommodation notes, although he was one of the directors of the bank, is no proof of notice to the corporation, especially as he was a party to all these contracts, whose interest might be opposed to that of the corporation; and the receiving part payment from the indorser and releasing him, cannot operate as a discharge of the principal debtor from the balance due. 3. To ascertain the balance due on the E P & Co. notes, the amount paid out of the goods and effects of W, must be applied distributively and proportionally to all the demands proved or admitted. Judgment for plaintiffs.

Cited: 6 Allen 81, 163; 9 id. 79; 118 Mass. 109; 121 id. 491; 122 id. 265; 128 id. 103; 131 id. 193; 136 id. 317.

WILDES v NAHANT BANK (1838) 20 Pick. 352.

Attachment against a bank as trustee. Trustee process was issued against the S Bank. At the time of the service of the writ, the S Bank held a large amount of these bills as vouchers for charges against the N Bank. No question is made as to the balance due the S Bank; but the claim was that the bank notes were liable to specific attachment for the debt of the N Bank. This claim was founded on the R. S., making bank notes and all other bills or evidences of debts, issued by any moneyed corporation and circulating as money, attachable property. Judgment for defendants. Appeal.

Shaw, C. J. The bills were not liable to be attached for a debt of the N Bank. Trustees discharged.

COMMERCIAL BANK v FRENCH (1838) 21 Pick. 486.

Assumpsit on a joint and several promissory note of T, as principal, and F, as surety, to pay "the cashier of the Commercial Bank, or order, \$9,000 on demand, with interest." This note was given the bank as collateral for a loan of the bank to T. The note was dated September 28, 1835. F was not called upon for payment until October, 1836. T was afterward called upon to pay the note, but no notice of non-payment was given the surety.

Morton, J. 1. The voluntary forbearance to collect, or the mere delay to prosecute upon any kind of security will not discharge the surety. 2. A contract made with "the cashier of a bank" is made with the bank. There is no so safe a criterion as the consideration. Judgment for plaintiff.

Cited: 1 Metc. 365, 475; 5 Cush. 176; 7 id. 114; 5 Gray 563; 13 id. 67; 8 Allen 462; 121 Mass. 432.

PERKINS v FRANKLIN BANK (1839) 21 Pick. 483.

Assumpsit on a post note of the defendant bank payable in seven months, with interest "until due, and no interest after." It was dated December 7, 1836, and on the margin was written: "Due July 7, 1837." The action was commenced July 7, 1837. The plaintiff offered evidence to show a custom among bankers not to allow days of grace on such notes. Defendant contended that days of grace should have been allowed. The statute (R. S., ch. 33, sec. 5) provides that on promissory notes payable on a future day certain, there being no express stipulation to the contrary, grace shall be allowed.

Shaw, C. J. 1. Days of grace are allowed. The time it became due being fixed, the statute gives three days from that time for payment. 2. The usage and custom of trade cannot control the statute. Nonsuit.

Cited: 1 Metc. 46; 6 id. 21, 22, 31; 7 Allen 34; 164 Mass. 114.

COMMONWEALTH v FARMERS & MECHANICS BANK (1839) 21 Pick. 542.

Bill in equity by bank commissioners praying that the bank proceed no further in the business of banking, and that a receiver be appointed to take possession of its property and discharge its liabilities. The answer controverts the allegations of the bill. The bank was incorporated under the Act of April 1, 1836.

Shaw, C. J. The case involves the construction of the Statute of 1838, ch. 14, providing for the appointment of bank commissioners, in relation to banks which have failed to comply with the provisions of their charters, or which are supposed to be insolvent. The act is not unconstitutional because it prescribes in a given state

of facts that an injunction shall issue. It is not an interference of the legislature, or an assumption of judicial power. Nor is it a restraint on the judicial power to require the judge to issue an injunction on complaint of a commissioner. Nor is it unconstitutional because the bank directors and other officers may be called upon to make answers which may criminate them, and render them liable to penalties. They may decline to answer in a case in which it is provided by the constitution that they shall not be held to answer. Nor does the act impair the obligation of a contract. The banks are incorporated on the condition that they will conduct their business according to banking principles and the rules of law. As they may violate the provisions of their charters, there must be some mode of redress for those who have suffered from such violation. The violation may affect great numbers, in which case it is consistent with public safety to institute a process in the name and under authority of the government, bound as it is to provide security for its citizens. The injunction which was issued had the authority of law, and defendants are not entitled to have it dissolved.

Cited: 2 Metc. 580.

WASHINGTON BANK v LINCOLN (1839) 22 Pick. 24.

Assumpsit on a promissory note signed by defendant Lewis, indorsed by defendant, L. T, one of the directors of the plaintiff bank, having been authorized to solicit notes for discount, when money was plenty, obtained the note from Lewis on the promise to have it discounted for Lewis, but had it discounted for his own benefit as collateral for a loan from the bank. Defendant contended that either, 1, T was agent for bank, or, 2, that T, being a director, the bank had notice, and in either event it could not recover. Case reserved.

Wilde, J. Lewis had knowledge of the usage and its limitation. This, being a limited agency, as proved by the usage, it is clear that T was not the agent of the bank in the transaction. He was the party applying for the discount, and was not acting as director. Judgment for plaintiff.

Cited: 121 Mass. 491; 139 id. 335.

COMMONWEALTH v COMMONWEALTH BANK (1839) 22 Pick. 176.

Debt to recover the semi-annual bank tax for April, 1838. By R. S., ch. 9, sec. 1, every bank shall, after the first Monday of April and October in each year, pay to the treasurer of the Commonwealth a tax. An Act of April 2, 1838, repealing the bank's charter, provided that the act should not release the corporation from any liability. Defendants contended that they were, under Act of 1828, ch. 96, entitled to 10 days from the first Monday of April; that the repealing act operated to bar the action; and that the corporation had no authority to sue. Case reserved.

Shaw, C. J. 1. The debt fell within the saving clause of the repealing act. The right of the Commonwealth to the semi-annual tax accrued on the first Monday of April and October, respectively, and not 10 days after those days. 2. The plaintiff had authority to sue. Judgment for Commonwealth.

WHITE v FRANKLIN BANK (1839) 22 Pick. 181.

For a deposit. Plaintiff deposited \$2,000 with defendant bank on February 10, 1837, and received a book containing the words: "To cash deposited, \$2,000. The above to remain until August 10. E. F. Bunnell, Cashier." The plaintiff brought action July 7, 1837. The first ground of defense is that the action was prematurely brought; second, that the transaction being illegal, the maxim *potior est conditio defendentis* applies; and that no demand was made. The R. S. ch. 36, provides that no bank shall make any contract in any form whatever for the payment of money at any future day certain, except for money borrowed of the Commonwealth, etc. Facts agreed.

Wilde, J. 1. The agreement that the deposit should remain until August 10, amounts in law to a promise to pay on that day. Such a promise is void under the statute. 2. Where money is paid under a contract prohibited by statute, the receiver, being the principal offender, may be compelled to refund. A demand is not necessary. Judgment for plaintiff.

Cited: 23 Pick. 32; 3 Metc. 585, 586; 101 Mass. 150; 120 id. 503; 121 id. 9; 123 id. 138; 128 id. 508; 131 id. 275; 135 id. 64; 161 id. 3; 162 id. 140.

KILBY BANK, PETITIONERS (1839) 23 Pick. 93.

Petition stating that the commonwealth had recovered a judgment against the bank for the semi-annual bank tax due in April, 1838, and that execution issued; but that the legislature had remitted the tax due from January 29, 1838, on payment of costs incurred for the recovery of the tax; that petitioners have paid the costs, and the bill prays for a writ superseding such execution.

Shaw, C. J. The bank contends that the resolution releases all taxes accruing after January 29, 1838, and was a remission of the entire six months' tax. We think the word "from" was used to distinguish that which accrued before, and that which accrued after the day fixed, and implies a pro rata release. The legislature intended to remit as large a part of the semi-annual tax as the time from January 29 to the first Monday in April, bore to the whole period of six months.

HARRIS v FIRST PARISH OF DORCHESTER (1839) 23 Pick. 112.

Assumpsit, by a creditor of the Franklin bank against a stockholder to recover the amount of a post note which the bank had refused to pay. The action was founded on R. S., ch. 36, sec. 36, providing that stockholders shall be liable, if any loss or deficiency of the capital stock of a bank shall arise from official mismanagement of the directors. It was contended: 1, That the stockholders were not liable to any suit by the creditors, but by the corporation itself; 2, that the proper remedy was in equity.

Morton, J. This case comes within the equity jurisdiction of the court; an action at law will not lie. The creditors are entitled to an action directly against the stockholders. Plaintiff nonsuit.

Cited: 9 Metc. 190; 8 Cush. 98; 10 Gray 235, 326; 3 Allen 485.

GRAND BANK v BLANCHARD (1839) 23 Pick. 305.

Action by the bank against an indorser of a promissory note. The bank gave notice of non-payment to the indorser the next day after the last day of grace. It had been made out the day previous, but not delivered by the messenger of the bank except as aforesaid. It is contended that the bank did not conform to its own usage, to send notice to indorsers on the afternoon of the last day of grace.

Shaw, C. J. The settled general rule of mercantile law is that notice to indorsers on the day of dishonor and after it, or in the course of the next succeeding day, is seasonable. Judgment for plaintiffs.

Cited: 6 Metc. 25; 9 id. 582; 102 Mass. 180; 127 id. 521.

FABENS v MERCANTILE BANK (1839) 23 Pick. 330.

Action on the case. The plaintiff left with the bank a note for collection. The maker resided in Philadelphia, where the note was payable, and the bank forwarded the note to the Bank of the United States in that city for collection. The note was due January 17, but was not presented for payment until January 29, when payment was refused. The action is for damages for the negligence.

Shaw, C. J. The defendants performed their duty when they transmitted the note to a solvent bank in good standing, and were not responsible for the negligence or misfeasance of that bank. Plaintiff nonsuit.

Cited: 6 Metc. 21, 26; 8 id. 83; 1 Cush. 186, 188; 10 id. 585.

CREASE v BABCOCK (1839) 23 Pick. 334.

Bill to enforce stockholders' liability. The C Bank was incorporated under an act providing for stockholders' liability on all bills unpaid when charter expired and reserving power of legislative repeal. Payment of two bank bills of \$1,000 was refused and the legislature forfeited the charter and complainants brought this bill. The bank demurred and others plead.

Morton, J. 1. The statute is a part of the charter and if a default has been committed, then, by the express terms of the compact, the legislature has a right to exercise the power of repeal. 2. An inquiry into the affairs or defaults of a corporation, with a view to continue or discontinue it, is not a judicial act. The repealing act is constitutional and valid, and by force of it the charter of the bank expired and was dissolved, and the creditors of the bank from that time became

entitled to all remedies against the officers and stockholders provided for in the statute. Demurrer overruled.

Cited: 13 Gray 253; 5 Allen 246; 123 Mass. 34; 148 id. 191, 194.

ATLAS BANK v NAHANT BANK (1839) 23 Pick. 480.

Creditors' bill under a statute by the A Bank against the N Bank, alleging the insolvency and repeal of the charter of the latter bank, and that plaintiffs are creditors. It prays for a receiver and an injunction. Receivers were appointed, but after injunction ordered and before the appointment of the receivers, other creditors attached property of the bank. The receivers then, in another suit, prayed that the creditors be restrained from making attachments, and that existing attachments be dissolved.

Shaw, C. J. The question is, whether the respondents acquired any legal and valid lien by their attachments which they can set up to prevent a sale by the receivers. The court are of opinion that this proceeding, in the special case of a corporation whose charter has expired, was intended to provide one general remedy for all creditors, and must necessarily supersede an interfering proceeding instituted for the benefit of a particular creditor, and that it was intended to prevent and defeat special preferences by attachments or mesne process, and that these respondents cannot set up their attachments against the power of the receivers to sell the attached property for the general benefit of all the creditors.

Cited: 7 Metc. 346; 10 id. 325; 10 Gray 235; 12 id. 235; 115 Mass. 70; 126 id. 142; 147 id. 368; 161 id. 386; 166 id. 239; 171 id. 26, 83.

BURRILL v NAHANT BANK (1840) 2 Metc. 163.

Writ of entry. Plaintiff obtained judgment against defendant and was about to sue out execution. To prevent this, directors gave plaintiff a mortgage on the premises. The "Directors' Records" showed that it was voted at a meeting, that B & S, two directors, be a committee to sell and transfer any property owned by the bank. The plaintiff introduced the mortgage, signed by B & S, describing themselves as a duly authorized committee, and stating that they had affixed the seal of the corporation. The condition of the deed was that, unless tenants shall pay \$1,500 within a year, the deed should "remain absolute." Judgment for plaintiff. Appeal.

Shaw, C. J. 1. The deed duly executed under the corporate seal of the bank, and produced by the party claiming under it, is *prima facie* a good title. 2. A board of directors may delegate an authority to a committee of their own number to alienate or mortgage real estate. 3. The case shows ratification by the board. Judgment affirmed.

AMHERST BANK v ROOT (1841) 2 Metc. 522.

On bond. Plaintiff sued R, its late cashier, and his sureties for R's irregularities during the years 1836, 1838, on a bond given in 1831. The defendants' objection to evidence of the handwriting of S, one of the subscribing witnesses, on the ground that S, as a stockholder, was not a competent attesting witness, was overruled. The defendants contended that a quorum was not present when the bond was presented to the board of directors; that it was illegally approved because three of the directors were sureties; and that the bond was for only one year or until the next annual meeting. C & B, two directors, testified that R was elected in 1831, without limitation as to time, that he was not afterward re-chosen, and that the books were in his handwriting. Defendant also set up the neglect of the directors to examine the books for years. The foreign deposition of R, though it did not appear that it was conformable to the commission, was admitted in evidence. Judgment for plaintiff. Appeal.

Shaw, C. J. 1. A formal vote is not necessary to prove the acceptance of the bond. 2. The negligence of an agent cannot deprive a corporation of a remedy against another agent for his default. 3. The declarations and admissions of the principal are evidence against the sureties in a joint action. 4. Though the election was for the ensuing year, the law made it a continuous office. 5. Evidence of S's handwriting ought not to have been admitted. 6. The deposition was properly admitted. The witness was competent to testify. Judgment reversed.

Cited: 6 Metc. 279; 6 Cush. 140; 11 id. 285; 1 Gray 146; 7 id. 6, 7; 9 id. 371; 1 Allen 340; 8 id. 376, 379; 12 id. 250; 103 Mass. 42; 115 id. 601; 116 id. 278; 125 id. 18; 129 id. 75; 130 id. 245, 246; 131 id. 86; 134 id. 184; 135 id. 29; 137 id. 438; 168 id. 590; 169 id. 502; 175 id. 255, 404.

ATLAS BANK v NAHANT BANK (1842) 3 Metc. 581.

Bill under R. S., ch. 44, against insolvent bank. The N Bank claimed damages under the statute for the detention of debts due at the rate of 24 per cent per annum from time of demand. The receiver disallowed this claim, but allowed 6 per cent from demand. The assignees of claims, whose assignors had made a demand, claimed interest from the time of demand. Allowed. Others claimed interest who made no demand. Disallowed. The claims of depositors who allowed their deposits to remain a certain time upon an agreement to obtain interest, and the claims of holders of bills issued, upon an agreement to keep these bills out of circulation, and not demand their payment for a certain time, both allowed. Objection to these last two claims as founded on illegal contracts was overruled. Judgment to abide appeal.

Wilde, J. 1. The statute is penal, and will not be enforced in equity. The allowance and the disallowance of interest are not open to valid objections. 2. The depositors, as creditors, are entitled to share in the assets. 3. The bill holders stand on the same footing, as, by the issue of the bills, the assets of the bank have been augmented. Judgment for defendant.

Cited: 145 Mass. 312; 162 id. 140.

WATSON v NEW ENGLAND BANK (1842) 4 Metc. 343.

Debt on foreign judgment. E sent a draft of plaintiff's to the defendants, the draft being indorsed to defendants. Defendants indorsed it to their correspondent, and having it returned uncollected, erased their indorsement, and returned it to E. E sent the draft to Maine, where his attorney in good faith brought suit in the name of the defendants, as the Maine law permitted only the person to whom a draft was indorsed to sue. The defendants knew nothing of this until after judgment was rendered against them. Suit is now brought on this judgment. Judgment for plaintiff. Appeal.

Wilde, J. 1. The defendants did all that was required to protect themselves against third persons by erasing their own indorsement, and redelivering the draft to the owners in the same condition in which they received it. 2. The defendants may show that the Maine court had no jurisdiction of its person. Nonsuit.

Cited: 98 Mass. 448.

NEPONSET BANK v LELAND (1842) 5 Metc. 259.

On promissory note. B, having due and unpaid a \$300 note upon which he was indorser with plaintiff, pledged to plaintiff the notes now in suit, expressly as collateral security for the payment by him, as indorser, of the \$300 note. Later the \$300 note was paid by the maker who demanded these notes. Plaintiff refused to deliver them. The defendant, as B's agent and with B's written authority, demanded the notes. Plaintiff claimed a lien for the payment of another note then due, of which F was maker and B the indorser, and which had been discounted for B. The defendant admits he was at plaintiff's banking house soon after the notes now in suit were pledged, and told plaintiff these were business notes and promised to pay both when the first of them fell due, but has not paid them either to plaintiff or to B. Judgment to abide appeal.

Dewey, J. These notes were deposited under special circumstances which negatives any inference of any general lien, and there is no ground on which plaintiff can establish a right to retain them. Judgment for defendant.

Cited: 147 Mass. 228, 229.

THE MECHANICS BANK v THE MERCHANTS BANK (1843) 6 Metc. 13.

To recover damages for negligence of bank. The F Bank issued a note, dated April 12, 1837, payable to A or bearer in three months. Until June 6, 1837, it had apparently been the unquestioned custom to regard these notes, called post-notes, as having no days of grace. Suits were begun to settle this very point, and it was decided before this action terminated, that these notes were negotiable and did carry days of grace. The defendants, following the custom, presented the

present note on June 12, and protested it for non-payment. Defendants set up that action should have been brought against the indorsers, and that they had used due care. Judgment to abide appeal.

Shaw, C. J. 1. The plaintiffs were not bound to prosecute a useless suit against the indorsers. 2. The benefits which the collecting bank derives, constituted such a bank, in acting for others, an agent for reward. 3. But the defendants were not chargeable with culpable ignorance of the law or want of due care and skill in not knowing when this note became due, and that by law it was not due until the 15th. In following the practise which had generally prevailed up to that time, they were excusable. Plaintiff nonsuited.

Cited: 8 Gray 224; 15 id. 421; 7 Allen 34, 36; 99 Mass. 596.

PHIPPS v CHASE (1843) 6 Metc. 491.

Where a note, payable at a bank, and left in charge of the cashier for collection, was not paid at maturity, and the cashier caused a notice of protest to be mailed to the indorser at his last place of residence, without making any inquiries as to his present abode, Held, the note, not being paid during banking hours, was dishonored; and the notice was not sufficient, as it was the cashier's duty to use reasonable diligence in ascertaining the indorser's actual residence.

Cited: 1 Gray 178; 4 id. 170.

FARMERS AND MECHANICS BANK v JENSK (1844) 7 Metc. 592.

Assumpsit on promissory note. Plaintiff was the receiver of F Bank, holder of the note. The note was given for stock of the F Bank, and was received as cash, in fraud of the banking act. The suit was instituted at the instance of the board of bank commissioners, but at the time of the trial, the act creating the board had been repealed. The act of incorporation of the bank was put in evidence, and actual use of the powers of the bank was shown. A regular organization, according to the provisions of the banking law, was not shown. Verdict for plaintiff. Exceptions.

Dewey, J. 1. The evidence of incorporation and of the use of the powers of the bank furnished sufficient grounds to authorize all further inference of other compliances with the proper requisites for a legal organization of the corporation. 2. The repeal of the act will not defeat the action. 3. There was a valuable consideration for the note. 4. The maker of the note could not plead fraud. Exceptions overruled.

Cited: 97 Mass. 352; 105 id. 60; 157 id. 80.

PHIPPS v MILLBURY BANK (1844) 8 Metc. 79.

Action for negligence in failing to notify indorser of a promissory note. The note was the property of the plaintiffs, who left it at the S Bank for collection. The bank transmitted it to the defendant. The note not being paid at maturity, the defendant sent a notice of non-payment to the plaintiffs, directed to the S Bank, but failed to notify the first indorser. In a suit by the present plaintiffs against the first indorser, judgment was given for the defendant on account of a failure to receive notice of dishonor.

Hubbard, J. The duty of a collecting bank is performed by demanding payment of the maker of the note, and on refusal to pay, by giving due notice to the party from whom they received it. Plaintiffs nonsuit.

Cited: 4 Gray 170; 132 Mass. 228; 144 id. 424.

WATSON v PHOENIX BANK (1844) 8 Metc. 217.

Assumpsit to recover a deposit. Before the commencement of the suit, the bank was put into the hands of a receiver. To prove the amount of the deposit, the plaintiff introduced evidence that the receiver had allowed his claim, which was presented to him, but no dividend had been paid upon it. Before bringing suit, the plaintiff went to the bank for the purpose of obtaining the deposit, but was excluded by the president of the bank in consequence of the suspension of payment. Verdict for plaintiff for amount of deposit with interest. Exceptions.

Hubbard, J. 1. The allowance of the claim by the receiver furnishes satisfactory evidence of it. 2. The visit to the bank, and the plaintiff's exclusion there-

from, was equivalent to a demand. 3. The plaintiff did not proceed so far by presenting his claim to the receivers, as to prevent his making his election to sue. 4. Plaintiff is entitled to interest on his claim from the time of the commencement of the suit. Exceptions overruled.

Cited: 143 Mass. 458.

COMMONWEALTH v WYMAN (1844) 8 Metc. 247.

Indictment for embezzlement of bank funds. The defendant was the president of the P Bank. The indictment was founded on R. S., ch. 126, sec. 27, and ch. 133, sec. 10. The former provides for punishment of the officers of incorporated banks for embezzlement. The latter provides for the punishment of agents and clerks for embezzlement. The proof showed that within six months of the day stated in the indictment, the capital of the bank was embezzled by the defendant. Verdict guilty. Defendant excepted: 1, On the ground that the president of a bank is not an "officer" within the meaning of the first statute; and, 2, that some distinct act of embezzlement must be shown within the six months, or the case is not within the meaning of the second statute.

Hubbard, J. 1. The president of a bank is an officer within the meaning of the statute. 2. The officers of a bank are not included within the meaning of the second statute. If the R. S., ch. 133, sec. 10, did embrace offenses specified in ch. 126, sec. 27, and the person charged be other than a clerk or servant, he must be indicted as agent, and it must be averred that he held trust funds. Exceptions sustained.

Cited 136 Mass. 488; 137 id. 104.

BAKER v ATLAS BANK (1845) 9 Metc. 182.

Bill to enforce statutory liability of stockholders. The suit was based on R. S., ch. 36, sec. 30, which provided that if any loss of the capital stock in any bank should arise from official mismanagement of the directors, the stockholders at the time of such mismanagement, should be liable. Sec. 31 provided that the stockholders should be liable on the expiration of a charter of a bank to all billholders. The present suit was instituted more than six years after the loss was occasioned, and was brought in behalf of all the creditors. The bill alleged the insolvency of the bank and the repeal of its charter.

Wilde, J. 1. Sec. 30 was never intended to apply to the stockholders of an insolvent bank. After the charter of the bank has been declared forfeited, the stockholders are only liable in their individual capacities for the payment of the outstanding bills of a bank under sec. 31. 2. If the stockholders were liable, the action would be barred by the Statute of Limitations in six years from the time of the loss or deficiency of the capital stock. Bill dismissed.

Cited: 3 Gray 62; 3 Allen 47, 50; 9 id. 76; 10 id. 257; 138 Mass. 100.

PACIFIC BANK v MITCHELL (1845) 9 Metc. 297.

Assumpsit against acceptor of a bill of exchange. The defendant accepted the bill for the accommodation of the drawer. The bill was discounted by the U Bank and sent by it to the plaintiff bank for collection, which placed the amount of it to the credit of the U Bank at maturity. It was argued that this was such a payment as discharged the acceptor. Verdict for plaintiff, subject to opinion of the court.

Hubbard, J. Upon crediting the U Bank, the plaintiff succeeded to its rights and became a bona fide holder of the bill. New trial granted.

Cited: 145 Mass. 569.

MUSSEY v EAGLE BANK (1845) 9 Metc. 306.

Assumpsit on a check. The check was drawn by C on the defendant bank. On it were written the words, "Good. H. B. Odivine, Teller." At the time the check was drawn, and at the time it was presented for payment, C had no deposit to his credit. It was proved to be customary for tellers in various banks thus to certify checks, but no authority was shown. Verdict for defendant. Motion for new trial.

Hubbard, J. Evidence of usage can imply no original, inherent power in tellers thus to certify checks, and tellers have no such inherent power. When check was

not good at the time of such certificate, the usage cannot bind the bank. Motion denied.

Cited: 10 Gray 551; 133 Mass. 22.

CHICOPEE BANK v EAGER (1845) 9 Metc. 583.

Assumpsit on promissory note against indorser. The note was payable at the C Bank. Notice of non-payment was sent through the mail to the defendant, as indorser, residing in the same town as the bank. This was the uniform custom of the banks and notaries in the town. Verdict for defendant directed. Exceptions.

Dewey, J. The defendant was bound by a notice conformable to the established usage of the bank at which the note was payable. Exceptions sustained.

Cited: 10 Cush. 586; 4 Gray 170.

DWIGHT v BANK OF MICHIGAN (1845) 10 Metc. 58.

Assumpsit to charge trustee. D was summoned as trustee of the principal defendant, a bank. The bank placed funds in the hands of W & Co. to its credit, to meet drafts drawn by it in favor of various parties in the East. In order to prevent these funds from being attached, the bank gave an order on W & Co. in favor of D, with instructions to use the fund for the payment of particular creditors. The bank transferred the account to D's credit. The holder of the drafts were notified that the funds were placed in his hands for such purposes, and they assented thereto.

Hubbard, J. Until D received or drew from the money, or changed the place of deposit so as to make himself personally liable, he was not the debtor of the bank, or a guarantor of the solvency of W & Co. Trustee discharged.

BANK v INHABITANTS OF WALTHAM (1845) 10 Metc. 334.

Assumpsit to recover a tax paid under protest. The tax in question was on stock held by the plaintiff bank as collateral security for a debt. R. S., ch. 7, sec. 11, provides that "when personal property is mortgaged or pledged, it shall, for the purposes of taxation, be deemed the property of the party who has the possession." On agreed statement.

Wilde, J. 1. The mortgagor, and not the mortgagee, is the owner of the property mortgaged for the purposes of taxation. 2. The above statute refers to property that is tangible, movable, and capable of possession by either party, which stock mortgaged is not. Judgment for plaintiff.

Cited: 1 Cush. 144; 10 Allen 101; 128 Mass. 316.

CREASE v BABCOCK (1846) 10 Metc. 525.

Bill to enforce the liability of stockholders. The act authorizing the charter of the bank provided that at the expiration of any bank charter, the stockholders should be individually liable for the redemption of outstanding bills. The charter of the bank having been repealed, plaintiff C sued the bank and part of its stockholders to compel them to pay certain bills held by the plaintiff at the time of the repeal. Defendants demurred to the bill on the ground that all the billholders should be joined or one should sue for the benefit of all, it appearing that there were several billholders. Sustained. Several other suits had been brought by other holders; the suits were discontinued, and the plaintiff moved to amend by writing all the plaintiffs in one bill. B, defendant, pleaded that he was not a stockholder at the time of the repeal, but held shares only as collateral security and as a trustee for others. The plea was defective in not showing that he had paid in the amount held as collateral. An amendment was allowed. The whole number of shares was 1,000, of which the bank owned 547. Plaintiff claimed the defendants were jointly and severally liable for all the bills. Certain post notes were issued by the bank, payment of which was claimed from the defendants. Defendants then moved that the post notes be rejected and that interest on the bills be disallowed. Some of the stockholders were insolvent. The bank owned some of its own stock. Some of the bank's real estate was attached in the suits commenced by the billholders severally.

Wilde, J. 1. If the bill charges any special matters and seeks a discovery, defendants are bound to answer as to the particular discovery. R. S. ch. 100, sec. 22, applies to suits in equity. The amendments were properly allowed, and the rule is substantially complied with. 2. All the billholders should be made plaintiffs, and all the stockholders, who were such when the charter expired, should be made defendants. 3. If a person was the holder of stock as pledgee or trustee, at dissolution, he may still be liable. 4. The several liabilities of the stockholders are not increased by the fact that the bank owned some of its own stock. 5. The defendants, who are responsible, are not jointly responsible, and cannot in any form of judgment be made liable for each other. 6. No stockholder can be responsible beyond a sum equal to the nominal par value of his stock at the time the charter expired. 7. Any holder taking the bank's bills in the ordinary course of business, after the repeal, has a claim as a creditor. 8. Transferees of bills may also share. 9. The attachments made by the plaintiffs severally are wholly unavailing. 10. The post notes are not bank bills for which stockholders are individually liable. 11. No interest can be allowed to the billholders. 12. The solvent stockholders are not affected by the insolvency of other stockholders. Decree for plaintiffs.

Cited: 10 Metc. 570, 575, 577, 579; 10 Gray 235; 12 id. 236; 3 Allen 44, 49, 485; 7 id. 491; 111 Mass. 201; 127 id. 592, 598; 142 id. 155; 176 id. 443.

GREW v BREED (1846) 10 Metc. 569.

Bill to charge stockholders on statutory liability. The statute provided that the holders of the bank stock at the time when its charter expired, should be liable for the payment of all unpaid bills issued by the bank, in proportion to their stock at the dissolution of the charter. The plaintiff held stock, as trustee, at the time of the commencement of the suit and did not join his *cestui que trust*, but sued for himself and other stockholders. On a claim of fraud in the issue of the bills, the only evidence was that the plaintiff purchased the bills at a discount from a broker. Some of the bill owners at one time agreed with the bank to accept certain property for them, but this agreement was never executed. Some of the defendants held their stock as security, some as trustees, and some as administrators. Certain of the bills were purchased under an agreement that they should not be returned to the bank before a certain limited time, and were purchased at various usurious rates of discount. A statute provided that three times the amount of interest taken on a usurious contract should be deducted from the amount of a claim. The master allowed the claims with interest, and did not deduct anything for dividends, which certain bill owners might have received had they presented their claims to the receiver of the bank.

Shaw, C. J. 1. It was not necessary to join the *cestui que trust*. 2. The evidence does not show constructive notice to the bill owners that the bills were issued fraudulently. 3. Defendants are not relieved from liability by the unexecuted agreement to accept property of the bank in exchange for the bills. 4. It was necessary for plaintiff to sue as representative of all billholders. 5. Trustees and administrators are not liable in their representative capacity. 6. Interest on bills was properly allowed. 7. The statute in relation to usury does not apply. 8. The holder of a bill is entitled to recover its par value, although it was purchased at a discount. 9. Deductions should have been made for dividends, which holders might have received from the assets of the bank. Decree for plaintiff.

Cited: 1 Gray 386; 3 Allen 44, 49.

TAYLOR v WILSON (1846) 11 Metc. 44.

Assumpsit on check. Plaintiff was captain in the United States Navy and defendant was purser at the Charlestown navy yard. Defendant drew check on P Bank on September 30, payable to plaintiff or order, and it was sent to plaintiff's residence in Newport on October 1. Plaintiff had forwarded to defendant, in advance, his receipt. On October 3, check was cashed by a Newport bank and sent in the usual course of business to its correspondent in Boston. On October 6, it was presented to P Bank for payment, which was refused. P Bank had suspended payment on October 3. Defendant refused to give back the receipt, and forwarded it to the Treasury Department.

Hubbard, J. 1. The receipt of a check before presentment, if there be no laches on the part of the holder, is not payment of the debt for which it was delivered.

2. The party receiving a check is not guilty of laches, though he does not present it the day it is drawn. The next day is held to be a reasonable time for presentment. The fact that a check is payable to order or at a future time does not change its character. Judgment for plaintiff.

Cited: 114 Mass. 73; 115 id. 398; 125 id. 421; 126 id. 358; 152 id. 201.

HUBBARD v CHARLESTOWN BRANCH R. R. CO. (1846) 11 Metc. 124.

Assumpsit to recover for overdraft. The plaintiff was receiver of the B Bank. Defendant, a depositor, overdrew his account. No demand was made on defendant for repayment. The court instructed the jury that if they found that the amount sued for had actually been paid to the defendant, then the jury should add interest thereto from the time of the overdraft. Judgment for plaintiff. Error.

Shaw, C. J. Payment of a draft on a bank, beyond the drawer's funds, constitutes a loan of money. If rightfully made, it does not necessarily draw interest until neglect or refusal of payment, after demand made, or some other default. Judgment reversed.

Cited: 2 Cush. 479; 14 Allen 60; 151 Mass. 117; 160 id. 441.

COMMONWEALTH v PHOENIX BANK (1846) 11 Metc. 129.

Petition by receivers of insolvent bank. The bank had a claim against the Commonwealth for \$6,000. The latter contended that it should be allowed the following setoffs: 1, A bank tax on the capital of the bank; 2, money advanced from the treasury of the Commonwealth for repairs on the bridge and deposited by B as agent of the Commonwealth for the Charles River Bridge; 3, a deposit made by the warden of the state prison, which is constituted by law a separate and distinct establishment. The United States claimed a right to priority of payment. A statute provided that "wherever any revenue officer or other person hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent, the debt of the United States shall be first satisfied." Heard on report of master.

Shaw, C. J. 1. The bank tax is a debt capable of being set off. 2. The Commonwealth has such an equitable interest in the money deposited to the credit of B, as agent for the Charles River Bridge, that it is proper to be set off. 3. The money received and held for the warden cannot be regarded as the money of the Commonwealth, and therefore is not the subject of setoff. 4. The statutory provision in regard to persons indebted to the United States does not extend to banks and other corporations. 5. There is no "insolvency" within the meaning of the statute, because there has not been a general assignment by the voluntary act of the debtor or a legal bankruptcy or insolvency. Decree accordingly.

Cited: 11 Metc. 225; 7 Cush. 219; 5 Allen 38; 112 Mass. 136; 171 id. 28.

SMITH v HURD (1847) 12 Metc. 371.

Action on the case for negligence brought by a stockholder in a bank against the directors. The first count of the declaration was based upon the negligence of the defendants, directors of the bank, in so managing the affairs of the bank that the capital was wasted. The second count was based upon the malfeasance of the directors in delegating the whole control of its affairs to the president and cashier who wasted and lost the whole capital. Demurrer.

Shaw, C. J. Neither by statute nor at common law can the stockholders in their individual capacity sue the directors. Their liability is to the corporation as such. Demurrer sustained.

Cited: 8 Cush. 590; 6 Allen 53, 55.

HUTCHINS v STATE BANK (1847) 12 Metc. 421.

Assumpsit to recover dividends on stock. Agreed case. A, a resident of Massachusetts, bequeathed bank stock to his wife, B, for life, and made her executrix, but provided that she should not sell the stock unless necessary for her comfort. The will was probated in New Hampshire, but not in Massachusetts. B sold the stock to X and it was transferred to X's name on the books of the bank, by Y, to whom B gave a power of attorney. X received the dividends. B died and C was appointed administrator de bonis non. He now sues to recover the dividends on the ground that B had no power to sell.

Shaw, C. J. 1. If an executor has power to transfer shares in a corporation, the corporation is not bound to see to the application of the proceeds or to decide at its own peril what are the wants of a legatee. 2. Where a will has been proved and an executor has received letters testamentary in the state of the testator's domicile, the personal property, wherever situate, vests in the executor. 3. The transfer was not invalid because it was done by power of attorney to another. Judgment for defendant.

Cited: 100 Mass. 392; 102 id. 261; 103 id. 248; 137 id. 419; 147 id. 206; 150 id. 307; 161 id. 352; 173 id. 208, 260; 175 id. 63.

TREMONT BANK v CITY OF BOSTON (1848) 1 Cush. 142.

Money had and received. Plaintiff bank paid a tax to defendant under protest. The tax was laid on real estate situate in Boston, consisting of the plaintiff's banking house and a dwelling house, leased at an annual rent, and also upon stocks pledged to the plaintiff as collateral security. R. S., ch. 7, sec. 7, provided that "all taxes on real estate should be assessed, in the town where the estate lies, to the person who shall be the owner, or in possession thereof, on the first of May." Judgment for plaintiff. Appeal.

Dewey, J. 1. The bank was not taxable on the stock held as collateral security. 2. Real estate of a bank is taxable in the town where it is situate. Judgment affirmed in part and reversed in part.

DORCHESTER BANK v NEW ENGLAND BANK (1848) 1 Cush. 177.

Assumpsit to recover the proceeds of certain drafts left with defendant bank for collection. The notes were payable in the city of Washington, where the defendant bank had no correspondent. The defendant therefore placed the drafts with the C Bank in Boston, which transmitted them to its correspondent, the Bank of M, in Washington. The plaintiff made a general indorsement of the drafts and the defendant bank did likewise. The C Bank failed, and the Bank of M collected the drafts and applied the proceeds to the payment of a balance due from the C Bank. A usage of banks of long standing was proved. Submitted to the full court.

Wilde, J. 1. The defendant's responsibility was limited to good faith and due discretion in the choice of an agent to transmit the bills and to procure a remittance of the money when paid. 2. The defendant was justified in making a like indorsement with the plaintiff. 3. Proof of usage was not necessary. Plaintiff nonsuited.

Cited: 10 Cush. 585, 587; 8 Allen 191; 151 Mass. 418.

SMITH v NORTHAMPTON BANK (1849) 4 Cush. 1.

Assumpsit to recover dividends. S died owning stock in the defendant bank. The plaintiff was named as his executor and offered his will for probate. Prior to the plaintiff's appointment as special administrator, a tax was levied on the stock to the plaintiff, "named as executor." The collector, having an apparently good warrant of distress, levied on the stock. It was thereupon sold. Subsequently the will was admitted to probate. The defendant bank, having notice of all the proceedings served upon it, transferred the stock to the purchaser. The stock was not exempt from taxation, and all the proceedings were prima facie good. The plaintiff claimed the assessment could not be made to him. The court directed a verdict for the plaintiff. Exceptions.

Shaw, C. J. The officers of the defendant having complied with the directions of the law, the defendant was not bound to go further and show that the tax was rightly assessed. Under the circumstances the tax was rightly assessed to the plaintiff. Plaintiff may consent to a nonsuit. If otherwise, verdict set aside, and new trial had.

Cited: 11 Cush. 340.

OXFORD BANK v DAVIS (1849) 4 Cush. 188.

Where an accommodation bill of exchange, payable six months after date, was mislaid by the holder, and not presented for acceptance until five months after its date, the indorser is liable, upon notice of protest, for non-acceptance.

RAYNES v LOWELL IRISH BENEVOLENT SOCIETY (1849) 4 Cush. 343.

Debt. C opened an account with the L Bank in the name of "C in trust for Lowell Irish Benevolent Society." C died, and deposits of money made by D and belonging to the society were credited to this account. Money alleged to be the property of the defendant was attached in the hands of the L Bank by trustee process by a creditor of the society. The bank contended that the money was not subject to attachment by the creditors of the society, and that, if paid over, it might be called to account for it by the administrators of C or by D.

Metcalf, J. The money of the society is so intrusted and deposited with the bank, that the bank is chargeable as trustee of the society. The money was subject to attachment on the trustee process by the society's creditors. By payment of the money to the plaintiff, the bank will discharge itself from all claims that can be hereafter made upon it. Trustee charged.

DEMMON v THE BOYLSTON BANK (1849) 5 Cush. 194.

Money had and received as a deposit. A made his note payable to T. T indorsed it to the defendant bank. Subsequently A, as an insolvent, assigned to the plaintiff. At that time he had a deposit with the defendant, which then held the note not yet matured. The defendant claimed the right to set off the note against the deposit. T was solvent. The statute made a note due absolutely, without condition or contingency, a debt provable, and provided that where there were mutual debts, an account was to be stated and one debt set off against the other. On a case stated.

Shaw, C. J. The defendant, having discounted the note, was the legal holder thereof. The note was, by the express words of the statute, provable, and therefore might be set off. The assignment was inoperative to defeat the right of setoff. Judgment for defendant.

Cited: 4 Gray 286; 7 id. 428; 112 Mass. 135; 127 id. 302; 160 id. 31.

MERCHANTS BANK v HEARD (1850) 5 Cush. 461.

Assumpsit on a guaranty. The defendant signed an undertaking providing that C should punctually pay any sum of money which should become due by reason of any loan or discount heretofore made, or hereafter made, to him or for his benefit. C became an accommodation maker for M, and M discounted the notes with the plaintiff. M's failure being imminent, C gave the plaintiff a memorandum check for the amount, upon which was written, "Two notes of like amount indorsed by M, as collateral and guarantee of Heard." The check was not charged up until after C's failure; and the notes were kept by the plaintiff. The plaintiff's president testified that C agreed, for the sake of further accommodation, to take up the notes, and that the check was thus given under the guaranty, and the notes left with the bank by mistake. A nonsuit was entered, subject to the opinion of the whole court.

Shaw, C. J. 1. Parties cannot enlarge, alter, or vary a written instrument by parol evidence. The expectation and intent of the principal and the guarantee could have no effect to bring the check under guaranty. 2. When a check is given as a substitute for a pre-existing debt, or the notes are not taken up, canceled, or destroyed, there is no loan of money or discount. Judgment for defendants.

DEDHAM INSTITUTION FOR SAVINGS v SLACK (1850) 6 Cush. 408.

On promissory note. S, defendant's testator, executed to the plaintiff the note in suit. Subsequently a release was given, signed, "Dedham Savings Bank, by F. Jr." The release was a technical release, under seal. But the plaintiff had never adopted any particular seal, and had not by a vote, or otherwise, authorized F to give a release. He was, however, authorized to keep and receive securities, and to perform and discharge all duties usually required of the treasurer and secretary of similar institutions. Subsequently T became treasurer. Payment of dividends was made to him and indorsed on the note as so much received of the assignees of the promisor, and certified by an examining committee as correct. But it was not shown that T knew anything of the release. Judgment for plaintiff. Exceptions.

Dewey, J. 1. In the absence of authority delegated to him, F would not, by virtue of his office, be authorized to give a release. 2. The payment of dividends and the indorsement on the notes were not sufficient proof of ratification. Exceptions overruled.

Cited: 6 Gray 220; 127 Mass. 109; 133 id. 20; 153 id. 407.

WESTERN BANK v MILLS (1851) 7 Cush. 539.

On promissory notes. The plaintiff discounted D's notes, indorsed by the defendant. Pleas: Illegality and usury. Pursuant to their understanding, D left one third of the proceeds with the plaintiff, and received therefor a certificate of deposit payable 90 days after notice. D assigned as an insolvent. The statute declared that no bank should grant any discount or loan unless the proceeds or amount were payable on demand, and every loan or discount, contrary to this provision, was so far void that the bank should not recover from the borrower or any other person, and provided a penalty for the bank. The defendant set up that the agreement was void.

Metcalf, J. The transaction was void because: 1, The certificate was not payable on demand, as provided by statute; and, 2, the discount was usurious in that the plaintiff gave only two-thirds of the money and charged interest on the full amount. The agreement of the defendant did not purge the discounts from their original taint. Judgment for defendant.

Cited: 6 Gray 464; 12 id. 217, 346; 173 Mass. 490.

MILLS v WESTERN BANK (1852) 10 Cush. 22.

Money paid on an illegal contract. Plaintiff was indorser of promissory notes. Defendant, a bank, discounted them. The proceeds were not to be payable on demand in specie, but a portion of them were to be retained by bank on deposit without interest. Plaintiff was a party to this arrangement, and deposited with bank collateral security for his indorsement. The makers of the notes became insolvent, and the bank realized the amount in suit on plaintiff's security. In a suit between the parties it was decided that the entire transaction was illegal, and plaintiff was not liable on his indorsement. R. S., ch. 36, sec. 58, prohibited banks from making such contracts.

Shaw, C. J. The law will no more lend its aid to recovering back money paid in performance of an illegal contract than it will enforce its performance. Judgment for defendant.

Cited: 6 Gray 461, 463; 16 id. 537; 8 Allen. 201; 107 Mass. 441.

WORCESTER CO. INSTITUTION FOR SAVINGS v CITY OF WORCESTER
(1852) 10 Cush. 128.

A tax assessed upon stock in which a savings bank had invested the money received on deposit is not valid.

Cited: 104 Mass. 587.

WORCESTER CO. BANK v DORCHESTER BANK (1852) 10 Cush. 488.

Assumpsit on a bank bill. The bill had never been issued by defendant bank, but was stolen from its vault and fraudulently put into circulation. The S Bank, which was the clearing house, had published and posted notices that it would not redeem bills of defendant. Plaintiff's cashier had received the note in the regular course of business for valuable consideration. He knew defendant had been robbed, but had no actual notice that S Bank would not redeem the defendant's bills. The bill was sent to S Bank in the usual way for redemption and returned to plaintiff.

Metcalf, J. The cashier did not exercise great vigilance, but we preceive, in his conduct, nothing like fraud or gross negligence. Judgment for plaintiff.

Cited: 11 Cush. 53, 10 Gray 560; 102 Mass. 508; 105 id. 218; 134 id. 278; 172 id. 73; 173 id. 278.

WARREN BANK v SUFFOLK BANK (1852) 10 Cush. 582.

On promissory note for negligence in collecting. Plaintiff sent note to defendant bank, its correspondent in Boston, for collection. The note was not paid at maturity, and defendant placed it in the hands of its regular notary for demand and protest. The notary was negligent and failed to give notice to maker. Plaintiff and defendant had transacted business of this nature together for years. It was defendant's invariable custom to place the notes not paid by evening of due day, in hands of this notary. The court refused to allow defendant to prove that it was the common usage of banks in Boston to employ a notary in cases of this kind. Verdict for plaintiff. Appeal.

Dewey, J. 1. Where the nature of the business in which an agent is engaged requires for its proper and reasonable execution the employment of a subagent, the principal agent is not responsible for the defaults of the sub-agent, provided that a proper sub-agent was selected. 2. The evidence of usage and course of business was proper and ought to have been submitted to the jury. New trial ordered.

Cited: 8 Allen 191; 141 Mass. 41.

WYER v DORCHESTER AND MILTON BANK (1853) 11 Cush. 51.

Assumpsit on a bank bill. Bill was genuine and had been stolen from defendant bank. Plaintiff presented bill and payment was refused by defendant. Defendant proved theft of bill and contended that it was incumbent on plaintiff to show that he had paid a consideration for bill, and did not show any ground for doubting his honesty. Verdict directed for defendant. Error.

Metcalf, J. 1. When bills of exchange or promissory notes have been fraudulently put into circulation, the burden is not on the holder to show how he acquired the bill, but the burden is on defendant to show that he received it under such circumstances as to prevent the maintenance of this action. New trial ordered.

Cited: 10 Gray 560; 102 Mass. 508; 105 id. 218; 134 id. 278; 173 id. 278.

LECHMERE BANK v BOYNTON (1853) 11 Cush. 369.

Quo warranto. The legislature, upon petition, granted the bank a charter in words to this effect: "H B & K, their associates and successors, are hereby made a corporation." At the first meeting, the signers of the petition organized and elected H, president. A number of persons who had merely signed a subscription to stock and had had nothing to do with the petition to the legislature, asserted that they were associates "within the meaning of charter," and claimed the right to assist in organizing the bank. B and other defendants were elected to office by the latter. Injunction pendente lite.

Shaw, C. J. If there are persons included in the act as grantees of the charter under the name "associates," they must be those who were actually associates, and could properly be designated, identified, and ascertained to be such at the time of the passing of the act of incorporation. Injunction made perpetual.

Cited: 12 Allen 364; 169 Mass. 230; 170 id. 75.

FALL RIVER UNION BANK v STURTEVANT (1853) 12 Cush. 372.

On promissory note against indorsers. H, a member of the firm of J H & Co., indorsed the note in the firm's name without the knowledge or consent of his partner. The note was not discounted by the bank in the ordinary course of business, but was received in payment of a smaller personal note of H's, lying at the bank dishonored. These facts were known to the cashier of the plaintiff bank. Subsequently J H & Co. became insolvent and defendant was made their assignee. The bank's claim for this note was allowed by the commissioner of insolvency. Appeal by assignee.

Shaw, C. J. The act of H was a fraud upon his partner, and upon partnership creditors, of which the bank had notice through its agent. Decision reversed.

Cited: 154 Mass. 167; 169 id. 51.

STOCKHOLDERS OF COCHITUATE BANK v COIT (1854) 1 Gray 382.

Petition to obtain priority for billholders. The respondents were appointed receivers for the C Bank, and had reported that the assets were insufficient to pay all the creditors in full, and that the bank was indebted to billholders, depositors, and others. The petitioners prayed that the respondents be ordered to first pay the billholders in full from the assets of the bank.

Shaw, C. J. All creditors have a right to share in the fund, in proportion to the amount of their respective debts. Holders of bank bills are not entitled to a preference over depositors and other creditors. Petition dismissed.

BULLARD v RANDALL (1854) 1 Gray 605.

Debt. Trustee process. D had commenced suit against defendant and summoned the M Bank as trustee of defendant. Thereafter, at a place other than

the bank, defendant gave D a check on the bank for his debt. D turned over the check to the cashier. When the cashier returned to the bank, he was informed that trustee process had been served on the bank's president by this plaintiff for the funds of defendant. The check of defendant was debited to his account, and the amount credited on the bank's books to D. The bank here contended that it was liable to D for the funds. Trustee process dismissed. Appeal.

Shaw, C. J. 1. The transaction was not an assignment, as of a chose in action by defendant to D, of a part of the debt due him from the bank, creating an equitable transfer. As a check on a bank, it was not available to D, until it reached the bank, which was after the service of the plaintiff's process. 2. Mere notice to a bank, that a party holds a check, without presentment and demand, will not bind the bank. A trustee process, operating by law to bind the fund in another form, has the same effect. Judgment reversed.

Cited: 13 Allen 447; 107 Mass. 49; 137 id. 356; 151 id. 385; 156 id. 459.

FULLER v RANDALL, TRUSTEE (1854) 1 Gray 608.

Where a person delivers bank bills to a trustee and obtains a receipt therefor, and the trustee, having deposited the bills to his individual account, thereafter draws out all the bills there deposited, and makes a new deposit of his own money, held, that title to money, including bank bills, passed with delivery; and he, who has possession, has prima facie evidence of title and may give good title to another by delivery; and that the claimant cannot assert title to the money last deposited.

CABOT BANK v MORTON (1855) 4 Gray 156.

Assumpsit. The plaintiff alleged that S, the defendant's intestate, discounted a note, payable to the order of R, and purporting to be indorsed by R; that he received payment therefor, on the representation and warranty of S, that he had good title to the note; and that the indorsement of R was a forgery. S was a director of the plaintiff. The court refused to charge that, as the cashier discounted the note partly in consequence of S's being the director, the implication of warranty of title would not arise; but instructed the jury that the implication of warranty would arise, only in case S acted in his individual capacity. Judgment for plaintiff. Appeal.

Shaw, C. J. 1. In every sale of personal property the vendor impliedly warrants that the article is in fact what it is described and purports to be, and that the vendor has a good title or right to transfer it. 2. If the director was acting in his official capacity in making the loan to a third person, he would not be responsible on an implied warranty for the genuineness of the note. But he cannot be both borrower and lender at the same time; he therefore acted in his individual capacity, and is liable. Judgment affirmed.

Cited: 3 Allen 260, 261; 113 Mass. 527; 115 id. 500; 135 id. 475; 147 id. 339.

FISHER v ESSEX BANK (1855) 5 Gray 373.

Tort for damages for refusal to transfer stock. B sold to the plaintiffs his stock in the defendant bank. The plaintiffs thereupon wrote the president of the bank informing him of the purchase, and that they held a power of attorney to transfer. Subsequently the stock was attached by a creditor of B. Three days thereafter the plaintiffs, by an attorney, made a demand at the bank for a transfer, which was refused. The statute provided that the stock of the bank "shall be transferable only at its banking house and on its books." Judgment pro forma for plaintiffs.

Shaw, C. J. A plain provision of statute law, calculated to promote the security of important legal rights, should not be construed to be a regulation made for the convenience and protection of banks. The statutory provision made the mode of transfer exclusive. Plaintiffs nonsuited.

Cited: 12 Gray 215; 3 Allen 342; 129 Mass. 281, 437; 133 id. 520, 521; 138 id. 247; 157 id. 72; 173 id. 208.

MILLS v RICE (1856) 6 Gray 458.

Bill for reconveyance of real estate. The plaintiff had conveyed certain real estate to his trustees, defendants, to satisfy his outstanding liabilities, and then

to reconvey the balance of the real estate. All claims against the plaintiff were satisfied, except those of the defendant bank for notes given it by the plaintiff. These notes were given in place of notes given by the plaintiff's firm. The firm notes were given contrary to the provisions of a statute which declared that every loan or discount made contrary to its provisions should be so far void that "the bank shall not be enabled to recover the amount thereof from the borrower or from any other person." The bank notified the trustees of the claim. The trustees thereupon refused to reconvey.

Merrick, J. Notes thus invalid, on account of the unlawful agreement in which they originate, can afford no legal consideration for any subsequent promise or contract. Decree for the reconveyance.

Cited: 12 Gray 217.

WALLACE v LOWELL INSTITUTION OF SAVINGS (1856) 7 Gray 134.

On contract to recover a deposit. A, at the plaintiff's request, deposited the plaintiff's money in the defendant bank, and having signed the plaintiff's name, received the usual deposit book made out in the plaintiff's name. Subsequently the plaintiff made a deposit in her own name and had it entered in her book. When the plaintiff offered the book and demanded her money, she was requested to write her name for comparison. Thereupon, although the plaintiff made an affidavit of ownership, the defendant refused to pay her, unless she gave a bond of indemnity. The defendant offered to show the usual custom of the bank. Rejected. Exception. Verdict for plaintiff. Exceptions.

Dewey, J. The contract is with the person named in the deposit book as the depositor, not with the servant, or agent. Having taken the money offered and passed it to the credit of the real owner, the defendant is bound to account to such persons therefor, unless there is some palpable violation of the by-laws that would preclude a recovery. No custom of the bank can deprive a depositor of a substantial right. Exceptions overruled.

STETSON v EXCHANGE BANK (1856) 7 Gray 425.

Conversion of promissory notes. T offered certain promissory notes to the defendants, who discounted some and kept others. After dishonor, the defendants paid those they had discounted. They contended that the others were taken as collateral, and in an action by the plaintiffs, assignees of T for the value of the notes, claimed a setoff. Demurrer to the setoff. Sustained. The defendants claimed an appeal before trial. But the judge ruled the case should go on, and if there were a verdict for plaintiffs, the appeal should then be allowed. Verdict for plaintiffs. Appeal.

Shaw, C. J. 1. The course adopted as to the order of trial was right, as the demurrer applied only to the setoff. 2. In the absence of an agreement, the bank had no right to retain these notes and claim a setoff; and the bank's refusal to deliver amounted to a conversion. Exceptions overruled.

Cited: 110 Mass. 497; 131 id. 16; 137 id. 264.

SHEPHERD v CHAMBERLAIN (1857) 8 Gray 225.

Where a note was made payable at a particular bank, and, after the usual banking hours, but while the bank was still open, a demand was made upon officers competent to answer, and who did answer that there were no funds, the demand was deemed sufficient to charge the indorsers.

MERRIAM v GRANITE BANK (1857) 8 Gray 254.

Replevin on a promissory note. The plaintiff gave their clerk the note, indorsed by them, to deposit in the E Bank. The clerk left it by mistake on W's counter. W, finding it, put it in a wrapper with plaintiff's name. W failed, and the note was found in the defendant's possession in a bundle with other securities left by W as collateral. The defendant claimed they received it for value in due course. But they could not tell for what they had taken it as security, or what they had paid for it. The court intimated that he would instruct the jury that if the circumstances under which the note was taken were not in due course, but suspicious, and put the defendant on inquiry, they must find for the plaintiff. Verdict for plaintiff. On exceptions.

Shaw, C. J. The rule of law designed to protect the free currency and circulation to negotiable securities transferable by indorsement or delivery, must be taken with a strict observance of the qualification that the negotiable security be taken in due course of business, without notice or reasonable cause for suspicion. This note cannot be said to have been taken in due course, for the circumstances were such as to put the defendant on his guard. Judgment on the verdict for plaintiff.

Cited: 107 Mass. 154.

BLACK RIVER SAV. BANK v EDWARDS (1858) 10 Gray 387.

On promissory notes. The first action was to recover interest; the second, to recover the principal. Defense, to both suits, that the note was given for accommodation, made at the request of plaintiff. The notes were given at the request of H, treasurer of plaintiff, who stated that he wanted to use defendant's name. Plaintiff received the money on the note, and defendant knew it was given for that purpose. The court instructed the jury that the burden was on plaintiff to establish consideration; that the words, "value received," imported a consideration on which plaintiff might recover, unless there was evidence to affect it; that, if defendant did not receive the consideration himself, the note was prima facie evidence of consideration. He refused to charge that the bank, in adopting the note, adopted in all respects the understanding and agreement of its treasurer; but charged that if the note was given to help the treasurer get money from the bank, or to conceal its condition, or with reasonable cause to know that it would be so used, the defendant would be estopped to allege his own fraud in defense. In the second action the court held that judgment for plaintiff in the first action was conclusive evidence of consideration in the second. Verdict for plaintiff in both actions. Exceptions.

Per curiam. (In first action.) 1. The instructions as to burden of proof were correct. 2. The defendant's request for instruction was properly overruled. 3. An advance of money to a person to whom defendant had given the note with power to use it, was a sufficient consideration. The instruction as to estoppel was correct.

Bigelow, J. (In second action.) The facts being the same in both cases, were distinctly put in issue in the first suit and decided by the jury. They must therefore be taken as fixed facts between the parties for all purposes. Judgment for plaintiff.

Cited: 4 Allen 565; 12 id. 476; 123 Mass. 273; 148 id. 305.

ATLANTIC BANK v MERCHANTS BANK (1858) 10 Gray 532.

Money had and received. H was the paying teller of the defendant and was a defaulter to a large amount. On March 26, the president of the defendant informed H, that he and the directors would attend that afternoon and count H's cash. H, and W, a teller of the plaintiff, with P, a broker, entered into a conspiracy whereby P drew his check on the defendant, where he had no funds, for \$25,000, which H certified to be "good." P took the certified check to W who cashed it. P delivered the proceeds of the check to H, who placed them in the funds of the defendant, so that when the president and the directors counted the funds of the defendant, they were correct. The following morning, the \$25,000 was delivered by the teller of the plaintiff, and W, in his official character, gave the defendant credit for the amount. Subsequently, funds and P's check were sent by the plaintiff to the defendant. The funds were credited to the plaintiff, but the check was refused payment.

Shaw, C. J. Treating the notes as bank bills or negotiable securities, the only title acquired in them was through the agency of the defendant's cashier. His knowledge of the fraudulent title under which he acquired and held them was constructively the defendant's knowledge, and it cannot hold them against the true owners. Judgment for plaintiff.

Cited: 4 Allen 294; 109 Mass. 216; 147 id. 273, 274, 277, 278, 281.

RICHARDSON v CITY BANK (1858) 11 Gray 261.

Petition by the assignees in insolvency of W H & Co. against the City Bank and others. The bank discounted a note of W H & Co., indorsed for their accommodation by H and D. The makers became insolvent and the bank proved the note. Afterward, the bank assigned the note to D on being paid the

amount at maturity. The prior indorser, H, took security from the makers, in fraud of the insolvent laws, and was obliged to pay its value to the assignees. This security he turned over to D, who received it in good faith, and whom the makers afterward paid. The note indorsed by D was for \$4,160. The notes taken by him as security and afterward paid were for \$4,000. The prayer of the petition was that the proof of the note for \$4,160 should be expunged from the record, or that dividends thereon should be paid on \$160 only.

Merrick, J. The note of W H & Co. for \$4,160 was properly proved by the City Bank, and they were entitled to receive whatever dividends the assignees should be ordered to pay upon it. This right might be assigned for a valuable consideration to D, and he thereupon succeeded to the rights of the bank and became entitled to receive future dividends. It makes no difference that he was one of the indorsers on the note, and a surety for the makers. The bank was not thereby prevented from dealing with him as a purchaser. Decree for defendants.

Cited: 11 Gray 138; 130 Mass. 302; 175 id. 549.

COLT v BROWN (1858) 12 Gray 233.

On bill of exchange. The C Bank was organized under ch. 127, stat. of 1851. Plaintiffs brought an action on a bill of exchange and note against defendant. An injunction had been issued against the bank, restraining it from doing any business except receive payment of security falling due. The injunction was continued from time to time, and made perpetual just before plaintiffs were appointed receivers. The bill and note became due after the receivers were appointed. Defendant offered in payment \$1,750 in bills of the bank, and a check drawn by that bank on a New York bank protested for \$1,200. Plaintiffs refused, but offered to give defendant certificates of these, such as were given to other billholders. Of this sum plaintiffs held \$1,200 when the first injunction was granted, and \$1,400 when plaintiffs were appointed receivers, but the whole when injunction was made perpetual. Defendant pleaded setoff.

Shaw, C. J. The first injunction, having been continued from time to time, and finally made perpetual, had the effect of sequestering and setting apart the assets of the bank, as they stood at the time. The defendant having bills of the bank for \$1,200 taken in the course of business, this was an equitable setoff, and the receivers took the assets subject to that equity. To allow any further setoff would be inconsistent with the intent and spirit of the statutes, and would essentially effect a preference in favor of the debtors to the bank by enabling them to pay in a depreciated medium. Judgment for plaintiffs.

Cited: 112 Mass. 136; 171 id. 27.

ANDREWS v SUFFOLK BANK (1859) 12 Gray 461.

Money had and received. Plaintiff, J F A, made his note payable in Boston to be discounted at the D Bank, which sent it to the defendant for collection. At maturity, plaintiff delivered the amount to an express company to take it up at defendant. The teller of defendant received the money, but by mistake handed the express company a note of the same amount, but signed I D A. The defendant on the same day caused plaintiff's note to be protested and returned it with notice to the D Bank, to which plaintiff paid the amount. Four days after payment, plaintiff found out the mistake, and demanded of defendant the amount paid by the express company, which defendant refused.

Merrick, J. 1. The appropriation was without authority from the plaintiff. It was an unintentional injury to the plaintiff, and resulted from a mistake of one of the officers of defendant acting in the regular course and discharge of its duty, 2. But the consequence of the mistake must fall upon the party by whom or by whose agent it was made. They had money of the plaintiff which they had the right to pay on demand, and, not having done so, plaintiff can maintain and recover under the count for money had and received. Judgment for plaintiff.

GROCERS BANK v KINGMAN (1860) 16 Gray 473.

On contract to recover on bond of K, cashier of plaintiff, against K, as principal, and against his sureties. Defendants objected: 1, That the bond in suit was invalid because it varied in the condition from the form required by R. S., ch. 36, sec. 27; 2, that no notice of the cashier's resignation or default was

given to the sureties, nor any demand made on them before suit; 3, that this action is not properly brought against the sureties jointly, because their obligation was several; 4, that by an increase of the capital of the bank, after the making of the bond, they were exonerated from liability; and, 5, that by a conveyance of property from the cashier to the bank, the defalcations were covered. The defalcations on which this suit was brought, were not known when the conveyances were made to the plaintiff.

Metcalf, J. 1. As the bond was voluntarily executed and nothing in the conditions was contrary to law, it was valid. 2. Neither notice nor demand was necessary before suit. 3. The sureties were properly joined. 4. An increase in the capital stock exonerates the sureties, as to liability for acts committed by the cashier after any of the increased capital was paid in. 5. Conveyance of property to the bank before the embezzlement became known cannot relieve the sureties. Judgment for plaintiff.

Cited: 118 Mass. 382; 121 id. 278; 133 id. 412; 138 id. 383; 166 id. 40; 172 id. 305.

FANEUIL HALL BANK v BANK OF BRIGHTON (1860) 16 Gray 534.

On contract on two drafts for \$10,000 each, drawn by W, the cashier of the defendant bank, on the F Bank, of New York, one to the order of F & Co., and by them indorsed to plaintiffs, and one payable to the plaintiffs. They were protested for non-payment. The drafts were drawn by the cashier for the purpose of concealing his embezzlements of the funds of the bank. The plaintiffs had no knowledge of the frauds of the cashier. The defendants contended that the drafts, being payable on time, were a violation of R. S., ch. 36, sec. 57, and therefore void. That section provided that no bank shall make or issue any draft for the payment of money at any future day certain, or with interest, except for money borrowed of the commonwealth or for a balance due the bank.

Chapman, J. 1. An innocent holder after due demand on the drawees and the bank may recover the amount of the draft with interest. He is not supposed to know for what purpose the draft was made. 2. The plaintiffs had a right as indorsees to regard the drafts as drawn against funds in the F Bank. 3. The defendants are responsible for the acts of their cashier, it being within the scope of his authority. Judgment for plaintiffs.

Cited: 4 Allen 15.

COMMONWEALTH v COCHITUATE BANK (1861) 3 Allen 42.

Bill in equity by the receivers of the bank for the confirmation of an assessment authorized by legislature to be levied upon the stockholders in the bank. The amount was such as in the opinion of the receivers was sufficient to make up the deficiency of the funds in their hands for the redemption of the bills issued by the bank. A stockholder in default was liable for interest at 12 per cent. The answers raised the questions whether Stat. 1860, ch. 167, is applicable to the stockholders and is constitutional, and whether the petition is barred by the Statute of Limitations, this suit being brought six years after the appointment of receivers.

Dewey, J. 1. Although the provision that the assessment shall be made to cover an amount which the receivers think will be sufficient, might seem to enlarge the stockholder's liability, yet since the assessment is supervised by this court, and since notice is required to be given to all parties, the legislative act cannot be said to enlarge the liability, and is therefore valid. 2. The interest for default cannot be said to enlarge his liability, for if he incurs that he does so voluntarily. 3. He is liable only for a proportionate share, which, if he pays it, discharges him. 4. The action is, however, barred by limitations. Petition dismissed.

Cited: 10 Allen 257.

JOCHUMSEN v SUFFOLK SAV. BANK (1861) 3 Allen 87.

On contract to recover the amount of a savings bank deposit with interest. The plaintiff depositor was a sailor who, a month after the last deposit in 1849, went to California, leaving his deposit book with B, and was not heard of until he returned in 1860. Prior thereto, B, who was appointed administrator of plaintiff's estate, presented the deposit book and received payment. The defendants were satisfied with plaintiff's identity, but refused payment to him. The plaintiff contended that the probate court had no jurisdiction to appoint an administrator.

Dewey, J. 1. That the appointment of the administrator was in derogation of the rights of the plaintiff admits of no question. 2. The only jurisdiction is over the estate of a dead man. When the presumption, arising from an absence of seven years, is overthrown by the actual personal presence of the supposed dead man, it leaves no ground for sustaining the jurisdiction of the probate court. Judgment for plaintiff.

Cited: 9 Allen 244; 12 id. 13; 117 Mass. 450; 127 id. 329; 128 id. 18, 144; 130 id. 490; 133 id. 450; 141 id. 36; 145 id. 519; 168 id. 578; 176 id. 81.

WALL v PROVIDENT INSTITUTION FOR SAVINGS (1861) 3 Allen 96.

On contract for money deposited with defendants by W, the plaintiff's intestate, with interest. The money was deposited "in trust for M W." The depositor gave the book to M W, who claims the money. The plaintiff was allowed to prove that the money was in fact the property of Michael Wall (the depositor), and was so deposited to secure it from attachment; and the jury were instructed that if it was his money, and so deposited to prevent it from being attached by his creditors, the plaintiff might recover. Verdict for plaintiff. Exceptions.

Chapman, J. 1. The ruling was erroneous, for the law never permits a party to establish his title by proving his own fraudulent act. The law will not aid him or his administrator in recovering it back, unless the administrator requires it for the payment of debts. 2. Since the plaintiff did not produce the deposit book, nor tender a bond or indemnify against the production of the book by other persons, the instructions to the jury that the plaintiff might recover were also erroneous. Exceptions sustained.

Cited: 5 Allen 24; 104 Mass. 230; 123 id. 322; 127 id. 185; 129 id. 432; 147 id. 291; 167 id. 183; 173 id. 417.

TAYLOR v BANK OF MUTUAL REDEMPTION (1861) 3 Allen 189.

Money had and received. The plaintiff deposited a parcel of foreign money containing \$214 in the Eliot Bank in Boston, which the latter, without counting, forwarded to defendant, who counted and returned it "short \$100." Between the Eliot Bank and its depositors was an agreement that the foreign money should be sent to the assorting bank, and that it should be at depositor's risk as to amount and quality, and that any package of money or bills returned from the assorting bank should be made good to the Eliot Bank by the depositor. Verdict for defendant. Exceptions.

Bigelow, C. J. The plaintiff cannot maintain his action. He cannot hold the defendant liable for the alleged loss, because if there is any privity between him and the defendant, it arises through his agents, the Eliot Bank. But his agreement with the Eliot Bank was that the money should remain at his own risk while in the hands of the assorting bank. Exceptions overruled.

NEALE v WEARE BANK (1861) 3 Allen 202

Conversion for two promissory notes. The plaintiff deposited the notes with A N & Co. (brokers), to be discounted, and they deposited the notes with defendants to be discounted. The notes were discounted at the P Bank for the benefit of the defendants. Plaintiff demanded the notes of defendants, but was refused. The court charged that if the notes belonged to the plaintiff, and defendant agreed to discount them and remit the proceeds to A N & Co. for plaintiffs, the action of defendants was a conversion. Verdict for plaintiff. Exceptions.

Hoar, J. If defendants were only bound to remit the proceeds to the brokers for the use of the plaintiff, their liability would not be for the conversion of the notes, but for the non-payment of the money. But the question of the terms of the contract should have been submitted to the jury. Verdict set aside. New trial granted.

TOWER v APPLETON BANK (1862) 3 Allen 387.

On contract against a banking corporation to recover the amount of bank bills issued by it and destroyed by fire. The bills were in the plaintiff's trunk, in a house which was burned down. Plaintiff demanded the amount and tendered a bond of indemnity. Verdict for plaintiff. Exceptions.

Hoar, J. The evidence of the destruction of the bills is circumstantial only

and not positive. To provide for the defendants, security by a bond of indemnity, is impossible because there is nothing to distinguish or identify the bills. The defendants have not contracted to redeem their bills, except upon production and delivery, and it is through the negligence or misfortune of plaintiff that they cannot be produced. Exceptions sustained.

Cited: 4 Allen 481; 107 Mass. 547; 119 id. 81; 147 id. 95; 153 id. 552.

COMMONWEALTH v BANK OF MUTUAL REDEMPTION (1862) 4 Allen 1.

Petition by the bank commissioner for an injunction to restrain the bank from a violation of the law. It was charged that it had not kept on hand in specie 15 per cent of its liabilities, as required by G. S., ch. 57, sec. 19; that it had made contracts for the payment of money at a day certain contrary to sec. 63 of the same chapter; that it had issued bills on the contract with another bank for specie, with an agreement that they should not be put into immediate circulation contrary to the provisions of sec. 67 of the same chapter. The acts contrary to law were either done by mistake or under misapprehension of the statutes. Injunction granted.

Bigelow, C. J. 1. Under the statute the bank must keep the requisite amount of specie on hand. It must have it in possession. 2. The right of a bank to borrow money from another bank is not prohibited. The only restraint on the power to contract such a debt is that the contract shall not be for the payment at a future time, or with interest. 3. The delivery of the bills of the bank to another bank for specie, with an agreement that they should not be returned for a redemption until a future date, is in contravention of the statute. Injunction dissolved.

Cited: 145 Mass. 498.

SKINNER v MERCHANTS BANK (1862) 4 Allen 290.

Money had and received. D, a clerk of the plaintiff's, to assist H, paying teller of the defendant, in concealing an embezzlement, let H have \$7,000 of the plaintiff's money. H put it in a drawer where the defendant's money was usually kept. The money was counted by the officers of the bank as its money, and put on the books to the credit of the cashier and afterward returned to him. The defendant did not know of the loan when made. Plaintiff then demanded \$7,000 from defendant which was refused. Case reserved.

Hoar, J. 1. H had the money in his custody as the property of the bank, and not as his own, but he could give the bank no property in it. 2. The defendant's appropriation of it as its own, although made through misapprehension, rendered it responsible for the amount. Judgment for plaintiff.

Cited: 109 Mass. 216; 147 id. 274, 281.

COMMONWEALTH v PEOPLES FIVE CENTS SAV. BANK (1862) 5 Allen 428.

Injunction to restrain the defendant from further prosecution of business, until a tax assessed upon it be paid. The bill alleged that the defendant was bound to pay a tax of one-half of 1 per cent on the amount of deposits to be assessed, one-half on the average amount of deposits for the six months preceding the first day of May, and the other half on the average amount for the six months preceding the first day of November, under the provisions of a Statute of 1862, ch. 224, sec. 4. The defendant contended that so much of the statute as applied to taxation was unconstitutional and void. It was also contended that by a statute passed in April, a tax could be levied for the preceding six months from the first day of May of that year. Temporary injunction granted. Appeal.

Bigelow, C. J. 1. The act is not in contravention of the constitution, for it is not retrospective in its operations. It gives a fair mode of ascertaining the existing value of a subject of taxation. 2. The legislature has authority to impose the excise, and it can be levied from the first of May of the year in which the act was passed. Injunction continued.

Cited: 11 Allen 275; 12 id. 300, 313, 314; 104 Mass. 587; 118 id. 389; 123 id. 496; 133 id. 163; 134 id. 425; 151 id. 106; 162 id. 120, 128.

SAWYER v PAWNER'S BANK (1863) 6 Allen 207.

On contract to recover for services as president of the defendant bank. There was no express contract for services by vote of directors or otherwise. Plaintiff

stated to some of the directors during the time of service that he should expect to be paid. The objects of the defendant were partly charitable. Judgment for defendant. Exceptions.

Merrick, J. 1. In the absence of some express agreement, or of some vote of the directors, allowing compensation or assenting to it, the presumption would be that the service was gratuitously performed. 2. There is no implied contract. Exceptions overruled.

Cited: 122 Mass. 270; 130 id. 396; 151 id. 435; 173 id. 446.

APPLETON BANK v FISKE (1864) 8 Allen 201.

If a person obtains discounts at a bank, and allows a sum to remain on deposit, thinking that this course will enable him to obtain discounts more readily, and there is no agreement that he may not draw his money at any time, there is no usury in the practice.

BANK OF BRIGHTON v SMITH (1866) 12 Allen 243.

On contract against surety on cashier's bond. According to custom, the cashier gave the directors a written statement purporting to show the bank's condition at a certain time. In answer to questions by the directors he made verbal admissions showing the statement to be false. The auditor, who reported on the bank's condition every six months, put these verbal admissions into his report. Defendant's general objection to having these admissions read was overruled. The bond was for \$2,000, and the cashier with nine sureties bound themselves in the sum of \$2,000 each severally and not jointly. The cashier then became a defaulter in more than \$2,000. The defendant requested the court to rule that the plaintiff was entitled to recover only one-tenth of the amount embezzled without interest. The court ruled that the plaintiff was entitled to the whole amount of the defendant's penalty, \$2,000, and interest thereon from the time of defalcation. Exceptions. Judgment for plaintiff. Appeal.

Colt, J. 1. To show the unfaithful performance of the official duties, and as part of the chain of evidence, the admissions were competent. 2. The sureties were bound severally, and the plaintiff may pursue them to the extent of their liability. 3. Interest is to be added to the penalty as damages for non-payment after notice and demand, but not from the time of the embezzlement. Judgment accordingly.

Cited: 98 Mass. 516; 102 id. 565; 103 id. 36, 401; 139 id. 594.

COMMONWEALTH v PROVIDENT INSTITUTION OF SAVINGS (1866)
12 Allen 312.

Action against a savings bank to recover the balance of a tax of three-eighths of 1 per cent on the average deposits for six months, assessed under Statutes of 1862, ch. 224, and 1863, ch. 164. The defendants were incorporated, had no capital or property except their deposits and the property in which these deposits had been invested. The average amount of deposits for the six months was \$8,000-000, part of which was invested in public funds of the United States. Defendants contended that they were not liable for the amount of deposit invested in United States securities, and had paid the residue of the tax. Decision reserved.

Bigelow, C. J. The tax is based solely on the value of the franchise. It is not a tax on property, but is in the nature of an excise or duty, and as required by the constitution is reasonable. Judgment for plaintiff.

Cited: 123 Mass. 496; 151 id. 106; 162 id. 120, 128.

DANA v THIRD NAT. BANK (1866) 13 Allen 445.

On contract by assignees in insolvency to recover amount paid by defendant from the insolvent's account. P gave B a check on the defendant bank. The check was duly presented and payment refused, as P's balance was insufficient. B then demanded the balance remaining in the bank and offered to indorse payment to that amount on the check. The defendant again refused. P became insolvent. Plaintiffs were appointed P's assignees, and demanded the balance remaining in defendant bank. Thereafter defendant paid the balance to B. The assignees now sue the bank. Verdict directed for plaintiffs. Exceptions.

Foster, J. 1. There was no equitable assignment in favor of the check holders. 2. A check drawn upon a bank for more than the amount of the drawer's funds

on deposit creates no lien upon, and gives the payee no right to, the actual balance, until the bank has agreed to pay it pro tanto. Exceptions overruled.

Cited: 99 Mass. 188; 107 id. 49; 126 id. 374; 137 id. 356; 151 id. 384; 156 id. 397.

AMES v MARIAM (1867) 98 Mass. 294.

On bank check. The defendants gave a check for \$700 to B, with directions to deposit it in two days and return the money to them. They received no consideration for it. B did not deposit it, but passed it to D, and received \$200 on it. B delivered the check to D, a director in the R Bank, to deposit and deliver the amount to B. But D passed it to the plaintiffs in payment of a debt. They presented it to the bank on which it was drawn, but payment was refused. The same day one of the defendants told the plaintiffs it was good and would be paid, but not until B had been seen. Defendants contended that D required no title to the check and could pass none. Verdict for plaintiffs. Exceptions.

Bigelow, C. J. 1. The rule that a bill of exchange or promissory note, taken when it is overdue, is subject in the hands of the holder to all the equities attaching to it as between the original parties, does not apply to checks on banks when taken within a brief period of time after their date. Exceptions overruled.

Cited: 108 Mass. 516; 156 id. 509; 168 id. 427.

FLINT v CITY OF BOSTON (1868) 99 Mass. 141.

Certiorari to the aldermen of Boston to reverse their refusal, on appeal from the assessors of Boston, to abate a tax under the state law on forty shares, owned by petitioner who resided in Boston, in the capital stock of the American Exchange National Bank, organized under the U. S. R. S. of 1864, ch. 106, and located in the City of New York. That act forbade state taxes on national bank stock owned by a resident of a state, the bank being located in another state. Petitioner paid the tax under protest. The answer admitted the facts. Case reserved for consideration of the full court.

Hoar, J. It is within the constitutional power of Congress to establish a national bank in any state, and to provide that its shares shall have such a local nature as to be exempt from taxation by other states. This power has been exercised in the statute cited. Certiorari to issue.

Cited: 101 Mass. 582.

NATIONAL BANK OF THE REPUBLIC v CONLAN (1868) 99 Mass. 181.

Trustee process to recover on a promissory note made by defendant, payable to S & Co., and by them indorsed to plaintiffs in the regular course of business. The note was indorsed to plaintiffs by the payees in the ordinary way of business before its maturity, and it remained their property. S & Co. gave plaintiffs security for the note and requested them to collect it. Plaintiffs summoned S & Co. as trustees of defendant. Verdict directed for plaintiffs. Exceptions.

Chapman, C. J. 1. The fact that the indorsers had given them security for the note, and had requested them to collect it of the maker, and the further fact, that they had summoned the indorsers as trustees of the defendant, did not affect their rights as indorsees. 2. The jury were correctly instructed to find for plaintiffs. Exceptions overruled.

SMITH v FIRST NAT. BANK OF WESTERFIELD (1868) 99 Mass. 605.

Tort to recover the value of bonds of the United States deposited with defendants for safe-keeping, alleged in one count to have been lost through their negligence, and in another to have been converted to their own use. The bonds had been kept in the defendants' safe, but had been lost or stolen therefrom. No consideration was shown for the defendants' custody of the bonds. Verdict for plaintiff. Exceptions.

Wells, J. 1. This was a gratuitous bailment. The defendants are liable not for want of ordinary care, but for gross negligence only. As it did not appear whether the bonds were lost by negligence or stolen, the plaintiff cannot recover on that ground. 2. Mere failure to return the bonds will not constitute conversion. Exceptions sustained. New trial granted.

Cited: 109 Mass. 456, 521; 116 id. 98; 135 id. 362; 137 id. 87; 153 id. 308; 163 id. 341; 167 id. 498.

BELKNAP v NATIONAL BANK OF NORTH AMERICA (1868) 100 Mass. 376.

Money had and received. Plaintiffs' bookkeeper, after certain checks were all properly made out to certain persons or order, verified the checks, put them into envelopes, sealed the envelopes, and sent a clerk with them to the post office. The clerk, obtaining possession of the checks, surreptitiously erased "or order," and inserted "or bearer." Later, some of these checks so altered were paid to unknown persons. The plaintiffs mailed about 2,000 checks a year, and had invariably drawn them payable "to order." Frequently, to get money or pay notes, plaintiffs drew checks payable to "notes payable or order," but in such cases one of the plaintiffs or the bookkeeper obtained the money from the bank. Plaintiffs claimed defendant was negligent. Judgment for defendant. Exceptions.

Chapman, C. J. 1. We cannot assume that it was careless on the part of the plaintiffs to send by the clerk, although he knew the contents. To obtain access to them he must commit a crime. 2. The alteration vitiated the instrument even in the hands of a bona fide holder for value. Exceptions sustained.

Cited: 121 Mass. 111; 123 id. 203; 131 id. 78; 171 id. 528.

CHARLES RIVER NAT. BANK v DAVIS (1868) 100 Mass. 413.

To recover amount of a check. Defendant, a banker, received a check purporting to be drawn by B on plaintiff. Defendant deposited the check and it passed in due course to plaintiff, who charged it to B. B pronounced the check a forgery. Plaintiff immediately sent a messenger to defendant, stating the facts and demanding the check be made good. Defendant was absent, but his clerk, having a number of blank checks for ordinary business purposes, filled one out, and gave it to the messenger in exchange for the forged check. The messenger gave this check to plaintiff's cashier in the presence of defendant, who "had some conversation on the subject, took the new check in his hand, said something about the B check, and did not dissent or object." Defendant stopped payment on the check that same afternoon, and tendered back the B check, which plaintiff refused. The court charged that if the defendant understood the transaction, saw the new check, knew the use that was to be made of it, and that plaintiff received it as payment of or in exchange for the check said to be a forgery, it was an adoption of the new check as his own, and a ratification of the act of the clerk. Verdict for plaintiff. Exceptions.

Foster, J. 1. The surrender of the forged check on which the defendant had received the money was a sufficient consideration for giving the one now in suit. 2. The ratification could not be recalled. Exceptions overruled.

CROCKER v MARINE NAT. BANK OF NEW YORK (1869) 101 Mass. 240.

To recover for the loss of a trunk, with its contents, deposited with defendants by plaintiff. The plaintiff in one action was a citizen of New York, in the other a citizen of Massachusetts. Defendants were a banking corporation established in New York under the Act of Congress of 1864, ch. 106. That act provided that every banking association formed under it might be sued within the district in which it was established, or in the city or county in which it was located. Defendants moved to dismiss the actions for want of jurisdiction. Motion overruled.

Gray, J. By sec. 57 of the Act of 1864, ch. 106, the intention of Congress is manifested that these associations should be sued, either in the federal or in the state courts, only in the judicial district in which it is established, and in which its officers may be summoned, and its books brought into court with the least interruption of business, and that the election of plaintiffs to sue in any court whatever should be defined within these limits in all cases. Action dismissed for want of jurisdiction.

Cited: 101 Mass. 312; 108 id. 507; 178 id. 31.

MERCHANTS NAT. BANK v NATIONAL EAGLE BANK (1869) 101 Mass. 281.

On contract to recover the amount of a check drawn on plaintiff by W to order of H Bros., and by them indorsed to and deposited with defendants. The clearing house articles provided that whenever checks sent through it are not good, they shall be considered provisional payments and shall not be retained after one o'clock, but shall be returned to the banks from which they were received; that if, by any mistake of fact, a check was not so returned, it should be consid-

ered as payment made under mistake of fact as in any other case. Defendants sent the check to the clearing house in the morning, when it was paid by plaintiff. Shortly before one o'clock, plaintiff's teller learned the check was not good and gave it to a messenger to return to defendants. The messenger made a mistake as to the number of the check and went to the wrong bank, and thus did not reach defendants until after one o'clock. Defendants refused payment. The check was paid by defendants through the agency of the clearing house, there being no funds of the drawer in their hands at the time. Verdict for plaintiff.

Colt, J. 1. Money paid to the holder of a check or draft drawn without funds may be recovered back, if paid by the drawer under a mistake of fact. 2. Payment was made under a mistake of fact, and the amount paid can be recovered back. Judgment for plaintiff.

Cited: 101 Mass. 290; 106 id. 443; 119 id. 145; 123 id. 70; 129 id. 439; 132 id. 149; 139 id. 518, 519, 520; 169 id. 283.

BOYLSTON NAT. BANK v RICHARDSON (1869) 101 Mass. 287.

Money had and received. D gave to defendants his check on the plaintiff. Defendants were not to collect it at once, but were to give D one or two days' notice in advance of collection. Payment was deferred at D's request, and two years having elapsed the check was presented and paid. The drawer had not at the time sufficient funds on deposit. Judgment for plaintiffs. Exceptions by defendants.

Wells, J. Money paid under mistake of fact may be recovered back, if there has been no laches and the situation of the other party remains unchanged. What constitutes a mistake of fact is a question of law. The only mistake in regard to D's account is that the amount on deposit was not sufficient. There was nothing in the transaction, which is a mistake of fact in a legal sense. Exceptions sustained.

Cited: 106 Mass. 443; 123 id. 70; 139 id. 521.

SAVANNAH NAT. BANK v HASKINS (1869) 101 Mass. 370.

Bill to enforce payment of drafts. The drafts were drawn by P on defendants, which, by their letter of credit containing an express promise to plaintiffs, the defendants were bound on presentment to accept and pay. The drafts were discounted by plaintiffs, sent by mail for acceptance, and lost in course of transmission. The death of the drawer rendered it impossible to procure duplicates. The bill offered indemnity, and an affidavit of loss was annexed. Demurrer.

Colt, J. 1. The case comes within the relief which courts of equity administer; where recovery at law is precluded by loss of a written instrument to whose possession the defendants are entitled on performance of their promise. This jurisdiction is commonly referred to the head of accident. 2. If defendant is reasonably indemnified from harm, he has no reason to refuse payment. Demurrer overruled.

Cited: 107 Mass. 547; 147 id. 95.

SCHOOL DISTRICT v FIRST NAT. BANK (1869) 102 Mass. 174.

Money had and received to recover a deposit. The treasurer of plaintiff deposited with defendant certain of the plaintiff's funds, which were credited by defendant to the treasurer's personal account. Subsequently the bank applied the deposit on the treasurer's personal indebtedness to the bank. The defendant alleged that it had no notice that the funds were to be credited to the depositor's account as treasurer. Judgment for defendant. Appeal.

Chapman, C. J. The treasurer having failed to give notice to defendant that the money was the property of plaintiff, the defendant had a right to regard it as the depositor's personal funds, and to appropriate it as they did. Judgment affirmed.

Cited: 147 Mass. 280; 172 id. 72.

McCLUSKEY v PROVIDENT INST. FOR SAVINGS (1869) 103 Mass. 300.

Contract for money deposited by plaintiff under her former name, C. Shea. Defense, ignorance of facts pleaded; that plaintiff was the wife of D S, and the deposit belonged to him, alleging the death of D S and the appointment of an administrator, who made demand for the money, and that two of the deposits

were made after the death of D S of money belonging to the estate. Verdict for defendant. Exceptions.

Chapman, C. J. 1. The statute, giving the wife the property she acquires by her sole and separate effort, leaves what she acquires otherwise as it was at common law. 2. It appearing that she mingled her money with his, she cannot now claim it. 3. She could not make the money which was his her own by depositing after his death. 4. Even if her husband made her a gift, if she mingled it with money belonging to him, she would thereby make it his. Exceptions overruled.

Cited: 104 Mass. 233; 113 id. 161; 114 id. 169; 116 id. 386; 126 id. 117; 128 id. 171; 130 id. 380; 134 id. 139; 140 id. 165; 159 id. 520; 160 id. 322, 383; 162 id. 457.

AMES v YORK NAT. BANK (1869) 103 Mass. 326.

Where a person sent an order to a bank to exchange their own check for one indorsed, and they forwarded instead the check of another party, and the same was lost in transit: Held, the fair construction of the order was that the bank should send one of their own checks, and that an action would lie for the damage sustained by reason of the bank's failure to comply with such order.

BRABROOK v BOSTON FIVE CENTS SAV. BANK (1870) 104 Mass. 228.

Contract for money had and received. K, the father of the plaintiff, deposited \$3,000 with the defendant. The bank, by its rules, could not take so large a sum from one person, and it was deposited in the name of K, trustee, for the plaintiff. After the death of K, the plaintiff claimed the deposit made in trust. A by-law of the bank, assented to by K, provided that any depositor might designate for whose benefit a deposit was made and be bound by it. Parol evidence was admitted against objection to show the whole transaction, and that K claimed the deposit. He always kept the deposit book. On facts agreed.

Wells, J. 1. The plaintiff shows no right to hold the money deposited with the defendant. K was not in fact trustee for her, otherwise than by the form of the deposit. The voucher for the deposit was never delivered to her. The whole transaction was K's voluntary act to which the plaintiff was not a party. There was no direction to the bank to pay her. 2. Her right to recover depended upon proof of an intent to make an absolute gift to her. 3. The parol evidence was admissible to show the whole transaction, notwithstanding the by-law of the defendant. Non-suit.

Cited: 108 Mass. 523; 109 id. 151; 120 id. 564; 124 id. 379, 591; 128 id. 161, 162; 134 id. 262, 445; 138 id. 583; 142 id. 453; 151 id. 219; 154 id. 114; 159 id. 596; 160 id. 322; 161 id. 383; 162 id. 457; 164 id. 584; 170 id. 413; 173 id. 309.

KINGMAN v PERKINS (1870) 105 Mass. 111.

Trustee process. The defendant gave P an order on the H Savings Bank for the full amount of his deposit. He was a minor, and was indebted to P in a sum larger than the deposit. The bank was afterward trustee, and when the order was presented by P, accepted it, "except the amount trustee." On facts agreed.

Morton, J. 1. The order being for the whole sum due, and given in good faith for a sufficient consideration, constituted an assignment of the amount in the hands of the savings bank. 2. The qualified acceptance of the bank of the order, after the trustee process was served, did not effect the rights of the claimant. 3. If the contract of the infant was voidable, it cannot be avoided by his creditors. Judgment for claimant.

Cited: 110 Mass. 327; 111 id. 54, 156, 287; 113 id. 132; 125 id. 591, 596; 129 id. 430; 142 id. 375; 144 id. 169; 151 id. 384.

WAY v BUTTERWORTH (1870) 106 Mass. 75.

Contract on a promissory note, "payable at any bank in Boston," against maker and indorser. J, a notary, presented the note at a place called "Bank of the Metropolis." He testified that he did not know whether it was a bank or not. The plaintiff showed that notes were discounted at the place and accounts kept with depositors, one of whom was M, to whose account the avails of the discount of this note were passed. The defendants contended that the place in question was not a bank. An attempt was made by the defendants to impeach

the evidence of the notary, as to notice, by showing a statement made by him before the grand jury, and he was allowed, against objection, to state what he said before the jury. The court ruled that the place was a bank. Verdict for plaintiff. Exceptions.

Chapman, C. J. 1. The evidence offered by the plaintiff was admissible, and it would have been competent for the jury to find that the place called "Bank of the Metropolis" was a bank. 2. But the ruling of the court that it was a bank included a decision as to the truth of the evidence, and that was a matter of fact for the jury. 3. It was competent for the notary to testify as to what he said before the grand jury, and it was properly admitted. Exceptions sustained as to the indorser only.

Cited: 124 Mass. 78; 151 id. 538; 165 id. 384.

NATIONAL BANK OF NORTH AMERICA v BANGS (1871) 106 Mass. 441.

To recover the amount of a forged check. Agreed case. The defendant took from some persons, whom he could not remember, and without inquiry, a check payable to his order drawn on plaintiff. The plaintiff paid the check through the clearing house, but was obliged to refund the money to the drawer, when he returned the check as a forgery.

Wells, J. 1. The drawee of a check is presumed to know the drawer's signature, and pays a forged check at its peril. This, however, in all cases is upon the assumption that the party receiving the money has acted with due caution in paying same. 2. The defendant did not make sufficient inquiry before parting with the funds. Judgment for plaintiff.

Cited: 123 Mass. 70, 77; 137 id. 303; 139 id. 518; 147 id. 277; 151 id. 283; 177 id. 395, 396.

CARR v NATIONAL SECURITY BANK (1871) 107 Mass. 45.

On bank check by payee. The declaration alleged that defendant was a banking corporation; that, in consideration of L depositing funds in it, it agreed with L to pay all checks of L, when in funds of L; that L, in consideration of \$600 paid by plaintiff to him, drew his check on defendant for \$600 payable to plaintiff's order; that plaintiff duly demanded payment and was refused; that at the time of demand and refusal, defendant was indebted to L, and L had funds in defendant to a greater amount than \$600; that defendant had never paid the check or any part of it; that plaintiff is still holder of the check, and has been unable to collect it or any part of it from L. Demurrer. Sustained. Judgment for defendant. Appeal.

Gray, J. 1. The money deposited becomes the absolute property of the bankers, impressed with no trust, subject only to their personal obligations to the depositor, to pay an equivalent sum on his demand or order. 2. The promise to drawer to honor his checks does not render the defendant liable to an action for contract by the holder also, unless they have made a direct promise to the latter. Judgment affirmed.

Cited: 108 Mass. 247; 121 id. 530; 123 id. 202; 127 id. 300; 132 id. 410; 136 id. 94; 137 id. 356; 141 id. 520; 171 id. 69; 172 id. 364.

WAY v BUTTERWORTH (1871) 108 Mass. 509.

Contract on promissory note. It was payable to M, and on the back contained the names of B and of M. The note was payable at any bank in Boston. It was presented at the office of the plaintiff, who was a private banker, under the style of "Bank of the Metropolis." His business was similar to that of incorporated banks, except that he did not issue bills for circulation. He discounted the note in suit. It was duly protested. Evidence was admitted to show that the note was not signed by B and M at the time it was made. The judge ruled that the private bank of the plaintiff was not a bank within the meaning of the contract; that if it was presented at any place which the maker and indorser and plaintiff had agreed to treat as a bank, that would be sufficient. Verdict for plaintiff. Exceptions.

Ames, J. 1. The defendants had a right to show by parol that the indorser did not sign at the time the note was made. 2. It was correctly ruled that the plaintiff's private bank was not a bank at which the note was made payable by the terms of the contract. There was no evidence tending to show that the maker had agreed

to use and treat the plaintiff's place of business as a bank. 3. There was then no presentment of the note, and for want of presentment, the indorsers cannot be charged. Exceptions sustained.

Cited: 124 Mass. 78; 165 id. 384.

FIRST NAT. BANK v HARRIS (1871) 108 Mass. 514.

Contract on defendants' check upon the S Bank, payable to the order of J & Co., and indorsed in blank to plaintiff. Answer: That the check was obtained by J & Co. through fraud and without consideration; that a bank check, not payable to bearer, but to the order of a particular person, is not negotiable so as to preclude defense thereto in the hands of a third party; that the check was overdue, when it was indorsed to the plaintiff; that J & Co. were sued by B, and that the defendants were summoned as trustees. The check was dated November 10, and delivered to the plaintiff on the 14th. It was presented to the drawee on the 16th, payment refused, and the defendants notified of its non-payment.

Chapman, C. J. 1. Dealing in checks is a part of the usual business of banking. There is no difference in this respect between a check payable to borrower, and one payable to order. 2. Plaintiff presented the check in two days after purchase for payment. This was not an unreasonable delay. 3. The action of B against J & Co., and these defendants as trustees, cannot affect the plaintiff. Judgment for plaintiff.

Cited: 156 Mass. 509; 157 id. 549; 168 id. 427.

CLARK v CLARK (1871) 108 Mass. 522.

Trustee process. The defendant was defaulted, and the S Bank, as trustee, answered that it had money deposited in the name of "B A, trustee for Ann Clark," the defendant. B A retained the deposit book until her death, and the defendant did not know of the deposit until then. A by-law of the bank provided "that no person shall receive any part of his principal or interest without producing the original book." The administrator of B A claimed the deposit.

Chapman, C. J. 1. If the plaintiff could prove that B A intended to create a trust, she did not do what was necessary to carry it into effect. 2. The defendant was not a party to the transaction, and never acquired any title to the money. Judgment for claimant.

Cited: 124 Mass. 379; 128 id. 162; 134 id. 262; 138 id. 582; 142 id. 453; 151 id. 219; 157 id. 50.

BRODERICK v SAVINGS BANK (1872) 109 Mass. 149.

To recover deposits. Plaintiff deposited his own money in the defendant bank under the name of E W, to prevent its being attached. The passbook was in E W's name. Plaintiff kept it in his possession. E W refused to transfer the book to plaintiff. Plaintiff sued in his own name. Verdict for plaintiff. Exceptions.

Chapman, C. J. The intent and fraudulent purpose to avoid an attachment without any transfer would not work a forfeiture of the deposit to the bank. Exceptions overruled.

Cited: 134 Mass. 262; 138 id. 582; 140 id. 165; 162 id. 457.

RAILROAD NAT. BANK v CITY OF LOWELL (1872) 109 Mass. 214.

To recover money. G, treasurer of the defendant city, had an account with the plaintiff. He told plaintiff that the defendant had authorized him to borrow money for defendant. Plaintiff paid his overdraft check drawn as treasurer. G had no authority for these acts. G mingled the proceeds with defendant's money in its cash drawer and paid most of it out to defendant's creditors. He was in default to defendant. The balance went into the hands of the defendant on G's resignation. G kept no personal account with the plaintiff. On facts agreed.

Wells, J. 1. The fact that the money in this case went into the hands of the treasurer, and was placed in the drawer provided by the city for the use of keeping the funds of the city, is not enough to charge the defendant with liability. 2. The city was not liable for the money as a loan. Judgment for defendant.

Cited: 118 Mass. 488; 128 id. 508; 135 id. 64; 150 id. 210.

KIMBALL v LELAND, ADM'R (1872) 110 Mass. 325.

Money had and received. Before her death, the intestate, for the purpose of transferring her deposit in a savings bank to plaintiff, delivered the bankbook to the plaintiff with an order to the treasurer of the savings bank to pay the deposit to N K, who was plaintiff's husband. The plaintiff did not attempt to draw the money until after the death of the intestate. The intestate had no creditors. The defendant drew the money from the bank as administrator. Statements made by the intestate after the delivery of the book and order to plaintiff, inconsistent with the transaction as testified to by plaintiff, were not admitted in evidence. Verdict for plaintiff. Exception.

Wells, J. 1. The transfer was effectual to pass the title to the money to plaintiff, whether it was made with or without consideration. 2. The evidence was properly rejected. A grantor or assignor cannot defeat his own deed or assignment by declarations made after it has taken effect. Judgment on the verdict.

Cited: 111 Mass. 287; 125 id. 591; 129 id. 430; 159 id. 529.

FOSS, ADM'R v LOWELL FIVE CENTS SAV. BANK (1873) 111 Mass. 285.

Contract for the amount of a deposit. A depositor in a savings bank gave her passbook to A, with an order to defendant to pay the deposit to A or order. A presented the book and order to defendant's cashier, who noted on the book that the order was given, returned the book to A, and kept the order. The depositor afterward died, and the money was paid to the plaintiff as administrator. A brought this suit in the name of the administrator without his assent. Defendant denied that they owed plaintiff for the assignee's benefits any sum. Case certified before verdict.

Gray, J. 1. The delivery of the book and order with notice to the bank constituted a gift inter vivos and a complete assignment of the fund as against the assignor or her personal representatives. 2. The assignment gave the assignee the right to sue in the name of the assignor, or after the assignor's death, in the name of the assignor's administrator, with or without his consent. 3. Defendants, after their denial, could not contend that they had assented to the assignment, and that therefore the action should have been brought in the assignee's name. 4. The allegation that defendant owes the amount to plaintiff for the benefit of the daughter is a mere conclusion of law. 5. A recovery herein will bar any subsequent suit in her name for the same amount. Case to stand for trial.

Cited: 125 Mass. 248, 591, 595; 126 id. 374; 129 id. 430; 131 id. 136; 159 id. 529.

GOLDSBURY v WARWICK (1873) 112 Mass. 384.

Bank shares were taxable against the owner in the town of his actual residence. Statute of 1872, ch. 321, compelling the stockholder to notify the bank of his true residence each year under the penalty of being taxed where he resides, and where the bank is located, is not to be construed as giving him the power to elect where he shall be taxed. This rule is not affected by the fact that the person taxed had by mistake given his residence in another town in a previous statement.

WASHINGTON COUNTY NAT. BANK v LEE (1873) 112 Mass. 521.

On promissory note. The defendant was summoned to answer unto "the Washington County National Bank, a corporation duly established by law and doing business in Greenwich, in the State of New York." The plaintiff to prove its corporate existence offered a certified copy of the certificate of organization of the "Washington County National Bank of Greenwich;" also a certificate of the comptroller of the currency, that "the Washington County National Bank of Greenwich in Washington County" had been organized. Objection. Overruled. Verdict for plaintiff.

Gray, C. J. In the absence of evidence that there was any other bank of that name at that place, the evidence introduced warranted the inference that the organization proved was that of the plaintiff corporation. Judgment on the verdict.

Cited: 172 Mass. 452.

WILSON v BOWDEN (1873) 113 Mass. 422.

Where an indorser of a note not yet due called at the bank, where such note was payable, and inquired of the officers whether the note was there, and they re-

plied that it was not, and made statements as to the whereabouts and ownership of the note prejudicial to the holder: Held, in an action by the holder, that the bank was his agent for collection only, and no declarations made by its officers would affect his rights unless expressly authorized.

CENTRAL NAT. BANK v PRATT (1874) 115 Mass. 539.

On bill of exchange against indorser. Plea: Usury. The bill was discounted by plaintiff, who carried on business in New York, at a greater rate than allowed by the laws of New York, under which it would be void. The plaintiff contended that the National Banking Law, providing for a forfeiture of the interest only, was superior to the state laws. Case certified before trial.

Morton, J. 1. Congress has power to fix the penalty of making a usurious loan. 2. That power, as exercised in the act creating national banks, precludes state legislation whether the state has or has not fixed the rate of interest. The bill in question is therefore not subject to laws of New York as to usury, and is not void. Judgment for plaintiff.

DAVIS v RANDALL (1874) 115 Mass. 547.

On bill of exchange against acceptor. The plaintiff was a receiver of a national bank which had discounted a draft drawn on defendant, and by him accepted for the accommodation of the drawer as the bank knew at a greater rate than allowed by the laws of New York. The defendant contended: 1, That the draft was void under the laws against usury in New York; and, 2, that the draft was accepted for the accommodation of a third party, and the acceptor had an oral agreement that he would not be called upon to pay, but that the bank would look to securities which it held. Verdict for plaintiff.

Morton J. 1. The act of Congress creating national banks supersedes the state laws on the question of usury so far as national banks are concerned. 2. The written acceptance of defendant was an absolute promise to pay which could not be contradicted by proof of an oral agreement to the contrary. 3. That the bill was for the accommodation of the drawer, is no defense. Judgment affirmed.

Cited: 130 Mass. 521; 133 id. 248; 134 id. 334; 140 id. 145; 154 id. 188.

COMMONWEALTH v BARRY (1874) 116 Mass. 1.

Indictment for receiving stolen property. The teller of a national bank unlawfully obtained the combination to the safe for the purpose of stealing the money therein. He stole it and gave part to defendant, who knew of the theft. The federal laws punished the embezzling of national bank funds by an officer. The state law provided punishments for larceny, and for knowingly receiving stolen goods. Defendant contended that his principal was punishable only under the federal laws for embezzlement, and that he himself therefore was not amenable to the state laws, as being guilty of merely an accessory offense. Verdict guilty. Exceptions.

Wells, J. 1. The teller's act constituted larceny. The federal law does not purport to punish larceny as such. The state courts therefore have jurisdiction over the crime of the teller, and hence over that of defendant. 2. Apart from those considerations, the offense of receiving stolen property is a substantive crime in itself, and not merely occasional to the principal offense of larceny. Exceptions overruled.

Cited: 136 Mass. 170; 173 id. 545.

LEONARD v NEW BEDFORD SAV. BANK (1874) 116 Mass. 210.

Money had and received. L was a depositor in defendant bank. H sued him, and the bank was summoned as his trustee, and paid over the sum deposited on an execution issued on a judgment in that action. The defendant's name was not correctly recited in the execution. Defendant was never adjudged L's trustee. Judgment for defendant. Appeal.

Wells, J. The bank by the payment was exonerated from further liability, if the proceedings were regular and valid. Judgment affirmed.

TAPLEY v MARTIN (1874) 116 Mass. 275.

Contract on an agreement made by defendant to indemnify plaintiff for any damage sustained by him as surety on the bond of M, cashier of the Hide and Leather National Bank, of Boston. Verdict for plaintiff. Exceptions. After exceptions were allowed, the defendant died. No administrator had been appointed in Massachusetts.

Morton, J. 1. The court had power notwithstanding the death to render judgment on the verdict, as of a preceding day or term, if justice required it. 2. At the time suit was brought, both parties were citizens of the state. The defendant afterward removed to Maryland. She was not entitled to remove the suit to the United States Circuit Court. 3. The defendant contended at the trial that the bank officers were guilty of gross negligence in not examining the books for frauds committed before the bond was given, and that the sureties were thereby discharged. The court ruled that, unless the defendant proved actual knowledge by the officers of previous fraud committed before the bond was given, the sureties were not discharged. The ruling was sufficiently favorable to defendant. Negligence of the officers in failing to examine the books does not discharge the sureties. 4. The court instructed the jury that if plaintiff paid the amount of his bond without the assent of defendant, he must show he was legally liable; but if he procured her assent and paid in good faith, she could not put him to proof that he was legally liable. The ruling was correct. 5. The copy of the certificate of the organization of the bank, certified by the comptroller of the currency, was properly admitted in evidence. Exceptions overruled.

Cited: 127 Mass. 328; 131 id. 86; 134 id. 340; 155 id. 87; 169 id. 582; 173 id. 214; 175 id. 462.

SWEENEY v BOSTON FIVE CENTS SAV. BANK (1874) 116 Mass. 384.

On contract to recover money deposited by plaintiff with defendant bank in the name of Mary E. Sweeney, plaintiff's wife, but alleged to belong to plaintiff. Verdict for defendant.

Ames, J. On occasion of the first deposit, he went to the bank with his wife, and the money, though furnished by him, was entered as her money and the book was delivered to her, and it purports on its face to be her property. The subsequent deposits, though made by him, were entered as her deposits and credited to her with his authority. On this state of the case, proof, that it was his own money and that he never intended to give it to his wife, is not sufficient to make out an implied promise to return it to him. Judgment for defendant.

Cited: 129 Mass. 432; 138 id. 581; 140 id. 165; 152 id. 131; 162 id. 457; 174 id. 199.

LEVY v FRANKLIN SAV. BANK (1875) 117 Mass. 448.

Contract to recover a deposit. The defendant had a by-law providing that as the officers might not be able to identify every depositor, it would not be responsible for loss sustained when a depositor had not given notice of his book being lost or stolen, if such book was paid on presentation. J, a third person, stole and presented the plaintiff's book and a forged order purporting to be signed by the plaintiff, and the deposit was paid thereon. Verdict for plaintiff. Exceptions.

Morton, J. If defendants, using reasonable care and good faith, paid a part or the whole of the deposit upon the presentation of the book, it was a case provided for by the by-law, and defendant is discharged to the amount so paid. Exceptions sustained.

Cited: 123 Mass. 322; 127 id. 185; 129 id. 432; 141 id. 36; 159 id. 529.

ATLANTIC NAT. BANK v HARRIS (1875) 118 Mass. 147.

Money had and received. The plaintiff's assignor, a state bank, paid money to defendant which it owed to B, upon the defendant's falsely representing that he had paid the claim to B. B subsequently brought an action against the plaintiff and recovered judgment, whereupon plaintiff brought this action against defendant. The defendant contended that no recovery could be had: 1, Because no cause of action against him passed by assignment of the rights of the state bank to plaintiff; 2, because Statute of Limitations barred the action which was not begun within six years after the state bank paid him the money. Judgment for plaintiff, but with interest from date of this action only. Appeal.

Endicott, J. 1. The chose in action passed by assignment and plaintiff can maintain this action in its own name. 2. The Statute of Limitations does not apply, as the plaintiff did not know of its right of action until within six years before this action was begun. 3. Plaintiff is entitled to interest from date it paid the money to defendant. Judgment affirmed and modified.

Cited: 120 Mass. 423; 124 id. 574; 139 id. 333; 144 id. 314; 151 id. 308; 154 id. 91.

BROWN v ABINGTON SAV. BANK (1875) 119 Mass. 69.

Contract on account of a deposit. The defendant had been served with notice to produce the deposit book containing the plaintiff's deposits. It did so, but objected to its admission. The court admitted it. The deposit was paid on an order found to be a forgery. The court instructed the jury that if the money was paid on a forged order, in good faith, without notice of the defect, the bank would not be protected thereby. Verdict for plaintiff. Exceptions. As to one of the exceptions, the court certified that it was not saved or taken at the trial.

Per curiam. 1. The book of deposit was admissible in evidence at least to show the amount of the plaintiff's money received by the defendant. 2. The exception certified by the court not to have been saved or taken at the trial, is not open to the defendant. Exceptions overruled.

MERCHANTS NAT. BANK v GLENDON (1876) 120 Mass. 97.

Where an affidavit of no defense under Statute of 1874, ch. 248, sec. 3, was objected to on the ground that it did not set forth that a debt or unliquidated demand in money was sought to be recovered, and a certificate of authority to commence business; and the testimony of an officer of another bank, to the effect that it had dealings with the defendant bank as a banking corporation, was offered as evidence: Held, that the affidavit complied with the statute, and the evidence was admissible to show that the defendant was a de facto banking corporation.

UPTON v NATIONAL BANK OF SOUTH READING (1876) 120 Mass. 153.

Bill to redeem land. The plaintiff was assignee in bankruptcy of E. The defendant had loaned E \$300 upon a promissory note, taking as collateral security a mortgage upon lands, payable to a third party and assigned to defendant. In addition, E and defendant had an oral agreement that another note, then owing by E to defendant, should be considered as forming a part of the indebtedness covered by the mortgage collateral. Plaintiff tendered unpaid balance of \$3,000, which defendant refused to accept unless the other note was paid. Plaintiff objected that defendant had no power under the National Banking Act to loan money on real estate, taking a mortgage as security; and that evidence of the oral agreement that the mortgage should stand as security for the other note was incompetent. Decree for defendant. Appeal.

Devens, J. 1. While a national bank is prohibited from loaning money on real estate security and taking a mortgage payable to itself, there is nothing to prevent it from taking as collateral, by assignment from a third party, a mortgage previously executed. 2. If this action had been between E and defendant, the oral agreement would have been admissible. The present plaintiff stands in E's shoes. Decree affirmed.

Cited: 142 Mass. 550; 159 id. 432; 169 id. 43.

NATIONAL SECURITY BANK v CUSHMAN (1877) 121 Mass. 490.

On promissory note against maker. The note was payable to L, and was by him indorsed and discounted by C at the plaintiff bank. The defendant offered to show that the note was obtained by fraud, and that C, who was one of the directors of the plaintiff bank, had knowledge of the fraud at the time the note was put in circulation. Not admitted. Exceptions. Verdict for plaintiff. Appeal.

Morton, J. It was competent for the defendant to show that the note was obtained from him by fraud, and that C had knowledge of the fraud. Exceptions sustained.

Cited: 124 Mass. 514; 139 id. 334; 147 id. 276; 150 id. 206; 156 id. 509; 158 id. 478; 166 id. 31.

CARPENTER v NORTHBOROUGH NAT. BANK (1877) 123 Mass. 66.

Contract for money had and received. The plaintiff made a promissory note payable to the order of C and delivered it to J. J forged C's indorsement to the note and had it discounted by the defendant, who paid the amount in good faith. Plaintiff paid defendant, the holder, at maturity. The plaintiff afterward discovered the forgery and sued for the money paid defendant. Verdict directed for defendant subject to the opinion of this court.

Lord, J. The money having been paid by mistake, the plaintiff is entitled to recover it back. Verdict set aside.

Cited: 123 Mass. 77.

GOLDRICK v BRISTOL CO. SAV. BANK (1877) 123 Mass. 320.

On contract to recover deposit. The plaintiff had an account with the defendant, a savings bank. His bank book was stolen. The thief presented it to defendant, was paid the deposit and receipted therefor in plaintiff's name. Defendant's officers did not know plaintiff by sight. The bank book contained a by-law of the defendant which provided that defendant should not be responsible for any loss sustained, when a depositor had not given notice of his book being stolen or lost, if such book should be paid on presentation. Judgment ordered for defendant. Exceptions. Appeal.

Morton, J. When plaintiff made the deposit he assented to the by-law, and it thus became a part of his contract. He cannot recover. Exceptions overruled.

Cited: 127 Mass. 185; 129 id. 432; 141 id. 36; 159 id. 529.

MACKINTOSH v ELIOT NAT. BANK (1877) 123 Mass. 393.

Contract to recover deposit. The plaintiff had an account with the defendant bank. The defendant paid checks purporting to be signed by the plaintiff's firm. The signatures to the checks were forgeries committed by the clerk of the plaintiff, who stamped them with the hand stamp of the firm. The clerk had been introduced to the cashier by the plaintiff as authorized to receive money on plaintiff's checks. Verdict directed for plaintiff, subject to the opinion of this court.

Gray, C. J. The plaintiff cannot be held bound by his clerk's unauthorized and criminal acts. Judgment on the verdict.

Cited: 171 Mass. 528.

COMMONWEALTH v LANCASTER SAV. BANK (1878) 123 Mass. 493.

Petition in equity, alleging that on December 30, 1875, the defendant bank was perpetually enjoined from doing business, and petitioners were appointed receivers to wind up its affairs; that the treasurer of the Commonwealth had called on the corporation to make a return of the amount of its deposits on May 1, 1876, and of the average amount of its deposit for the six months preceding May 1, 1876, and demanded the payment of a tax on such average amount under the Statutes of 1862, ch. 224, and 1868, ch. 315. Decree against the validity of the Appeal.

Endicott, J. 1. The tax was a tax on the value of franchises in existence on the 1st of May, 1876. 2. There being no franchise in existence when this tax was levied, it was invalid. Decree affirmed.

Cited: 126 Mass. 530; 151 id. 106; 162 id. 120, 128.

POWERS v PROVIDENT INSTITUTION FOR SAVINGS (1878) 124 Mass. 377.

Contract for money had and received. The plaintiff sued as the administrator of Marley, who in his lifetime had two accounts in his name with the defendant. He drew equal amounts from each account, and opened three new accounts with the defendant in the name of "John Marley, Trust." M lost his bank books. He notified defendant of the loss. They were never found. No one demanded the money as M's cestui que trust. Defendant refused to deliver it to plaintiff. The court refused to rule that a prima facie case of the existence of a trust was established. The existence or non-existence of the trust was left to the jury. Exceptions. Verdict for plaintiff. Appeal.

Soule, J. The mere fact that the money deposited by Marley was entered to the credit of "John Marley, Trust," was not conclusive evidence that he held it

subject to a trust in favor of some other person. There was no error, therefore, in submitting the question to the jury. Exceptions overruled.

Cited: 128 Mass. 163; 138 id. 582; 151 id. 219.

WEST BOSTON SAV. BANK v THOMPSON (1878) 124 Mass. 506.

On promissory note against second indorser. The note was made by H to the order of J, and was secured by mortgage on real estate. J assigned the mortgage, and indorsed the note to the defendant to secure a loan. J subsequently repaid the loan, and the defendant, at his request, assigned the mortgage to P & M, and indorsed the note in blank. Before the maturity of the note the plaintiff acquired it in good faith for value. The defense was that the defendant did not intend to indorse the note, but only to assign it to J. It was not proved that plaintiff took the note on the strength of defendant's indorsement. Verdict directed for plaintiff. Exceptions.

Morton, J. 1. It was not necessary for the defendant to indorse the note; but as he saw fit to put it in circulation with his indorsement, he became liable on it to any one who took it in good faith and for value before its maturity. 2. The indorsee has a right to look to all the parties on the note. The fact that he did not rely on the defendant's name is immaterial. Exceptions overruled.

NATIONAL MAHAIWE BANK v BARRY (1878) 125 Mass. 20.

Bill to charge land with a trust. Defendant knowingly received money stolen from plaintiff. Defendant procured his son to purchase land therewith, title being taken in the name of the defendant's wife. The son was a minor, living with his parents. None of the defendants had other sufficient means to buy the land. Decree for plaintiff. Exceptions.

Gray, C. J. Equity will charge the land purchased in the name of the wife with a trust in favor of the plaintiff bank for the amount of stolen money invested in it by defendants. The evidence warranted the presumption that the son received the money from thief, knowing it to have been stolen from plaintiff. Decree for plaintiff.

Cited: 128 Mass. 356; 149 id. 405; 166 id. 515.

NATIONAL PEMBERTON BANK v PORTER (1878) 125 Mass. 333.

On promissory note made by I & Co., payable to order of defendant, and by him indorsed "waiving demand and notice." The plaintiff, a national bank, was indorsee and holder from B. The defense was that a national bank has no authority to buy a promissory note. Verdict for plaintiff. Exceptions by defendant.

Lord, J. This defense is not available to the defendant. If the transaction was void as between B and the plaintiff, the plaintiff is still entitled to recover from defendant and to hold the proceeds of the note in trust for B. Exceptions overruled.

Cited: 126 Mass. 534; 127 id. 77; 129 id. 440; 131 id. 272, 274; 134 id. 180; 137 id. 309; 157 id. 549; 160 id. 180.

ATTLEBOROUGH NAT. BANK v ROGERS (1878) 125 Mass. 339.

Money had and received. The defendants were brokers engaged in selling commercial paper. They sent certain negotiable notes to plaintiff, ordered by the president, and received a check for the amount from its cashier. The directors refused to purchase the notes, contending that the sale was dependant upon their approval. The answer was a general denial. Case reported for the determination of this court.

Lord, J. If there was a completed contract between the parties for the purchase and sale of the notes, it is immaterial whether plaintiff had the right to buy or not. The defendants had the right to sell. Nor could plaintiff rescind the contract thus fully performed on the ground that it had no authority to purchase the notes. Let the case stand for trial.

Cited: 131 Mass. 274; 160 id. 180.

NORTH NAT. BANK v HAMLIN (1878) 125 Mass. 506.

On promissory note made by defendant to his own order, indorsed by D & Co., to whom it was delivered by defendant, and for whom it was discounted by plaintiff. The defense was a general denial. The note was protested for non-payment, and two days after the bank charged off a balance on its books to the credit of D & Co., who kept an account there. The bank held other paper on which D & Co. were liable as indorsers, and did not intend to apply the balance to the note in suit exclusively. The defendant asked the judge to rule that the plaintiff was bound to apply balance to the note in suit. The judge refused, and ordered judgment for plaintiff. Exceptions by defendant.

Lord, J. The defendant is ultimately liable as maker. He claims a deduction because of partial payment. Such payment is not pleaded; if made, it was not made by him, nor in his behalf, nor was it one which in law would inure to his benefit. Exceptions overruled.

Cited: 174 Mass. 474.

PIERCE, ADM'R v BOSTON FIVE CENTS SAV. BANK (1878) 125 Mass. 593.

On contract to recover deposits with interest in a savings bank. The action is brought in the name of the administrator of the estate of G for the benefit of M. The superior court, on petition of the bank, ordered P as administrator to be made a party defendant under Statute of 1876, ch. 203, sec. 19, whereby claimants to funds in banks may be made parties defendant. Verdict for plaintiff. Exceptions.

Gray, C. J. An action to recover the deposit can only be brought in the name of the depositor, or, in case of his death, in the name of his administrator. It is inconsistent with the terms of the statute, and with the rules of the common law, to make the plaintiff himself a defendant also. Verdict set aside.

Cited: 141 Mass. 306.

GLOBE NAT. BANK v INGALLS (1879) 126 Mass. 209.

On promissory note against makers. Answer: General denial, and plea of payment of a note for which this was given as collateral security. The plaintiff held a prior note of which the note in suit was a renewal, and held bonds as collateral to such prior note, and made an arrangement with the assignee in bankruptcy of an indorser on the prior note, by which the bonds were to be sold at public auction. The plaintiff bid a certain amount, but no one bidding more, kept the bonds and proved its claim. The plaintiff was allowed to prove that there was no sale. Verdict for plaintiff. Exceptions.

Ames, J. 1. Evidence that the attempt to sell the bonds at auction was unsuccessful was admissible. 2. The plaintiff had received from the trustee, to whom the property of the railroad corporation had been mortgaged to secure the payment of its bonds, certain sums of money arising from a sale of a portion of that property, which sums the plaintiff offered to allow in part satisfaction of its claim. The defendant urged that the receiving of this payment was evidence to show a previous bona fide sale of the bonds to the bank. There was no error in refusing so to rule. Whether the plaintiff held the bonds as collateral security or as absolute owner, he might properly receive any payment that might be made thereon. Exceptions overruled.

MACHINISTS NAT. BANK v FIELD (1879) 126 Mass. 345.

Bill in equity, against F, a broker; H & H, auctioneers; and D, a purchaser. P owned shares of plaintiff's stock, which were taken without her knowledge, and with a forged power of attorney delivered to F for sale. He sent them to H & H, who sold them to D. Plaintiff, at F's request, issued a new certificate in the name of H & H, which, with the power of attorney, was delivered to H & H, and by them to D. A new certificate was then issued to D. P then brought suit against plaintiff, and the latter delivered to her a certificate for the shares. She was not a party herein. Plaintiff asked that the other defendants pay the money given by D either to D or to plaintiff for D's benefit; and that D surrender the certificate.

Gray, C. J. The bill cannot be maintained. D cannot be ordered to return his certificate. He purchased in good faith and for value. The relief prayed against F, and H & H is for D's benefit, contingent on his being ordered to surrender

his certificate, and as he is not bound to do so, he has no claim against either of the defendants. P, the original owner, is not a party. Bill dismissed.

Cited: 126 Mass. 445; 135 id. 474; 137 id. 429; 138 id. 49; 150 id. 203.

HOLMES v FIRST NAT. BANK OF FALL RIVER (1879) 126 Mass. 353.

Bill by trustees in bankruptcy of the estate of E & M, to compel the conveyance to them of shares of stock conveyed by E & M to defendant, a bank, as collateral security for a loan to E & M by the defendant. When the loan became due, defendant accepted a check of E & M, erroneously supposing it to be against funds, and surrendered the certificates. E & M were in fact wholly insolvent, and later in the day redelivered the certificates to defendant. They had neither funds nor a reasonable expectation of having funds in the hands of the drawers to meet the check. The question was, whether the transaction was on a payment of the loan.

Colt, J. The check of E & M was not a payment because it was drawn with no funds to meet it. The delivery of the securities to E & M did not terminate the pledge because they were obtained wrongfully. The act of restoring them to defendant was not a new pledge, but simply restoring defendant to its rights. Bill dismissed.

Cited: 158 Mass. 593.

COMMONWEALTH v BARNSTABLE SAV. BANK (1879) 126 Mass. 526.

Petition in equity, by Board of Commissioners of Savings Banks, alleging that \$4,842.38 was assessed on defendant bank, being a tax imposed by statutes of 1862, ch. 224, and 1868, ch. 315, on the average deposits of six months preceding May 1, 1878, and praying that its receivers be ordered to pay it. The bill was filed February 21, 1879. On September 28, 1877, the bank was, as averred in the answer, enjoined from the exercise of its franchise by decree of this court, except so far as might be necessary to maintain its organization, collect its debts, and discharge its obligations. On October 16, 1877, the injunction was modified by extending to the bank other powers, such as the power to sue, to invest money, to foreclose and purchase mortgaged property, to sell property obtained by foreclosure, and to pay taxes. On May 23, 1878, all powers were taken from the bank and receivers were appointed.

Endicott, J. The bank was liable for the tax on May 1, 1878, and cannot be relieved from this obligation because afterward the court found it necessary to issue a permanent injunction and appoint receivers. Decree for complainants.

Cited: 127 Mass. 242; 151 id. 106; 162 id. 120, 128.

**ATLAS NAT. BANK v SAVERY. } (1879) 127 Mass. 75.
FREEMAN'S NAT. BANK v SAVERY }**

On promissory notes against second indorsers. One note was made by L, payable to P & Co., first indorsed by P & Co., and after them by the firm name of defendants. L was a member of both firms. The note was made for L's accommodation, in fraud of defendants, L signing defendants' firm name. Plaintiff, a national bank, purchased in the market, in good faith, before maturity, from a broker. The other note was similarly made and indorsed. Plaintiff purchased it in good faith, before maturity, from D, known by plaintiff to be a member of the firm of P & Co. In the second action, the court ruled that plaintiff was affected with notice as to all defendants except L. Verdict against all defendants in the first action. Verdict ordered against L, and for other defendants in the second action. Exceptions.

Lord, J. 1. The plaintiff's power to purchase notes is entirely independent of the executory contract which plaintiff is seeking to enforce. 2. There is nothing in the form of the notes to charge plaintiff with knowledge of their invalidity. 3. That one note was sold by a broker raises no presumption that he was L's agent for its negotiation, so as to charge plaintiff with notice of its infirmity. 4. The fact that the second note was discounted by a member of the firm that was the prior indorser, does not raise the presumption that defendants were merely accommodation indorsers. Exceptions overruled in the first action. New trial ordered in the second.

Cited: 127 Mass. 84; 129 id. 558; 130 id. 595; 136 id. 572; 137 id. 309; 148 id. 499; 149 id. 449; 154 id. 167; 156 id. 509; 157 id. 549; 160 id. 180; 161 id. 89; 162 id. 75; 163 id. 385; 175 id. 75.

NATIONAL SECURITY BANK v McDONALD (1879) 127 Mass. 82.

On promissory note against makers. Defendants T & J were partners. K agreed to discount a note given them by G. Subsequently T, without his partner's knowledge and without consideration, executed to K in the firm name a note dated the same day, for the same amount, and payable at the same time as G's note. K discounted G's note. He wrote on the back of the firm note "this note is held by me for note signed by" G, and described it. K sold G's note, and afterward the note in suit to plaintiff. Verdict ordered for plaintiff. Exceptions.

Colt, J. 1. The writing on the note in suit, together with its similarity to G's note, charged plaintiff with knowledge of its infirmity. 2. In order to charge all the members of the partnership, the burden is on plaintiff to show that the note was given with their consent, or in payment of a firm debt. Exceptions sustained.

BRADLEE v WARREN FIVE CENTS SAV. BANK } (1879) 127 Mass. 107.
TAPPAN v SAME }

Assumpsit. The first case is against defendant, as indorser, on three notes payable to the order of defendant, and indorsed in its name by M, its treasurer. The notes were purchased by defendant and went into possession of M, as treasurer. On a vote of the defendant, they were sold to R, who sold them to plaintiff. The second case was for interest on two other notes of the same maker, indorsed in the same way. The declaration contained count for money had and received, based on false representations by defendant. Judgment for defendant in each action. Exceptions.

Soule, J. 1. The vote of the defendant corporation to sell the notes did not authorize the treasurer so to indorse them as to impose the liability of indorser on the defendant. 2. Authority to indorse is not to be inferred from the nature of the treasurer's office, though the by-laws authorized him to draw all necessary papers, and discharge all obligations of the corporation, and made his signature binding on the corporation. 3. By suing on the notes in the second case, the plaintiff elects to stand by the contract. He cannot stand at the same time and in the same action in the attitude of repudiating the contract. Exceptions overruled.

Cited: 133 Mass. 20; 137 id. 444; 159 id. 508; 173 id. 57; 175 id. 382.

DONLAN EX'R v PROVIDENT INST. FOR SAVINGS (1879) 127 Mass. 183.

To recover the amount paid by defendant bank on D's bank book to a person, who, after the death of D, presented the book for payment, representing herself to be depositor. The plaintiff, as executor of D's estate, demanded payment. The by-laws were signed by D with her mark. She was unable to read. The by-laws required notice of the book being lost or stolen, or the defendant would not be responsible for payment to the wrong person. Before payment by the bank, the executor published the usual probate citation to show cause against probate of the will. The jury negated negligence on the part of the bank. Verdict for defendant. Exceptions.

Colt, J. 1. The by-laws apply equally to the depositor and his personal representatives. 2. The citation of the probate court did not affect the defendant with notice, either actual or constructive. Exceptions overruled.

Cited: 141 Mass. 36; 159 id. 529.

NATIONAL MAHAIWE BANK v PECK (1879) 127 Mass. 298.

On promissory note against indorser. The note was signed by B, "Treas.," and indorsed by defendant. B kept an ordinary account with plaintiff, a bank. He was treasurer of a town. The plaintiff gave B a draft for the note, to be used for paying the town's debts. The transaction was not made a part of B's individual account. The plaintiff held B's personal note. On its maturity plaintiff applied B's balance to its payment. Three days after, Peck presented B's check to the

bank in which B directed the balance to be paid on account of the official note. The cashier refused so to apply it.

Gray, C. J. Where by express agreement or by a course of dealing a note or bond of the depositor is not included in the general account, any balance due is not to be applied in satisfaction of that note or bond, even for the benefit of a surety thereon, except at the election of the banker. Judgment for plaintiff.

GERRISH EX'RS v NEW BEDFORD INST. FOR SAVINGS (1879) 128 Mass. 159.

To recover a deposit. D deposited in his own name and on his own account all the money allowed by the rules of the bank. He afterward made three other deposits as trustee, one for his only son, and the others in trust for two granddaughters, naming them. He took separate books for these accounts, retaining them and receiving the dividends. This action was brought by D's executors. The son and granddaughters appeared as claimants. Judgment for plaintiffs. Motion for new trial.

Colt, J. The claimants offered to prove at the trial that testator had said to each of them at different times, "that he had put this money in the bank for them, that he wanted to draw the interest during his lifetime, and after he was gone, they were to have the money." The evidence was admissible. Notice given by the donor to the donee of the existence of the trust would in most cases be decisive of the intention. It is a declaration in the nature of an act necessary to complete the transaction and create the trust. A jury would be justified in finding that the testator had fully constituted himself a trustee for these claimants. New trial granted.

Cited: 130 Mass. 130; 136 id. 209; 138 id. 582; 140 id. 166; 142 id. 453; 146 id. 422; 151 id. 220; 166 id. 260; 167 id. 363; 170 id. 414; 173 id. 308, 309.

BARNSTABLE SAV. BANK v SNOW (1880) 128 Mass. 512.

On joint and several promissory note, signed by defendant S as principal, and the other defendants, G & T, as sureties. The plaintiff bank had passed into the hands of receivers. G & T had several accounts with the bank, and offered the deposits in payment of the note. Judgment reserved, subject to opinion of the court.

Lord, J. 1. The G. S., ch. 130, sec. 8, expressly provides, "if there are several defendants, the demand setoff shall be due to all of them jointly." The statute, therefore, in terms forbids the setoff claimed in this case. 2. Statute of 1878, ch. 261, merely affirming in favor of depositors in savings banks the existing law as to setoff, does not apply. Judgment for plaintiff.

Cited: 168 Mass. 538.

COMMONWEALTH v READING SAV. BANK (1880) 129 Mass. 73.

To set aside a mortgage. The petitioner owned a mortgage given by P on his land. She alleged that P was the treasurer of the defendant, having been elected in 1869; that he gave a bond to secure his faithfulness "while and so long as he acts as treasurer," secured by a prior mortgage on the land; that the bond was an annual one; that P had been elected but once, and had fulfilled the conditions of the bond; and that the bank was insolvent, and receivers had begun suit; and asked to have the prior mortgage discharged. The G. S., ch. 57, secs. 137, 138, provides that the treasurer of a savings bank shall hold his office during the pleasure of the trustees. Demurrer. Sustained. Petition dismissed. Appeal.

Colt, J. The bond is for the good behavior of the treasurer for an indefinite time. Its obligation ceases only when he ceases to act as treasurer. Decree affirmed.

Cited: 130 Mass. 245.

DICKINSON v CENTRAL NAT. BANK (1880) 129 Mass. 279.

Conversion of bank stock. In 1866, defendant issued to P a certificate for 10 shares of its capital stock, which were transferable only on the books of defendant by P or his attorney, on the surrender of the certificate. In 1871, P gave his promissory note to C & Co. for \$1,500, payable on demand, and at the same time he delivered the certificate of stock as collateral security. P executed, on a separate paper, a power of attorney authorizing C & Co. to

transfer the stock. In October, 1875, P became a bankrupt, and plaintiff became his assignee in bankruptcy. In December, 1875, J C, the surviving partner of C & Co., notified the plaintiff and P that the stock would be sold at public auction on February 21, 1876. The notice and affidavit of service were recorded in the city clerk's office of Worcester where all parties resided. On February 15, 1876, plaintiff demanded of the defendant a transfer of the stock to him. The defendant refused, and transferred the stock to L, who purchased it at the public sale on February 21. Plaintiff offered to show that C & Co. agreed with P to keep the transaction secret, so that P might obtain a false credit. Judgment for defendant. Exceptions.

Colt, J. 1. The delivery of the certificate as collateral security for a debt due, with a power of attorney to transfer the shares and execute an assignment of them to any person, conferred a power coupled with an interest and gave to any one claiming under an execution of the power a right to demand of the bank a certificate of the stock. This power was not revoked by the bankruptcy of P. 2. An assignee under the bankruptcy act takes no greater right in property than the bankrupt had at the time of filing the petition. The offer of proof was properly excluded. 3. The only right which the plaintiff as assignee took in these shares was a right to redeem them by paying the debt which they were pledged to secure, and that right was foreclosed by sale of the same at public auction after notice. Exceptions overruled.

Cited: 129 Mass. 437; 133 id. 520; 134 id. 242; 138 id. 248.

WOOD v BOYLSTON NAT. BANK (1880) 129 Mass. 358.

Where a promissory note was received by an attorney at law for collection, and he deposited the same, properly indorsed, with his bank for collection, without any mention of his title, and the bank collected the note and appropriated the proceeds toward paying a debt due it by the attorney, and the attorney subsequently became bankrupt, and the bank made a settlement with his assignees, crediting this note and receiving but a part of its claim, and not till afterward was the bank informed of the real owner's claim, Held, that the banker, having a general lien for the balance due on all securities in his hands, had a right to so apply such funds, and that the same could not be recovered by the original owner of the note in an action against the bank.

MANUFACTURERS NAT. BANK v THOMPSON (1880) 129 Mass. 438.

Action against indorsers of a promissory note. The note was payable at the plaintiff bank, and discounted at the F Bank. When the note became due, the F Bank charged it to the plaintiff bank and sent it through the clearing house for payment. Plaintiff's teller, by mistake, stamped, "paid" on the note. The mistake being discovered before the close of banking hours, both the F Bank and the indorsers were notified, and the note duly protested. The F Bank claimed that under the rules of the clearing house the note became the property of the plaintiff, and it was paid by the plaintiff expressly without any waiver of its legal rights. The note was indorsed in blank. At the trial the F Bank disclaimed all title or interest in the note. Judgment for plaintiff. Appeal.

Colt, J. 1. The note is still an outstanding unpaid note. 2. The plaintiff has sufficient title to maintain this action. Judgment affirmed.

Cited: 139 Mass. 518, 519; 166 id. 46.

NORTH BRIDGEWATER SAV. BANK v SOULE (1880) 129 Mass. 528.

Action on three promissory notes. Defendant signed for the accommodation of P & X. P & X failed. Defendant and S, treasurer of plaintiff, were jointly liable as sureties on a note of P & X. Defendant paid it. S agreed to pay the notes in suit so that defendant might prove them in bankruptcy against P & X; S brought the note to the creditors' meeting and stated that he had paid them. Defendant gave S the paid note. He proved the three as a debt due himself. Defendant never consented to these notes being taken from the register's office. K, plaintiff's receiver, testified that after S's death he found the three notes in plaintiff's regular place of deposit. Defendant's offer to prove that S told the register that the bank had been paid, excluded. Defendant admitted S had not paid plaintiff. Defendant offered to set off a deposit purchased for value before proceedings to restrain the plaintiff from doing its usual business were begun. The

Statute of 1878, ch. 261, provides that any person indebted to a savings bank may set off the amount of any deposit, held and owned by him, if acquired before proceedings to restrain such bank from doing its usual business. Case reserved subject to the opinion of the court.

Lord, J. 1. There are no facts which would warrant a jury in finding the defendant was discharged. 2. There is no element of unconstitutionality in the statute. 3. No notice of assignment to the bank is necessary to sustain the setoff. Judgment for plaintiff as to the notes, for defendant as to the setoff.

ELLISON v NEW BEDFORD FIVE CENT SAV. BANK (1880) 130 Mass. 48.

To recover deposits. The father of the two plaintiffs had, in his lifetime, made two separate deposits with defendant, one for plaintiff M, and the other for plaintiff E. This action was brought by them jointly after the father's death. No objection was made on the ground of misjoinder. Verdict for defendant on the merits. Reported for determination on the verdict.

Gray, C. J. The merits of this case cannot be decided upon the report before us. The declaration is for a sum of money due to the plaintiffs jointly. But on the evidence, their claims, if meritorious, are several and not joint, and cannot be united in one action. The fact that defendant made no objection to this joint action, cannot enable this court to enter a judgment which the law does not warrant. Judgment for defendant.

Cited: 157 Mass. 397.

PEW v FIRST NAT. BANK OF GLOUCESTER (1881) 130 Mass. 391.

For services. Plaintiff, president of defendant, was appointed by the directors as one of a committee on the alteration of defendant's building. Plaintiff devoted all his time, except what was required for his duties as president, to supervising the work. The directors knew of the services. Plaintiff's labor saved the expense of a superintendent. Plaintiff's salary as president had been fixed at \$400 per annum. He was also a director. When he was re-elected president in 1875, he refused to serve longer unless his salary was increased to \$2,000; but he was sworn in without any increase. A vote was taken by the directors, continuing salary at the old figure. Plaintiff had no actual knowledge of the resolution, and he only attended the meeting at which he withdrew his resignation, on the assurance by one of the directors that his salary would be satisfactorily attended to. The first count was for services in connection with the alteration; and the second for salary at the rate of \$2,000 per annum. Verdict for plaintiff on first count; for defendant on second. Case reserved.

Morton, J. 1. The mere fact that the services were rendered for defendant's benefit does not make it liable on an implied promise to pay for them. 2. The burden was on the plaintiff to show that the defendant had, by an express or implied contract, agreed to increase his salary. The evidence shows the express refusal by the directors to make such a contract. New trial ordered upon the first item only.

Cited: 151 Mass. 435; 173 id. 446.

REED v HOME SAV. BANK (1881) 130 Mass. 443.

Tort for malicious prosecution. On April 25, a verdict was rendered for defendant, the court holding that the action could not be maintained. On the same day plaintiff filed exceptions, which were disallowed on June 27, for want of notice of filing, and the case continued "nisi." On July 1, the report was filed. After the entry of the case in this court, a motion to dismiss was made, on the ground that the court could not report the case after exceptions had been disallowed.

Gray, C. J. 1. The report of a question of law raised at the trial may be filed by the judge at any time during the same term at which the verdict is returned. The case will stand for argument. 2. A savings bank is liable to an action for damages for malicious prosecution. Exceptions sustained.

Cited: 133 Mass. 19, 479; 137 id. 439; 140 id. 575; 148 id. 245; 152 id. 52; 160 id. 178; 172 id. 297.

FIRST NAT. BANK OF PETERBOROUGH v CHILDS (1881) 130 Mass. 519.

On promissory note. The note in suit was made in New Hampshire, the rate of interest there being 6 per cent. A higher rate than this was exacted on the

note in suit, and a deduction was claimed from the amount apparently due on the note for the interest, under sec. 5198 of the U. S. R. S., providing that a national bank charging more interest than allowed by the state should forfeit it. Some of the interest had been reserved more than two years before this action was commenced.

Soule, J. 1. The forfeiture of the interest can be availed of, in an action in the state court as well as in the United States court. 2. As the taking of unlawful interest avoids the note so far as the interest is concerned, the defense is open to the defendant in an action brought to recover the amount of the note, though it be more than two years after the taking of unlawful interest. The statute only limits to two years the time within which an action may be maintained to recover twice the amount of unlawful interest paid. Judgment accordingly.

LITTLE v LITTLE (1881) 131 Mass. 367.

To recover taxes. The tax in question was levied on national bank stock owned by defendant's testator, an inhabitant of the district of Newbury, the bank being situated in the town of Newburyport, where the stock was assessed under a statute which required that stock in national banks could be assessed only in the cities or towns where the banks were located.

Endicott, J. The legislature having forbidden the assessment of these particular shares in any place but Newburyport, Newbury cannot include them in her valuation, nor can the school district of Newbury reach them for purposes of taxation. Judgment for defendant.

Cited: 138 Mass. 528, 530.

NATIONAL EXCHANGE BANK v NATIONAL BANK OF NORTH AMERICA
(Three Cases) (1882) 132 Mass. 147.

For money had and received. The notes in question were made by C & Co., payable at plaintiff, and were sent through the clearing house by defendants, and settled for by plaintiff in the usual way, as though paid. C & Co. had money on deposit with plaintiff that day, but not enough to pay these notes. They had been accustomed to pay their notes by check between one and two o'clock, but had not authorized plaintiff to apply their deposit in payment. Plaintiff retained the notes until after two o'clock, when it ascertained that they would not be paid. Before the banks closed, plaintiff tendered back the notes to defendants; and demanded the money paid thereon; which was refused. These actions were brought to recover it. There was a finding for plaintiff in each case, and they were reported here for determination.

Endicott, J. 1. Sending the notes to plaintiff through the clearing house was not a demand for payment. 2. The receiving bank had no authority to apply the deposit of the makers of the note to their payment. Payment was made under a mistake of fact, and the money can be recovered back. Judgment for plaintiff.

Cited: 139 Mass. 518, 519; 176 id. 306, 307, 308.

DANA v NATIONAL BANK OF THE REPUBLIC (1882) 132 Mass. 156.

For money had and received. A check drawn by plaintiff on defendant bank, and payable to the order of a particular person, was cashed by the clerk of the plaintiff, who had fraudulently erased the payee's name, and made it payable to bearer. On the first of the following month, the check, with others, was returned to plaintiff with the usual statement and balance. No objection to the payment of this check was made until 23 months after. The account was closed and the balance drawn out two months after the check was paid. Evidence was offered and excluded, showing that the bank had paid 12 other checks drawn by plaintiff, in which the name of the payee was altered. The court decided that, as a matter of law, plaintiff could not be deemed to have ratified the payment of the check in question. Verdict for plaintiff. Exceptions.

Allen, J. 1. Ratification of the payment was a question of fact. 2. The evidence offered in regard to the payment of former checks drawn by plaintiff, in which the name of the payee had been altered, was properly excluded. Exceptions sustained.

Cited: 139 Mass. 523; 171 id. 530.

FIRST NAT. BANK OF LYNN v SMITH (1882) 132 Mass. 227.

On promissory note against indorser. The note was sent by plaintiff to its correspondent in Boston, where the maker resided, for collection. It was stamped as follows: "Pay National Bank of Redemption, or order, for account of First National Bank of Lynn, Mass." Not being paid, the Boston Bank had it protested at maturity. The following day was Sunday. On Monday following, the notary making the protest inclosed a notice of protest to defendants in an envelope directed to the cashier of plaintiff, which notice was received on Tuesday morning, and was mailed to defendants on the afternoon of the same day at their residence. Verdict for plaintiff. Exceptions.

Morton, C. J. 1. The notice was sufficient. 2. The indorsement was sufficient, though not signed, to enable the Boston Bank to demand and receive payment of the note. Exceptions overruled.

Cited: 151 Mass. 417.

TAFT v BOWKER (1882) 132 Mass. 277.

Trustee process. The M Savings Bank, summoned as trustee, admitted that \$292.95 stood on its books to the credit of the defendant in the attachment, when it was levied. The money was claimed by S, to whom the depositor had theretofore delivered his passbook, without any written assignment, to hold as collateral for a note made by him to S. The court found against S. Case reserved.

Field, J. The delivery of a savings bank book as collateral for a debt gave the creditor an equitable claim upon the deposit which was superior to a subsequent attachment. New trial ordered.

Cited: 142 Mass. 375; 147 id. 94; 156 id. 21.

STAFFORD v NEW BEDFORD SAV. BANK (1882) 132 Mass. 315.

Where a bank held the note of a bankrupt corporation, the property of which was transferred to a new corporation organized for the purpose of arranging a settlement with the old corporation's creditors, and the bank thereafter paid for certain stock, receiving dividends in bankruptcy equivalent to the value of such stock, and the surety on the note thereafter paid the balance due on said note, after deducting the amount of dividends, and received an assignment of all securities for the payment of the note held by the bank: Held, in an action to compel a transfer by the bank of the stock, held in the new corporation, to the surety, that such stock was never held as collateral, and that plaintiff was therefore not entitled to the transfer.

COMMONWEALTH v READING SAV. BANK (1882) 133 Mass. 16.

Claims in insolvency. The claims were for money loaned on deposit books of a bank now insolvent. The treasurer, under the by-laws, had charge of the books of account. He made entries of deposits, and could "draw all necessary papers and discharge all obligations of the corporation, and his signature shall be binding on the corporation." The loans were secured fraudulently by the treasurer, without knowledge of the bank or its directors, and without benefit to it or them, on pass-books either paid or in which he had inserted fictitious balances. The receivers asked instructions as to these claims.

Devens, J. 1. The by-laws do not make the treasurer a general agent to bind the bank in the administration of its affairs. He had no such right by virtue of his office. 2. As between the depositor and the bank, it may be shown that an entry in a passbook is an error, and that the depositor is not entitled to receive the sum stated, or that it has been paid. 3. The treasurer of a savings bank is an officer of more limited powers than the cashier of an ordinary commercial bank. 4. The assignee of the bank books stands in no better position in regard to these claims than would his assignor. Claims disallowed.

Cited: 134 Mass. 179; 135 id. 61; 137 id. 303, 438, 439; 173 id. 57.

FIRST NAT. BANK OF PETERBOROUGH v CHILDS (1882) 133 Mass. 248.

On promissory note. There was a judgment for the face of the note without interest. The rate of interest charged was greater than that allowed by law of the state where the note was made. The note sued on was given in renewal of another note which had been several times refused for the face of the original loan,

and the defendants claimed the right to offset the payments of illegal interest on all the notes under sec. 5198, U. S. R. S., which gave the party paying this illegal interest the right to maintain an action for double the amount. Judgment for plaintiff. Exceptions.

Devens, J. 1. While the right to sue for double the amount of illegal interest paid is given by the statute, there is no right of setoff given. 2. Forfeiture of the interest upon the note sued on follows the note, however, and cannot be recovered. Judgment affirmed.

SIBLEY v QUINSIGAMOND NAT. BANK (1882) 133 Mass. 515.

Bill to compel transfer of stock. The plaintiff was the owner of the stock in controversy, being certain shares of stock in the defendant. She transferred them to H, in trust, to hold for her. H had the stock reissued to him, the certificate being in the usual form and containing no reference to the trust. This he assigned to the plaintiff who held it. The stock stood in H's name on the books of the bank, he collecting the dividends and paying them to the plaintiff. A creditor of H attached the stock as the stock of H. Thereafter H assigned his property to two trustees for the benefit of his creditors. The trustees claimed the stock under the assignment and also under the attachment. Plaintiff tendered the certificate for transfer and notified the bank of her right. Decree for defendant. Appeal.

W. Allen, J. 1. The stock, in fact, belonged to plaintiff, and H, her trustee, had nothing which he could assign; and his trustees stand in his shoes. 2. As H had no interest, his creditors acquired none to this stock by the attachment, and it was not necessary to proceed in the attachment suit to determine the question. Decree for plaintiff.

Cited: 138 Mass. 245; 139 id. 33, 34; 149 id. 312.

HOLDEN v UPTON (1883) 134 Mass. 177.

Bill in equity brought by the receivers of a savings bank, to restrain defendant from prosecuting actions at law on, and to compel the delivery to plaintiffs of, certain promissory notes in defendant's possession. The notes bore the name of but one promisor. The statutes forbade savings banks to invest in such notes. They were received by the bank for a loan, and thereafter transferred to defendant by the treasurer.

Allen, J. 1. The notes were held in trust for the depositors by the bank. If a trustee has lent trust money in an unauthorized manner, he not only may recover it back from the borrower, but it is his duty to do so. Hence the notes were valid in the bank's hands, and its receivers may maintain this action. 2. The treasurer, merely by virtue of his office, has no implied power to transfer to a purchaser the notes belonging to the bank. Decree for plaintiffs.

Cited: 135 Mass. 61, 62, 63; 137 id. 438; 141 id. 295; 161 id. 338; 173 id. 57.

WHITE v SPRINGFIELD INST. FOR SAVINGS (1883) 134 Mass. 232.

Scire facias, on a judgment in a trustee process. The question is, whether the defendant in this suit, summoned as a trustee in the original action, when it afterward paid the deposit standing in the name of James Shay, ought to have known that this depositor was the same person who was the principal defendant in the original action, and named in the writ as James Shea, the trustee having deposits belonging to different persons standing in each name. Defendant discharged. Exceptions.

Colburn, J. The question whether Shay or Shea are different names, or only different ways of spelling the same name, was one of fact and not of law. The question of identity was one of fact, and the presiding justice having found the fact in favor of defendant, we do not see that any rule of law has been violated. Exceptions overruled.

MECHANICS NAT. BANK v ROBINS (1883) 134 Mass. 331.

On a draft against acceptors. The drawer was liable on note held by the bank, and it was agreed between the bank, drawer, and the defendant that the latter should accept a draft in favor of the bank, the draft to be discounted by

the bank and proceeds used to pay the note, which was to be given up to defendant. Verdict for plaintiff. Exceptions.

Field, J. It was a necessary part of the agreement that the bank should, on discounting this draft, become the owner of it. Exceptions overruled.

PROCTOR v WHITCOMB (1883) 134 Mass. 428.

On promissory note for \$2,500, payable at the E National Bank to the order of the makers, and indorsed by them and by defendant. The bank lent the makers a sum less than the face of the note on a pledge of it. The makers failed and gave to the bank a demand note for the amount of the loan, declaring the note in suit to be held as collateral for it, and giving the bank powers to sell it on default. The demand note was sold to plaintiff, the note in suit being delivered with it as collateral. The plaintiff requested the court to instruct the jury that there was no evidence that the bank sold to the plaintiff absolutely the collateral security, or did anything more than to sell to the plaintiff the debt for which it held the security, and the interest of the bank in the collateral security as such. The plaintiff seeks to recover only the amount of the loan. Verdict for defendant. Exceptions.

Devens, J. The instruction requested should have been given. Exceptions sustained.

Cited: 136 Mass. 364; 137 id. 309.

LORING v BRODIE (1882-1883) 134 Mass. 453.

Bill to compel the transfer of money and stocks. Defendant B was the trustee for a trust fund consisting of railroad and manufacturing stock, United States bonds, and money, the proceeds of real estate. In 1865, B appointed F, who was cashier of the defendant, attorney to collect the dividends on the stocks held by him as trustee. F receipted for the stock and bonds as cashier. Throughout the transactions, F acted for both, B and the bank. In 1867, F made B a loan from the funds of the bank, B pledging the bonds as security. Subsequently F, as cashier, made many other loans to B, receiving these bonds and the other trust funds as collateral security for B's notes. The notes of B were signed by him as trustee. F left the bank in 1873, and C became cashier. On the note of September 13, 1869, the bonds and the railroad stock were given as collateral security. The balance on this note was included in a note of September 18, 1873. A note was given in 1874 for advances to speculate in cotton. B gave the stocks as security.

Devens, J. If the cashier received the securities with a knowledge that they were wrongfully transferred, and were the property of others, his knowledge must affect the bank. The bank received these bonds charged with the knowledge that they were trust property, and with the duty of ascertaining whether they were so used. The bank was chargeable with notice that B was drawing the proceeds of the real estate from the bank for his private uses. The bank could not receive funds except charged with the knowledge which the cashier had, and subject to the responsibilities which that involved. Decree for plaintiff.

Cited: 137 Mass. 442; 139 id. 333; 145 id. 14; 147 id. 274; 166 id. 31; 167 id. 247; 168 id. 576.

HOLDEN v PHELPS (1883) 135 Mass. 61.

Bill to restrain the power of sale in a mortgage. P, the treasurer of a savings bank, assigned to the defendants a mortgage to pay an indebtedness. P had no authority under the by-laws of the bank to make such an assignment. The directors had not by vote given him authority to make the assignment. P had previously, by verbal consent and by direction of the investment committee, assigned seven mortgages relating to three other estates. The plaintiffs were appointed receivers of the bank. The defendants contended that they were depositors and thus creditors; that it was part of the duty of the treasurer to pay depositors; that he was not bound to pay in cash, but could pay in securities.

Devens, J. 1. While it is the duty of the treasurer to pay certain obligations, if he has not the means of doing so with the cash at his disposal, proper provisions must be made by the board of investment. He does not thereby acquire the right to use and dispose of the invested property of the bank any more than he would that of a third person. 2. A special permission to assign a certain mort-

gage did not invest the treasurer with a general authority to assign mortgages, nor to entitle the defendants to infer that he had such authority, even if this fact had been known to them. 3. When the assignment is returned and the defendants are allowed to stand as creditors, both parties are in their original position. Decree for plaintiffs.

Cited: 137 Mass. 438; 173 id. 57.

EASTMAN v WORONOCO SAV. BANK (1884) 136 Mass. 208.

Money had and received. H deposited money with the defendant bank in the name of plaintiff, but "subject to the order of Parley Hutchins," the depositor. He delivered the bank book to plaintiff. Subsequently he took it from plaintiff to keep for him. He signed and gave plaintiff a paper certifying the money was plaintiff's. H never drew the interest, and retained the book in his safe. Six days after the decease of H, and before the bank paid the money to H's administrators, plaintiff notified the bank of his claim. The bank paid the administrators of H, and E brought this action. Verdict for plaintiff. Case reported for determination of this court.

Allen, J. 1. There was evidence which would authorize the jury to find a completed gift to the plaintiff. The stipulation which accompanied the deposit is not decisive of itself, but is only a circumstance to be taken into consideration. 2. Seasonable notice of the claim was given the bank. Judgment on verdict.

Cited: 138 Mass. 582; 166 id. 260; 173 id. 310.

ROLLSTONE NAT. BANK v CARLETON (1884) 136 Mass. 226.

Action on a bond of C, as clerk of the plaintiff bank, for the faithful performance of duty against principal and sureties. The condition was for the faithful discharge of his duties as clerk of the bank, and against the misappropriation of any of the funds of the bank. C performed the duty of a teller, in receiving and paying out money over the counter. The court found that this was within the duties of a clerk. During the last eighteen months of his service, he committed defalcations and embezzlements of the bank's funds.

Morton, C. J. 1. The word "clerk" does not necessarily import a person who performs the duties of a mere bookkeeper. It is a general name which may embrace many duties including those of a teller. 2. This is an action on the bond, and the judgment must be for the penal sum. Judgment for plaintiff.

Cited: 138 Mass. 383; 168 id. 590.

SHUTE v PACIFIC NAT. BANK (1884) 136 Mass. 487.

On three certificates of deposit, issued by the defendant bank. The answer of the receiver of the bank set off two promissory notes of the depositor, discounted by the bank. The certificate was issued for their proceeds. The depositor indorsed the certificates to the plaintiff. Verdict for plaintiff. Exceptions.

Colburn, J. 1. Certificates of deposit are not due until demand made. They are not within the letter or spirit of G. S., ch. 53, sec. 10, in reference to promissory notes payable on demand. 2. The defendant is not entitled to set off its claims against the certificates. Exceptions overruled.

Cited: 141 Mass. 519.

BROWN v NEW BEDFORD INST. FOR SAVINGS (1884) 137 Mass. 262.

For money had and received. The plaintiff is trustee under an assignment for the benefit of creditors made by B. He seeks to recover the proceeds of stock transferred by B to defendant to secure a note, so far as they are not necessary to pay that note. The defendant claims the right to hold them for a general balance due from B. Verdict ordered for defendant. Exceptions.

Holmes, J. In this state, the English decisions, which adopted a custom of merchants giving bankers a lien for their general balance, would not be applied to the case of a savings bank taking security for a specific note, as here. Exceptions sustained.

Cited: 138 Mass. 331; 141 id. 492; 156 id. 492.

COMMONWEALTH v SCITUATE SAV. BANK (1884) 137 Mass. 301.

Petition in equity, by D, trustee, to compel the receivers of the respondent bank to rank him as a creditor, and to pay him the dividends upon a deposit in the bank. One J had been a depositor. She assigned her claim and book to C. In an action by C, the bank was summoned as trustee of J and defaulted. Execution was issued by petitioner, as attorney for plaintiff, and the bank, by its treasurer, issued a deposit book to him, as trustee, for the amount of J's deposit. The petitioner indorsed on the execution payment of the amount.

Holmes, J. 1. The petitioner cannot claim as assignee of J's account. That belongs to C, whose title is beyond the reach of any dealings between the bank and petitioner. 2. The book was not issued by the bank, but by its treasurer, who had no authority to bind the bank by a book which represented neither the J deposit nor any other. Petition dismissed.

Cited: 141 Mass. 197, 306.

PROCTOR v WHITCOMB (1884) 137 Mass. 303.

On promissory note to the order of the makers, W & T, payable at the Eliot National Bank in Boston, indorsed by the makers, and by defendant, as accommodation indorser, to secure a debt for which a demand note was subsequently given. The defendant, L W, indorsed the note on the understanding it was to be used only in that bank. The makers pledged the note to the bank for a loan. The bank assigned the claim and the note as collateral to plaintiff, who took it with knowledge of these circumstances and for an unlawful purpose. Verdict directed for plaintiff. Reported to this court.

Allen, C. J. 1. The bank, in the absence of an agreement to the contrary, could dispose of the debt and its security, the note in suit. 2. That plaintiff took the note with intent to use it in an unlawful manner does not preclude him from using it in a lawful manner for the purpose of collecting the principal debt. 3. Interest should be computed from the time the demand note was actually given. Judgment for plaintiff.

WHITNEY v ELIOT NAT. BANK (1884) 137 Mass. 351.

Bill of interpleader against the bank and assignee of H & Co. to determine the ownership of a sum of money deposited with plaintiffs. H & Co. shipped goods to M, and drew drafts, expressed to be chargeable to the goods, on M in favor of the bank, which discounted the drafts. M had notified H & Co. not to draw on him. This was not known to the bank. M received notice that the drafts had been drawn on him, but he remitted the amount to H & Co. instead of accepting the drafts. The drafts were protested. The bank did not possess the bills of lading. H & Co. suspended payments and deposited the money received from M in plaintiffs' hands, for whom it might concern.

Field, J. The drafts are negotiable bills of exchange, not payable out of a particular fund, and do not constitute an assignment of that fund. The money should be paid to the assignee in bankruptcy. So ordered.

Cited: 142 Mass. 375; 151 id. 385; 176 id. 540.

COMMONWEALTH v READING SAV. BANK (1883-1884) 137 Mass. 431.

In dissolution proceedings. Upon the application of the plaintiffs, the defendant was enjoined from the further continuance of its business, and receivers appointed to take possession of its property. A filed a petition alleging that in November 29, 1871, W conveyed in mortgage certain land in Reading to the defendant. The consideration expressed was \$5,000, and was given to secure a promissory note of that date. On May 14, 1878, the bank, by its treasurer, P, assigned the note and mortgage to the petitioner and received the principal and interest then due, with the privilege to the bank of repurchasing it. The treasurer showed A a copy of the resolution of the trustees authorizing the treasurer to discharge, assign and release all mortgages belonging to the bank. The word "assign" had been interpolated without the knowledge of the bank. On April 30, 1879, A took possession of the property. On May 5, 1879, the receivers took possession of the property by virtue of a mortgage of \$1,550, given by W on May 16, 1870. The petitioner prayed that the receivers be ordered to reform the assignment by executing to the petitioner a sufficient assignment.

Devens, J. 1. If false certification be made by the recording officer, the in-

jury resulting therefrom must be borne by the corporation whose officer he is, and it must be estopped to deny the correctness of the vote as certified. 2. The fact that the bank was entitled to the security did not render the transaction the less an actual sale. If, by the defective execution of the assignment, the intention is not completely carried out, a court of equity should correct it, and treat the mortgage given to secure the debt as transferred with it. Decree accordingly.

Cited: 141 Mass. 459; 147 id. 281; 168 id. 121.

SWAN v WARREN (1884) 138 Mass. 11.

Trustee process. A savings bank was summoned as trustee for a deposit credited to defendant on its books. W and P were claimants of the fund by virtue of an assignment to them from the defendant of all the right, title and interest she had or might have to a sum of money in B's hands, derived from the sale of a specified farm. The deposit represents part of the proceeds of the sale of the farm by B and deposited by him before the assignment. The savings bank book was held by B, administrator of the estate, the deposit being made by him in the name of the assignor. The plaintiff had judgment. Claimants excepted.

Devens, J. The assignment included the money held by B, so far at least as to keep it from the assignor. Exceptions sustained.

HOLDEN v METROPOLITAN NAT. BANK (1884) 138 Mass. 48.

Action of contract. Plaintiffs were receivers of a savings bank whose treasurer caused stock, belonging to the savings bank, to be transferred to defendant, a national bank, and borrowed money from the defendant on a pledge of the new certificates, as though for the savings bank. He executed a power of sale as treasurer to defendant. The debt was unpaid. Defendant sold the stock. Plaintiffs sought a remedy in contract contending that the acts of the treasurer were unauthorized.

W. Allen, J. The plaintiffs cannot both deny and affirm the validity of the transfers to defendant. By denying the validity of the transfers, they disclaim the ownership of stock represented in the certificates issued upon such transfers; by affirming the validity of the transfers, they ratify the pledge of the stock. In one case, the stock sold would not belong to the savings bank; in the other, the sale would be authorized by the savings bank. In neither case can the plaintiff recover in this action, which is founded on an unlawful sale of stock belonging to the savings bank. New trial ordered.

HAYDENVILLE SAV. BANK v PARSONS (1884) 138 Mass. 53.

On a note against sureties. The maker, after the maturity of the note, asked an extension. Plaintiff's treasurer promised to let the note "lay along," if the maker would keep up the interest. The note did not specify the rate of interest after maturity. The maker paid plaintiff six months' interest in advance at 7 per cent as interest after maturity. This and subsequent similar payments, plaintiff indorsed on the note. One of the defendants demanded that plaintiff sue on the note. Verdict directed for plaintiff. Exceptions.

Holmes, J. 1. Receipt of interest in advance on an overdue promissory note from the maker does not of itself import such a giving of time as will discharge the sureties. 2. Payments and the indorsement of payments of interest at 7 per cent, irrespective of time, since the note was due, do not amount to a change of the contract, or satisfy the statutory requirement of an agreement in writing to bind the maker to pay that rate in the future. 3. The fact that one surety told the plaintiff's treasurer to sue on the note is immaterial. Exceptions overruled.

Cited: 166 Mass. 264.

MILLER'S RIVER NAT. BANK v JEFFERSON (1884) 138 Mass. 111.

To prove collateral notes in insolvency proceedings. The plaintiff bank discounted a draft of the firm of G S & Co., consisting of G, H and S, now in insolvency, individually and as a firm. Plaintiff took as security for this and antecedent debts, demand notes of the firm owned by G and H, respectively. The discounted draft was paid before insolvency proceedings were begun, but some of the antecedent debts had not been paid. The question was, whether the bank could

prove the collateral notes, after having already proved for the whole amount of the unpaid advances.

Holmes, J. The collateral notes represent distinct contributions from members of the firm who are liable in solido for the firm's debts, but still contributions diminishing their separate estate and swelling that of the firm. The bank is a holder for value and entitled to prove the notes. Judgment for plaintiff.

Cited: 151 Mass. 389; 156 id. 125; 158 id. 35; 160 id. 172; 164 id. 316; 176 id. 393.

CENTRAL NAT. BANK v WILLISTON (1885) 138 Mass. 244.

Bill in equity to secure plaintiff's right to certificates of stock. An owner of stock in a domestic corporation delivered the certificate, with an assignment in blank signed by him, to the plaintiff as security for negotiable paper. Before this assignment was filled out, and before notice of the assignment to the corporation, the stock was attached as the property of the assignor by defendant. The stock was transferable only on the books of the company.

Allen, J. The question is, whether the title of the bank is good against the attaching creditor. Sec. 26, Statute of 1870, ch. 224, provides that shares may be transferred by the proprietor, by a writing under his hand, which shall be recorded in the corporation's transfer book. The purchaser shall, on producing the writing to the treasurer, and delivering to him the former certificate, be entitled to a new certificate. The attaching creditor acquired the rights of a purchaser for value. That, upon these facts, the statute makes the assignment invalid as to him, cannot be doubted. Bill dismissed.

Cited: 159 Mass. 66.

GRAY v STREET COMMISSIONERS OF BOSTON (1885) 138 Mass. 414.

Certiorari to review tax assessment. Plaintiff's tax returns showed his indebtedness amounted to \$1,000, and his deposit in a national bank amounted to \$1,343.46 on demand, without interest. Plaintiff claims his indebtedness ought to be set off against the deposit as a debt to him. The tax statute provides that "personal estate shall, for the purposes of taxation, include goods, chattels, money, and effects, wherever they are, money at interest, and other debts due the persons to be taxed, more than they are indebted or pay interest for." The statute provides also for preparing the valuation list, the fifth column of which provides that the assessors shall enter "the amount of money on hand, including deposits in any bank." The assessors tax the plaintiff on the whole \$1,343.46. Petition dismissed. Appeal.

Morton, C. J. The legislative construction shows that money on deposit in a bank should be included in and form a part of the money on hand, liable to taxation without deduction on account of debts due. Judgment affirmed.

COLE v CASSIDY (1885) 138 Mass. 437.

Deceit. The declaration alleged that defendant, as a director of the P National Bank, fraudulently represented the bank to be sound, and that plaintiff was thereby induced to buy stock and make deposit in the bank; that the bank was not sound; that the defendant, when he made the representations, knew them to be untrue. Under objection defendant offered evidence to prove that he did not know the bank was unsound. Verdict for defendant. Exceptions.

Morton, C. J. 1. The evidence put in by defendant was competent. 2. To maintain an action of deceit, the plaintiff must prove representations of material facts which are false, and which induce him to act; and either that the defendant knew them to be false, or that the facts, being facts susceptible of knowledge, he represented, as of his own knowledge, that they were true, when in fact he had no such knowledge. Exceptions overruled.

Cited: 147 Mass. 404.

RICH v PACKARD NAT. BANK (1885) 138 Mass. 527.

Where an assessment was made against the shares of stock of a national bank for fire district purposes, and the stockholders all resided in the town where the bank was located: Held, that in view of the fact that the statute only provides for taxation of bank shares for state, county, and town purposes, the assessment is invalid and cannot be collected.

SHERMAN v NEW BEDFORD FIVE CENTS SAV. BANK (1885) 138 Mass. 581.

To recover a deposit made with defendant by S, plaintiff's testator. The deposit was entered to the credit of the C Society, which appeared herein as claimant. Interest was payable to the order of S. Principal was made payable to the board of managers of the C Society after the decease of S. Verdict directed for claimant. Judgment reserved.

W. Allen, J. There was no transfer of the fund and no perfected gift of it to the claimant. The form of the deposit, as regards the claimant, was nothing more than a declaration of the depositor, competent only on the question of his intention. The deposit, of itself, gives no right to the claimant. Judgment for plaintiff.

Cited: 142 Mass. 3, 453; 146 id. 422; 151 id. 219; 162 id. 457; 164 id. 584; 169 id. 169; 170 id. 415.

INNERARITY v MERCHANTS NAT. BANK (1885) 139 Mass. 332.

Conversion. Plaintiff consigned to B, as agent, a cargo of sugar. B, having the bill of lading with authority to sell the sugar, pledged it with defendant. The loan was given by defendant's president in accordance with his authority, and was afterward confirmed at a meeting of the directors. B was a director of the defendant and was present at the meeting, but it did not appear what part he took thereat. Plaintiff claimed that B's knowledge was knowledge of the defendant. Judgment for defendant. Appeal.

Devens, J. Whether B acted or not at the meeting of the directors in the matter of the loan, he could not lawfully have done so as a representative of the bank. There arises no imputation of knowledge by the defendant of B's fraud. Judgment affirmed.

Cited: 141 Mass. 293; 147 id. 277; 150 id. 206; 151 id. 75; 152 id. 194; 160 id. 566; 166 id. 30.

NEVADA BANK v LUCE (1885) 139 Mass. 488.

On bill of exchange against acceptor. O had some wool with defendants on consignment. He estimated the value of the wool at \$3,800; defendants, at not over \$3,000. On March 27, defendants telegraphed "Draw \$1,500." O replied, "Will you accept 30 days' draft \$2,000?" April 3 defendants answered, "Think you can get 14 cents for 90 bales very best? If you decide to sell, draw \$2,500 on demand; if not, draw not over \$1,500." On March 27, O discounted his draft on defendants for \$1,500 with plaintiff. Defendants first heard of this April 6, when they paid it. On April 3, O sent his clerk with defendants' telegram of that date to plaintiff with draft for \$2,500. The clerk showed the telegram and said O had authorized the sale. Thereupon plaintiff discounted this draft. Defendants had no notice of this until presented April 12, when they refused to accept it and later to pay it. O drew out most of his money from plaintiff before April 12. Plaintiff acted in good faith. Judgment for defendants. Appeal.

Allen, J. The authority to O to draw on defendants being limited to \$2,500 in all, the plaintiff took the second draft at its own risk. Judgment affirmed.

MERCHANTS BANK v BANK OF THE COMMONWEALTH (1885)
139 Mass. 513.

To recover amount of a check. On August 23, plaintiff, holding warehouse receipts for sugar as collateral on a loan to B's firm, turned some of the receipts over to B, as agent for the bank, to sell the sugar, and to give the bank the proceeds to apply on the loan. B's firm had often been allowed to do this and had always accounted to the bank. The check received for the sugar was deposited on September 1 to the firm's credit, and the bank so entered it, not knowing it came from the sale of the sugar. On September 4, B's firm had an apparent credit of \$17,145.56, including the credit of \$7,500 on the above check. Checks were paid that day by plaintiff to the amount of \$1,425. On the same day a \$15,000 check, drawn on September 3 by B's firm in favor of L, came from defendant through the clearing house of which both plaintiff and defendant were members. This \$15,000 check, in accordance with the usual custom, was provisionally paid. About one o'clock, plaintiffs found there had been no payment to it for the sugar, and immediately sent the check back to defendant and erased the \$15,000 debit. The check reached defendant about seven to twelve minutes after one. The clearing house rules

required checks not good to be returned, and "in no case are they to be returned after one o'clock." Defendant refused payment. Defendant had entered the \$15,000 check to the credit of L on the day of its deposit, and did not change its position toward L in the interval between one o'clock and twelve minutes after. B's firm was insolvent. On a case stated.

Devens, J. 1. The money having been paid under a mistake of fact, the plaintiff is entitled to recover. 2. Plaintiff was not guilty of laches in not returning it before one o'clock. Plaintiff can only recover the difference between the amount of the check and the amount which B was entitled to draw. Judgment accordingly.

Cited: 152 Mass. 37; 176 id. 309.

SCOTT v BERKSHIRE COUNTY SAV. BANK (1885) 140 Mass. 157.

To recover deposits. F made deposits in the names of the plaintiffs with defendant, taking out bank books in their names, but retaining the books. F's administrator intervened as a claimant. The claimant offered a letter of September, 1871, from the treasurer of defendant to F, saying, "You are hereby notified that the sum of \$80.74 has been standing to your credit, on which you have not been entitled to interest;" also, evidence that F told the claimant that it was not her intention to give a certain deposit to plaintiff E. Claimant also offered to prove a conversation with F a short time before F got an order from E to pay all or part of the deposit in E's name to F, with reference to the title and disposition of the deposits in the case of F's death. Claimant offered the letter accompanying the order. The letter was not in the writing of F, nor signed by her, but in the name of another, and no agency was shown. Claimant offered to show that F consulted a justice about a will, and that she stated to him it was not her intention to give plaintiffs the deposits. All this testimony was objected to and excluded. The judge charged that the deposit by F in the names of the plaintiffs—F retaining the deposit books, if nothing further was done—did not vest title in the plaintiffs; that if F made deposits subject to her right to draw for her own needs and retained the books, no trust was created until some further act; that if F made deposits intending to vest title in the plaintiffs, subject to her rights to draw for her necessities, and took the orders in evidence, and communicated her intention to plaintiffs, a trust was created; that if F intended the funds to become plaintiffs' on the destruction of the orders, and they were not destroyed, plaintiffs cannot recover; but if she took the orders only for the purpose of making her reserved right effective, and intended to destroy the orders and did not, the destruction was unnecessary. Judgment for plaintiffs. Exceptions.

Allen, J. 1. The claimant is entitled to the fund unless his intestate made a gift to each of the plaintiffs of the money deposited in her name. 2. The letter of the bank and F's declarations are competent. So are F's declarations and acts while holding the books. So are the acts of taking orders from the plaintiffs for payment to herself, and F's declarations and letters preceding and accompanying these acts. The declarations of the donor in relation to making her will were properly excluded. 3. The instructions of the judge were substantially correct. Exceptions sustained.

Cited: 142 Mass. 453; 146 id. 422; 157 id. 50.

KIMINS v BOSTON FIVE CENTS SAV. BANK (1886) 141 Mass. 33.

Contract to recover deposit. Plaintiff made deposits with defendant. On forged orders directing bank to pay amounts to plaintiff's nephew, defendant paid out the money now sued for. The nephew had stolen the passbook and got the money on these forged orders, and then each time returned it. Plaintiff could not read or write, though defendant did not know this, except so far as imputable from the fact that she made her mark instead of signing her name. Neither plaintiff nor defendant were guilty of bad faith or had knowledge of the forgeries until after all the money had been drawn. The passbook stipulated that the subscribers agree to be governed and abide by the regulations of the institution as expressed in the by-laws. A by-law provided that defendant had power to alter or amend them, and another that the institution would not be responsible for loss sustained, when depositor has not given notice of his book being lost or stolen. Later this by-law was amended by adding, "In all cases a payment upon presentation of a deposit book shall be a discharge." This was not added until after plaintiff got her passbook and she knew nothing of it. The payments were all made after this by-law

was amended. The bank did not give plaintiff a new book or request the surrender of the old book, and it was not its custom to give notice of changes in by-laws. Judgment for defendant. Exceptions.

Allen, J. The authority of the defendant to make by-laws did not empower it to change, without the consent of the plaintiff, a contract it had made with her, or to discharge the debt to her by payment to a stranger. Exceptions sustained.

Cited: 159 Mass. 530; 176 id. 528.

WHITNEY v LEOMINISTER SAV. BANK (1886) 141 Mass. 85.

Bill for an accounting. In 1875, plaintiff became surety on S's note, payable on demand to the L Bank, one of the defendants. In 1877, S, to save plaintiff harmless, gave the L Bank a mortgage on certain interests, with power of sale. The L Bank had a sale, and, together with the F Bank, the other defendant, bought the property in. Plaintiff's bill alleged the sale was made invalid by some secret arrangement without his knowledge, so that the purchaser held in trust for him and was bound to apply the proceeds to exonerate him. The master found an agreement between the defendants and the mortgagor for the F Bank, to bid in the property and apply the net proceeds to payment of the mortgage note. Defendants excepted to this finding as not within the issues raised, contending that the finding was not justified by the evidence and arguing that if there was such an arrangement it was ultra vires. The report and exceptions reserved for consideration of the full court.

Morton, C. J. 1. The arrangement proved is within the allegations of the bill. 2. Findings of fact are not to be set aside without clear proof of error or mistake on the part of the master. 3. The defendants cannot defeat plaintiff's claim, and apply the proceeds to their own use upon the ground that the act was illegal and ultra vires. Judgment accordingly.

Cited: 143 Mass. 422; 157 id. 127.

UNDERWOOD v BOSTON FIVE CENTS SAV. BANK (1886) 141 Mass. 305.

To recover balance of deposit. Plaintiff sued as assignee of S. The defendant admitted the deposits and balance as alleged and the assignment to plaintiff as trustee for herself. Upon defendant's motion, the administrator of S was summoned in and admitted as claimant and codefendant under the statute. The defendant then admitted that the whole title lay between plaintiff and claimant, and paid the money into court. Plaintiff claimed to have shown a contract of the defendant with himself, and therefore claimant should not have been admitted. Verdict for defendant.

Holmes, J. 1. We presume the verdict was pro forma. The defendant should have been discharged. 2. The claimant was entitled to be heard. Case to stand for trial.

Cited: 143 Mass. 227; 146 id. 349, 398; 151 id. 207; 166 id. 549; 167 id. 79; 168 id. 49; 170 id. 219.

HOLDEN v PHELPS (1886) 141 Mass. 456.

Where it appeared that a person in purchasing mortgages from an officer of a savings bank relied upon the records of a meeting of the board of trustees, as to the officer's power to sell such mortgages, and it thereafter appeared that such records were forged: Held, on a bill in equity by the receivers of the bank to obtain a reconveyance of the mortgage, that the bank was bound by the authority appearing on the records.

HUNT, APPELLANT (1886) 141 Mass. 515.

Accounting of trustee. H, as trustee, purchased with trust funds a certificate of deposit of a national bank payable within five months at a time certain. At the time the bank was doing business and its stock was selling slightly above par. Subsequently the bank failed, and its assets paid only about 25 per cent of its liabilities. The cestui que trust offered evidence, over objection, to show that it was not customary for national banks to issue certificates of deposit payable at a future time. The trustee also proved over objection that this bank had issued to various persons, including savings banks and trust companies, about 1,100 certificates of deposit, some of them payable at a future time, within a year prior to its failure. The U. S. R. S. prohibit national banks from issuing any other notes to circulate

as money than those authorized by its provisions. The state statutes permit the state and county treasurers to deposit in national banks on interest, and savings banks may invest their funds, to a limited amount, in shares of such banks. The probate court rejected a credit of H in his account for the amount of the certificates so purchased. Decision reserved for the consideration of the full court.

C. Allen, J. 1. All that can be required of a trustee is that he shall conduct himself faithfully and exercise a sound discretion. 2. The certificate of deposit was not illegal. A legal debt from a bank, due within a short time, may properly be considered as a security of a higher order than shares of its capital stock. 3. The various matters of evidence objected to were competent. Decree accordingly.

Cited: 152 Mass. 186.

ELIOT NAT. BANK v BEAL (1886) 141 Mass. 566.

On a bond against administrators. C, cashier of plaintiff bank, was the principal and B surety upon a bond, a condition being that no suit should be brought or founded upon it unless commenced within 12 months after C's employment terminated. C's employment terminated July, 1878, and suit was brought against both principal and surety in December, 1878. In October, 1881, while the suit was still pending, B died testate. His will was contested, and finally probated in May, 1882, when the defendant qualified as administrator with the will annexed. This suit was then brought against B's administrator. The original suit was still pending. Defendant contended the action could not be maintained because of the condition. Verdict for defendant. Case reserved.

C. Allen, J. The stipulation, though absolute in its literal terms, includes an implied assumption that the obligors would remain in condition to be sued. Verdict set aside.

Cited: 153 Mass. 519; 162 id. 401; 169 id. 455.

BROOKS v BIGELOW (1886) 142 Mass. 6.

Where a check is drawn on a bank in this state payable to a resident of another state, under an agreement that the check shall pass immediately to the depositor's credit, and if unpaid, it shall be charged to such depositor's account, and the law of the state, in which said depositor resides, provides that the bank is not a collecting agent, but becomes the owner of the check, the receiver of the bank may maintain an action for the amount of the check against the maker, who cannot avail himself of the defense, that, upon suspension, the payee of the check stopped payment of the same.

CUMNOCK v INST. FOR SAVINGS IN NEWBURYPORT (1886)
142 Mass. 342.

For damages for retaining securities. Plaintiff alleged that he gave his note to defendant due June 15, with stocks as collateral, with authority to sell the collateral in case of default; that defendant agreed to hold and redeliver the stocks on payment of the note; that plaintiff was ready and willing to pay the note on the 15th, and offered to redeem the stocks and demanded them, but was informed that defendant had lost them; that defendant neglected and refused to return said stocks, or permit him to redeem; that by reason of said refusal plaintiff lost a sale, for which he had effected a valid contract on or before the maturity of the note; that on or about September 15, the stocks were found by defendant and the debt discharged and said stocks received back, and sold at a greatly diminished price, whereby plaintiff lost \$700, caused solely by neglect of defendant. Demurrer that no cause of action was shown. Sustained. Judgment for defendant. Appeal.

Field, J. 1. No conversion is alleged, and for that reason alone the count is not a good count in trover. 2. The plaintiff forbore to insist upon his rights. In consideration of this forbearance, the defendant made no promise to the plaintiff to pay him anything, and committed no tort and no breach of contract in retaining the stock until plaintiff paid his note. Judgment affirmed.

Cited: 152 Mass. 23.

TOWNSEND v WEBSTER FIVE CENTS SAV. BANK (1886) 143 Mass. 147.

Money had and received. Plaintiff alleged that she was a depositor and claimed money deposited in her name. Defendant admitted having money deposited in plaintiff's name, but averred that it had paid out sums, in a judgment against it,

as trustee, for plaintiff's husband for funds belonging to him, but standing in plaintiff's name, and offered to pay the balance to whom it may belong. Plaintiff testified the money was her own. This was not contradicted, and her husband disclaimed the funds. Defendant's by-laws provided no funds should be withdrawn without a notice in writing. It was not contended that plaintiff had given any notice in writing. Upon the evidence the judge directed a verdict for defendant. Plaintiff alleged exceptions.

Holmes, J. By denying that plaintiff was a depositor, defendant repudiated the relation on which its right to notice was founded. The evidence warranted a finding that the plaintiff was the creditor of the bank. Exceptions sustained.

Cited: 152 Mass. 54.

UNION SAV. BANK v POOL (1886) 143 Mass. 203.

Accounting for funds held by bank. P and his wife C were each seized in fee of an undivided half of certain premises. In 1872, P gave a mortgage in his own name, wherein C joined merely to release her dower to the whole property, to secure a loan with the defendant bank. This mortgage was recorded. In 1877 the bank, discovering C's ownership, got a quitclaim from her, giving at the same time an agreement that, if the property were sold, it would pay her one-half of the proceeds, or, if one-half were not sufficient to satisfy its claim, the remainder. This agreement was not recorded. In 1877, A purchased at a sheriff's sale all of P's equity. In 1884, the bank sold to A the estate under the power of sale in the mortgage given by P, and paid the taxes as P had agreed in the mortgage to pay all taxes for 1882 and 1883. A contended that since the agreement between C and the bank was not recorded and he had no actual notice, his rights cannot be affected. C contended that she was entitled to the balance of the proceeds in the hands of the bank and interest. The bank held the money as a stakeholder and filed a bill of interpleader. Decision reserved for the consideration of the full court.

Gardner, J. 1. The mortgages were not joint mortgages, and granting that A had no actual notice of the agreement between C and the bank, he did not purchase any right, title, or equity of hers. 2. By the terms of the agreement with the bank, the balance of the proceeds belong to C, but the facts do not show that the bank should pay interest. 3. The payment by the bank of the taxes was proper. Decree accordingly.

EATON v PACIFIC NAT. BANK (1887) 144 Mass. 260.

Money had and received. The directors of the defendant voted to increase its capital stock. Plaintiff subscribed and paid for 40 shares of the issue. Defendant suspended before the total number of shares was subscribed. Afterward, the directors voted that the increase should only be of the amount actually subscribed. The comptroller sent a certificate, required to validate an increase, but for the lesser amount only. The plaintiff was then registered on the stock register of the bank. She demanded the money paid in by her for the 40 shares. According to the statute, no increase of the capital stock of a national bank is valid until the whole amount is paid in. On case stated. Reserved for the full court.

Field, J. 1. The plaintiff paid in her money upon the implied condition that she should not be entitled to new stock unless the original amount was paid in, and also upon the implied condition that she should not be required to take any new stock unless the amount proposed was created. 2. The certificate of the comptroller cannot make one a stockholder who is not one, nor enable a bank to appropriate a debt it owes to a payment for stock, or to treat one of its creditors as a shareholder. Judgment for plaintiff.

MANUFACTURERS NAT. BANK v PERRY (1887) 144 Mass. 313.

Money had and received. In February 1879, plaintiff, by mistake, overpaid to defendant's clerk, H, on a check drawn by defendant, \$200. Plaintiff brought suit December, 1885. The evidence shows that H the same day discovered the overpayment and notified defendant, and asked to be allowed to return the money, but defendant refused. On H's next visit to the bank the teller asked him if he had been overpaid and he denied it, and reported his denial to defendant. Defendant set up the Statute of Limitations. Judgment for plaintiff. Exceptions.

Morton, C. J. 1. There was a fraudulent concealment by defendant of the plaintiff's cause of action, which took the case out of the Statute of Limitations.

2. The plaintiff is entitled to interest from the time of the receipt of the money by defendant. Exceptions overruled.

Cited: 178 Mass. 402.

IMPORTERS AND TRADERS NAT. BANK v SHAW (1887) 144 Mass. 421.

On a promissory note against indorser. In March, the defendant indorsed the notes, now sued on, payable in six months. At that time he resided in N and was a member of a firm having its principal place of business in P street, Boston. In July defendant's firm failed. Its assignee continued the business, keeping the same offices, and employed defendant as a clerk. After the assignment, defendant left the state, but retained his residence in N. He gave no direction to forward his mail, and the notice of protest came and was filed away by the assignee who notified defendant's attorney. The plaintiff when it took notes knew defendant's firm was a Boston firm, and its place of business was in P street. No notice was given it of the dissolution, and it does not appear that there was a dissolution. Judgment for plaintiff. Exceptions.

W. Allen, J. If the plaintiff had known that the defendant resided in N and had known the other facts disclosed at the trial, the notice would still have been sufficient. Exceptions overruled.

Cited: 148 Mass. 185; 149 id. 213; 151 id. 348.

BLAKE v TRADERS NAT. BANK (1887) 145 Mass. 13.

Action by surety to follow trust funds. In 1855 plaintiff's testator became surety upon a probate bond of a trustee. In 1864 the trustee pledged shares of stock with defendant. The certificate and assignment showed it belonged to the trust estate. In 1867 defendant, at the trustee's request, sold the stock and applied the proceeds to the loan. The surety was released from the bond in 1869, and gave up a bond he had received from the trustee amply securing him. In 1877 the breach of trust was discovered, and suit brought against the surety and prosecuted by new trustees, who recovered in 1884. Then the plaintiff brought this suit against defendant for the conversion of trust fund. The defendant sets up the Statute of Limitations and laches. On a case stated.

W. Allen, J. 1. The defendant having received and sold the stock with notice of the trust fund, was liable to the new trustees and to the cestui que trust. 2. The equitable remedy was not barred by the Statute of Limitations. 3. The surety takes the place of the creditor, and was justified in the delay. Judgment accordingly.

COTTON v ATLAS NAT. BANK (1887) 145 Mass. 43.

Bill for an accounting. In 1877 C transferred stocks to defendant bank as collateral to a promissory note of F for \$50,000. At the time F was largely interested with H in various enterprises, and was the agent of C, acting under her direction, and advising and representing her. H had borrowed large sums from C. F applied to her to lend the stocks as collateral, representing that H wanted to enlarge and increase his business. C left the details of the transaction to F. The note was renewed by new notes, the interest being paid until September, 1881. C died in 1880. The last note was not taken up, but kept along until January, 1883. At that time the defendant held another overdue note of F's, and a new note was given defendant and two checks by F, as executor, for the amount due on the two notes. Plaintiff, coexecutor with F, brought this suit against the bank and F for an accounting, and claimed these transactions constituted payment of the debt, and that, if the debt was not extinguished, the conduct of the pledgee had released the security, and that C stood to the defendant in the relation of a surety upon the note and was released. Payments to the amount of \$10,000 had been made on the consolidated note from dividends and sales of the stock pledged by C. Case reserved for consideration of the full court.

W. Allen, J. 1. C, not F, was the real debtor. 2. Whether the taking of a negotiable instrument for a pre-existing debt is a discharge of the old debt is a matter of intention, and the evidence shows that the parties to the original debt did not intend that anything they did should be a discharge. 3. The payments upon the consolidated note have all been made from the estate of C, and must be regarded as applied to the debt secured by her stock. Bill dismissed.

Cited: 145 Mass. 569; 169 id. 300.

CORCORAN v BATCHELDER (1888) 147 Mass. 541.

On note against maker. A national bank loaned defendant \$15,000. For \$6,000 of this amount he gave the two notes in suit. The bank authorized defendant to consult with the comptroller of the currency in regard to its affairs. Defendant wrote upon the notes, "Secured by 173 shares Erie Tel. Company," and delivered the shares to the bank's president. Plaintiff became the bank's receiver. The capital of the bank was \$100,000. Sec. 5200, U. S. R. S., prohibited a national bank from lending a sum greater than 10 per cent of its capital stock. The defendant objected to the introduction of depositions filed on the 15th day after they were opened. The 41st Common Law Rule of the supreme court required them to be filed within 14 days, unless prevented by accident or unforeseen cause. Plaintiff testified that his omission was due to his mistake in reckoning the time. Depositions admitted. Parts of a conversation between the defendant and the comptroller, showing that the defendant entered the statements on the notes by the comptroller's advice, were admitted to show his good faith in so doing; but defendant's declarations in his own favor, made in this conversation and in a letter to one of the directors, were rejected. The question was put to the jury without objection at the time from defendant: "Did the defendant deliver the 173 shares to the bank?" They answered in the negative. Defendant contended that it was misleading. Judgment for plaintiff. Exceptions.

Morton, C. J. 1. The prohibition in sec. 5200 does not prevent a bank from recovering of a person, to whom it has lent a sum greater than 10 per cent of its capital stock, the excess of the loan over the limit of 10 per cent. 2. It was competent for the presiding justice to find that the failure to file the depositions within the rule was caused by accident, and he had the right to order them to be filed within his discretion, which we cannot revise. 3. It was not competent for the defendant to put in his own declarations in his own favor. 4. The defendant made no objection to the form of the question at the time and it is too late to object now. Exceptions overruled.

RICHARDS v ATTLEBOROUGH NAT. BANK (1889) 148 Mass. 187.

Breach of contract on an award. Defendant, a national bank, closed its business under sec. 7, U. S. R. S. of July 12, 1882, which provided a mode for voluntary liquidation of banks. A board of directors was in existence when defendant's franchise expired, and they held over during the winding-up process. The plaintiff filed a claim against the defendant for services, which the directors submitted to arbitrators. The stockholders elected a new board of five directors, three of whom were not stockholders when elected, but stock was transferred to them immediately afterward. The new board gave the arbitrators notice that they revoked the submission. The arbitrators returned an award for the plaintiff, which he demanded of defendant and which was refused. The U. S. R. S., sec. 5146, provided that every director should be a stockholder. Judgment withheld, subject to the opinion of the court.

Devens, J. 1. The stock ceased to be negotiable at the time when liquidation commenced, and no one not a stockholder then, could become a director. 2. The election was invalid and consequently there was no valid revocation of the submission to arbitration. Judgment for plaintiff.

LEWIS v LYNN INSTITUTION FOR SAVINGS (1889) 148 Mass. 235.

To recover a deposit. Plaintiff's intestate had deposited moneys with defendant, and her deposit book showed that in 1838 she was credited with \$321.60, that an item for loss deducted was \$15.25, and that she had received the balance, \$306.35. Fifty years afterward demand was made for the first time by her administrator, who brought this action. The defendant proved by its books that it had suffered loss from investments of its depositor's money, lawfully and properly made, and that the item of \$15.25 was the intestate's proportionate share of that loss. Judgment withheld, subject to the court's opinion.

C. Allen, J. It is now to be assumed that the apportionment was a just one, that notice thereof was given to the depositors, and that it was known to the plaintiff's intestate when the money was paid. The court will not readily infer or assume the existence of a wrong which has not been discovered or complained of for 50 years. Judgment for defendant.

Cited: 152 Mass. 52; 159 id. 529; 170 id. 67.

MANUFACTURERS NAT. BANK v CONTINENTAL BANK (1889)
148 Mass. 553.

To recover the amount of a check. The plaintiff sent a check to the F Bank to be collected, and the F Bank sent it to the defendant for the same purpose. The F Bank became insolvent and ceased to do business. The defendant learned of this before it presented the check to the drawee, and was then informed by the drawee that the plaintiff wished defendant to hold the funds paid upon it for plaintiff. Defendant, however, credited the amount to the F Bank and refused to pay plaintiff. Judgment for defendant. Exceptions.

Knowlton, J. It was implied in the contract for collection, between plaintiff and the F Bank, that the latter should continue in business. When it ceased to do a banking business, it lost the right to appropriate to itself the proceeds of the plaintiff's property, and the entry to its credit by the defendant did not pass the property. Exceptions sustained.

SUFFOLK SAV. BANK FOR SEAMEN, PETITIONER (1889) 149 Mass. 1.

Petition for the abatement of a tax. The petitioner had erected a building, part of which it used in its own business, and part it rented to others. The rented part was taxed for city and state purposes. The Pub. Stat., ch. 116, sec. 20, cl. 7, provided that a bank might invest, not to exceed 10 per cent of its deposits, in a "suitable building for the convenient transaction of its business." The cost of the building was less than 10 per cent of the deposits. By Pub. Stat., ch. 13, sec. 20, savings banks were to pay a tax on their deposits, excepting such parts of the deposits as should be invested in "real estate used for banking purposes." The general purpose of the act was the "relieving property from double taxation in certain cases." The state contended that the exemption extended only to so much of the building as was used by the bank in its own business. Petition granted.

Holmes, J. The whole building is exempted from taxation by the state under Pub. Stat., ch. 13, sec. 20. Decree for petitioner.

Cited: 151 Mass. 108.

ATWOOD v DUMAS (1889) 149 Mass. 167.

Trustee process to reach debtor's assets in the possession of a bank. The bank's answer showed that it was a co-operative bank; that the defendant held nine shares upon which she had paid \$63, and that their withdrawal value was \$62.66; that the money paid had been mingled with other money of the bank; and that the 30 days' notice which the Statute of 1887, ch. 216, sec. 2, required the members to give before withdrawing the money paid by them, had not been given. Defendant defaulted and trustee discharged. Appeal.

Holmes, J. 1. The withdrawal value of defendant's shares can be reached by trustee process. 2. The fact that the defendant has not given the required notice does not affect the question. Trustee charged.

Cited: 173 Mass. 56.

CORCORAN v SNOW CATTLE CO. (1890) 151 Mass. 74.

On note against maker. The notes were renewals of similar notes signed by defendant's treasurer for the accommodation of another company in which the treasurer and the president of the L Bank were financially interested. The president procured the directors, who were ignorant of his adverse interest, to discount the notes. Plaintiff was receiver of the L Bank. Judgment for plaintiff. Exceptions.

Holmes, J. The bank was not affected by its president's knowledge of any fact affecting the validity of the notes. Exceptions overruled.

Cited: 159 Mass. 507; 160 id. 566; 166 id. 30.

SUFFOLK SAV. BANK FOR SEAMEN, PETITIONER (1890) 151 Mass. 103.

Petition for the abatement of a tax. The Statute of 1862, ch. 224, provided that the excise tax on state savings banks should be estimated on the amount of each bank's deposits. The petitioner, a savings bank, made a return for the purposes of taxation, showing the average amount of its deposits, and, at the request of the treasurer, the amount of its guaranty fund and its undivided profits. These were added to the deposits and a tax assessed upon the resulting sum.

Knowlton, J. The amounts held by the petitioner as a guaranty fund and as undivided profits are not deposits, and were improperly included in the sum upon which the tax was assessed. Decree for petitioner.

HOLDEN v METROPOLITAN NAT. BANK (1890) 151 Mass. 112.

Money had and received. The treasurer of a savings bank of which plaintiffs were receivers, had shares of stock belonging to it transferred to the defendant. He procured certificates to be issued to defendant and pledged them to the latter, to secure the repayment of money which he then borrowed as for the savings bank. This transaction was without the knowledge of the bank, and it never received the money. As soon as it learned of the matter, it repudiated the whole transaction. When the debt came due and was unpaid, defendant sold the shares according to the contract of pledge. Judgment withheld, subject to the opinion of the court.

Holmes, J. The plaintiffs cannot connect themselves with the transaction except through the acts of their treasurer, which acts they have repudiated. Judgment for defendant.

Cited: 154 Mass. 180; 174 id. 348.

FIRST NAT. BANK OF DANVERS v FIRST NAT. BANK OF SALEM (1890)
151 Mass. 280.

To recover money paid by mistake. The defendant cashed for a stranger, without requiring his identification, a check purporting to have been drawn upon plaintiff by one of plaintiff's depositors, and transmitted it to plaintiff. Plaintiff paid and charged it to the account of the supposed drawer. This account was not active, hence it was some months before the check was shown to them. They pronounced it a forgery. The trial court found that the defendant had been negligent in paying, and plaintiff in not sooner showing the check, but that plaintiff's negligence had not prejudiced defendant. Judgment for plaintiff. Exceptions.

Devens, J. The loss was caused by defendant's negligence and it must bear it. Exceptions overruled.

Cited: 177 Mass. 395.

FREEMAN'S NAT. BANK v NATIONAL TUBE WORKS CO. (1890)
151 Mass. 413.

For money paid to use. Drafts drawn by defendant upon itself were unrestrictedly indorsed to the order of the A Bank, without consideration and for collection only. The A Bank indorsed them to the B Bank: "Pay B Bank, or order, for account of A Bank." The B Bank indorsed them to plaintiff: "Pay F, or order, for account of B Bank." Before the drafts fell due, plaintiff advanced the B Bank money upon them. The B Bank failed, and the A Bank and the agent who had drawn the drafts, notified defendant not to pay them. Submitted for the opinion of the court.

Knowlton, J. 1. The A Bank became the agent of the defendant, and the defendant, as owner of the drafts, can avail itself of all that its agent did for its protection. 2. The last two indorsements were restrictive and gave notice that the ownership had not passed beyond the A Bank. 3. The owner could control the drafts until they were paid and the plaintiff acquired no rights against him by advancing funds to the B Bank upon them. Judgment for defendant.

DICKINSON v LEOMINSTER SAV. BANK (1890) 152 Mass. 49.

To recover money deposited in the name of the plaintiff during her minority. Some of the deposits were made by the plaintiff, others by her father. There was evidence that the father intended the deposits made by him as gifts; that the money was drawn out by him in 1870; that the plaintiff did not authorize the payments to him; and that she did not know that he had withdrawn the money until 1888. Defense: 1, Pub. Stats., ch. 116 sec. 29, "Money deposited in the name of a minor may be paid to such minor, or to the person making such deposit;" 2, Statute of Limitations. Verdict for defendant.

Field, J. 1. Under the statute, payment could be made to the father only to the amount that he deposited. 2. The statute does not begin to run in favor of

the defendant until there has been something equivalent to a refusal to pay or a denial of liability. New trial ordered.

Cited: 164 Mass. 200; 173 id. 240.

INTERNATIONAL TRUST CO. v INTERNATIONAL LOAN AND TRUST CO.
(1890) 153 Mass. 271.

Injunction to prevent defendant from carrying on business in the state under its present name. Plaintiff was a domestic corporation organized to receive deposits and act as financial agents. Defendant, a foreign corporation, transacted business, but chiefly in selling its own debenture bonds, and receiving money on deposit. On its window it had printed in large letters, "of Kansas City, Missouri," with the same title on its letter paper and circulars. The Statute of 1889 prohibits any foreign corporation from doing a banking, mortgage, loan and investment or trust business under the same name as a domestic corporation, or one so nearly identical as to mislead. The statute provided that foreign corporations carrying on such business should indicate their state or country upon all signs, advertisements, letters, and other documents. Judgment for plaintiff. Appeal.

Morton, J. The injunction order should be modified so as to restrain the defendant from doing any business in its corporate name the same as or similar to that done by the plaintiff, and leaving defendant free to engage in any business which its charter admits under the name or style of the "International Loan and Trust Company of Kansas City," or "of Kansas City, Mo." Judgment modified.

SCHMIDT v PEOPLE'S NAT. BANK (1891) 153 Mass. 550.

On certificate of deposit. The money was deposited for the plaintiff by C, who took a certificate in his own name, indorsed it, and delivered it to the plaintiff. The defendant agreed to pay 2 per cent interest on the deposit. The plaintiff thereafter made demand for the deposit without producing the certificate. Payment was refused, except upon condition that he give an indemnity bond. The plaintiff testified that he had destroyed the certificate. The court found as a fact that the certificate was lost, and found for the plaintiff with 2 per cent interest to date, and ordered judgment not to be entered, without the production of the certificate, until the filing of a bond. Reported for consideration of this court.

Morton, J. 1. The finding of the court that the note was lost was a finding of fact, which cannot be revised here. 2. The finding as to interest was correct. 3. The court had the power to require the plaintiff before entry of judgment to file a bond for the defendant's protection against the lost note. Judgment on the finding.

Cited: 164 Mass. 125; 167 id. 496; 171 id. 574; 177 id. 302.

HALLOWELL v BLACKSTONE NAT. BANK (1891) 154 Mass. 359.

Bill to redeem stock. On December 3, 1888, the defendant discounted two drafts which had been accepted by the firm of G & C, of which S, as defendant knew, was a member. On December 14, 1888, S borrowed \$25,000 of the defendant, giving his demand note and deposited as collateral security shares of stock, with authority to sell them or any collaterals substituted for them, without notice, at public or private sale at the option of the defendant, on the nonperformance of that promise. The defendant was to apply the net proceeds to the payment of the note and account to S for the surplus. It was further agreed, that the surplus shall be applied to any other note or claim against S held by the defendant. About January 3, 1889, the defendant made a demand on S for payment. S made a payment on account. It was understood that the claim would not be pressed without notice. The acceptance of G & C was not paid. On February 7, 1889, S made an assignment to the plaintiff. The defendant sold the stock of the manufacturing company, and after paying the note, there was a surplus of \$2,588.88 besides the stock of the Guano Co.

Holmes, J. 1. The failure of S to pay on demand was a nonperformance of his promise. 2. Security for any claim against him included claims against him as partner. The bank had a right to apply the surplus proceeds of the stock to the balance due on the firm's debts. Decree accordingly.

Cited: 166 Mass. 65.

NATIONAL BANK OF COMMERCE v CITY OF NEW BEDFORD (1892)
155 Mass. 313.

Petition for the abatement of a tax. The petitioner gave the respondent's assessors a list of its shares, and they assessed a tax on the basis of their value as shown by the capital stock, the surplus fund, and the undivided profits, in supposed compliance with Pub. Stats., ch. 13, sec. 8, which required a bank's shares to be assessed at their fair cash value. Judgment for defendant. Appeal. The superior court ruled that the shares should have been assessed at their market value, irrespective of the capital stock, the surplus fund, and the undivided profits. Exception. Respondent also contended that the statutory conditions of an abatement had not been complied with, because the list of shares, required to be filed with the assessors, under Pub. Stats., ch. 11, sec. 72, had been filed by petitioner and not by the shareholders. Case submitted for the opinion of the court upon the facts.

Holmes, J. 1. The fair cash value of shares, having a market, is to be ascertained by finding the price at which they will sell in the market. 2. The list was properly furnished by the bank. Judgment for petitioner.

Cited: 155 Mass. 317; 175 id. 143; 178 id. 471.

WAY v TOWLE (1892) 155 Mass. 374.

Where an instrument is drawn in all respects similar to a check, except that it is made payable at a day subsequent to its date, it will be treated as a check, and not a bill of exchange, and hence is not entitled to grace.

CANTON INSTITUTION FOR SAVINGS v MURPHY (1892) 156 Mass. 305.

On indemnity bond against principal and sureties. D, the principal, was executor of M, who was believed to have had a deposit with the plaintiff. Upon the supposition that the deposit book was lost, the bond was given to indemnify the plaintiff "from and against any and all claims of any other persons to the deposit." Thereupon a deposit belonging to another person was paid to D, as executor. Verdict directed for defendant.

Morton, J. The object of the bond was to save the plaintiff harmless if, for any reason, D was not entitled to it as executor. The sureties should not be liable for the payment of another person's money to D. Judgment on verdict.

Cited: 174 Mass. 280.

PRESCOTT NAT. BANK v BUTLER (1893) 157 Mass. 548.

On promissory note against indorser. The note had been purchased by the plaintiff. Defenses: 1, That the plaintiff had no title; 2, that the note was made on the Lord's day, and therefore void. Judgment for plaintiff. Exceptions.

Knowlton, J. 1. If such a purchase is *ultra vires*, it is an ordinary contract, not made penal or expressly forbidden, and the maker or indorser cannot defend on the ground of no title. 2. The contract between the defendant, as indorser, and the plaintiff was not made on the Lord's day, and whether the note could be enforced by the payee against the maker is immaterial in this suit. Exceptions overruled.

Cited: 160 Mass. 180, 420.

WELD v ELIOT FIVE CENTS SAV. BANK (1893) 158 Mass. 339.

On a deposit. The plaintiff had on deposit with the defendant the sum of \$1,000 which, with interest and dividends, amounted on April 26, 1892, to \$1,372.62. The plaintiff on that day made an order on the defendant to pay the whole amount to M, to whom she also delivered the passbook. Defendant declined to pay because of the omission by plaintiff to specify the month and day of the month in the order. Fifteen days thereafter, defendant tendered the assignee of plaintiff the amount due without interest. The defendant contended that the plaintiff was bound to show that by the rules and by-laws of the defendant he was entitled to payment without giving prior notice. Judgment for plaintiff. Appeal.

Allen, J. 1. It was for the defendant to show that he was not so entitled. 2. There is no legal presumption that it had any rule entitling it to prior notice. 3. The demand was good and the subsequent tender was insufficient. Judgment affirmed.

McCARTHY v PROVIDENT INSTITUTION FOR SAVINGS (1893)
159 Mass. 527.

Bill to recover a trust fund. S, having a deposit in the defendant bank, assigned it to the plaintiff in trust, and delivered to him the deposit book. Plaintiff gave the defendant notice of the assignment, and requested it to transfer the deposit to himself, which it refused to do upon the assignment in trust. Thereafter S got possession of the deposit book upon some pretext, and gave to B an order directing the defendant to pay the money to B. B redeposited the money in the name of "B, trustee for S." On the same day, the plaintiff again served notice of the assignment upon defendant. Thereafter B withdrew the deposit. Decree for plaintiff. Appeal.

Barker, J. 1. The assignment to the plaintiff gave him, in trust, a complete title to the book and the fund, but, having returned the book to S, he would have no claim against the defendant for payment of the money to B. 2. When B redeposited it in trust for S, the defendant knew from the transaction that it was the same money and a trust fund, and the plaintiff's notice must be held to have informed the defendant that possession had been wrongfully obtained by B. Decree affirmed.

Cited: 173 Mass. 545.

CLARK v NORTHAMPTON NAT. BANK (1893) 160 Mass. 26.

Money had and received by assignee in insolvency of the F Co. On March 8, the F Co. notified its creditors of its inability to meet its obligations, and at a meeting of creditors, at which the defendant was represented, the officers of the F Co. were told to turn the stock on hand into cash and pay no bills except for help. Accordingly, sales were made, and the money deposited with the defendant. Checks were drawn to pay the help and for other purposes, all of which were honored. On April 25, the F Co. filed a petition in bankruptcy and the plaintiff was made assignee. This action is to recover the balance of the deposits made between March 8 and April 25. The defendant pleaded a setoff for the amount of overdue promissory notes of the F Co. held by the defendant. Judgment for defendant. Exceptions.

Field, C. J. The setoff must be allowed unless the deposits after March 8 were made with a view to give a preference. It was for the court below to draw the proper inferences of fact. Exceptions overruled.

- | | |
|--|-------------------------|
| 1. SPRINGFIELD INSTITUTION FOR SAVINGS
v COPELAND | } (1894) 160 Mass. 380. |
| 2. STROUT v COPELAND | |
| 3. SAME v SAME | |
| 4. SAME v SAME | |

1. **Bill of interpleader** to determine whether money deposited with the Springfield Institution in the names of S and M, belonged to the estate of S, or M, his wife. 2. Bill to compel the transfer to the administratrix of M, stocks and bonds standing in the name of S, on the ground that they were purchased with the money of M. 3. Bill to compel the payment, to the administratrix of M, of money deposited in the S Bank in the names of S and M, on the ground that the money was the property of M. 4. Bill to compel the H Bank to pay to the administratrix of M, money deposited by S in his own name on the same ground. S had kept an account in the H Bank for many years, and the greater part of his deposits in these banks were shown to have been the property of M. As to the balance, there was no evidence that any of the money was his. The other deposits in dispute were made in the names of S and M, with money drawn from the H Bank. The stocks and bonds standing in his name were purchased with her money, with her assent. S died first.

Field, C. J. 1 and 3. Money deposited in the names of husband and wife, either to draw whole or part, must be taken to show that the amount not drawn in the lifetime of both should belong to the survivor. Decree in these two suits for administratrix of M. 2. The stocks and bonds in his name, having been purchased with her assent, and being permanent investments, in absence of proof that they were held in trust for her, must be held to be the property of S. 4. The inference to be drawn from the facts in this case is that M neither intended to give nor lend

to her husband the money deposited by him in the H Bank, but that she permitted it to be so deposited for convenience. Decree for administratrix of M.

Cited: 172 Mass. 449; 176 id. 471.

FREEMAN M'F'G CO. v NATIONAL BANK OF THE REPUBLIC (1894)
160 Mass. 398.

Where an injunction was granted by a state court against a national bank: Held, that under U. S. R. S., sec. 5242, a state court had no such power; and that such provision was not repealed by U. S. R. S., July 12, 1882, sec. 4; March 3, 1884, sec. 4; or August 13, 1888, sec. 4.

RANDOLPH NAT. BANK v HORNBLOWER (1894) 160 Mass. 401.

Where the drawer of a check, at the payee's request, sent a check to the bank and had it certified, and upon the strength of such check the payee delivered up a note, held, the drawer was still liable.

FIRST NAT. BANK OF GRAFTON v BABBIDGE (1894) 160 Mass. 563.

On a note. L, the president of the plaintiff, being embarrassed, asked defendant to let him have his note which he discounted with the cashier of plaintiff, and immediately drew it out on checks. The officers of plaintiff had no knowledge of the transaction, or that he had procured the note without any consideration. The defendant contended: Want of consideration. Verdict for plaintiff. Appeal.

Allen, J. Under the circumstances, the president's knowledge is not to be imputed to the plaintiff. The bank is entitled to recover on the note. Judgment affirmed.

Cited: 166 Mass. 30.

INTERNATIONAL TRUST CO. v WILSON (1894) 161 Mass. 80.

Money had and received. Two notes were drawn by M C & Co. to the order of the defendant and by him indorsed. A third note drawn in the same manner, payable to the plaintiff and secured by collaterals, was discounted by C, one of the firm. Evidence was adduced which tended to prove that the president's attention had been called to the firm's account, and he himself had seen them about it, and he noticed that the firm was not very prosperous, and had informed them he could not discount for them to the extent he had been doing. The court instructed the jury, that if there was evidence that the president of plaintiff had reason to believe that C was abusing the confidence of his partner, then it was material whether the partnership had the benefit of the proceeds of the note. That if the plaintiff parted with its money without notice or knowledge of C's fraud on the firm, the plaintiff can recover. Judgment for plaintiff. Exceptions.

Baker, J. The facts testified to were merely suspicious circumstances consistent with the plaintiff's good faith, and not sufficient to justify charging it with notice of any taint in the transaction. Exceptions overruled. Judgment affirmed.

Cited: 176 Mass. 595; 177 id. 204.

NORTH BROOKFIELD SAV. BANK v FLANDERS (1894) 161 Mass. 335.

To recover possession of land. Pub. Stat., ch. 175, provided that where a mortgage has been foreclosed by sale, the person entitled may recover possession by real action. The plaintiff was mortgagee under a mortgage containing a power of sale and authority to the mortgagee to purchase at the sale. The plaintiff's board of investment directed its treasurer to foreclose. Prior to the day of sale, the treasurer arranged with N to bid off the property in his name for the benefit of the bank, which N did. The treasurer then executed a deed in the name of the plaintiff to N, and N executed a deed to the plaintiff. The plaintiff offered in evidence the mortgage, the deed to N with affidavit of sale annexed, and the deed of N to the plaintiff. The defendant asked the court to rule: 1, That the action could not be maintained because it did not appear that the treasurer had authority to execute the deed to N; 2, that no action could be maintained in the name of the plaintiff. Judgment for plaintiff. Exceptions.

Lathrop, J. 1. The treasurer had authority to collect the debt by appropriate proceedings. The plaintiff, by accepting the deed and bringing this action, has ratified his doings. 2. Where the purchaser is the agent of the mortgagee, and the

conveyance to him, and the conveyance from him to the mortgagee are simultaneous acts, the action may be maintained under the statute. Exceptions overruled. Cited: 168 Mass. 443; 173 id. 545.

L'HERBETTE v PITTSFIELD NAT. BANK (1894) 162 Mass. 137. *

To recover a deposit. The money was received by defendant's cashier under an agreement that defendant would invest the money in stocks for the plaintiff, and, until so invested, pay him interest on the deposit. Defendant did not actually receive the money from the cashier. Defense: *ultra vires*. An envelope, bearing the amount of the sums deposited, with the cashier's initials opposite the items, was put in evidence. Judgment for plaintiff. Exceptions.

Allen, J. 1. The cashier was a proper officer to receive deposits, and although the agreements made by him were invalid because *ultra vires* or unauthorized, that does not debar the plaintiff from recovering the deposits without interest. 2. The fact that the cashier misappropriated the funds is no defense. 3. An envelope used as a passbook is admissible to show the conditions of a depositor's account in like manner as the ordinary passbook would be. Exceptions overruled.

Cited: 164 Mass. 224; 165 id. 123.

BOOTH v BRISTOL COUNTY SAV. BANK (1894) 162 Mass. 455.

To recover a deposit. J intervened as claimant. The bank book stood in the plaintiff's name. The plaintiff testified that all the money deposited had been given to him by J, his father. J testified that the money was his, that the book had always been in his possession, and that he had employed the plaintiff to make deposits for him. A bank clerk testified that the bank never saw he claimant and did not know him in the matter. The court refused the plaintiff's request to charge that it was immaterial to whom the money originally belonged; if the claimant delivered the book to the plaintiff and permitted him to exercise control over it, the gift was complete. Verdict for claimant. Exceptions.

Lathrop, J. 1. The instruction was properly refused. 2. A deposit in a savings bank in the name of another is not alone sufficient to prove a gift. Exceptions overruled.

Cited: 164 Mass. 584; 170 id. 413.

MALONEY v CASEY (1895) 164 Mass. 124.

Trustee process. Plaintiff attached, as the property of the defendant, a deposit in the H Savings Bank, and recovered judgment, by agreement, against defendant on the entry of the writ. The bank, summoned as the trustee of the defendant, answered that the defendant made the deposit, but it did not know whether deposit was or was not the property of the defendant; that the by-laws of the bank provided that "no payment will be made without the presentation of the deposit book." The defendant had lost the book, and had made no assignment of the deposit, nor given an order for the same. The bank asked that the judgment should not be entered against it as a trustee except on the production of the deposit book, or on giving a bond to hold the bank harmless. Pub. Stat. sec. 33, provides that when a savings bank is charged as trustee, the court, in its discretion, may require plaintiff to give a bond, to hold the bank harmless. Denied. Judgment for plaintiff. Appeal.

Field, C. J. 1. As the trustee in this case is protected by a judgment, no bond is required. 2. The finding of the court that the defendant is the person who made the deposit, makes the statute inapplicable. Judgment affirmed.

RILEY v HAMPSHIRE COUNTY NAT. BANK (1895) 164 Mass. 482.

Bill to redeem stocks. Plaintiff's husband borrowed money from the defendant and gave his note indorsed by the plaintiff. Plaintiff pledged 17 shares of stock, and assigned them to the defendant in blank, and a power of attorney authorizing the cashier of defendant to transfer the stock. Plaintiff's husband continued his account until he failed. The first note was renewed from time to time and others given. The president of the bank told plaintiff's husband before he failed that his account was overdrawn, and to make a note for the overdraft to defendant, and to write on it the words "Collateral, seventeen shares of stock,"

which he did. Plaintiff was not present at the time, nor was she consulted till after her husband's failure. Defendant contended that the pledging of the shares on the first transaction was to apply to future indebtedness of the husband; that plaintiff was estopped from denying it. Plaintiff contended that parol evidence was admissible to show the transaction. Judgment for plaintiff. Appeal.

Lathrop, J. 1. The actions of the parties do not show an agreement on plaintiff's part that the stock should be security for her husband's general indebtedness. 2. Oral evidence is admissible to show that the transaction, however absolute, was merely a pledge, and to show the consideration and purposes. 3. There was nothing in the conduct of the plaintiff to work an estoppel against her, or furnish ground upon which equity should not give relief. Judgment affirmed.

Cited: 171 Mass. 112, 574.

NOYES v INSTITUTION FOR SAVINGS IN NEWBURYPORT (1895)
164 Mass. 583.

Where a depositor in a savings bank deposited money to the joint account of herself and another, without the latter's knowledge, and the passbook was kept in the possession of the depositor, the deposit was held to be the property of the original depositor.

Cited: 170 Mass. 413.

DRESSER v TRADERS NAT. BANK (1896) 165 Mass. 120.

Assumpsit. Plaintiff made a contract with defendant to furnish defendant with a certain customer, in consideration of which the defendant agreed to turn over to plaintiff \$100,000 worth of fire insurance. Plaintiff procured the customer and defendant refused to carry out the contract. Under clause 7 of the U. S. R. S., sec. 5137, a national bank is given general powers "to make contracts, and to exercise all such incidental powers as shall be necessary for the business of banking, discounting promissory notes, drafts, and other evidences of debts." Defendant contended that the contract was ultra vires. Demurrer. Overruled. Judgment for plaintiff. Appeal.

Lathrop, J. The contract is outside the legitimate purposes for which national banks are organized, and it must be deemed ultra vires. Judgment reversed.

COGSWELL v NEWBURYPORT INSTITUTION FOR SAVINGS (1896)
165 Mass. 524.

Bill of interpleader. M deposited with the defendant a sum in the name of M and D, because she had already another deposit of the full amount upon which M could be allowed interest. The bank book read: "M and D, payable to either or the survivor." M died and D claimed the money. Plaintiff was the administrator of M. T testified that he saw the passbook in D's possession. R testified, over objection, that T had stated that he had seen the book in M's possession. Finding for plaintiff. Exceptions.

Barker, J. The evidence as to the statement of R was admissible as tending to contradict T's testimony that he saw it in M's possession. The evidence justified the finding that the deposit was made in the names of deceased and claimant, for the reason that deceased had already a deposit of the full amount upon which interest was allowable, and there was no gift to claimant. Exceptions. Overruled.

INDIAN HEAD NAT. BANK v CLARK (1896) 166 Mass. 27.

On a note. Defendant made two notes to the order of H, which were discounted by the plaintiff before maturity. Such discount was made entirely through McK, plaintiff's cashier, who, without plaintiff's knowledge, had been embezzling from the plaintiff. H knew of the cashier's frauds upon plaintiff. H was insolvent. The notes were signed or indorsed by defendant at H's request. Defendant received no consideration for the indorsement on the notes. Defendant contended that the acts of H should be imputed to the plaintiff, and that his frauds are a bar to the action. Judgment for plaintiff. Appeal.

Barker, J. 1. Neither the fact that the defendant was an accommodation party, nor the fact that the person for whom they were signed had no property, is a defense to the action. 2. Knowledge of the cashier's embezzlement cannot be imputed to the bank, and the fact that he embezzled the proceeds of the discounted paper

is no defense. Neither the fraud nor the knowledge of it is to be imputed to the bank. Such a holder could recover of the defendant even if the paper had been stolen from him. Judgment affirmed.

Cited: 171 Mass. 531; 176 id. 588; 177 id. 311.

COOK v COLEMAN (1897) 167 Mass. 414.

Trustee process. A writ of attachment was served upon the H Bank, the trustee herein, through its president, who had charge of its business. In the body of the writ, the defendants were described as co-partners under the name of the B M Co. There was \$100 on deposit in the bank to defendants' credit under that name. This was attached by the writ. Afterward a part of it was paid out on checks drawn by defendants. The president testified that he did not examine the body of the writ, but relied on the manner in which it was entitled on the back, from which there appeared to be but one defendant. Order charging trustee with \$100. Appeal.

Morton, J. His neglect to examine the body of the writ was that of the bank; and the payments which were made by it, subsequent to the attachment, were made of the bank in its own wrong. Order affirmed.

BERTH v WESTEN (1897) 167 Mass. 529.

On check. Plaintiff refused to deliver defendant's horses and dogs unless defendant would pay the price plaintiff charged for boarding and stabling. Defendant claimed the charges were exorbitant and unreasonable, but gave the check in suit, to obtain possession of the animals, denying at the time any liability. Verdict directed for plaintiff. Exceptions.

Morton, J. The defendant must abide by the settlement he made. Exceptions overruled.

SHAWMUT NAT. BANK v MANSON (1897) 168 Mass. 425.

On check. The check was signed by the defendant M, payable to the order of, and indorsed by, P & Co., and contained under the name of the indorser the words "Indorsement guaranteed. Pay only through clearing house to S Nat. Bank. T, cashier." The defendant M set up: 1, That the check was given for margins in stock; 2, that the payee agreed to hold the check but did not; 3, that the plaintiff was not a bona fide holder for value. The court ruled that plaintiff was a bona fide holder for value. Exceptions.

Field, C. J. The plaintiff received the check from the payees, who indorsed it, and credited the amount of the check to the payees in their account as depositors, and permitted the payees to draw against it before it received notice through the clearing house that the check had been dishonored. This made the bank a holder for value. Exceptions overruled.

PEOPLE'S NAT. BANK v FREEMAN'S NAT. BANK (1897) 169 Mass. 129.

Tort, or contract. The defendant received by mail, for collection, a sight draft pinned to a sealed package addressed to the drawee, who was a broker. The package was to be delivered only on payment of the draft. The cashier of the defendant allowed the drawee to open the package, after which the drawee refused to pay the draft. The defendant returned the draft and package. The plaintiff claimed that the defendant had destroyed the money value of the draft by permitting the drawee to open the package, and that, but for such negligence, they could have collected the draft in full. Reported for determination by this court.

Barker, J. The acts of the cashier and of the drawee could not in law be found to be a delivery either of the draft or of the package. The instruction was not violated by allowing the drawee to take the draft and the sealed package into his own hands for the purpose of examining the contents of the package, and so determining whether he would accept the package and pay the draft. Judgment for defendant.

NORTHAMPTON NAT. BANK v SMITH (1897) 169 Mass. 281.

Money had and received. A check was dated and given by H on March 28. Notice was given by H through an agent to the plaintiff on March 30 not to

pay the check. Upon the same day the check was presented by O and payment was refused. On April 27, it was presented by the defendant and was paid by the teller, who forgot that payment had been stopped. There was no misrepresentation on the part of the defendant in obtaining the money. The check was never tendered until tendered in court. Judgment for defendant. Appeal.

Allen, J. If, after payment had been made through mistake, the plaintiff sought to enforce a return of the money, it was its duty, first, to tender the check to the defendant. He was entitled to receive it before returning the money. Judgment affirmed.

Cited: 171 Mass. 533.

JOHNSON v GERALD (1897) 169 Mass. 500.

On a bond against principal and sureties. The principal, who was the treasurer of the B Bank, of which plaintiff became receiver, embezzled moneys of the bank and absconded five years after the bond was signed. The defendants contended: 1, That the bond could not become binding without a formal approval by a vote of the trustees of the bank that it was to their satisfaction; 2, that the bond was signed upon an agreement that it should not take effect until signed by the father of the principal, which was never done. The jury found that there were no conditions to the agreement. Verdict for plaintiff. Exceptions.

Knowlton, J. Their approval did not need to be by a formal vote. Exceptions overruled.

Cited: 173 Mass. 545.

NEIMAN v BEACON TRUST CO. (1897) 170 Mass. 452.

Contract to recover the amount of a deposit. The plaintiff and R F deposited with defendant in their joint names the sum of \$600. The deposit was entered by the defendant to the credit of the plaintiff and R F, and it issued a passbook in such joint names. It agreed that no payment of the deposit should be made, except on the check of both depositors signed by both names. Subsequently the defendant, on representations by R F that she had become the owner of the whole deposit, paid it to her. At the time the deposit was made the plaintiff owned one-half and B F owned the other half, but this fact was not known to the defendant. The plaintiff contended that by virtue of the marriage between R F and himself he became the owner of three-fourths of the deposit. The defendant contended that it was liable to the plaintiff for one-half of the deposit. Judgment for plaintiff. Appeal.

Allen, J. 1. The defendant should be compelled to reimburse the plaintiff for his actual loss. 2. The defendant must be held to have contemplated that there might be a change in the respective interests of the depositors. Judgment affirmed.

GREGORY v MERCHANTS NAT. BANK (1898) 171 Mass. 67.

Bill to recover a deposit. Money was deposited with defendant by order of the United States Circuit Court during the pendency of a suit to determine its ownership. There was no allegation that the bank was a designated United States depository, and the bank and the clerk were the only defendants to the bill by the plaintiff. Statutes of United States provided that money paid into court should be deposited in the name of the court in a designated depository, and could only be withdrawn by order of the judge of the court. Defendant demurred. Sustained. Judgment for defendant. Appeal.

Knowlton, J. 1. The judges of the United States Court, who were the depositors, not being parties to the bill, the suit cannot be maintained. 2. A state court cannot adjudicate questions properly cognizable only in the United States Court. The state court could not make the judges of the United States Court parties to the bill. 3. The bank could not be required to pay over the deposit to anyone but the depositor. Decree affirmed.

Cited: 173 Mass. 421.

SHEPHARD & M. LUMBER CO. v ELDREDGE (1898) 171 Mass. 516.

On checks. Two checks were made to order of plaintiff by defendant, and by him mailed to the plaintiff for goods purchased. The checks were drawn on the N Bank, and purported to have plaintiff's indorsement and other indorsements, one of which was the M Bank by which it was presented. Both checks were paid, charged to

defendant's account, and returned to him by his bank. The indorsements had been made by a clerk in plaintiff's employ, who had forged the plaintiff's indorsement, and had deposited the checks in the A Trust Co., by which they were collected from the N Bank through the M Bank. As soon as plaintiff was informed of the forgeries, he notified the indorsers, and obtained the checks from the defendant. Plaintiff reindorsed the checks and sent them to his bankers for collection. Payment was refused. Defendant requested rulings; that plaintiff could not maintain the action; that the plaintiff had neglected to give notice after discovery of the forgery; that the obtaining of the checks from defendant was a ratification of the indorsements. Testimony as to plaintiff's actions after he discovered the forgery was excluded. Judgment for plaintiff. Exceptions.

Barker, J. 1. The holder of an unindorsed check, payable to his own order, is under no legal obligation to the drawer to exercise care, so long as he acts without collusion. 2. The plaintiff's act in procuring the checks without notifying him that plaintiff claimed them, and intended to collect them, at the same time informing defendant of the forgery, would naturally induce defendant to omit to give the information to the drawee. 3. The receipting of subsequent bills by plaintiff without informing defendant that the debts for which the checks had been given had not been paid, worked no estoppel. Judgment reversed.

Cited: 173 Mass. 281; 177 id. 558.

WINSLOW v EVERETT NAT. BANK (1898) 171 Mass. 534.

To recover a deposit and damages for refusing to honor a check. Plaintiffs gave the check on his deposit in the defendant bank to M Co. Defendant, having paid the check on a forged indorsement, refused payment when properly indorsed. M Co. subsequently assigned their rights to the plaintiff. Defendant contended that the plaintiff's debt to M Co. had been satisfied by the check or the assignment, and that he had suffered only nominal damages. Verdict for plaintiff. Exceptions.

Holmes, J. 1. It was immaterial to the bank whether plaintiff owed M Co., or that the plaintiff's damage was merely nominal. 2. The defendant was liable. Exceptions overruled.

Cited: 172 Mass. 366.

HANCOCK NAT. BANK v ELLIS (1898) 172 Mass. 39.

To enforce the liability of stockholder. Plaintiff was a creditor of a Kansas corporation in which the defendant held stock. Defendant and plaintiff were citizens of Massachusetts. After failing to collect on an execution issued against the corporation, which had become insolvent, plaintiff commenced the action against the defendant as a stockholder. Par. 1192 of the G. S. of Kansas of 1889, provided that if an execution against a corporation was returned unsatisfied, then execution might issue by order of the court against any stockholder to the amount of his stock. The decisions of the highest court of Kansas held that the enforcement of a stockholder's liability was several and not joint. The Massachusetts court had jurisdiction over similar actions, and service was made according to the laws of that state. The G. S. of Kansas in regard to stockholder's liability and the decisions of the highest court of that state were put in evidence. Judgment for defendant. Exceptions.

Field, C. J. 1. The action to enforce the liability of stockholders under par. 1192 of the G. S. of Kansas of 1889 was properly brought in the courts of the state in which the defendant resided. 2. The liability was directly to the creditor and could not be enforced by the receiver or by the corporation. Exceptions sustained.

Cited: 172 Mass. 361; 176 id. 295, 296.

TAFT v QUINSIGAMOND NAT. BANK (1899) 172 Mass. 363.

To recover the amount of a check. Plaintiff deposited a check on a foreign bank with the defendant and was credited with it. There was no evidence that defendant gave notice that it only received checks for collection, or that there was a special arrangement with the plaintiff to that effect. The defendant said it would be a short time before it was known whether the check was paid by the maker. Over a month after the deposit was made, plaintiff was informed that the check had not been collected, but defendant continued to honor checks on plaintiff's deposit for two months, when, upon writing up his passbook, plaintiff was charged with the

check. Defendant contended that it was not a purchaser of the check. Judgment for plaintiff. Exceptions.

Barker, J. When a bank receives upon deposit a check indorsed without restriction, and gives credit for it to the depositor as cash in a drawing account, the form of the transaction is consistent with and indicates a sale, in which the check becomes the absolute property of the banker. Exceptions overruled.

PORTLAND STEAMSHIP CO. v DANA (1899) 172 Mass. 447.

Bill to recover trust funds. The bill alleged that defendant's testator was the forwarding agent for plaintiff, a transportation company. The testator sent the plaintiff his personal check for an amount he had collected, and died before depositing funds to cover it. Immediately his clerk deposited money to cover the check, and the bank paid the money to the defendant instead of the plaintiff. Decree for plaintiff. Appeal.

Lathrop, J. The deposit was impressed with a trust in favor of the plaintiff. Decree affirmed.

UNITED STATES NAT. BANK v VENNER (1899) 172 Mass. 449.

On a judgment. The plaintiff obtained a judgment against the defendant in a New York court. The writ described the plaintiff as the "United States Nat. Bank of New York, N. Y., a banking association duly organized under the laws of the United States, and having its place of business in the City and State of New York." Plaintiff put in evidence certified copies of the articles of incorporation, the organization certificates, the certificate to do business, showing the existence of the United States Nat. Bank of the City of New York, and proved that the plaintiff recovered the judgment, and that there was no other bank in New York of the same or similar name. Defendant contended there was a variance. Judgment for plaintiff. Exceptions.

Lathrop, J. 1. The words of "New York, N. Y." do not necessarily import to be a part of the plaintiff's name, but may be considered as description only. 2. In the absence of evidence that there was any other bank of that name at that place, the evidence introduced warranted the inference that the organization proved was that of the plaintiff corporation. Exceptions overruled.

HALL v FIRST NAT. BANK (1899) 173 Mass. 16.

Injunction. The bill alleged that the defendant, a bank, held the note of the plaintiff H; that there was an oral agreement that the defendant would discount and renew H's notes until his business improved; that the defendant did discount such notes; that the defendant, refusing to renew certain notes, commenced suit on them; that the plaintiff S agreed to indorse notes for H, and did so with the express understanding and agreement that the defendant would discount them. The bill prayed that the defendant be enjoined from enforcing payment of the notes, and be ordered to specifically perform the contract. Demurrer. Sustained. Appeal.

Holmes, J. 1. The alleged agreement, not being in writing, could not be proved in contradiction of the written contract, which was to pay a definite sum on a day certain. 2. Nor does the alleged agreement import a legally binding promise. The allegations are too vague and uncertain. Bill dismissed.

Cited: 173 Mass. 438, 445; 175 id. 429.

JEWETT v WEST SOMERVILLE CO-OPERATIVE BANK (1899) 173 Mass. 54.

Contract. The defendant was a legally organized co-operative bank. The plaintiff held an order for the payment of money accepted by the defendant's treasurer. The treasurer was not expressly authorized to make such acceptances. By statute all payments of money were upon an order signed by the president and secretary. The court refused to rule for the defendant, that the treasurer had no authority, and that the bank had no power, to accept such an order; that such acceptance, if made by the bank, was ultra vires, and that from the evidence the plaintiff was not entitled to recover. Judgment for plaintiff. Exceptions.

Knowlton, J. 1. The treasurer of the bank had no authority by virtue of his office to bind it by his acceptance of the plaintiff's order. 2. The ruling should have been given. Exceptions sustained.

Cited: 175 Mass. 382.

GREVES v SHAW (1899) 173 Mass. 205.

Petition for instructions as to the payment of an inheritance tax. The testatrix, a resident of New York, died owning stock in corporations and national banks in Massachusetts. Petitioner qualified as executor in New York, and transferred some of the stock in accordance with the provisions of the will. The certificates of stock were actually in New York, and the petitioner paid an inheritance tax there. Subsequently he was appointed executor under the Massachusetts law. By the Massachusetts law all property or any interest therein, within the state, whether it belonged to inhabitants of the state or not, and whether tangible or intangible, was subject to an inheritance tax. Decree for the commonwealth. Appeal.

Knowlton, J. The property was subject to an inheritance tax under the Massachusetts law. Decree affirmed.

Cited: 173 Mass. 377; 175 id. 61.

COMMONWEALTH v WARNER (1899) 173 Mass. 541.

Indictment for embezzlement. Defendant was an officer of a savings bank. The indictment was for taking a quantity of money; to wit, \$5,000 of the property of the savings bank. The jurors were not allowed to answer whether they were stockholders or related to stockholders of a bank. The organization of the bank was proved by a book of records kept in defendant's writing, and the book was identified by a witness who had seen it at a trustees' meeting. Checks, signed by defendant as treasurer, were proved never to have been paid to the payees. Defendant's exceptions were all general. Defendant contended that the indictment was bad for not alleging the value of the money or that he had personal possession of it. Defendant further contended that a savings bank was not an incorporated bank within the statute; that the checks did not correspond to the specifications; that the jury should have been instructed as to the effect of the evidence under each specification; that the evidence in regard to the payees of checks failing to receive the money was improper. Verdict of guilty. Exceptions.

Knowlton, J. 1. It was not necessary to allege the value of money or anything in regard to defendant's personal possession of the money. 2. A savings bank is an incorporated bank within the statute for converting the money of a bank. 3. The questions to the jurors were properly refused. 4. The book containing records was proper to prove an organization of the bank. It was proper to receive evidence that the defendant had produced the book of records at meetings of the trustees. The defendant should be held strictly to show any error. The contents of the bank's books were properly presented to the jury. 5. It was immaterial that the checks did not correspond exactly to the specifications. The defendant was not entitled to have the jury instructed as to the effect of the evidence introduced under each specification. The exception to the check signed by the defendant as treasurer was immaterial. Exceptions overruled.

Cited: 177 Mass. 263.

BROWN v BROWN (1899) 174 Mass. 197.

Accounting of administrator. Petitioner was the administrator of his wife's estate, and filed his account claiming credits to himself for the proceeds of his wife's deposit in a savings bank, and also the proceeds of a check. Petitioner gave his wife money which she deposited in a savings bank in her own name. At times he would take the book and deposit in her name. A check for the proceeds from a sale of his property was made payable to the wife and was deposited by her in her name. Decree disallowing the credits. Appeal.

Hammond, J. The decree should stand. The deposits in the savings bank and the check became the property of the wife, by contract with the bank, not by gift from petitioner. Decree affirmed.

NATIONAL BANK OF COMMERCE v CITY OF NEW BEDFORD (1900)
175 Mass. 257.

Petition for the abatement of taxes. The assessors levied a tax on the share of stock of the petitioner, which they valued at \$73 a share. The respondents made no objection that the appeal from their decision was not taken at the proper time. By agreement, after a term at which the appeal could have been tried, a commissioner was appointed to take testimony. The directors' vote authorized the petition only to the extent of the fair cash value on the cash sales on or about

a certain date. The commissioner received evidence of the cash value of the shares covering a considerable period of time, by receiving reports of auction sales of the stock. The respondent was not allowed to prove the prices brought at private sales or the prices quoted by the newspapers, or the intrinsic value of the shares on a certain day. Respondent contended that the bank was estopped to set up that the fair cash value of the shares for assessment was less than the cash sales on the fixed day, and that the court did not have jurisdiction because of irregularity in the proceedings. Judgment for petitioner, reducing the assessment. Exceptions.

Holmes, C. J. 1. The court had jurisdiction. 2. The directors' vote was intended to authorize an application for an abatement of any amount that could be obtained. 3. The evidence received of the value of the shares over a length of time was proper. 4. Evidence of private sales and newspaper quotations of value was properly excluded. 5. There was no estoppel. Exceptions overruled.

SLATTERY v NORTH END SAV. BANK (1900) 175 Mass. 380.

Contract. Defendant, a savings bank, made a building loan to L, and agreed to pay out the money on contracts made by him. The defendant's officers had general authority to conduct its business, but did not have express authority to make such an agreement. Plaintiff furnished materials to complete the building commenced by L. Plaintiff contended that the bank was estopped to deny the debt. Verdict for defendant. Exceptions.

Barker, J. There was no estoppel. The officers of the bank had no authority to make such an agreement. Exceptions overruled.

HOWARTH v LOMBARD (1900) 175 Mass. 570.

Contract to collect the assessment to pay the debts of a bank. Plaintiff was the receiver of a bank in the State of Washington, in which defendant held stock. A Washington statute made the stockholders of its banks liable for debts to the amount of their stock. The Washington courts had regularly proceeded and levied an assessment on the shareholders, in accordance with the laws and decisions of that state. Demurrer. 1. Want of equity. 2. That defendant did not appear to be liable under Massachusetts laws. 3. That the receiver could not recover. 4. That the liability could only be enforced in Washington. Demurrer sustained. Judgment for defendant. Appeal.

Knowlton, J. 1. The defendant was liable for the assessment. 2. The action was properly brought in the name of the receiver. 3. Decisions of the Washington courts were binding on defendant. Demurrer overruled.

Cited: 176 Mass. 295, 296.

ATLAS NAT. BANK v NATIONAL EXCHANGE BANK (1900) 176 Mass. 300.

On promissory note. The note was made by the B Co., and was included in the account of the defendant against the plaintiff in the clearing house, and the amount of it charged to the B Co. on the books of the plaintiff in red ink, as all clearing house notes are charged, at about eleven o'clock. At the same time the defendant was credited with this amount in its clearing house account. A few minutes before three o'clock, the plaintiff called up the B Co. and asked about the note. The treasurer responded that it had made an assignment. The cashier of plaintiff then had the charge for the note against the maker crossed out, and the credit in favor of the defendant of the same amount, and sent the note to the defendant and demanded the money credited by it in the clearing house. It was the universal custom among the members of the clearing house association that if the notes were not returned before the time of closing of the bank, which, in case of the plaintiff, was two o'clock, the conditional payment became absolute. Report in favor of plaintiff. Judgment for plaintiff. Appeal.

Loring, J. Banks which are members of a clearing house association may agree that a promissory note, included in the clearing house settlement and in that way conditionally paid without inspection, shall be returned as soon as it is found out that it is not a good item in that account, and to limit the time within which it can be returned, and to provide that, if it is not returned within the time so fixed by the clearing house, the conditional payment shall become absolute. Report discharged.

Cited: 178 Mass. 533.

HUDSON, ADM'R v ROXBURY INST. FOR SAVINGS (1900) 176 Mass. 522.

Contract to recover the balance of a deposit. The intestate, C, deposited the money in 1861 and died in 1868. The bank book was destroyed by fire in 1867. It was shown that no demand had been made for the money, except by the plaintiff. Art. 26 of the defendant's by-laws provided that the defendant would not be responsible for any loss sustained when the depositor had not given notice when a bank book was lost or stolen, but, on satisfactory proof of the loss, the money could be paid on the giving of an indemnity bond. The by-laws were adopted after the deposit was made. Judgment for plaintiff. Appeal.

Morton, J. The bank book having been destroyed, the plaintiff representing him or his estate cannot be held bound by art. 26 of the amended by-laws under the circumstances disclosed in this case. Judgment affirmed.

DEDHAM'S NATIONAL BANK v EVERETT NAT. BANK (1901) 177 Mass. 392.

On checks. The checks were both drawn on the plaintiff "to the order of cash," and signed by W J G, who had a deposit with the bank. The checks were presented to the defendant by a clerk of one of its depositors, who was known to the defendant. The checks were not indorsed by the depositor nor by his clerk. The defendant gave the clerk part cash and the balance was credited to the depositor. The defendant indorsed the checks, "pay only through clearing house to the Everett National Bank." On August 2 and September 7, 1897, the checks passed through the clearing house, and were paid by D, an employee of plaintiff. The signature of W J G was on file with plaintiff, and had it been compared with the signatures on the checks, the forgeries would have been discovered. In February, 1898, the plaintiff notified the defendant that the checks were forgeries and requested repayment. Judgment for defendant. Appeal.

Holmes, C. J. 1. When the holder of a check in no way contributes to the deception, the bank takes the risk of paying, so far as the signature is concerned. 2. The indorsement of the check by the defendant was not an indorsement by the payee. It was not an indorsement for purposes of transfer, and contained no representations beyond what would have been imported by a presentment in person. 3. A drawee paying a forged draft or check to a bona fide purchaser cannot recover back the money paid. Judgment affirmed.

SAUNDERS v WHITCOMB (1901) 177 Mass. 457.

On bills of exchange. The defendant and C, while in England, accepted the bills in question drawn by W & S, payable at B, S & Co., London. The bills were sent by B, S & Co. to their New York branch, who sent them to the F Bank of W for collection. The New York branch of B, S & Co. accepted half of the amount of the bills in full settlement without any authority of the plaintiff. Previous to the action, the bills were assigned by the drawers to the plaintiff to enable him to sue for the benefit of the drawers. Verdict for plaintiff. Exceptions.

Barker, J. The action of the collection agents in receiving less than the full amount of the debt in satisfaction of the whole, without the original authority of the owners or their subsequent ratification, was no bar to the action. Exceptions overruled.

ATLAS NAT. BANK v NATIONAL EXCHANGE BANK (1901) 178 Mass. 531.

On promissory note. The note of the B Co. was included in defendant's clearing-house account against plaintiff and charged to the maker on plaintiff's books at eleven o'clock. On the day that the plaintiff bank paid the note through the settlement of its daily balances at the clearing house, it found that the maker of the note had made an assignment, and it sent back the note to the defendant bank. This was after banking hours, and the clerk of the defendant refused to receive it. There was a rule or custom that notes must be returned before two o'clock, or, if time is given, at two o'clock. Report in favor of plaintiff.

Loring, J. The court erred in ruling that a custom would be invalid, which fixed a time within business hours when the conditional payment of a note, made by the note having gone through the clearing house, becomes absolute. Report discharged; new trial granted.

•

MICHIGAN

BANK COMMISSIONERS v BANK OF BREST (1838) Harr. 106.

Motion for appointment of a receiver. The board of directors of defendant, an insolvent bank, without authority of the stockholders, assigned all its assets to a trustee for the benefit of creditors. Defendant denied the right of the court to remove the trustee except for misconduct, and denied that it was insolvent. The facts showed that during a certain period the assets of the bank had been greatly reduced without a corresponding reduction in the liabilities.

The Chancellor. 1. The bank is insolvent and a proper case is made for the appointment of a receiver. 2. A transfer of a portion of the assets to a trustee is within the power conferred on a board of directors of a corporation, but when all the assets are so transferred, the authority of the stockholders is necessary, or the assignment is invalid. Motion granted.

Cited: 2 Doug. 541, 546, 557.

BARNUM v BANK OF PONTIAC (1839) Harr. 116.

Motion for injunction. The charter provided that if a bank failed to pay its notes on demand, it should have 60 days within which to redeem; but that nothing in the act should prevent the issuing of an injunction, and that it might be issued when any bank refused to pay its debts. The plaintiff alleged demand and refusal to pay, but did not show insolvency or that the rights of the creditors were in danger, and contended that under the statute the injunction must issue.

The Chancellor. 1. An injunction will only be granted where the right to such is clearly established. 2. To make out a proper case, it is necessary to show immediate pending insolvency, and that the rights of the creditors are in jeopardy. Motion denied.

FAY v ERIE & KALAMAZOO R. R. BANK (1839) Harr. 194.

Motion to discharge a receiver. The plaintiff, a creditor of defendant bank, had obtained appointment of a receiver. Other creditors intervened. Subsequently the plaintiff, having been paid his claim, made the motion, alleging that it must be granted as a matter of right, and that no one could be heard in opposition. No provision had been made for the receiver's expenses, nor to indemnify him against any liabilities.

The Chancellor. 1. An individual creditor, after having a receiver appointed and receiving payment of his claim, and other creditors, having filed claims, cannot, as matter of right, have the receiver discharged. 2. This court has power to discharge the receiver, but it will not do so until it has provided for the protection of such officer and safeguarded the rights of all other creditors. Motion denied.

Cited: 97 Mich 150.

WALES v BANK OF MICHIGAN (1842) Harr. 308.

Motion for an injunction. The complainant, an accommodation indorser of a note, payable at defendant bank, received as collateral security for his indorsement two other promissory notes. He deposited these with the defendant, with instructions to its president to collect them, and apply the proceeds to the payment of the original note. The complainant was sued as indorser by the defendant, and a judgment was rendered against him. Subsequently, the complainant ascertained that the defendant had collected and failed to apply the proceeds of one of the collateral notes as directed. Demurrer: That the president acted as agent of complainant and not of the bank, and that complainant came too late and his defense was at law.

Farnsworth, C. 1. Taking security for a debt is one of the ordinary transactions of a bank, and the transaction comes fairly within the scope of the powers of its officers. 2. Where a party is ignorant of facts which constitute a defense at law, until after judgment has been rendered against him, he may come into equity. Demurrer overruled.

Cited: 60 Mich. 621.

ATTORNEY-GENERAL v BANK OF MICHIGAN (1842) Harr. 315.

Motion for injunction and receiver. The bill alleged that for four years defendant had been unable to pay its liabilities; that the officers refused to pay them; that its business as a bank had almost ceased; that it had large liabilities in outstanding bills and moneys due depositors, all payable on demand; that the state had been unable to collect its claim. The answer admitted that it was unable to meet its liabilities; its indebtedness to the state; and alleged that it refused to pay same in specie only because it could not pay all its billholders in specie; that it has assets sufficient to meet all liabilities, but could not at once realize on them; that an examination by a committee of the legislature disclosed that its assets were in excess of its liabilities, and that the appointment of a receiver would be ruinous. A preliminary injunction had been granted. Motion.

The Chancellor. 1. The jurisdiction over corporate bodies has been conferred upon courts of equity by statute, and this court has power to declare forfeited the charter of any bank which shall suspend specie payments. 2. Injunctions will not be granted in the first instance, simply on the allegation that a bank has stopped payment, even if forfeiture is alleged. Such facts must be shown. 3. Forfeiture is never presumed. 4. The failure to conform to the statute on the particular days mentioned did not work a forfeiture. Motion for receiver denied.

Cited: 48 Mich. 135.

COOK v WHEELER (1842) Harr. 443.

To enforce stockholder's liability. Cross bill for discovery alleging that the original bills charged fraud and mismanagement by defendants, as directors of the C Bank or as fraudulent partners; that complainant held notes of the bank, and was the assignee of certificates or receipts given by the receiver; that it was not alleged when W became possessed of the bank notes or the consideration given; that if he was the assignee, some other person had an interest in them, who had been made a party to the bill; that the bills were bought on speculation after the bank stopped payment. Demurrer to the cross bill.

The Chancellor. 1. The stockholders being liable for the bank's debts, it is immaterial what consideration was paid for the notes or the time of the assignment, and it was not necessary to make the persons for whom complainant held the notes parties to the bill. 2. If defendants are fraudulent co-partners, they are equally liable for the entire amount of the indebtedness. Demurrer allowed.

Cited: 6 Mich. 73; 8 id. 230.

WHEELER v CLINTON CANAL BANK (1842) Harr. 449.

Bill to enforce individual liability. The bill was by a creditor of defendants against the directors and stockholders, because the stockholders, under shelter of the banking law and with fraudulent intent, formed a corporation to carry on a banking business. They misused their powers to defraud the creditors. Plaintiff asked that a receiver be appointed. A receiver had previously been appointed at the instance of a creditor who had treated defendants as a corporation. Defendants demurred: 1, That a receiver is already in charge of the assets; 2, this is a creditor's bill, and plaintiff has not conformed to the rules required to establish such bill; 3, the plaintiff has an adequate remedy at law; 4, the bill is multifarious, as defendants were connected with the bank at different times, and so have different liabilities; 5, the receiver should have been made a party.

The Chancellor. 1. The fact that another creditor has seen fit to treat defendants as a corporation cannot deprive this plaintiff of his remedy in this form, if he can sustain his allegations. 2. This is not a creditor's bill, but seeks to charge defendants in original proceedings as members of a fraudulent association or co-partnership. 3. Plaintiff had no remedy at law. 4. A bill may be sustained against different persons relative to matters of the same nature in which all defendants are more or less concerned, though not jointly in each act. 5. The receiver is not a necessary party. Demurrer overruled.

Cited: 32 Mich. 392; 43 id. 312; 60 id. 479.

WELLES v R. R. & G. R. R. R. CO. (1842) Walk. Ch. 35.

Injunction. A statute prohibited a stockholder from discounting a note in order to make payment for his stock. Plaintiff caused a certain note and certifi-

cate of deposit to be discounted to enable them to raise funds to pay for stock of a bank. On default in payment, defendant sued on the note. Plaintiff asked for an injunction and that the certificate of deposit and note be canceled. Demurrer.

The Chancellor. 1. The plaintiff, having been guilty of a fraud, will be left to his remedy at law. 2. When a bill is filed for relief, the discovery is ancillary, and a demurrer good to the relief, is good to the discovery. 3. This court, when refusing relief on account of fraud, will not aid a party thereto at law. Demurrer sustained. Bill dismissed.

ATTORNEY-GENERAL v OAKLAND COUNTY BANK (1842) Walk. Ch. 90.

Injunction. The bill alleged that defendant bank had forfeited its charter by failing to comply with a saving clause in an act repealing the charter, and that it had established a branch at another town in violation of its charter. The bill asked for a receiver and that its charter be declared forfeited, and for an injunction pending the hearing. The injunction was granted, and defendant filed its answer alleging that defendant had complied with the saving clause, and that the branch did not do a regular banking business, but confined itself to redeeming the issues of the bank. Motion to dissolve injunction.

The Chancellor. 1. An injunction will only be dissolved when the equity of the bill is met and denied by the answer, and will not be dissolved where the answer admits the equity of the bill, but sets up new matter. 2. The defendant must show by facts a compliance with the saving clause, not a general allegation of compliance. 3. The answer shows that the largest part of the assets were kept at defendant branch, and the business transacted there was a violation of the charter. 4. The injunction was properly granted. Motion denied.

Cited: Walk. Ch. 295; 2 Mich. 147; 12 id. 71; 16 id. 477; 23 id. 494; 36 id. 250, 403; 95 id. 214.

HAMMOND v MICHIGAN STATE BANK (1843) Walk. Ch. 214.

Accounting. The defendant bank, having become indebted to the State in a large sum, offered to turn over certain assets in discharge of the debt. The legislature authorized the plaintiffs, certain State officers, to effect the settlement, and empowered them to do whatever they deemed equitable in the premises. A settlement was subsequently made, the plaintiffs taking over, among the assets, certain mortgaged property, and agreed to pay such liability. The legislature ratified the settlement, except as to the mortgage debt. Many of the assets were in the hands of the bank's attorney for collection. After the legislature refused to ratify the whole agreement, the bank and its attorney refused to go further. The plaintiffs asked for an accounting, and that the bank and its attorney may be decreed to carry out the agreement. Defendant contended that the prayer of the bill made it multifarious. Demurrer.

The Chancellor. 1. The act did not authorize them to impose a new liability upon the state. The defendant is chargeable as a matter of law with a knowledge of the extent of the authority conferred on the plaintiffs by the legislature. 2. Where an agent does an act which binds his principal, and at the same time does something which he is not authorized to do, and the two acts can be separated, then that which the agent was authorized to do is binding, and the other is void, and the assumption of the liability by the state in this agreement was separable from the balance of the contract. 3. The objection of multifariousness will not lie. To determine whether a bill is multifarious, we must refer not to the prayer alone, but to the body of the bill, for a plaintiff is entitled only to that relief which he sets up in the pleading. 4. The state acquired a right to the property notwithstanding the rejection of the condition. Demurrer overruled.

Cited: 77 Mich. 447; 116 id. 244.

BAILEY v MURPHY (1844) Walk. Ch. 424.

Foreclosure. The defendant executed a bond and mortgage to R Bank, to secure a pre-existing indebtedness, contracted in the regular course of business. It bore interest at the rate of 7 per cent per annum. The bank's charter provided that it should not charge more than 6 per cent in advance "on its loans or discounts." Subsequently, the bond and mortgage were assigned to the complainant. The bill alleged that the assignment was made by the bank to M, November, 1839, and that M "afterward, to wit, on 25th of February, 1839," assigned to

complainant. It also stated that the assignment was acknowledged February 25, 1841. Demurrer.

Manning, C. 1. A mortgage for a pre-existing debt is neither a loan nor a discount, and the interest charged was lawful. 2. The assignment stated in the bills was sufficient for complainant to maintain the action. The date, February 25, 1839, was clearly a clerical error. Demurrer overruled.

MICHIGAN STATE BANK v HASTINGS (1844) 1 Doug. 225.

Bill to enforce a trust. The plaintiff bank was indebted in a large sum to the state. Its charter, which contained no repealing clause, had been declared forfeited because of failure to pay its liability in specie. The legislature appointed the defendants, State officers, commissioners to settle with the bank. The parties entered into an agreement whereby the indebtedness was canceled, on plaintiff conveying certain property. This agreement was on the express condition that the state should indemnify the plaintiff against liability. The plaintiff transferred the property to defendants. Two years later, the State legislature ratified the agreement, except that the indemnity clause was repudiated. The breach was that defendants had allowed a mortgage on the land to be foreclosed. The bill also prayed that defendants be decreed trustees of the property conveyed. Demurrer. Sustained. Appeal.

Whipple, J. 1. The legislature was powerless to declare the charter forfeited. 2. While a state cannot be sued, this only applies where the record shows it to be a party. 3. The plaintiff has failed to show that it has been damaged. 4. Whether the defendants had power to annex the indemnity clause is immaterial, as the state has ratified it by acting on the agreement for two years. 5. The act of the legislature rejecting this part of the contract is a mere nullity. Decree affirmed.

Cited: 2 Mich. 246; 31 id. 51; 38 id. 750; 42 id. 427; 47 id. 131; 56 id. 318; 60 id. 43; 62 id. 412.

PEOPLE v OAKLAND COUNTY BANK (1844) 1 Doug. 282.

Quo warranto. The application was for the purpose of requiring the defendant to show by what right it exercised corporate privileges. It was contended that the act under which the defendant claimed incorporation became void, because the required specie was not paid into the bank within two years from the passage of the act; that the charter was repealed by Act of 1842. That act repealed the charter of the "Bank of Oakland County." By the act of incorporation the name was, "The President, Directors, and Company of the Oakland County Bank." It was alleged that the defendant had violated its charter, by the establishment of an agency at Detroit; that the charter required the bank to be located at Oakland. The books of the bank showed that the required specie had been paid into the bank within the two years, and it was contended that it had been immediately withdrawn.

Whipple, J. 1. The books of the bank show the payment of the required specie within the time limited, and the evidence of its immediate withdrawal was not sufficient to establish fraud. 2. The repealing act did not indicate with sufficient clearness the name of the corporation intended to be repealed. 3. In establishing a branch in Detroit, there was an assumption of authority by the defendant not warranted by law; but as it has been discontinued, we do not feel authorized to declare judgment of forfeiture against the defendant. Case continued.

Cited: 12 Mich. 91; 17 id. 170; 23 id. 494; 24 id. 396; 25 id. 241; 47 id. 51; 55 id. 24.

GREEN v GRAVES (1844) 1 Doug. 351.

On promissory note. The receiver of the Bank of N, insolvent, was plaintiff. Demurrer on the ground that the bank never had any legal existence, the Act of 1837 under which it was organized being unconstitutional. The constitution of the state provided that "the legislature shall pass no act to incorporate unless with the assent of at least two-thirds of each house." The act under which the bank was incorporated was not so passed.

Whipple, J. So much of this act as purports to confer corporate rights upon the associations organized under its provisions, is unconstitutional and void. Demurrer sustained.

Cited: 2 Doug. 160, 195; 1 Mich. 119, 120, 121, 482, 512; 2 id. 287; 5 id. 259; 13 id. 151; 16 id. 258; 45 id. 510; 66 id. 2; 72 id. 451; 76 id. 166; 79 id. 66; 80 id. 608; 89 id. 579; 91 id. 96.

BANK OF MICHIGAN v NILES (1844) 1 Doug. 401.

Bill for specific performance. The plaintiff bank, pursuant to an agreement with defendant, contracted to purchase real property and convey it to defendant. The charter of plaintiff authorized it to hold only such real property as was necessary for its use, and to receive real property by way of security or in satisfaction of debts due it. The defendant refused to carry out his agreement to buy. Defendant demurred. Sustained. Appeal.

Felch, J. 1. The transaction was prohibited by the terms of plaintiff's charter. 2. Equity will not aid an unlawful agreement. Decree affirmed.

Cited: 25 Mich. 245; 47 id. 51; 76 id. 65.

FARMERS AND MECHANICS BANK v TROY CITY BANK (1844)
1 Doug. 457.

On bills of exchange. The bills were directed to W, cashier of defendant bank, who wrote across the face "accepted. W, cashier." The acceptance was without consideration, for the accommodation of the drawers, and this was known to the plaintiff, and was not authorized or approved by the directors. Defendant contended that plaintiff did not authorize the suit, and that plaintiff had not proved itself a corporation. The attorney's name was indorsed on the writ; and the record recited that "the plaintiff, by his attorney, comes," etc. The court charged, that the defendant, by its agent, accepted the bills, and refused to charge, that plaintiff could not recover, if it knew that the draft was drawn and accepted by the cashier for the drawers' accommodation, without the approval or ratification of the directors. Judgment for plaintiff. Error.

Whipple, J. 1. There was sufficient to show that plaintiff authorized the suit. 2. The evidence of plaintiff, having fulfilled all conditions to become incorporated, being complete, its incorporation is presumed. 3. The instruction given was proper. 4. The refused instruction should have been given. Persons dealing with a bank are presumed to know the extent of the cashier's authority. Judgment reversed.

Cited: 14 Mich. 214; 28 id. 299; 31 id. 204; 56 id. 582; 95 id. 376.

MICHIGAN STATE BANK v HAMMOND (1845) 1 Doug. 527.

Bill for accounting. The plaintiff bank owed the state. Defendants were state officers, appointed commissioners by the legislature to secure its payment. Defendants took a conveyance of certain property of plaintiff in satisfaction of the debt. In the agreement conveying the property was a condition that the state should indemnify the plaintiff from liabilities on some of the property. Two years later the legislature ratified the agreement, except as to the indemnity clause. A judgment was obtained against plaintiff on one of the liabilities covered by the indemnity, and plaintiff was obliged to pay. The state refused to indemnify plaintiff. The attorneys for plaintiff held for collection some of the assets conveyed by plaintiff to defendant under the agreement, and refused to deliver them to defendant. Action was brought to compel repayment to plaintiff of the amount of the judgment it was obliged to pay; also, that defendants be decreed trustees. Demurrer sustained. Appeal.

Whipple, J. 1. The legal effect of the refusal by the state to indemnify plaintiff is that the assets, conveyed by plaintiff to defendants, revert to plaintiff. 2. The part of the act of the legislature, not ratifying the indemnity clause, was of no effect, and the state, by allowing two years to elapse and exercising control over the assigned property, ratified the agreement of the plaintiff and defendants in full. 3. Before plaintiff is entitled to relief, it must deliver to defendants all the assets in the attorney's hands. 4. On plaintiff agreeing to waive any forfeiture growing out of the breach of the condition, the court will decree the defendants trustees, and that the judgment paid by plaintiff be repaid out of assets in defendants' hands. Judgment reversed.

Cited: 38 Mich. 750; 60 id. 43.

SMITH v BARSTOW (1845) 2 Doug. 155.

On promissory note. F Bank, organized under the general banking law of the state, drew on W, who accepted the drafts for the bank's accommodation by its depositing its bills with him. The drafts were negotiated and the bank failed to provide for their payment. Afterward defendants, directors of the bank, who were liable for the debts of the bank under the general banking law, gave the note to plaintiff, and assigned securities in trust. The consideration was the surrender of the bills deposited with him. Plaintiff was to collect the securities and apply the collections to W's acceptances. The court refused to charge for defendant: That the consideration was illegal, being given to provide means for the payment of bills issued by the F Bank, which was organized under an unconstitutional act; that the drafts for which the note was given were illegal, in not being payable on demand without interest; that the note was made, and other securities assigned to plaintiff, for the purpose of indemnifying W, and unless the jury believed he had been damnified by reason of the acceptances, plaintiff could not recover. Judgment for plaintiff. Error.

Goodwin, J. 1. Assuming the unconstitutionality of the general banking law of the state, as to bills and drafts in question, the note in suit was not given for an illegal consideration or object. The transaction was free from the supposed illegal taint. 2. The presumption is that the bills were reclaimed and redelivered for the purpose of preventing their circulation, or for the purpose of anticipating and obviating liability under them. The act had not been pronounced unconstitutional. 3. It was not necessary to find that W had been damnified in order for plaintiff to recover. Judgment affirmed.

Cited: 2 Doug. 255.

HURLBUT v BRITAIN (1846) 2 Doug. 191.

Foreclosure. The defendant executed a mortgage to a bank. Subsequently, the bank went into the hands of plaintiff, as receiver, on an allegation of insolvency made by the bank commissioners, charging a violation of the law under which it was organized. The bank was not incorporated under any special law, and could only claim corporate powers under the general banking law, which had been declared unconstitutional. Plea: That there had never been any delivery of the mortgage in question. Decree for defendant. Appeal.

Goodwin, J. This bill cannot be maintained, for the bank was organized under the general banking law. Decree affirmed.

Cited: 45 Mich. 510; 57 id. 271.

ORR v LACEY (1846) 2 Doug. 230.

On bill of exchange. The action was for the benefit of a branch of an Indiana bank. Defendant had indorsed the bill sued on. The acceptor testified, under objection, that the bank, in discounting the original bill of which the one in suit was a renewal, reserved interest in excess of that allowed by the charter. The charter provided that a bill or note upon which such interest was taken or reserved should be void. The court charged that, if the contract was found to be usurious, the plaintiff should recover the amount appearing to be due, less three times the excessive interest. Judgment for plaintiff. Motion for new trial.

Whipple, J. 1. In taking more than 6 per cent interest, the bank violated the provisions of its charter, and both agreements were rendered void, and the court should have so charged. 2. The testimony of the acceptor was admissible. Motion granted.

Cited: 33 Mich. 495; 38 id. 446; 47 id. 51.

BROOKS v HILL (1846) 1 Mich. 118.

Debt. The action was against the directors of an insolvent bank to collect a debt due from the bank. The bank was organized under Act of March 5, 1837, which made the directors liable in case of insolvency. So much of the act as purported to confer corporate rights had been declared unconstitutional. The defendants averred that there was no corporation; that the contract was made by them as a bank, contrary to a restraining act of the state. Judgment by default. Error.

Wing, J. As the law under which the bank was attempted to be organized was

unconstitutional, there never was any corporation, and defendants are not liable. Judgment reversed.

Cited: 59 Mich. 75.

THE STATE v HOW (1846) 1 Mich. 512.

Bill to enforce individual liability. It was sought to charge the directors of a state bank individually with the payment of the bills of the bank, organized under the General Banking Law of 1837. The bank had failed. Demurrer.

The Chancellor. The general banking law, under which the bank was organized, being unconstitutional, it follows that the defendants cannot be charged in their individual capacity with its debts, by reason of their being members of the corporation; for where there is no corporation, there are no corporators. Demurrer sustained.

Cited: 1 Mich. 483; 45 id. 511.

TOWN v BANK OF RIVER RAISIN (1847) 2 Doug. 530.

Injunction. The defendant bank, by its officers and directors, made an assignment preferring some of the creditors, without knowledge of some stockholders, but with approval of a majority of them. The plaintiff, a creditor, filed the bill against the bank and the assignees asking for an injunction and receiver on the grounds: 1, That the assignment was a surrender of franchise without the authority of the state; 2, that it was void as not authorized by charter; 3, that it was contrary to statutes of the state. Decree for plaintiff. Appeal.

Whipple, J. 1. The acts done and suffered by the bank were not a surrender of the charter and did not work a dissolution. 2. A corporation can only be dissolved by consent of the creating parties or judicial proceedings. 3. Corporations are presumed to have power to provide for payment of debts and the assignment was valid. 4. The assignment was not contrary to the provision of the statute of the state. Decree reversed.

THE PEOPLE v WHITTEMORE (1852) 4 Mich. 27.

Mandamus. The application was to command the state treasurer to give notice that the notes of a state bank would be redeemed at the state treasurer's office. The charter provided that if the bank refused on demand to redeem its notes in lawful currency of the United States, the state treasurer, on notice, should sell so much of the stock deposited with him as should be necessary to redeem any notes of the bank. The mode of redemption adopted by the officer of the bank was, when a package of bills was presented, to take up one bill at a time, separate it from the rest, examine it, step back to a table, pick up the coin, and pay it over, and so proceed till banking hours expired, and then refuse to redeem any more for the day. At times he tendered the coin in bags, at the sums marked thereon, but on condition that there should be no recourse to the bank for the correction of errors. The treasurer had the affidavits several days, and announced that he would extend the bank's time for filing counter affidavits.

Wing, P. J. 1. The bank had refused to redeem according to law. 2. The treasurer's delay to act upon the presentation of the affidavit amounted to a refusal to act. Application granted.

THE PEOPLE v HOLMES (1855) 3 Mich. 544.

Mandamus. The writ was to command the state treasurer to pay the plaintiff such sum as he was entitled to as holder of bills of a state bank, out of the proceeds of the stock deposited. The defendant objected that the affidavit of the relator did not state that bills were countersigned or registered as the notes of the bank. They were described in the affidavit as bank bills issued by the bank. The defendants also averred that a receiver had been appointed for the bank, and that he could not be required to pay any of the notes of the bank or any portion of them.

Green, P. J. 1. "Bills" in an application of this kind will be taken to mean such bills as are properly issued. 2. After the stock deposited with the defendant has been sold, it was his duty to apply it to the payment of the bills of the bank, although the bank was insolvent and in the hands of a receiver. Application granted.

STRONG v FARMERS AND MECHANICS BANK (1856) 4 Mich. 350.

Assumpsit on bank bills. The bills were issued by defendant and were for \$5 each. The plaintiff presented the bills and refused payment in silver half-dollars, United States coin, tendered by the bank. The coin was issued under an act of Congress of February 23, 1853, entitled "an act amendatory of existing laws, relative to the half-dollars." The defendant gave special notice of the facts and claimed that they constituted a tender. Demurrer. Case reserved.

Per curiam. It was competent for the bank to make the tender in the manner proposed. Demurrer overruled.

KIMBALL v CLEVELAND (1857) 4 Mich. 606.

On promissory note. Prior to the maturity of the note, the E Bank being indebted to the plaintiff, the note in suit, which had been discounted by the bank, was given him by the cashier. The court instructed that the cashier was presumed, in the absence of proof to the contrary, to have authority to turn over the notes and assets belonging to the bank in payment of its debts. Judgment for plaintiff. Error.

Copeland, J. There was no error in the instruction to the jury; the transfer of the note by the cashier was within the general scope of his powers and duties. Judgment affirmed.

Cited: 14 Mich. 214; 84 id. 384; 104 id. 524; 126 id. 332.

PEOPLE v RIVER RAISIN AND LAKE ERIE R. R. CO. (1864) 12 Mich. 389.

Quo warranto. The application charged defendant, a railroad company, with usurping banking powers by issuing notes and transacting banking business. Plea: Neither denying nor admitting the allegations, set out the charter, the by-laws, requiring the defendant's president and treasurer to countersign all evidences of debt, which were required to be in the form of promissory notes, payable on demand, at defendant's office; that large liabilities were so adjusted, and that X became the owner of a number of such instruments. Reply: That the instruments were in the form and appearance of bank bills, and were signed by X as defendant's president and issued to him to circulate. Demurrer: 1, That the offense set up in the replication is not the same as that in the information; 2, duplicity in alleging the instruments were in similitude of bank bills, and were intended to circulate as money; 3, that there was no averment that defendant intended the instruments to circulate as money; 4, that plaintiff did not admit or deny the plea, and that issue was not joined on the plea, which traversed the information.

Campbell, J. 1. In an information in the nature of a quo warranto it is only necessary to set out the franchises alleged to be usurped, generally. The people can avail themselves of any special matter by replication. 2. Issuing notes, payable to bearer, on demand, intended for money, was not within defendant's grant. 3. The facts stated in the replication not relating to a single material issue, the replication is double. 4. The plea, having neither confessed nor avoided the information, is bad for insufficiency. Demurrer overruled.

Cited: 13 Mich. 492; 15 id. 181; 47 id. 51; 89 id. 592, 613.

THE PEOPLE v BANK OF PONTIAC (1864) 12 Mich. 526.

Quo warranto. The information charged defendant with usurping banking franchises. Defendant pleaded the right to exercise the privileges under a charter granted by the territorial council of Michigan. It was alleged that defendant became insolvent in 1840, suspended operations, and did not resume until 1864. A statute of 1846 provided that whenever any incorporated company should have remained insolvent or have suspended business for a year, it should be deemed to have surrendered its franchises, and should be adjudged dissolved. Defendant admitted its previous insolvency and suspension, but averred present solvency; that the insolvency and suspension did not, ipso facto, dissolve the bank; that the failure of the State to insist upon the forfeiture, by judicial proceedings, before it became solvent and resumed business, was a waiver of its rights to do so.

Christiancy, J. 1. The acts of defendant constituted a violation of its duty, and its subsequent good behavior was not an atonement. 2. Insolvency and suspension did not, ipso facto, work a dissolution without a judicial proceeding for that purpose. 3. After a forfeiture of its rights, the State shows sufficient diligence, if

it proceeds to institute proceedings, and to claim a forfeiture, within a reasonable time after being informed that defendant intends to resume business. Judgment for petitioner.

SECOND NAT. BANK v WILLIAMS (1865) 13 Mich. 282.

Assumpsit on check. Shortly before his death, S made a check for the amount on deposit in defendant bank, payable to plaintiff, but was too weak to sign. Plaintiff wrote S's name for him in presence of witnesses, one of whom testified that S drew the check with the understanding that plaintiff was to pay funeral expenses and the remainder to S's family. After S's death, payment of the check was demanded and refused. Judgment for plaintiff. Error.

Christiancy, J. 1. The check did not amount to an assignment of the deposit. 2. The drawer was the only party who could have been held liable to the plaintiff, and no mere contract or liability of the donor can be recognized as the proper subject of a gift causa mortis. Judgment reversed.

Cited: 62 Mich. 348; 116 id. 284.

PENINSULAR BANK v HANMER (1866) 14 Mich. 208.

On contract. The agreement sued on was signed by the cashier of defendant, and under seal of the bank. It was an indemnity against a mortgage on premises pledged as security by X to the plaintiff; the plaintiff was obliged to pay on the mortgage and brought this suit on the indemnity. The bank accepted the benefit of the transaction. Judgment for plaintiff. Error.

Cooley, J. 1. The bank could not rescind it so far as it imposed an obligation upon the bank, and affirm the transaction so far as it operated to its advantage. 2. The bank never repudiated the cashier's authority to enter into the contract, and, having received the benefit, is liable. Judgment affirmed.

Cited: 54 Mich. 167; 66 id. 244; 84 id. 384.

SMITH v FIRST NAT. BANK OF TECUMSEH (1869) 17 Mich. 479.

To collect a tax. Laws of 1867 provided that banks, organized under the laws of the United States, doing business in the state, should pay to the state an annual tax upon the capital stock paid in, less the value of real estate held by such banks. Judgment for defendant. Error.

Per curiam. States may tax the shares of stock in national banks, but not the capital stock itself. Judgment affirmed.

Cited: 21 Mich. 489; 34 id. 3; 44 id. 361; 83 id. 578.

MONTGOMERY v MERRILL (1869) 18 Mich. 338.

Ejectment. Plaintiff claimed under a sheriff's deed of 1859, effective June, 1860, based upon a judgment against the C Bank. The defendant relied upon title of the receiver of the bank appointed in 1844. No assignment was ever made to the receiver. The receiver commenced an action of ejectment which never came to trial. The receiver died in 1851, and no successor was appointed. The bank was chartered in 1836 to run to March, 1857, and in 1842 the legislature passed an act to repeal its charter; suits could be commenced within three years after the charter expired. Judgment for defendant. Error.

Campbell, J. 1. The Act of 1842 was not alone enough to repeal the charter, and the receiver's rights could not outlast the suit or be used for any purposes not justified thereby. 2. The legal estate never vested in the receiver, and, when the right of the receivership terminated, there had been no sale or other legal disposition of the land, and the execution title stands as if there had been no receiver appointed. Plaintiff was guilty of laches. Judgment reversed.

Cited: 36 Mich. 101; 49 id. 152.

THATCHER v WEST RIVER NAT. BANK (1869) 19 Mich. 196.

On promissory note. The note was indorsed to plaintiff bank. The defendant contended that the organization of the plaintiff bank was illegal; that the certificate of organization, on file with and certified by the comptroller of currency, was acknowledged before a notary who was a stockholder of the bank; that the bank did business before the date of the certificate of organization; that

there was no consideration for the note; that, by the declaration, the plaintiff claimed to be a corporation by the name of "The West River National Bank of Jamaica, Vermont," and that the certificate did not prove a corporation of that name, as the word "Vermont" did not appear in it. A copy of the note and indorsement were served with the declaration, the note and indorsement were read in evidence, and no other evidence was received on that point. The court refused to charge, for defendant, that the indorsement should have been proved in some other way. Judgment for plaintiff. Error.

Christiancy, J. 1. The question of the sufficiency of the acknowledgment of the certificate of organization of the bank was for the comptroller, and his certificate of compliance with the act of Congress removes all objection to it. 2. The fact that the bank did business before the date of its certificate does not affect the bank as indorsee. 3. The addition of the word "Vermont" may be treated as intended only to show in what state the bank was located. 4. As between indorsee and maker, it is no defense that it was an accommodation note, and that the indorsee had notice of that fact. 5. The indorsement was sufficiently proved. Judgment affirmed.

Cited: 34 Mich. 280; 95 id. 377.

FIRST NAT. BANK OF STURGIS v WATKINS (1870) 21 Mich. 483.

To recover taxes. The taxes had been collected of the plaintiff bank under the Law of 1867, charging specific taxes on national banks. Defense: Voluntary payment, and that a portion of the money was paid over to the state treasurer. The payment was under protest. Judgment for plaintiff. Error.

Campbell, C. J. Where, as in this case, the entire claim is unlawful, and the money is taken under color of public office, accompanied by a threat of immediate enforcement of the law, and the payment is made under protest, an action lies for its recovery. Judgment affirmed.

Cited: 26 Mich. 119; 27 id. 500; 34 id. 3; 40 id. 337; 45 id. 576; 52 id. 275; 60 id. 539; 83 id. 578; 93 id. 79; 114 id. 507.

CATE v PATTERSON (1872) 25 Mich. 191.

On certificate of deposit. R deposited money in a bank payable to the order of C. This certificate was in the usual form, with interest if the money remained on deposit three months, and was indorsed by C to the plaintiff, with a special request not to present it for three months. In the meantime the bank failed. The presentation was made the day after the three months expired. The defendant claimed that the paper was not seasonably presented, and that the paper was not a promissory note, and not admissible in evidence. The court charged the jury that the defendant was liable as an indorser. Judgment for plaintiff. Error.

Christiancy, C. J. 1. The instrument was, in legal effect, a promissory note. 2. The presentation was seasonable. 3. The defendant was liable as an indorser. Judgment affirmed.

Cited: 36 Mich. 497; 57 id. 210; 104 id. 89; 118 id. 274.

PEASE v WARREN (1874) 29 Mich. 9.

Foreclosure. The mortgage was given by defendant to secure the payment of notes, payable at E Bank. The notes were not indorsed by the payee. The plaintiff held the notes and mortgage by assignment, acknowledged and recorded. The notes, mortgage and assignment were presented to the bank at maturity, and payment was refused upon the ground that the payee had not indorsed them. The mortgagor had deposited money in his own name to pay the notes, and instructed payment and the deposit stood to his credit when the bill was brought. Bill dismissed. Appeal.

Cooley, J. The bank had no right to demand further evidence of plaintiff's title, and the bank's refusal was defendant's refusal. Decree reversed.

Cited: 94 Mich. 550.

SUTHERLAND v FIRST NAT. BANK (1875) 31 Mich. 230.

On promissory note. The defendant deposited money with bankers at A, with instructions to send it to the plaintiff bank to pay his note, payable there. The bankers deposited the money to the credit of the defendant, and sent to the plain-

tiff for the note which was sent indorsed for collection. After the maturity of the note the bankers failed, with the deposit standing in the name of the defendant; no remittance had been made to the plaintiff. Judgment for plaintiff. Error.

Campbell, J. It was the maker's duty to see that the note was paid at maturity; and instead of paying it himself, he intrusted the money to his own bankers who never applied it. Judgment affirmed.

Cited: 37 Mich. 481; 41 id. 125.

PERLEY v COUNTY OF MUSKEGON (1875) 32 Mich. 132.

Money had and received. The action was against bankers for deposits made with them by P, county treasurer, who was a defaulter. P kept personal and county funds in the same account. The funds were drawn out and renewed, discounts made, and the proceeds deposited. It was alleged that the defendants knew the character of the county funds, and permitted P to improperly draw and apply them. Judgment for plaintiff. Error.

Campbell, J. 1. In case of all but special deposits, the money becomes the property of the banker, and he becomes debtor to the depositor. 2. The money was that of the officer, and there being no law authorizing any one but the treasurer to handle or intermeddle with the funds, he was responsible for it as a debtor. 3. If there was any liability on the part of the defendants arising from a knowledge of the improper use of the county funds to which they were in any sense privy, it must be enforced by an action on the case or bill in equity. Judgment reversed.

Cited: 39 Mich. 24; 47 id. 354; 55 id. 203, 215; 57 id. 211; 90 id. 332; 119 id. 661.

FRANKENBERG v FIRST NAT. BANK OF DECATUR (1875) 33 Mich. 46.

On a check. A check was drawn by the defendant in favor of C upon the plaintiff bank, and paid, although the defendant had no funds in the bank. The defendant contended that he notified the bank not to pay the check. The jury found specially that the cashier had not received such notice. Inconclusive questions were submitted specially to the jury for a finding. Judgment for plaintiff. Error.

Marston, J. 1. The bank was entitled to recover. 2. Inconclusive questions should not be submitted to the jury for a special finding. Judgment affirmed.

Cited: 33 Mich. 245; 36 id. 29.

LOBDELL v MERCHANTS AND MANUFACTURERS BANK (1876) 33 Mich. 408.

On promissory note. The note was held by plaintiff as collateral security, and the suit was at the request of the owner. The writ was against the makers and all of the indorsers except one. The plaintiff put the note in evidence, without proof of the indorsements or signatures of the indorsers. Defendant contended that the plaintiff had no right to bring the suit in its own name and for its own benefit; that there was no proof of defendant's partnership as alleged in the declaration. General objection was made to the introduction of the duplicate notices of protest. Judgment for plaintiff. Error.

Marston, J. 1. Where the action is brought against the makers and indorsers, under the plea of the general issue, each defendant thereby admits that he signed the instrument as alleged in the declaration, and that it was executed by the parties declared against. 2. The plaintiff had the right to sue and collect in its own name. 3. Particular grounds of the incompetency of the notices of protest should have been given. Judgment affirmed.

Cited: 37 Mich. 259; 49 id. 356; 91 id. 359; 92 id. 371; 93 id. 217; 107 id. 545.

FIRST NAT. BANK v BENNETT (1876) 33 Mich. 520.

On promissory note. The note was given by the defendants, B as principal, and X and N as sureties. The amount of the note was applied to taking up a previous note held by the plaintiff bank against B, on which the other parties were sureties. The president of the bank gave the sureties each his written personal guaranty against all loss or liability by reason of signing the note sued on. Parol evidence was admitted to show that the guaranty given them was that of the

bank, and that the president had charge of all discounts, and was allowed to exercise all the powers of the board of directors. Case made.

Cooley, C. J. The guaranties given by the president on their face were his own, and did not purport to bind the bank in any manner, and parol evidence was not admissible to vary them. Judgment for plaintiff.

Cited: 103 Mich. 515; 126 id. 599.

DETROIT SAV. BANK v BURROWS (1876) 34 Mich. 153.

For deposit. The husband of plaintiff had a deposit in defendant bank, and subsequently made an assignment in Canada to K. The husband soon thereafter drew out his money, defendant being ignorant of the assignment. Later, he made a deposit with defendant to the credit of plaintiff, and delivered a paper signed by plaintiff, stating that all checks against the deposit should be drawn to his order. Plaintiff drew some of this money on checks indorsed by her husband. K recovered judgment against defendant bank in a friendly suit, which defendant did not attempt to stay until plaintiff should be present, and, without appealing, paid the judgment. The bank did not send plaintiff notice of day of trial, but she knew of the suit, and her agent testified at the trial. Plaintiff, upon hearing of judgment, demanded of defendant the balance of deposit, and on refusal to pay her check, instituted this suit. The court refused to charge that plaintiff was not entitled to recover. Judgment for plaintiff. Error.

Cooley, C. J. 1. There were no peculiar obligations resting on defendant bank to protect the interest of plaintiff. 2. The judge erred in not charging that plaintiff was not entitled to recover. Judgment reversed.

Cited: 53 Mich. 167; 95 id. 12.

GARTON v UNION CITY NAT. BANK (1876) 34 Mich. 279.

On promissory note. The note was made to A, as cashier of the plaintiff bank, as collateral security for a demand against A. It was not indorsed to the bank. Plea: General issue. Plaintiff put in evidence, under objection, the certificate of the comptroller of the currency of the organization of the bank, the note, and evidence in explanation of its consideration. The note was not indorsed by A. Two paragraphs in the charge to the jury were oral, but no objection was made until after the jury retired. The principal debtor requested an extension of time of payment, and inclosed a consideration for the extension which was not agreed to, but the amount inclosed was indorsed on the note. Judgment for plaintiff. Error.

Graves, J. 1. There is no force in the objection to the admission of the comptroller's certificate. 2. The corporate existence of the plaintiff, for the purpose of this action, was admitted by the plea of the general issue. 3. The note was admissible, without indorsement by A, as it plainly indicated that it was made to him as an officer, and that it was a contract with the bank. 4. Evidence of the consideration for the note was properly admitted. 5. The point that part of the charge was oral was waived. 6. Keeping the money sent for an extension and indorsing it on the note, was not an assent to the request of the debtor to extend the time of payment. Judgment affirmed.

Cited: 119 Mich. 488.

BENNETT v DEAN (1877) 35 Mich. 306.

For money due. Plaintiff sued the defendants, as co-partners, for an indebtedness to a banking institution styled the National Savings Bank of J. There was no partnership, and plaintiff sought to estop defendants from making such a defense, because they had allowed the proprietor of the bank to represent them, in printed notices, as partners. The notices represented them as directors. Judgment for plaintiff. Error.

Graves, J. The printed notices suggested the existence of a bank, and that the defendants were directors; but they did not import or imply the existence of a partnership, and there was no foundation for the estoppel. Judgment reversed.

Cited: 37 Mich. 478; 38 id. 783.

HOWELL v VILLAGE OF CASSOPOLIS (1877) 35 Mich. 471.

To recover tax. The tax was levied by defendant, the village, where the bank was located, on the stock of a national bank. Plaintiff resided in another town-

ship. The charter of defendant authorized a tax on all property within its limits, if not exempt from taxation for county and township purposes; and the state law of 1875 provided for a tax on national bank stock in the township where the bank was located, except where a stockholder resided in another township in the same county, in which case he was taxable in his own township. National banking laws allowed stock to be taxed as a state may determine, except that non-residents of state holding stock shall be taxed where the bank is located. Judgment for defendant. Case made.

Campbell, J. When stock in a national bank is owned by a non-resident of the village in which the bank is located, he is not liable for a tax levied on his stock by the village. Judgment reversed.

FIRST NAT. BANK OF STURGIS v REED (1877) 36 Mich. 263.

For dividends. The defendant bank filed a setoff of sums which the plaintiff, while president of the bank, had caused to be paid to B, on informing the cashier that he would see the several sums paid. The plaintiff had entire charge of the loans. B was known to be irresponsible, and gave no security. The cashier testified that the plaintiff told him he was interested with B in the matter, and requested him not to mention the loans to the directors. The plaintiff testified that he never regarded himself as liable for the loans. Judgment for plaintiff. Error.

Cooley, C. J. 1. The testimony of the plaintiff that he did not consider himself liable was objectionable as expressing an opinion. 2. The act of the plaintiff in allowing B to draw money from the bank was irregular and unwarranted, and was a breach of trust. Judgment reversed.

Cited: 39 Mich. 233; 121 id. 646.

TRIPP v CURTENIUS (1877) 36 Mich. 494.

On certificate of deposit. The defendants were partners in banking. H made a deposit in their bank, took a demand certificate of deposit and transferred it to D, who delivered it to the plaintiffs to apply on his indebtedness to them. Payment was refused. The deposit was made in 1873, and delivered to the plaintiffs, and presented by them in February 1876. Defendants' offer, to prove that they had paid D about half of the deposit and tendered him the balance while he held the certificate, was refused. Judgment for plaintiffs. Error.

Marston, J. 1. Certificates of deposit are not intended for long circulation, and no one can become a bona fide purchaser who does not take them within some reasonably short period. The certificate was in effect a promissory note payable on demand, and should have been presented within a reasonable time. 2. The evidence should have been admitted. Judgment reversed.

Cited: 51 Mich. 39; 57 id. 210; 104 id. 89.

CAMERON v MERCHANTS AND MANUFACTURERS BANK (1877) 37 Mich. 239.

On promissory note. The note was pledged as collateral security for a note discounted at the plaintiff bank at the rate of 10 per cent. Defendant contended that the contract was usurious. The legal rate of interest was 7 per cent, except that up to 10 per cent might be collected if agreed upon in writing, and banks were prohibited from taking more than "the legal rate." Judgment for plaintiff. Error.

Campbell, J. A bank may charge and collect 10 per cent interest for discounts or loans, if it is expressly so stated in writing. Judgment affirmed.

Cited: 79 Mich. 566.

BURTNETT v FIRST NAT. BANK (1878) 38 Mich. 630.

Assumpsit for a deposit. The plaintiff had a bond on deposit in the defendant bank for safe-keeping. His attorney got the bond from the bank, cashed it, and deposited the proceeds in the bank to his own account. He checked out a portion of the deposit and soon after died, indebted to the bank. The balance was applied to reduce the attorney's debt. The plaintiff had no knowledge of the payment and surrender of the bond, or of the conversion of the proceeds until after the attorney's death. The court charged that, unless the officers of the bank knew at the time the deposit was made, that the money belonged to the plaintiff, he could not recover. Judgment for defendant. Error.

Graves, J. The fact that the officers were ignorant of the ownership of the deposit could not bar the right of the plaintiff to recover, as a principal or beneficiary may in such cases follow and claim his own. Judgment reversed.

Cited: 53 Mich. 167; 95 id. 12; 110 id. 181.

COOTS v McCONNELL (1878) 39 Mich. 742.

Assumpsit for a deposit. M and X had the plaintiff's money on deposit, and put aside part in a package marked with the plaintiff's name, "private." That evening they made an assignment to defendants. The plaintiff did not know of the transaction until after the assignment, and defendants took the package with the other assets. The plaintiff claimed that a trust was created, and that the money became irrevocably set apart to his use. Judgment for defendants. Error.

Campbell, C. J. The money belonged to the bank at the date of the assignment, and no trust had been created. Judgment affirmed.

Cited: 110 Mich. 679.

GALLERY v NATIONAL EXCHANGE BANK OF ALBOIN (1879) 41 Mich. 169.

On promissory note. Defendants made the note in suit, payable to and indorsed by X. Defendants were directors and X was president of a railroad company. X was president of the plaintiff. Evidence was offered to show that it was agreed with X, as president of defendants, that the note should be paid from the assets of the railroad, when realized upon, the money being for the benefit of the railroad. Each of the makers was to pay one-tenth of it, and some of them had paid their proportion. The court struck out this evidence, and submitted to the jury the question of how much remained unpaid on the note. Judgment for plaintiff. Error.

Marston, J. 1. The evidence that the makers of this note should not be personally liable in accordance with the terms thereof, and that it should be paid only out of the assets of a corporation of which they were directors, was clearly incompetent. 2. X, as president of the bank and president of the railroad, could not represent the bank, and agree to his own release and the release of his co-makers, and bind the bank thereby. Judgment affirmed.

Cited: 57 Mich. 191, 193; 126 id. 335.

AMERICAN NAT. BANK v BUSHEY (1881) 45 Mich. 135.

For a deposit. The checks of the plaintiff were signed by a signature meant to represent his name, he not being able to write. Two checks, which the bank had paid, were in the handwriting of C. The plaintiff was a small depositor, and his deposit book was not settled often. He supposed he had exhausted his account, but was notified that he had a balance, which he at once drew out. Two years later this action was brought. C had sometimes signed checks for the plaintiff. To show that he did not authorize C to sign the checks, plaintiff proved that, when ill, he signed checks in bed, and he never authorized his daughter, who wrote his letters, to sign checks, and also proved what had occurred in a trial between plaintiff and C, to which defendant was not a party. The court charged that the bank must show by a preponderance of the evidence that the plaintiff had given C authority or had ratified his acts. Judgment for plaintiff. Error.

Campbell, J. 1. The defendant bank had a right to assume that the plaintiff had means of tracing the items of his account, and that, if he had not full data, he would resort to the bank to get them. 2. Evidence tending to show lack of authority in one person is not evidence tending to show lack of authority in another. 3. The court should have held that the case presented such evidence as called upon the plaintiff to impeach it. Judgment reversed.

Cited: 48 Mich. 415; 60 id. 209.

FIRST NAT. BANK v TOWNSHIP OF ST. JOSEPH (1881) 46 Mich. 526.

To collect tax on bank shares. Defendant claimed the tax in dispute was illegally levied, because at the meeting of the tax board, H, a justice of the peace, was appointed as temporary clerk, the regular clerk being absent, and verified the proceedings. The law allowed a justice of the peace to act as clerk in the regular clerk's absence. Defendant also claimed that the warrant was defective in not being addressed to the treasurer of the township. It was addressed to "Treasurer of town-

ship of—," and was signed by a supervisor of plaintiff and annexed to its tax-roll. Defendant also claimed that no deduction was made from value of stock for debts due by owners, and that the absence of \$ mark and the plan of figures showed the valuation was less than that upon which the tax was extended. All the other columns were properly filled. An act of Congress declared state taxation of national banks should not be at a greater rate than on other moneyed capital. The state statutes provided that a taxpayer should furnish a statement of his debts and credits, and an opportunity should be given to object to the assessment. Defendant did not do so. Judgment for plaintiff. Error.

Campbell, J. 1. The power to appoint a temporary clerk is a necessary incident to corporate meetings, and his records and doings in that capacity must be held valid. 2. The roll taken together cannot be destroyed by a technical omission which corrects itself. 3. The state officers must act in harmony with the act of Congress. 4. If a person does not have his assessment corrected, when in his power to do so, it is an admission of correctness. Judgment affirmed.

Cited: 54 Mich. 385; 107 id. 667; 108 id. 572; 118 id. 453.

CANADIAN BANK OF COMMERCE v COUMBE (1882) 47 Mich. 358.

On drafts. The drafts had been accepted by defendant and held by plaintiff, a bank, with branches at W and C. The drafts, payable at W, and indorsed by the manager at W, were discounted before acceptance. The plaintiff contended that the acceptor could not set up the defense that the bank knew that it was an accommodation acceptance. To prove such acceptance and notice thereof, defendant proved the details of the transaction by showing bills of lading, receipts, and conversations, and proved that time of payment had been extended without his consent, and that on one draft of the series a memorandum was attached by the bank showing that the drawer provided the funds for the payment. The manager at W, after receiving notice of the transaction notified defendant that he was not liable. Defendant put in evidence an unanswered letter written by him to the manager at W, setting up the facts and statements made by the manager, after being put in charge of another department. The letter and statements were made after the suit was commenced. Judgment for defendant. Error.

Campbell, J. 1. It is competent to show that any obligation, whatever its form, was in fact made for the debt of another. 2. The bank, having notice that defendant was a surety, was bound to take no steps changing the principal's liability without defendant's consent. 3. It was error to receive the letter and the statements made by the manager after suit had been commenced. 4. The manager at W had authority to receive notice of the nature of the transaction, as an agent of the bank. Judgment reversed.

Cited: 62 Mich. 652.

NUTTING v BURKED (1882) 48 Mich. 241.

Assumpsit on draft. The draft was made by a private banking house in E, on a New York bank, and dishonored when presented, and was indorsed by defendant. The draft was dated April 8, delivered to the plaintiff on the 9th, with the privilege of recalling it on the 14th and forwarded by him on the 15th in the usual course of business, and presented in New York on the 21st. It was duly protested. The drawers failed on April 16th. The defendant claimed that the plaintiff, by holding the draft from April 9 to April 15, discharged the indorser and held it at his own risk. Judgment for plaintiff. Error.

Campbell, J. Retaining the draft for seven days was not unreasonable and did not discharge the indorser; such a draft is only required to be forwarded for acceptance and payment within a reasonable time. Judgment affirmed.

Cited: 55 Mich. 111.

DETROIT SAV. BANK v ZIEGLER (1882) 49 Mich. 157.

Assumpsit on a bank teller's official bond. The principal was receiving teller of the plaintiff bank, where there was also a general teller. In the absence of the general teller, defendant sometimes performed his duties; and while so acting, moneys came to his hands for which he did not account. The defendants contended that assumpsit did not lie; that the failure to account for the money, which came to his hands while discharging the duties of another officer of the bank, did not constitute a breach of the bond. The bond was conditioned for the faithful and honest dis-

charge of the duties of the office named, and to account for and apply all moneys coming into his hands. Judgment for defendants. Error.

Cooley, J. 1. The action of assumpsit may be brought in all cases where at common law an action of debt might be brought on a contract under seal. 2. The bond covered any duties to which, in the ordinary course of business of the bank, the principal might be assigned. Judgment reversed.

Cited: 55 Mich. 60; 61 id. 426.

SHAW v CLARK (1882) 49 Mich. 384.

On promissory note. The note was made by defendants and discounted at the N Bank. Just before it matured, the plaintiff paid the amount to the bank and received the note. Defense: That it was given for a gambling consideration. The plaintiff, a director in the bank, knew all the facts, and recommended the note to the bank for discount. It was given for options, and the defendants insisted that the jury should pass on the question of whether the bank took the note in good faith; no managing officer of the bank had notice of any defect in the note. Judgment for plaintiff. Error.

Cooley, J. 1. As plaintiff did not act for the bank, the right of the latter is in no way impeached. 2. If one holds negotiable paper by unimpeachable title, he may transfer a like title to any other person, and knowledge of original defects on the part of the transferee will be of no avail. Judgment affirmed.

Cited: 51 Mich. 211; 98 id. 548; 126 id. 333.

BIRCH v FISHER (1883) 51 Mich. 36.

Trover for a certificate of deposit. The certificate was payable on return thereof properly indorsed. Thirty-one days after the certificate was issued by N Bank, the plaintiff indorsed it in blank and left it with S as a pledge. S took it without the knowledge of the plaintiff to defendant bankers, who, without any knowledge of how it came into the possession of S, purchased it. Verdict directed for defendant. Judgment for defendant. Error.

Sherwood, J. The question of good faith on the part of the bankers in making the purchase should have been submitted to the jury. Judgment reversed.

Cited: 104 Mich. 89.

WARREN v GRAND RAPIDS SAV. BANK (1884) 52 Mich. 557.

To collect judgment. A non-resident stockholder of E Bank became a judgment debtor of the plaintiff bank, and the claim made by the plaintiff was for a ratable amount of its judgment against the E Bank from the estate. The judgment was put in evidence and then the stock-ledger, letters, and oral testimony were given to prove that the non-resident was a stockholder. The claim matured before the passage of the Act No. 141 of 1877, which failed to provide for collecting such a judgment from a non-resident stockholder. The former law so provided. Judgment for plaintiff. Error.

Cooley, C. J. 1. The plaintiff was entitled to prove its claim as was done. 2. The Act of 1877, being passed after the stockholder's liability became fixed, did not apply. Judgment affirmed.

Cited: 98 Mich. 474; 108 id. 178; 120 id. 8, 10.

DAVIS v LENAWEЕ CO. SAV. BANK (1884) 53 Mich. 163.

For deposit. Defense: That the money belonged to the plaintiff's deceased wife. When the account was opened, the plaintiff had a deposit in his name made by his mother, and an officer of the bank suggested that he deposit in the name of his wife, subject to his own draft. The account was so opened. The deposit was never given to the wife. After the death of his wife, the bank refused to recognize his right to the money. Judgment for plaintiff. Error.

Campbell, J. Where a deposit is made in a bank in the name of a third party, the depositor may show all the circumstances connected therewith, and that he is still the owner. Judgment affirmed.

Cited: 110 Mich. 181.

NEELY v ROOD (1884) 54 Mich. 134.

Assumpsit on check. A check was left by plaintiff with W, and by him deposited in his general account in a bank, and afterward transferred to the defendant, with the balance of his deposit. The check was given for the purpose of paying a tax, but W, who was county treasurer, found that he was a defaulter, and he transferred his whole deposit for the benefit of his bondsmen. Judgment for defendant. Error.

Champlain, J. The identity of the money having been lost, the trust fund cannot be recovered. Judgment affirmed.

Cited: 65 Mich. 273; 94 id. 81.

FREIBERG v CODY (1884) 55 Mich. 108.

Assumpsit on check. The defendant gave the plaintiff a check on a bank at C, 20 miles away. Plaintiff arrived at C after banking hours, and being obliged to be at his home 27 miles in another direction on the next day, Saturday, left the check at his bank for collection on Monday. Early that day the drawee failed. The defendant had a large deposit in the bank at C, and claimed that the plaintiff was negligent in not having presented his check. Judgment for plaintiff. Error.

Sherwood, J. The delay, under the circumstances, was not unreasonable, and the payee should not be held to suffer for the loss. Judgment affirmed.

Cited: 76 Mich. 416.

GRAMMEL v CARMER (1884) 55 Mich. 201.

For order on the receiver. Defendant was receiver of an insolvent estate, and was asked to make payment of two sight drafts drawn by A, the insolvent, on the C Bank. Before the drafts reached the C Bank, A had made an assignment, and the assignee notified the bank not to pay the drafts, and payment was refused, though the bank had funds belonging to A. The assignee failed to give bond, and the defendant was appointed receiver. The plaintiff contended that A's sight draft was in legal effect a check, and that, as there were funds in the hands of the drawee for its payment, he was entitled to payment, and could not be deprived of it by the action of the drawer, or the assignee or receiver of the drawee. Order granted. Appeal.

Cooley, C. J. The drawee of a sight draft is only liable in law or equity to the holder, if, having funds of the drawer at the time the draft is presented, he fails to accept and pay it. Order reversed.

Cited: 57 Mich. 255; 62 id. 348; 115 id. 257; 116 id. 284.

FULLER v BENNETT (1884) 55 Mich. 357.

On promissory note. Defendant was surety. The maker and the payee were not parties to the suit. After maturity, the payee left the note with bankers for collection. No general authority was shown for the bankers to sell notes. The bankers collected and paid the payee, and five years later defendant learned that, after collecting the note, the bankers had sold it to plaintiff for the accommodation of the maker, who promised to be liable on it. The plaintiff contended that as the bankers made a sale, the payee must either rescind and return the money or the sale would be ratified. The payee did not admit a sale was made. The court instructed that, if plaintiff bought the note without knowledge that the bankers did not have authority to sell, plaintiff could recover. Judgment for plaintiff. Error.

Cooley, C. J. 1. The defendant was not bound by the maker's promise to continue liable. 2. The payee, having supposed the note was regularly paid, could not be required to make the election. 3. The surety was not bound, as the bankers had no authority to sell the note. Judgment reversed.

CODY v CITY NAT. BANK OF GRAND RAPIDS (1884) 55 Mich. 379.

Trover for bank check. The plaintiffs left a check indorsed in blank in a local bank, as money subject to be drawn upon. The bank sent it to defendant bank for collection, and credit to its account. The bank where the deposit was made suspended, and the plaintiffs telegraphed to stop payment, and the check was returned to the defendant bank which refused to surrender it. Judgment for defendant. Error.

Campbell, J. As the paper was indorsed and deposited without restriction, it was proper for defendant to regard it as the property of the bank forwarding it for collection. Judgment affirmed.

MOORE v DAVIS (1885) 57 Mich. 251.

Assumpsit. Judgment was rendered against the principal, and the garnishee admitted his indebtedness, but answered that he had been notified that the debt had been assigned to a bank in Indiana, which appeared as claimant. The bank had discounted a draft negotiable in form for the principal on the garnishee before the garnishment was served for the amount of the debt, to which the bill of the indebtedness was attached. Judgment against the garnishee. Error.

Cooley, C. J. The draft by the principal upon the garnishee, received and discounted by the claimant, operated as an assignment of the demand to the bank. The draft, with the bill attached, is an order that the debtor shall pay the amount of his debt to the person to whom it is delivered, and the fact that the draft is negotiable in form is of no importance. Judgment reversed.

EDSON v ANGELL (1885) 58 Mich. 336.

For an allowance of a claim. The insolvent made an assignment for the benefit of creditors, and a receiver was appointed. The claimant deposited a draft with the banker, with instructions that it should be a distinct fund. It was forwarded to his correspondent in New York for collection and deposited to his credit. The draft was forwarded with others, and was not distinguished from any other remittances, and was entered upon the books like ordinary deposits. At the time of failing the banker had a balance to his credit in the New York bank. Claimant contended that the amount of the draft was a trust fund held by the New York bank. Defendant was receiver of the insolvent bank. Decree for receiver. Appeal.

Campbell, J. As there was no request to keep the proceeds of the draft separate from other funds, no trust arose, and the claimant is not entitled to recover more than any other creditor. Decree affirmed.

HOLMES v ROE (1886) 62 Mich. 199.

On protested check. While in D, on August 8, the defendant gave the plaintiff the check. The plaintiff was in D that day during banking hours, but did not present the check. He took it to his home in C, 55 miles distant, and the same day, Saturday, deposited it in a bank. The check was forwarded by the first mail, on Monday, for collection, and payment was refused on Tuesday, as S's Bank failed on Monday. The defendant contended that the check was not presented in a reasonable time. The court did not present to the jury the question whether the defendant had assented to plaintiff's taking the check home with him. There was some evidence tending to show such consent. Judgment for defendant. Error.

Champlain, J. 1. If the person who receives the check, and the banker on whom it is drawn, are in the same place, the check must, in the absence of special circumstances, be presented the same day, or at latest the day after it is received, in order to charge the drawer in case the banker becomes insolvent. 2. The evidence upon the question, whether the defendant consented that plaintiff should take the check home, should have been left to the jury. Judgment reversed.

Cited: 76 Mich. 416; 95 id. 438.

BRENNAN v MERCHANTS AND MFG. NAT. BANK (1886) 62 Mich. 343.

On check. A check on defendant bank, payable to W's order, was indorsed in blank by his authorized agent. That night W died, and the agent gave the check to his widow, who, a few days later, presented it to the bank, where it was paid, without knowledge of the death of W. The check was passed back to the plaintiff, the administrator of W's estate. Judgment for plaintiff. Error.

Campbell, C. J. The death of a payee or indorser after a note has been negotiated, cannot affect its negotiability further or prevent the drawee from safely paying it, and this payment was authorized by the apparent condition of the paper, for which the payee was responsible. Judgment reversed.

Cited: 116 Mich. 284.

SIMPSON v WALDBY (1886) 63 Mich. 439.

On drafts. Plaintiff drew on R, Vermont, payable to the order of the defendants, bankers, who undertook their collection. The drafts were forwarded and paid to a Vermont bank, which sent its draft on New York to the defendants. Defendants proved the non-payment, protest, and return of the drafts, without producing or accounting for them. Plaintiff testified to statements by defendants' bookkeeper, made in the usual course of business. The defendants averred that the amount of three drafts was never received by them, on account of the failure of the bank in Vermont, and the dishonor of its draft on the New York bank. Judgment for defendants. Error.

Morse, J. 1. Secondary evidence cannot be received without accounting for failure to produce the best evidence. 2. The statements of the bookkeeper were admissible. 3. Where a person leaves with a bank for collection a draft on a person in another city, and no special agreement is made, the home bank is liable for a loss arising through the failure or dishonesty of its collecting agent. Judgment reversed.

Cited: 120 Mich. 169.

LENAWEE CO. BANK v CITY OF ADRIAN (1887) 66 Mich. 273.

To enjoin collection of tax. The defendant county taxed all the shareholders in the plaintiff savings bank organized under the general law, and also undertook to tax the bank, as a corporation, for its fixtures and an alleged surplus. The statute indicated that shares should include all property of the bank, including real estate, and then provided that real estate should be deducted for separate taxation. The plaintiff contended that it was not taxable, except for real estate. Decree for defendant. Appeal.

Campbell, C. J. The taxation of the shares included all the property of the bank, and the only taxable property to be separately assessed under the statute was real estate. Decree reversed.

Cited: 113 Mich. 206.

SHOW v GILMORE (1889) 76 Mich. 127.

For damages. Defendants were bankers, to whom S, a debtor in failing circumstances, gave choses in action, to collect and pay his indebtedness to them and to plaintiffs. The cashier, a member of defendant firm, by direction of S, agreed with plaintiffs to apply the balance in payment of their claim. Defendants collected the amount due them, and delivered the balance to S, who absconded. Plaintiffs demanded the assets. Judgment for defendants. Error.

Champlain, J. The cashier could bind the bank by the agreement relied on irrespective of ratification as to the disposition of the assets remaining after payment of defendants' claim, if shown to be by S's direction. Judgment reversed.

BECKWITH v WEBBER (1889) 78 Mich. 390.

Subrogation by indorser. A person came to plaintiff's hotel, giving his name as C. C and T were the same person. Cashier of defendant, becoming acquainted with T, cashed two checks for him, which proved to be good. Thereafter T presented a forged draft to the cashier at defendant's bank, drawn by M & Co., for \$350 and indorsed by A and T. Cashier paid \$200 on the draft, giving T a certificate of deposit for \$150. Subsequently C presented the certificate of deposit for payment at O Bank, and was told to obtain an indorser. C then obtained the indorsement of plaintiff, who knew nothing of the fraud. O Bank paid C the money in good faith. Indorsements other than plaintiff's were forgeries. Plaintiff paid O Bank, after the certificate had been protested, and took the certificate. Judgment for plaintiff. Error.

Sherwood, C. J. 1. When plaintiff indorsed and the O Bank cashed the certificate in good faith, plaintiff's liability was incurred, and when it was protested it became plaintiff's duty to pay the O Bank, and upon payment he was subrogated to the rights of the O Bank against the drawers and prior indorsers; and he, being a bona fide holder, became entitled to proceed against defendant to reimburse himself for the amount he paid the bank. Judgment affirmed.

KNICKERBOCKER v WILCOX (1890) 83 Mich. 200.

On an undertaking for indemnity. Defendant agreed to indemnify the plaintiff against harm for having signed a replevin bond. The defendant was cashier of the

T National Bank. He wrote the plaintiff who lived in Indiana, that if he would sign a bond with B and H, who were about to bring a suit, "we will stand between you and harm," and signed it as cashier. A judgment record of a suit on the bond was introduced, showing a copy of the bond. The defendant denied personal liability, and contended that the judgment was secured by fraud and collusion. The court refused to submit the question of fraud and collusion to the jury. Judgment for defendant. Error.

Cahill, J. 1. National banks have no power to enter into contracts of suretyship in matters in which they have no interest. 2. The paper, not being the contract of the bank, must be considered as the individual undertaking of the defendant. 3. The judgment record, showing the bond, was admissible and showed a cause of action, and it must be presumed that the judgment was rendered on proper proof of the bond. 4. The question of fraud and collusion should have been submitted to the jury. Judgment reversed.

Cited: 125 Mich. 187.

WRIGHT v WEIMEISTER (1891) 87 Mich. 594.

Assumpsit for money due. Defendant was the surviving member of a banking firm in which plaintiff was a depositor. J, a brother of the defendant, had been engaged in banking with O and bought his interest. The business was continued under the name of J and Co., until J assigned for the benefit of creditors. J and Co. used printed noteheads, headed J and Co., with the name of J and the defendant, in corners. Defendant, formerly a clerk, announced that he had been made a partner, and at plaintiff's inquiry another clerk made the same statement. Plaintiff, relying on such representations, made the deposit. A statute required all persons engaged in banking to file a certificate with the county clerk setting forth the names of the members of the firm. Defendant's offer, to prove that no such certificate had been filed, was rejected. Judgment for plaintiff. Error.

Grant, J. 1. Defendant was estopped from denying the partnership. 2. The evidence that no certificate was filed was properly rejected, for persons engaged in the banking business will not be permitted to take advantage of their own neglect of duty. Judgment affirmed.

CONNOR v THIRD NAT. BANK (1892) 90 Mich. 328.

Garnishment. The principal defendant had a deposit in the defendant bank, which was garnisheed. The writ of garnishment being quashed for defect, the treasurer of the principal defendant, at its direction, transferred the deposit to his wife, and the bank was again garnisheed, as having property of the principal defendant under its control. Judgment for plaintiff. Error.

Long, J. The relation of debtor and creditor had ceased to exist between the bank and the garnishee defendant, but the bank had under its control credits belonging to the principal defendant. Judgment affirmed.

Cited: 114 Mich. 323.

EYKE v LANGE (1892) 90 Mich. 592.

Mandamus. The petition was to compel defendant, cashier of the bank, to pay taxes assessed against the stockholders of the bank. The Laws of 1889, act 195, secs. 11 and 33, provided the collector should demand payment of the cashier, and if payment was refused, he could seize the property or sue the person to whom it was assessed.

Per curiam. The remedy provided by the statute is clear and specific, and the collector should not proceed against the agent of the corporation by mandamus. Writ denied.

Cited: 104 Mich. 20, 22, 26; 118 id. 354.

MICHIGAN STATE BANK v TROWBRIDGE (1892) 92 Mich. 217.

To foreclose mortgage. S gave a note to the plaintiff bank, and assigned a mortgage, which they held, to C, as cashier of the bank, his successors and assigns, as collateral security. The defendants were indorsers, and claimed that C was the holder of the legal title to the mortgage and note, as trustee for the plaintiff; that it could not be foreclosed without making them parties; and that plaintiff could not have a decree holding each defendant personally for the deficiency. Decree for plaintiff. Appeal.

Morse, C. J. 1. The assignment was made to C, not as an individual, but as a bank officer, and it was a contract with the bank. 2. It was not necessary to make the assignors parties to the bill, as the bank can maintain an action for foreclosure in its own name. Decree affirmed.

Cited: 101 Mich. 616; 117 id. 637.

KUX v SAVINGS BANK (1892) 93 Mich. 511.

Money had and received. The plaintiff, made a deposit in the defendant bank. The defendant contended that the deposit had been raised and introduced the pass-book in evidence. Expert witnesses for the plaintiff were permitted to express an opinion, whether the figure was 1 or 4. The defendant offered the books of the bank, and contended that they, with the deposit slip, were prima facie evidence of the amount deposited. Judgment for plaintiff. Error.

Montgomery, J. 1. The expert testimony was properly admitted. 2. The pass-book retained by the plaintiff was the book of original entry, and as between this book and the books retained by the bank, the latter were not entitled to greater credence. Judgment affirmed.

SHERWOOD v MILFORD BANK (1892) 94 Mich. 78.

Petition for an order to pay claim. The plaintiff, on August 18, sent a note to the defendant bank for collection. The maker was a depositor, who, on August 31, having a credit greater than the note, C gave the cashier a check, though having nothing on deposit, the amount of which was charged against C, and the note surrendered as paid. The bank was then insolvent, and the cashier did not forward the money to the plaintiff; and no money was set aside for that purpose. On September 15, the bank went into the hands of a receiver. The petitioner contended that the amount constituted a trust fund in the hands of the receiver. Petition dismissed. Appeal.

Durand, J. As there was no particular fund, the relation of trustee and cestui que trust did not arise between the bank and plaintiff. Decree affirmed.

Cited: 103 Mich. 117; 107 id. 196; 116 id. 283.

BAY CITY BANK v LINDSAY (1892) 94 Mich. 176.

On draft. It had been accepted by V & Co., payable at the bank. When presented, V & Co. had no funds. The defendant promised, orally, to pay a sight draft of V & Co. upon himself, if the bank would cash the draft upon V & Co. The bank took the new draft of V & Co. and cashed the first draft for defendant. Judgment for defendant. Error.

Montgomery, J. 1. There was no such privity of contract between the plaintiff and defendant as entitles the plaintiff to recover. 2. The oral agreement to accept was not binding on defendant. Judgment affirmed.

GLADSTONE BANK v KEATING (1892) 94 Mich. 429.

Assumpsit for overdrafts. Two of the defendants sued as partners joined in a letter instructing the plaintiff bank to pay no checks on the part of defendants, unless countersigned by S, their bookkeeper. The plaintiffs paid 22 checks, not so countersigned, after the receipt of the letter, and did not show that defendants derived any benefit from the money and sued to recover. Plaintiff pleaded estoppel. Judgment for plaintiff. Error.

Montgomery, J. 1. Either member of a co-partnership may protect himself by a stipulation that the other member shall not have authority to bind the firm by signing checks by giving notice to the depository. 2. When the bank has disregarded the notice, without showing that some benefit was derived by the firm from the payment of the money, it could not recover for an overdraft made with checks not in accordance with the authority. 3. The defendants are not estopped from making this defense by the fact that they had an opportunity to examine the checks. Judgment reversed.

HAMILTON v WINONA SALT AND LUMBER CO. (1893) 95 Mich. 436.

On bank checks. Five of the checks were dated December 5, and one December 10. The drawee bank suspended at noon on the 11th. The bank was located at

T, and the plaintiff resided at X, two miles distant. The last check was presented on December 11, and payment refused, though defendant's deposit was ample to pay. The other checks were not presented at any time, but the plaintiff based her right to recover upon a promise alleged to have been made by the defendant on December 12. The plaintiff had judgment on the check drawn on December 10. Judgment for defendant on all of the others. Error.

McGrath, J. 1. The promise to pay the five checks, affords no presumption of notice of dishonor, in view of the admitted fact that the checks had not been presented. 2. When a person received a check and the banker on whom it is drawn is in a different place, the check must be forwarded for presentment on the day after it is received, in order to charge the drawer in the event of the failure of the bank. Judgment affirmed.

WAYNE CO. SAV. BANK v AIREY (1893) 95 Mich. 520.

Interpleader. The plaintiff bank had a deposit to the credit of A, who gave a written order, drawn by the plaintiff, to his wife to draw any and all money deposited in his name. The administrator of the wife claimed that this paper was made for use only after the death of A. Demand was made on the bank by the administrator of the estates of A and of his wife. The paper signed by A was drawn by the bank, and some of the deposit was drawn upon it after A's death. It was contended that, because the bank made payments after the death of A, it should be estopped to deny the sufficiency of the order, or its obligation to pay. Bill dismissed. Appeal.

Hooker, C. J. 1. When others assert a title to the money, and forbid its payment on the order, it would be inequitable to require payment at the risk of the bank, and a bill for interpleader may be filed. 2. There was no estoppel. 3. The order was no more than an authority to A's wife to receive money for him. Decree reversed.

WACHSMUTH v BANK (1893) 96 Mich. 426.

For false imprisonment. The plaintiff, as a member of the common council of M, introduced a resolution to withdraw the deposit of the city from the defendant bank, because the bank was not safe. The bank brought an action for libel against the plaintiff, on which he was arrested and held to bail. The court held that the affidavit on which the arrest was based showed that the act of the plaintiff in introducing the resolution was privileged, and the case was dismissed. Defendant contended that the order to bail protected it. The affidavit on which the plaintiff was held to bail was made by the cashier, and the suit was commenced by his order in the name of the bank. Judgment for plaintiff. Error.

McGrath, J. 1. The cashier must be presumed, *prima facie*, to have had authority to direct the commencement of the suit. 2. A corporation may be liable in tort, even though a malicious intent is necessary to be proven, and the malice of the agent is imputable to the corporation. 3. The order to hold to bail was void. Judgment affirmed.

Cited: 104 Mich. 49; 117 id. 41.

STONE v DODGE (1893) 96 Mich. 514.

Assumpsit. The receiver of an insolvent savings bank sued to recover money due at the date of suspension. The defendant, after the suspension, procured a creditor of the bank a certificate of deposit, before application was made for a receiver; this he filed in setoff. The bank had been closed five days, when the certificate was procured. Judgment for defendant. Error.

McGrath, J. Suspension of business being *prima facie* evidence of insolvency, a certificate of deposit procured of another under such circumstances cannot be allowed in offset to a debtor to the bank. Judgment reversed.

Cited: 103 Mich. 115.

STATE BANK v BYRNE (1893) 97 Mich. 178.

On draft. The plaintiff bank sent a sight draft, accepted by the defendant, drawn by L to the M Bank for collection. The title to the draft was in the plaintiff. There was a custom between the defendant and the M Bank, by which the bank was to treat all such acceptances as checks, and pay the money to the drawer.

Defendant had a deposit in M Bank in excess of the draft. The M Bank failed before paying the draft. The defendant claimed that he had paid the draft to the bank, and was not liable to pay it again. Judgment for plaintiff. Error.

Hooker, C. J. The agreement between the defendant and the M Bank did not relieve the defendant from liability on his accepted draft. Judgment affirmed.

BOWLEY v BATES (1893) 97 Mich. 406.

Replevin. Plaintiff and his two sons did banking business as partners. B furnished the capital, and took securities in his own name. P, a debtor of the bank, assigned to plaintiff a chattel mortgage on the property of defendant in payment of a debt due the bank, and one of the sons purchased the property covered by the mortgage to secure other debts of defendant to the bank, and took a bill of sale in the name of his brother. It was stipulated that the bank should pay two other mortgages on the property, given after the one assigned to plaintiff. This agreement not being carried out, subsequent mortgagees took possession of the property. B sued under the mortgage assigned to him by P. Judgment for defendants. Error.

McGrath, J. The bill of sale operating as a payment of the first mortgage, the subsequent mortgagees had a right to proceed against the property. Judgment affirmed.

RICE v NATIONAL BANK (1893) 97 Mich. 414.

Garnishment. The bank, as garnishee, disclosed that G, the principal defendant, at the date of service, had a deposit, but that he was indebted to the bank for discounts in excess of that amount. G was credited in his account at the bank with drafts on his debtors, some of which had not been accepted. It was agreed that all drafts so returned might be charged back to him. These discounts exceeded his deposit. Judgment against garnishee. Error.

Montgomery, J. It was competent for the parties to make the arrangement, and as G could not have maintained an action against the bank on the day of the garnishment, if it had refused to honor his check, the plaintiff could not have done so. Judgment reversed.

CITIZENS SAV. BANK v CIRCUIT JUDGE OF INGHAM CO. (1893) 98 Mich. 173.

Mandamus. The application was to compel the judge of the circuit court to order an issue framed, to determine the liability of an insolvent banking corporation on a claim of the relator bank. The relator had a note against X, an insolvent savings bank in the state. The receiver rejected the claim, and the circuit judge had refused to frame an issue.

Long, J. Under Laws of 1887, the court, having jurisdiction of the receiver and the fund, should hear and determine the claims presented by creditors. Application denied.

Cited: 98 Mich. 478, 616; 105 id. 235; 120 id. 7; 121 id. 524.

BISSELL v HEATH (1894) 98 Mich. 472.

Assumpsit. The receiver of an insolvent bank sued to charge defendant with liability as a stockholder. The defendant denied that he was a stockholder, and alleged that he was induced to subscribe through fraudulent representations of the bank's condition; that the act, to revise the banking laws and to establish a banking department was unconstitutional because it was double in its title, and gave the receiver judicial powers to adjudicate claims, and impaired obligation of contracts. When the bank was organized, the defendant negotiated with W for the stock. A certificate was issued, and the defendant received several dividends. W never assigned the stock upon which the defendant's certificate was issued. Judgment for plaintiff. Error.

Montgomery, J. 1. The defendant, after receiving the dividends, cannot set up the absence of the formal assignment which the bank could waive. 2. A stockholder, when a creditor's rights have intervened, cannot set up that he was induced by fraud to become such. 3. The banking law is constitutional. Judgment affirmed.

Cited: 101 Mich. 100; 108 id. 518; 111 id. 508; 117 id. 400; 120 id. 15.

SHERWOOD v SAVINGS BANK (1894) 103 Mich. 109.

Petition. The application was to require the receiver of the defendant bank to repay funds coming into the hands of the bank, as agent, before its failure. The petitioner, a depositor in defendant, left mortgages for collection. They remained sometime credited to the cashier's account. On the day the bank failed, they were credited to the petitioner, who claimed that the amount was a special deposit. On the day the bank failed, the petitioner received a part of it, and a draft on D for the balance, which was never paid. This was urged as a waiver of petitioner's claim. The bank claimed that it did not have the money, whereas, it was in the vault. Decree for plaintiff. Appeal.

Hooker, J. 1. It was the duty of the bank to collect the money and pay it over; and the proceeds of the mortgages were the petitioner's property as much as the mortgages. 2. The action of the bank or the receiver, in mingling it with the funds of the bank, gave the petitioner a lien upon the whole fund. 3. By receiving a draft under false representations, the petitioner did not waive his right to claim the fund. Decree affirmed.

Cited: 104 Mich. 66; 107 id. 193, 194, 342; 116 id. 283; 119 id. 420, 669.

WING v COMMERCIAL & SAV. BANK (1895) 103 Mich. 565.

To cancel promissory notes. The notes were given to defendant bank in connection with a scheme to develop lands. The cashier, the indorser on the note, allowed by the directors to exercise general authority in its business, agreed with the plaintiff to release him from liability on the note. The bank afterward repudiated the arrangement, and brought suit. Plaintiff was the maker of one and the indorser of several notes. Defendant contended that the remedy was at law. Decree for plaintiff. Appeal.

McGrath, C. J. 1. Equity has jurisdiction of the subject-matter. 2. If a cashier be allowed to exercise general authority in respect to the business of the bank for a considerable time, the bank is bound by his acts. Decree affirmed.

FIRST COMMERCIAL BANK v TALBERT (1895) 103 Mich. 625.

On promissory note. The defendant was engaged with M in banking under the name of M & Co., which failed in 1884. The National Bank of P then held paper indorsed by M & Co. The defendant authorized N, cashier of the Bank of P, in writing, "to use my name," as one of the firm of M & Co., on paper sent for renewal, on which they were indorsers. The note was so indorsed by N. The bank at P was reorganized into the plaintiff, a state bank. Judgment for defendant. Error.

Montgomery, J. 1. The intent of the defendant was to authorize the continuance of the firm name in the indorsement on the renewals. 2. The plaintiff, as successor of the national bank, had authority to indorse the firm name on the renewal note. 3. The indorsement of paper held by the national bank, which was reorganized into the plaintiff bank, would bind the defendant to pay to the new bank. Judgment reversed.

CITY OF MUSKEGON v LANGE (1895) 104 Mich. 19.

Assumpsit for taxes. Plaintiff sued the cashier of a national bank to recover taxes assessed against two stockholders. The Laws of 1889, act 195, sec. 33, provided that, in case tax assessed upon shares of any bank was not paid by the holder, it should be presented to and paid by the cashier, and charged to the shares so taxed. The cashier refused to pay. The bank was not a party to the suit. Judgment for defendant. Error.

Hooker, J. 1. The cashier acted officially and is not personally liable. 2. The action should be against the bank, and not against the cashier. Judgment affirmed.

Cited: 104 Mich. 27, 30.

EYKE v LANGE (1895) 104 Mich. 26.

Mandamus. The petition was to compel the cashier of a bank to pay taxes assessed upon shares of its stock under the tax law of 1889.

Hooker, J. Distress, and not mandamus, is the proper action for the collection of the tax. Writ denied.

Cited: 111 Mich. 107; 113 id. 206; 116 id. 291; 118 id. 354.

FIRST NAT. BANK v HANSCOM (1895) 104 Mich. 67.

On non-negotiable note. Defendant, having received the note from her husband, guaranteed the payment to bearer without consideration. Plaintiff bank discounted it. Before the discount, the husband represented that he desired the discount for his own purposes; he paid a draft, held by the bank for collection, and used the rest in payment of his debts, except \$100, which he deposited in his wife's name. Judgment for defendant. Error.

McGrath, C. J. The inference of agency was repelled by the proposed appropriation of the proceeds, made known to the bank officers before the discount, and the bank cannot say that the discount was for defendant's benefit. Not being for the wife's benefit, she was not bound. Judgment reversed.

BEARDSLEY v WEBBER (1895) 104 Mich. 88.

On certificate of deposit. In October, 1892, the plaintiff deposited money with the defendants, bankers, and took a certificate of deposit, payable to himself, when returned properly indorsed. The bank suspended payment in July, 1893. The plaintiff demanded payment before suit. Interest was allowed from date of the certificate. Judgment for plaintiff. Error.

Grant, J. 1. The certificate being a demand note, the institution of a suit is sufficient demand. 2. As interest did not begin to run until demand made or suit brought, it was improper to allow interest from date of the certificate. Judgment for principal and interest from date of writ.

Cited: 115 Mich. 159; 118 id. 274.

RICE v THIRD NAT. BANK (1895) 104 Mich. 176.

Garnishment. The principal defendant agreed, with the officers of the garnisheed bank to keep a balance of \$1,000 on deposit to cover his liability on return drafts. When the service was made on the bank, he had only \$979 to his credit. On the next day this amount was reduced to \$7.94 by debits, and both before and after the service, and up to the time the answer of the bank was filed, it was less than \$1,000. Judgment charging garnishee. Error.

McGrath, C. J. That the balance was at times reduced below the sum named, was not inconsistent with the existence of such an agreement. Judgment reversed

DAVENPORT v STONE (1895) 104 Mich. 521.

On promissory note. Defendant was the receiver of an insolvent savings bank. The bank renewed a note which was rediscounted by the plaintiff by arrangement with the cashier, and the proceeds received by the bank. The directors intrusted the entire management of the bank to the cashier. It was claimed that the note was not in fact rediscounted. The old note was not surrendered, and the new one was not entered in the books. Judgment for plaintiff. Error.

Grant, J. 1. The failure to surrender the old note or enter the new one on the bank's books did not prevent it from being rediscounted. 2. The directors, after intrusting the management of the bank to the cashier, cannot deny his authority to deal with the plaintiff. 3. The cashier of a bank can rediscount paper of the bank. Judgment affirmed.

STONE v CIRCUIT JUDGE (1895) 105 Mich. 234.

Mandamus. The petition was by the receiver of a savings bank. B, without applying for leave to intervene, filed her petition for an order requiring the plaintiff to pay a claim held by her against the bank, to which the plaintiff pleaded in abatement. A demurrer to the plea sustained. Motion to dismiss the petition denied. The relator then applied for mandamus to compel the relief desired, without obtaining leave to proceed.

Per curiam. The petition of B, without obtaining leave, was irregular and unauthorized. The mandamus cannot issue. Petition denied.

GIBBONS v HECOX (1895) 105 Mich. 509.

To establish a banker's lien. Plaintiff was a receiver of a national bank. A note of defendant of \$2,000 was among the bank's assets. The bank also held a

note of \$1,000 for collection for defendant. When the \$2,000 note matured, defendant could not meet it, and subsequently assigned the \$1,000 to P. The question raised was whether under the circumstances the bank had a lien upon the \$1,000 note, by reason of his indebtedness. Demurrer. Sustained. Appeal.

Long, J. A bank has a lien on all moneys, notes, and funds of a customer in its possession, for indebtedness of the customer to the bank which is due and unpaid. Decree reversed.

Cited: 115 Mich. 158, 649.

FIRST NAT. BANK v STONE (1895) 106 Mich. 367.

Petition to require receiver to pay claim. Defendant was receiver of an insolvent savings bank. Two promissory notes were executed by L & E Iron Works, indorsed by and payable at the insolvent bank, and discounted by the plaintiff bank. Defense: That the notes were not first discounted by the insolvent bank; that the only record on its books was to credit the makers with the proceeds. Three of the six directors were cognizant of the transactions at the time. Petition granted. Appeal.

Grant, J. 1. The fact that no record was made on the books of the defendant's bank, except to credit the maker of the notes with the proceeds thereof, does not establish the fact that this was not rediscounted paper. 2. The directors are chargeable with knowledge of the transaction, because courts presume that they knew what, by due diligence, they might have known. Decree affirmed.

HANISH v KENNEDY (1895) 106 Mich. 455.

Assumpsit. Plaintiff was an accommodation indorser on notes made by defendants, and paid by plaintiff. It was averred that J, one of the defendants, was intoxicated at the time he signed the notes. The plaintiff knew that J signed as surety for his son, the other defendant. Plaintiff proved a date, stamped on a note by the discounting bank, as evidence of the time of payment, and as bearing upon the question of J's intoxication. The note so stamped was paid by the plaintiff at the time the notes sued were signed. This stamp was never used except to mark payments on papers. Defendants contended that plaintiff was a cosurety with them. Judgment for plaintiff. Error.

Hooker, J. 1. The paper with the stamp of the bank upon it was properly admitted as evidence, to prove a date. 2. The plaintiff indorsed for the accommodation of both defendants, though one was an accommodation maker for the other, and the rule of contribution between cosureties does not apply. Judgment affirmed.

WALLACE v STONE (1895) 107 Mich. 190.

Petition to require receiver to pay a claim. Defendant was receiver of an insolvent bank. G deposited money in the bank, and afterward the plaintiff sent the bank a note and mortgage executed by G, with instructions to collect the interest and any portion of the principal G might wish to pay, and remit to her. G paid interest and part of the principal, and surrendered a certificate of deposit, and a cashier's check, which she took when she made her deposit. The bank failed before a remittance was made. The amount paid was indorsed on the note by the bank. Plaintiff accepted a dividend from defendant. Order granting petition. Appeal.

McGrath, C. J. 1. The relation of trustee and cestui que trust was created between the bank and the plaintiff. 2. The acceptance of the dividend did not affect plaintiff's claim. Decree affirmed.

Cited: 119 Mich. 420, 669.

SAVINGS BANK v DETROIT (1895) 107 Mich. 246.

To recover taxes paid under protest. The plaintiff, a savings bank, held mortgages in which it was agreed that the mortgagors should pay the taxes. The plaintiff made a sworn statement of its real and personal property, including the mortgages for assessment. The assessors did not deduct the mortgages, but assessed to each stockholder the full value of his stock. The city charter provided for appeal to the common council to correct assessments. Plaintiff did not ask either the assessors or common council to make correction, and its petition to have the tax refunded was denied. The bank paid the full amount and took an assignment from the stockholders. Plaintiff contended that it did not seek a correction

according to the terms of the statute, because the case had been prejudiced. Judgment for plaintiff. Error.

Grant, J. Having failed to ask for a correction and not showing a legal excuse for review, the plaintiff cannot recover. Judgment reversed.

MARTIN v SMITH (1896) 108 Mich. 278.

On promissory note. Defendant was an indorser. Defense: That a legal demand was not shown. The note, payable at I Bank, left with C Bank for collection at maturity, was sent by the C Bank to the I Bank, through a messenger of the latter. The officers received it, recognized the demand, and refused to pay. The note was protested the same day, as appeared by the certificate of the notary under seal in evidence. Without objection, the bank officers testified from the bank books and not from recollection, after being refreshed by the books. Judgment for plaintiff. Error.

Hooker, J. 1. As the note reached I Bank, during banking hours on the day of maturity, and was acted upon by that bank by returning the paper rejected, there was a compliance with the law. 2. The certificate of protest was presumptive evidence of presentment, demand, and notice of dishonor under the statute, as it was under the notary's seal. 3. A case will not be reversed because testimony, admitted without objection, was not the best evidence. Judgment affirmed.

FIFTH NAT. BANK v DUNHAM (1896) 109 Mich. 23.

Accounting. W Co. was indebted to several banks, including the plaintiff bank, which held the company's notes indorsed by the defendant, except one held by the plaintiff. The defendant was president and manager of the plaintiff bank. The company, being insolvent, conveyed real and personal property to the defendant in trust. A chattel mortgage secured the plaintiff's claims against the company. These conveyances proved insufficient to pay the company's debts in full. A note held by B Bank, was sent by request of the defendant to the plaintiff for payment. The plaintiff alleged that the note so paid was paid from the trust fund in the hands of the defendant, and asked for a return of a portion of the money so paid. Decree for complainant. Appeal.

Hooker, J. 1. The plaintiff is estopped to assert that the note was paid from the trust fund; and is entitled to no claim on the money so paid. Decree reversed.

DROVERS NAT. BANK v BLUE (1896) 110 Mich. 31.

On promissory note. The note was made by the defendant to the C Co. The plaintiff purchased it before maturity by crediting it to the company which did banking business with the plaintiff. The defendant offered to show that the note was procured by fraud of the C Co. This was excluded because the plaintiff had not shown that it was a bona fide purchaser. Judgment for defendant. Error.

Hooker, J. 1. Merely giving credit did not show that the bank was a purchaser for value. 2. Where there is a prima facie case of bona fide holding, it is proper to exclude evidence of fraud in the inception until defendant produced evidence attacking the prima facie case. Judgment affirmed.

Cited: 121 Mich. 158.

ACKENHAUSEN v PEOPLE'S SAV. BANK (1896) 110 Mich. 175.

For a deposit. The plaintiff made the deposit, subscribed the signature book, and took a deposit book, containing the printed by-laws, one of the provisions of which was that the bank would not be liable in case of payment to a third party presenting the deposit book, although he may have stolen it. The statute provided that the deposit should be paid to the depositor or his legal representative. There was no evidence that the plaintiff's attention was called to the by-law. The deposit was paid to the wrong person. Judgment for defendant. Error.

Moore, J. We think the requirement of the statute cannot be changed by by-law, unless the attention of the depositor is called to the by-law and he assents thereto, actually or impliedly. Judgment reversed.

Cited: 123 Mich. 260.

FIRST NAT. BANK v WILLS CREEK COAL CO. (1896) 110 Mich. 447.

Upon a draft. The draft was discounted before acceptance. The acceptance for accommodation was made by the defendant's bookkeeper, without authority. The plaintiff bank claimed to be a bona fide holder, and that the acceptance was ratified by defendant's vice-president, who had general authority for that purpose. The question of ratification was submitted to the jury who found in the affirmative. Judgment for plaintiff. Error.

Montgomery, J. 1. If the acceptance was for the accommodation of the drawer, a recovery could be justified only upon a finding that the plaintiff was a bona fide holder. 2. Unless, when the acceptance came to the bank, it had funds, which it released or failed to withdraw from the drawer, because of the acceptance, the bank did not part with value in reliance on the acceptance in such a sense as to constitute it a bona fide holder. Judgment reversed.

MICHIGAN TRUST CO. v STATE BANK (1896) 111 Mich. 306.

Trover for certificate of stock. L, a stockholder and debtor of defendant bank at the time of his death, borrowed \$1,000 on plaintiff's note, and assigned his certificate of stock in the defendant with authority to sell it, if his note was not paid within 10 days after maturity. The note was renewed, the renewal paid, and the certificate sold. The statute, sec. 4866, provided that, as to third parties, transfers should be void, until entered on the books of the corporation, and until the transferrer's obligations to the bank should be canceled. The defendant refused to recognize any interest of the plaintiff or its assignee, as L was indebted to it at the time the demand was made, to transfer, although the defendant's debt had not matured at the time the stock was transferred to the plaintiff. Judgment for defendant. Error.

Long, C. J. The demand not having been made until L's debt to the bank matured, the defendant was in a position to refuse to transfer, as the bank issuing the stock had a prior lien. Judgment affirmed.

Cited: 111 Mich. 319; 113 id. 286, 288.

CITIZENS COUNTY BANK v KALAMAZOO BANK (1896) 111 Mich. 313.

To compel transfer of stock. The plaintiff held stock in defendant bank by assignment from the original owners, and asked to have it transferred. The answer set up that the assignors, who were partners at the time of the assignment, were indebted to the defendant; that it had a lien on the stock, and prayed by way of cross bill, that the lien be foreclosed, and the stock sold. Under its by-laws the bank had a lien on stock for all debts of the stockholder, and had 10 days to buy. A part of the debt was due from a firm in which the stockholder was a member. Bill dismissed. Decree of lien in favor of defendant on cross bill, but denying the prayer for foreclosure, because the original debtors were not parties to the bill. Appeal.

Long, C. J. 1. The transferee of bank stock takes it subject to any debt of the bank where the stock is registered, and the bank has the right to enforce the lien. 2. The necessary parties were before the court. 3. The by-law, giving the bank 10 days to purchase the stock before the holder could sell, does not waive the bank's right to claim a lien for the debt of a registered holder. 4. The lien extends to a debt due from a firm of which the stockholder was a member. Decree modified by allowing foreclosure and sale.

Cited: 113 Mich. 286, 288; 118 id. 170; 120 id. 22.

DETROIT MOTOR CO. v THIRD NAT. BANK (1897) 111 Mich. 407.

For accounting. The plaintiff, being indebted to the bank, issued bonds, secured by mortgage, and delivered them to the cashier to sell and credit on plaintiff's account. The plaintiff consented that 25 bonds should be held as collateral for all debts. The cashier afterward gave a note to the bank and placed the amount to his credit, without the knowledge of the directors. The note stated that he had deposited or pledged some of the plaintiff's bonds as security. Subsequently he gave another note, and pledged other bonds of the plaintiff in the same manner. The bank had gone into the hands of a receiver, who was a defendant. Decree for defendant. Appeal.

Hooker, J. The bonds were taken and held by the bank as security for the plaintiff's, and not the cashier's, debt, and should be applied to reduce plaintiff's debt. Decree reversed.

STONE v JENISON (1897) 111 Mich. 592.

Assumpsit for money paid. Plaintiff was receiver of a bank and sought to compel defendant to repay money paid him after the bank became insolvent, with a view to give him a preference. The payment was made in the forenoon of the day, on which the bank closed. The cashier, expecting in good faith to get through the run, had persuaded some depositors not to withdraw their money, and had paid others as demanded. Judgment for defendant. Error.

Moore, J. When a bank, having assets sufficient to induce its officers to believe it can continue business, is confronted with a run, and to avoid suspension, pays depositors as fast as they present their claims, the receiver cannot sue and recover the money so paid in good faith to the depositors, if the bank is forced to suspend. Judgment affirmed.

JOHNS NAT. BANK v TOWNSHIP OF BINGHAM (1897) 113 Mich. 203.

To enjoin tax suit. The owner of the stock against whom the tax was assessed, to collect which suit was threatened, had transferred it before the tax attached and became a lien. Decree for defendant. Appeal.

Long, C. J. The complainant's claim, being a legal one, should be set up as a defense to the action at law. Decree affirmed.

OAKLAND CO. SAV. BANK v STATE BANK (1897) 113 Mich. 284.

To compel transfer. Plaintiff sought to compel the transfer of stock upon the books of the defendant bank. Defendant's cashier informed the plaintiff, by letter, before the purchase by plaintiff of the stock, that he did not hold any lien on the stock, and signed as cashier. The defendant claimed that W, who assigned the stock to the plaintiff, was indebted to it, and refused to recognize the ownership of the plaintiff. A transfer upon the books could only be made by consent of the directors, where the bank had a lien for indebtedness against the person registered as owner. Decree for defendant. Appeal.

Montgomery, J. 1. A bona fide purchaser of bank stock cannot have a lien prior to that of the bank for an indebtedness of the registered holder. 2. The plaintiff had a right to rely on the assertion of the cashier, and the defendant is estopped from denying its right to a transfer of the stock. Decree reversed.

Cited: 126 Mich. 332, 336.

POTTER v TOLBERT (1897) 113 Mich. 486.

On promissory note. The defendants T and M, partners in banking, closed their bank and did no business, except to collect accounts and liquidate indebtedness. The plaintiff, a depositor and creditor of the bank, knew of the suspension. After the suspension, M, who was mainly intrusted with settlements, gave the plaintiff the note sued on, signed in the partnership name. T denied the execution of the note. Judgment for plaintiff. Error.

Moore, J. 1. A partnership is dissolved when it ceases to do the business for which it was organized. 2. A partner, who is intrusted with settlement of partnership affairs, is not authorized, after the dissolution, to give notes in settlement of the partnership debts, in the absence of authority conferred upon him by the other partner. Judgment reversed.

DETROIT RIVER SAV. BANK v DETROIT (1897) 114 Mich. 81.

To recover taxes paid under protest. The plaintiff bank's application to the assessors to deduct the value of mortgages held by it, from its capital stock, was refused. The bank did not appeal to the common council as it could have done. Judgment for defendant. Error.

Moore, J. Having failed to appeal to the common council from the action of the assessors, plaintiff cannot recover in this action. Judgment affirmed.

FERRY v HOME SAV. BANK (1897) 114 Mich. 321.

Garnishment. The draft of D Co., the principal defendant, indorsed by R, its secretary and treasurer, and a director in the bank, was delivered to the bank for collection. The bank received the amount of the draft, used a part to pay an overdraft, and credited the balance to M, an agent, who checked it out. This money was in the bank at the time of the garnishee service. The court refused to permit the plaintiff to prove that the bank's officers knew that the money belonged to the D Co., and that the note was for a bona fide indebtedness. Garnishee discharged. Error.

Moore, J. 1. The plaintiff should have been allowed to show knowledge on the part of the bank, and submit such facts to the jury. 2. Plaintiff should have been allowed to show that the note was given for a bona fide indebtedness. Judgment reversed.

CITIZENS SAV. BANK v VAUGHAN (1897) 115 Mich. 156.

Petition against the receivers of M Co. for the payment of dividends. M Co., having made a voluntary assignment, receivers were appointed, who were ordered to make a dividend on all claims proved. There was a balance due the company on an account with plaintiff, which held demand note against the company larger than the balance. A statute provided that partnership associations could not contract debts for more than \$500, unless in writing signed by two managers. The note was for a larger sum, and was not signed by two managers. Plaintiff contended that only the excess was void, and that it could set off against the balance due the company, and to have the dividend on the difference. The court allowed the setoff, but not interest on the dividend. Appeal.

Grant, J. 1. Banks have a lien on deposits for a demand note held against a depositor, and the offset was proper. 2. Under the statute in regard to partnerships, the entire note was void. 3. The bank was entitled to its money at the time the dividend was ordered, and interest followed. Decree modified.

Cited: 126 Mich. 215.

McINTYRE v FARMERS BANK (1897) 115 Mich. 255.

Garnishment. R and D, husband and wife, were impleaded as claimants of the fund. D claimed the fund; her income did not appear to have been sufficient to furnish the amount of the deposit. R testified that the funds were principally those of D. R mingled his own funds with hers in the bank with the understanding between them, that the fund was to be treated as his. R had given D a check for a portion of the fund, which had not been presented at the time of garnishment. Judgment for plaintiff. Error.

Grant, J. 1. The question of ownership of the deposit being in doubt, it was properly left to the jury. 2. The facts justified the conclusion that the wife gave her money to be used by the husband as his own. 3. If, with the knowledge and consent of the wife, the husband mingled his funds with his wife's, with the understanding that the fund was to be treated as his, that fund was subject to garnishment for his debt. 4. The check was not an equitable assignment of the fund. Judgment affirmed.

Cited: 116 Mich. 284.

FIRST NAT. BANK v WALKER (1897) 115 Mich. 434.

On promissory note. The defendants signed as accommodation guarantors, and had an understanding with the principal that there should be deposited with the bank discounting its other notes, an equal or larger amount as collateral, and that it would apply the proceeds to the note. As part of the transaction, the other notes were delivered to the bank, and the plaintiff collected part of the collateral notes and gave the principal credit. The plaintiff, without the knowledge or consent of two of the guarantors, surrendered the collateral and took, in their stead, two notes due at a later period, signed by only one of the two original makers. Plaintiff objected to certain findings of fact where there was some evidence to support it. Judgment for defendants. Error.

Long, C. J. 1. The bank had no right to change the form of the collaterals, take new notes, extend the time of payment, and drop one of the makers. 2. A finding of fact will not be disturbed on appeal, except where there is no evidence to support it, or it is contrary to the undisputed evidence. Judgment affirmed.

MECHANICS BANK OF DETROIT v STONE (1898) 115 Mich. 648.

Petition for equitable setoff. Plaintiff held notes guaranteed by the bank, since insolvent, and of which defendant was receiver. The notes had not matured at the time the bank became insolvent. Petitioner sued the bank when it failed. Decree for defendant. Appeal.

Hooker, J. 1. The right of other creditors had intervened, and their equities are superior to those of persons seeking to set off claims not matured. 2. Mere insolvency is insufficient to justify an equitable setoff of a claim not due. Decree affirmed.

SUNDERLIN v MECOSTA COUNTY SAV. BANK (1898) 116 Mich. 281.

Petition for preference. The G Bank sent the defendant checks for collection. No money was received upon them, but they were charged upon the books against the drawers, and the defendant sent the G Bank a draft on N Bank for the amount. The defendant made an assignment and the N Bank refused payment of the draft, although it had funds of the defendant. The G Bank claimed that there was a trust in its favor, and that the draft was an assignment to it of the amount. Petition denied. Appeal.

Hooker, J. 1. The amount of the check credited to petitioner did not constitute a trust fund. 2. The draft as between the maker and payee did not constitute an equitable assignment of an indebtedness owing by the bank, upon which it had been drawn. Decree affirmed.

Cited: 119 Mich. 420, 670.

DROVERS NAT. BANK v POTVIN (1898) 116 Mich. 474.

On promissory note. Defense: Fraud. The cashier of plaintiff testified that it was purchased before maturity, and that the bank had no notice of any defense or any fraud, and that the bank had no agent, other than himself, to transact loan business. Defendant claimed that, as all of the bank officers were not called, there was failure to show want of notice of the original transaction. Judgment for plaintiff. Error.

Montgomery, J. The fact that the cashier, who was the only one to act for the bank, had no knowledge of any infirmity in the security, was sufficient prima facie evidence of the bank's good faith in buying the note. Judgment affirmed.

LANSING NAT. BANK v COLEMAN (1898) 117 Mich. 177.

Money had and received. The defendant, cashier of the plaintiff bank, had taken a note, purporting to be made by B & Sons, placed it among the assets of the bank, and credited himself on the books with \$2,000 as loaned upon the note. No loan was made, no cash paid out, no note had ever existed of which this purported to be a duplicate. A suit was brought upon the note, and, by an agreement with defendant, was discontinued. The defendant stated that his son had stolen \$2,000, and that this note was used to cover the transaction. B & Sons were informed that a note of theirs was missing and gave the note in question, marking it as a duplicate. The defendant agreed in writing to pay the duplicate note "out of any dividends made from the remaining securities of the L National Bank." The bank went into liquidation. The defendant contended that the agreement was without consideration, and testified that he informed the president and directors that his son had said he had taken the money. Judgment for defendant. Error.

Grant, C. J. 1. There was no consideration for defendant's promise. 2. The testimony in regard to the son's theft was hearsay and not competent. Judgment reversed.

FIFTH NAT. BANK v PIERCE (1898) 117 Mich. 376.

To foreclose land contract. Defendant K was a judgment creditor of P, the principal defendant, and held an execution on the property. K contended that in consequence of plaintiff's stating, that P's financial standing was good, credit was extended to him. P conveyed the mortgaged property to C before his failure. She defended on the ground that, during the time the plaintiff's mortgage remained unrecorded she was ignorant of it, or she would have secured her debt earlier; and that the inchoate dower interest of P's wife was not conveyed by the mortgage, and belonged to her. It was urged that the bank was not authorized under the National Bank Act to extend credit upon real estate security. The contract was on

a printed blank, calling for 10 per cent interest. In most places 7 per cent was written in by the parties. Defendant contended that 32 days was too short a redemption period, and that a receiver should have been appointed. Decree for complainant. Appeal.

Moore, J. 1. If the bank, in taking this security, violated any one of the provisions of the banking act, it did not invalidate the mortgage. 2. The bank was not liable for replying to an inquiry as to a person's credit. 3. As the mortgage was executed by both P and his wife, her inchoate right of dower was alienated. 4. The mistake in regard to the interest can be corrected in this proceeding. 5. Thirty-two days is not an unreasonable time in which to redeem, where that debt became due, and suit was instituted about two years before the decree was entered. 6. Being the foreclosure of a land contract, a receiver was not necessary. Decree affirmed.

WHITNEY v FOSTER (1898) 117 Mich. 643.

To enforce lien. The proceeding was against the receiver of a savings bank, to establish a lien on the banking house. The building was purchased of the plaintiff, under a land contract, and partly paid for; the plaintiff also loaned money to the bank, and the cashier gave him a written agreement, showing that the payment of the amount due on the contract was extended, and that the amount due included the loan, regarding it as part of the purchase price. The cashier consulted one of the directors, the attorney of the bank in making the contract. Decree for defendant. Appeal.

Hooker, J. 1. The loan had the approval, implied, if not expressed, of the bank. 2. The instrument given was an equitable mortgage of whatever interest the bank had in the property. Decree reversed.

STATE SAV. BANK OF DETROIT v FOSTER (1898) 118 Mich. 268.

For dividend. Petition sought to compel the receiver of an insolvent savings bank to pay a dividend. The plaintiff bank held two certificates of deposit, which were proved as claims against the defendant's insolvent bank. The money was not deposited by the plaintiff, but it had given the insolvent bank a right to draw upon it. The defendant's bank drew checks on the plaintiff, and the certificates were given to cover the amount. Decree for defendant. Appeal.

Long, J. The plaintiff cannot be treated as a depositor. Decree affirmed. Cited: 118 Mich. 281.

AMERICAN TRUST & SAV. BANK OF CHICAGO v FOSTER (1898)
118 Mich. 280.

For dividends. Petitioner sought to compel the receiver of an insolvent savings bank to pay dividends. The moneys were borrowed by the insolvent bank from the plaintiff. Petition dismissed. Appeal.

Long, J. The petitioner was not a depositor, and was not entitled to claim any part of the dividend. Decree affirmed.

DUNN v DETROIT SAV. BANK (1898) 118 Mich. 547.

Garnishment. The T Co. claimed the fund. The plaintiff held a judgment against S, the principal defendant. At the date of service, S had on deposit the proceeds of sale of his business. The officer by mistake served the affidavit of garnishment, instead of a copy of the writ, and a few hours later made a service by copy of the writ. In the meantime, the bank paid out all the money of S on his checks. The claimant had a mortgage on S's stock, present and future proceeds of sales, and claimed any amount the bank might be held for. The mortgagee's claim was omitted from the former disclosure but the court allowed an amendment permitting intervention by T Co. Judgment for claimant. Error.

Grant, C. J. The bank was not estopped by its first disclosure to show the exact condition of things at the time of the alleged defective service. Judgment affirmed.

CITY OF MARQUETTE v WILKINSON (1899) 119 Mich. 413.

To enforce trust. The proceeding was against the assignees of W, deceased, a national bank and a savings bank, to reach funds deposited by W in defendant banks. Plaintiff city claimed a preference. W was a private banker, receiving funds

of the plaintiff on deposit, and redeposited in the two other banks two-thirds in amounts, under an agreement to benefit the city and secure the bondsmen. W assigned before his death, and the assignees insisted that the deposits belonged to W's estate. Plaintiff contended that W's bondsmen were parties in interest, and were not competent witnesses. The defendant banks admitted their liability to pay to some one. The court found that the deposits were trust funds; that they were deposited for a particular purpose by the plaintiff city with W, and by him redeposited with the other two banks, all of the banks holding them for the plaintiff city for the payment of particular city orders designated when the deposits were made. Decree for plaintiff. Appeal.

Grant, C. J. 1. The bondsmen were competent to testify. 2. The transaction was legitimate, and impressed upon the funds the character of a trust. Decree affirmed.

Cited: 119 Mich. 661; 124 id. 636.

BOARD OF FIRE AND WATER COMMISSIONERS OF MARQUETTE v WILKINSON (1899) 119 Mich. 655.

Petition to reach trust fund. Defendant was assignee of W, who was a member and treasurer of plaintiff and also of the firm of C & W, bankers, where plaintiff deposited moneys paid there by water consumers. Act No. 131, Pub. Acts, 1875, provided that every public officer receiving public moneys shall keep the same separate, and no such officer could use such money for his own purposes, or receive pecuniary benefit from it. The money was mixed with the general funds and was used by C & W in their business. Only a small part had been paid in on checks drawn by petitioners. Judgment for defendant. Appeal.

Hooker, J. 1. The legal custodian of the funds of this board had no right to deposit these funds in a banking institution in which he was stockholder or partner, and no order of the board could make it lawful. 2. This was a trust fund and petitioner was entitled to the cash paid in, as the checks could be charged against a prior balance. 3. One who seeks to recover a trust fund must be able to trace the trust property to some specific fund or piece of property. Judgment reversed.

FOSTER v ROW (1899) 120 Mich. 1.

To enforce liability of stockholders. Plaintiff, the receiver of P Bank, applied to court by petition ex parte for an order to proceed against stockholders. Testimony was taken and an order determining necessity for an assessment granted. A statute allowed this liability to be enforced in law or equity, and authorized receiver to so enforce it. Defendants C and F, who were stockholders on the books, claimed that they were induced to purchase stock on fraudulent representations. Stock was left at the bank to be sold. M bought it, borrowing \$500 from the bank, \$475 of which he left at the bank to be deposited to the credit of the former owner. The transfer was never made on the books, and M refused to take the stock when tendered. Defendant E was a registered stockholder, but on the strength of a promise of the purchase of his stock by O, he withdrew his account and the stock was transferred to O individually, who instructed the cashier to credit E with \$300. Defendant R owned stock, but transferred it to his son as a gift, and there was no evidence that he knew of bank's insolvency. Defendant S, a non-resident, sold and indorsed his certificates to X. The transfer was not recorded on the books, though known to the bank. Decree for plaintiff. Appeal.

Long, J. 1. The court had jurisdiction to determine the necessity for the commencement of proceedings. 2. It became the duty of the plaintiff, on failure of bank, to pay depositors at once, and if the assets were insufficient, he was bound to ascertain the amount necessary to meet deficit. 3. The stockholders liable to depositors are those who are such at the time the bank became insolvent. 4. A stockholder, who has received benefits, cannot escape liability on the ground that he was induced to purchase on fraudulent representations. 5. Defendant E, not being entitled to the rights of stockholders and to enforce those rights, was not liable. 6. As title to stock passes to transferee, the moment the assignment is made and stock delivered, the defendant S cannot be liable. 7. The intent to avoid liability is a material element in determining the liability of one who has transferred his stock while the corporation was a going one. Decree affirmed as to defendants C, F, and M, and reversed as to E, S, and R.

MAY v GENESSEE COUNTY SAV. BANK (1899) 120 Mich. 330.

Bill to enforce liability of stockholder. B, borrowing money of the defendant bank, on a demand note, deposited shares of stock in an insolvent bank as collateral and assigned the certificate to the bank. The note being unpaid, defendant notified the insolvent bank to transfer his stock to it as pledgee. The latter bank issued a new certificate absolute in form, and entered the transfer as such without the knowledge of defendant. Evidence offered to show that the stock was in fact a pledge, was excluded. Decree for plaintiff. Appeal.

Grant, C. J. 1. A transfer absolute upon its face may always be shown to be an assignment as collateral security. 2. An officer of a bank cannot, by failing to make the correct entry, impose a statutory liability, when it is known to him that the stock is held as security, or in some other fiduciary capacity. Decree reversed.

NATIONAL BANK v STILLWELL CO. (1899) 121 Mich. 154.

On accepted time draft. W drew a draft payable to the order of plaintiff bank at D Bank and accepted by defendant. The plaintiff discounted the draft, by crediting the amount to the account of W, who drew the amount. The defendant afterward paid W. It was forwarded to the D Bank, protested, and returned. Defendant, over plaintiff's objection, proved that an attorney, calling before the draft was due, said he represented W, and that there was a balance due, and gave in evidence letters showing that W received defendant's check in payment of the draft, and an assignment by W, in which plaintiff was listed as a secured creditor; the defendant's check showing it had passed through plaintiff bank. There was no evidence of the attorney's authority. Judgment for defendant. Error.

Moore, J. 1. In the absence of proof that plaintiff authorized them, the statements of W and the attorney were not binding. 2. The testimony did not warrant the inference that the plaintiff was the bona fide holder of the draft, and the unauthorized payment to the drawer did not prevent the suit thereon. Judgment reversed.

HOGAN v DREIFUS (1899) 121 Mich. 453.

On accepted drafts. The drafts were accepted by the defendants, discounted by the N Bank, in whose favor they were drawn, and indorsed in blank for the bank by H, who had authority to make the indorsements. The plaintiff produced the drafts at the trial. Judgment for plaintiff. Appeal.

Long, J. The acceptances belonging to the bank were duly indorsed by one having the authority, and being produced by plaintiff on the trial, the claim of ownership to them by the plaintiff was fully established. Judgment affirmed.

EARLE v HUMPHREY (1899) 121 Mich. 518.

Bill to rescind a contract. The plaintiff became a director in the bank, and continued so until it became insolvent. A receiver was appointed and an assessment ordered, before he sought to rescind a contract for purchase of stock in the bank. The bill was not brought for more than two years and a half after the plaintiff became a director, and not until nearly a year after the insolvency. The receiver was not a party to the bill, and the court appointing him, did not consent to the bringing of the suit. Demurrer. Overruled. Decree for plaintiff. Appeal.

Moore, J. 1. The receiver not being party to the bill, and the court appointing defendant, not having authorized the suit, the bill was bad on demurrer. 2. Plaintiff was guilty of laches. Decree reversed.

COMMERCIAL BANK OF BAY CITY v CHATFIELD (1899) 121 Mich. 641.

For negligence. Defendants were charged with negligence in the management of the funds of the plaintiff bank. The defendant C was a director and president, and the defendant W was cashier of plaintiff. The allegation was that C allowed W to borrow to a large amount on poor security. Plaintiff's offer to prove that W informed C that he wanted the money to put into a mining venture was excluded. The defendant C claimed to have acted in good faith. A juror was excused for cause when he was not disqualified, but plaintiff was not harmed thereby. The court refused to give instructions ignoring the president's claim that the matter was presented in the usual course of business and approved by the directors, and

instructed that, if the president acted in good faith, he would not be liable. Judgment for defendant. Error.

Moore, J. 1. The testimony was competent as bearing on the good faith of C. and whether he had exercised the care and prudence required of a director in approving a loan. 2. Plaintiff cannot complain because the juror was excused. 3. The court properly refused the instructions. 4. It was error for the court to say, in effect, that if C acted in good faith, he would be excused from liability, whatever his negligence. Judgment reversed.

W. & A. McARTHUR CO. v OLD SECOND NAT. BANK OF BAY CITY (1899)
122 Mich. 223.

On sight draft. The draft was sent to the defendant bank for collection. The draft was accompanied by a bill of lading, indorsed in blank by the plaintiff. The draft was accepted and the bill of lading was delivered to the acceptor, who presented it and obtained the goods described therein. The acceptor being insolvent, the draft was not paid. Judgment for plaintiff. Error.

Long, J. The presumption is that the plaintiff intended a cash transaction and defendant is liable for delivering the bill of lading without receiving payment of the draft. Judgment affirmed.

Cited: 125 Mich. 204.

BLOOMER v DARE (1899) 122 Mich. 522.

To foreclose mortgage. The plaintiff, mortgagee, had been doing business with a bank, where the note secured by the mortgage was payable. He took his banking matters out of the hands of the bank, and wrote the defendant of the change, but the latter did not receive the letter. The note matured, and the defendant paid it to the bank, but did not ask for note or mortgage, which were in the possession of the plaintiff. The bank failed, without making payment to the plaintiff. Decree for defendant. Appeal.

Grant, C. J. 1. When one withdraws from his agent the instruments evincing debts, there is an implied revocation of the authority of the agent. 2. The fact that a note and mortgage were made payable at the bank did not establish the agency. 3. Defendant paid the note and mortgage at his risk. Decree reversed.

FLYNN v THIRD NAT. BANK OF DETROIT (1900) 122 Mich. 642.

For accounting. The bank became insolvent, and the bill alleged that the loss of the assets and the insolvency were due to the maladministration of the defendants, directors of the bank. Three of the defendants answered, and the rest demurred, averring want of equity, that the liability alleged was an asset of the bank, which would go to the receiver, and that he could not be made a party defendant. The receiver was a defendant. Decree for complainant. Appeal.

Hooker, J. 1. An action for such negligence as that alleged may be brought on behalf of the bank by a shareholder, where the receiver is a director. 2. A general demurrer cannot be sustained, where there is matter in the bill upon which equitable relief can be granted. Decree affirmed.

PRESTON v SAVINGS BANK (1900) 122 Mich. 696.

Trover for stock. The stock was issued by the F Copper Co. B, cashier of defendant bank, purchased the stock for the plaintiff, paid for it with defendant's check, kept it for a time, and sold it. The transaction did not appear on the books of the bank, which was not engaged in buying and selling stock, and which did not know of it. B kept the stock in his private drawer, from the time he received it, until he sold it. Judgment for defendant. Error.

Grant, J. The entire transaction was with B individually, and not with the bank. Judgment affirmed.

CASSERLY v CASSERLY (1900) 123 Mich. 44.

On an administrator's account. Defendant was the administrator of the estate of X. The defendant, in the hearing in the probate court, made no claim that X had given him her property. The court instructed that an intent to make a gift must be manifest by a delivery of the property or evidences of property, with words in-

dicating an intent to pass title, and that defendant was chargeable with cash taken just before X's death. Defendant claimed that he did not account for the cash because it was a gift from X. There was no conclusive evidence of a gift. Judgment for plaintiff. Error.

Montgomery, C. J. 1. To constitute a valid gift, the circumstances must show that a present gift is intended, as distinguished from a promise to change title in the future. 2. The fact that defendant made no claim to the money at the hearing in the probate court, tended to show there had been no gift. 3. The administrator's excuse for not accounting for the cash was not testimony showing a gift. Judgment affirmed.

PENINSULAR SAV. BANK v WINEMAN (1900) 123 Mich. 257.

Interpleader. W directed the bank to transfer his deposit to his wife. A passbook was issued in her name, and delivered to and retained by him. He never afterward had an account with the plaintiff. He added more to this deposit in the wife's name. She signed two checks, and he signed one for a small amount, explaining that it was not convenient to get his wife's signature. The several amounts so drawn were on checks written by the cashier and were used by W. The wife did not know that the deposit and passbook were in her name until after W's death. The executors of W and the wife were the claimants of the fund. Decree for executors. Appeal.

Hooker, J. There was no perfected gift to the wife. Decree affirmed.

FIRST NAT. BANK OF CHICAGO v CITIZENS BANK OF DETROIT (1900) 123 Mich. 336.

Money had and received. A certificate of deposit was sent to defendant bank for collection. It was indorsed by the plaintiff and forwarded by the defendant, directly to the issuing bank, and the latter failed before the certificate was paid. The instructions by plaintiff were "collect at your best rate of exchange." There was no other bank where the deposit was made. Judgment for plaintiff. Error.

Long, J. The instructions justified defendant in sending the draft directly to the issuing bank, the only one in the place, and defendant is not liable for the loss. Judgment reversed.

FOSTER v WHELPLEY (1900) 123 Mich. 350.

Bill in aid of execution. From and after 1892, defendant W held stock in a bank, of which plaintiff was receiver. Defendant W bought land from a purchaser from the state in 1861. In 1895 defendant assigned one-half interest in this land to his wife, also a defendant. In 1896 the bank failed, in 1897 a patent of the lands was issued to defendants jointly, upon payment of \$200 to the State by the wife. At W's request, the land commissioner added the words "his wife" to the name of Mrs. W in the deed. Defendants claimed to hold by entirety. In 1898 a decree was rendered against defendant for the liability on his stock, this liability having accrued as early as July, 1896. Decree for plaintiff. Appeal.

Moore, J. 1. The undivided interest which defendant W had in the property, prior to the issuance of the patent, could be reached by execution. It was immaterial whether defendants held in entirety. 2. After the liability accrued, defendant W could not, without any consideration passing to him, cause the title to property, then subject to levy and sale, to be so changed that it could not be reached by execution. Decree affirmed.

HENDERSON v MICHIGAN TRUST CO. (1900) 123 Mich. 688.

For rent. Defendant was receiver of a bank, which had a claim against X, who assigned his rights to future rents from the banking house to plaintiff. Defendant contended that the past due claim could be set off. Judgment for plaintiff. Appeal.

Long, J. 1. A claim that is past due cannot be set off against an assigned claim which was not due and payable at the time of the assignment. Judgment affirmed.

MICHIGAN TRUST CO. v COMSTOCK (1900) 123 Mich. 689.

For assessment on stock. The husband of defendant, owning stock in the bank, of which plaintiff was receiver, assigned shares to defendant, but the certificate was not delivered to her. The bank failed. There was testimony that defendant received and cashed checks for dividends; that she knew the stock was either assigned or issued to her, and recognized it as hers. Court excluded questions as to whether the husband had given his wife a separate allowance before the assignment, and as to whether the bank officers considered the stock as belonging to defendant. The defense was that defendant did not own the stock. Judgment for plaintiff. Error.

Grant, J. 1. There was evidence to support plaintiff's claim. 2. What the bank officers thought, and what allowance the husband had made his wife before assigning the stock to her, were not competent in regard to ownership. Judgment affirmed.

STATE SAV. BANK OF IONIA v MONTGOMERY (1901) 126 Mich. 327.

On promissory notes. The defendant was an accommodation maker of one note and an accommodation indorser of the other, for the cashier of the plaintiff bank, and he knew that they were to be discounted by the plaintiff. The defendant did not show that he was injured by the cashier's falsely representing that the notes were renewals, when the originals had been paid. The committee on discounts did not know of any defect in the paper, and supposed it secured by collateral of the cashier. Judgment for plaintiff. Error.

Moore, J. The knowledge which the cashier possessed is not imputable to the bank, because the cashier represented himself alone when the paper was discounted, and the defendant knew that these notes were to be used for the cashier's benefit, and that in discounting them, he would act in his own interest. Judgment affirmed.

HULBURT v JUST (1901) 126 Mich. 337.

To enforce mechanic's lien. The defendants were the administrators of J, deceased, a former cashier of defendant bank, and averred that the claim was fraudulent and excessive. The claimant filed a lien on a building erected for J. It was contended that during the work claimant's account was overdrawn, under circumstances creating no liability to the bank, but that the credit was extended to J, who had been cashier of the bank, and was acting with apparent authority, in instructing the assistant cashier to pay plaintiff's checks, which constituted the overdraft. The claimant, acting in good faith, overstated the amount of his lien. Decree for complainant. Appeal.

Montgomery, C. J. 1. The overstatement of the amount of a lien does not defeat the lien, unless made in bad faith. 2. The credit not being given exclusively to the cashier, the contractor was bound on his checks and the overdraft was not a payment reducing his lien. Decree modified.

MINNESOTA

DANA v BANK OF ST. PAUL (1860) 4 Minn. 385.

Damages for breach of contract. The answer averred that the contract sued on was not signed by defendant's president and cashier, although the incorporating act provided that contracts should be signed by those officers. Demurrer. Overruled. Judgment for defendant. Error.

Flandreau, J. Sec. 19 of the Act of July 26, 1858, under which defendant was incorporated, does not prevent a bank from contracting otherwise than through its president and cashier; but one who contracts through other agents must prove their authority. The statute merely relieves one whose contract is signed by the officers from proving the authority of the contracting agents. Judgment reversed.

DOUGLAS v FIRST NAT. BANK OF HASTINGS (1871) 17 Minn. 18.

Assumpsit. W kept a deposit in defendant bank in the name of S. The bank held an unpaid note of S which had matured several months before the account was opened, and it charged the note as a debit in the account. Two distinct theories

as to the nature of the deposit were supported by the testimony, but the referee's findings were consistent with neither. There was no evidence that defendant had been misled to its damage with regard to the ownership of the deposit. W assigned to plaintiff. Judgment for plaintiff. Appeal.

Berry, J. 1. Where there are two conflicting theories in the testimony, and the referee's findings are consistent with neither, it is ground for reversal. 2. The bank had no right to charge the account of W with S's note unless he gave his consent, express or implied, or unless the bank, misled by his conduct and believing the deposit to belong to S, had suffered it to remain uncollected, relying upon the deposit account for its payment. Judgment reversed.

SHEREN v MENDENHALL (1876) 23 Minn. 92.

Assumpsit. Plaintiff sued defendants as partners. The answer denied the partnership, alleging incorporation under P. S., ch. 17, secs. 56 and 57. This statute authorized the incorporation of benevolent societies, and the adoption of by-laws "proper and best for the good of the corporation." Defendant's by-laws provided for the receipt of deposits and payment of interest thereon, but not that the business should be conducted for the sole benefit of such depositors. Judgment for plaintiff. Appeal.

Berry, J. 1. Ex vi terminus, a benevolent association must be one whose leading purpose is benevolence and not the profit of its members. A savings association for the pecuniary benefit of its members is not a benevolent society. Judgment affirmed.

FARMERS AND MECHANICS BANK v BALDWIN (1876) 23 Minn. 198.

On promissory note. Plaintiff was organized under G. S., ch. 33, as it existed prior to the amendment in Laws of 1876, ch. 92. This statute gave it generally the powers of a bank of deposit, discount, and circulation. It had no express authority to purchase promissory notes, although sec. 13 provided for the purchase of foreign and inland bills of exchange. Plaintiff's title to the note in question rested upon an absolute purchase, there being no indorsement by the seller. The court charged that, unless plaintiff discounted the note, it could not recover. Judgment for defendant. Appeal.

Cornell, J. 1. Discount is a deduction upon advances or loans of money upon negotiable paper payable at a future day, which are transferred to a bank. 2. Discounting a note and buying it are not identical in meaning; the latter denotes a transaction in which the seller does not indorse the note. The power to purchase notes is, therefore, not a necessary incident to the powers of a bank of discount. 3. The fact that no indorsement was procured from, or responsibility incurred by, the seller of the note, tends to show that this was a contract of sale and not one of loan and discount. 4. Sec. 13, G. S., ch. 33, does not authorize the purchase of promissory notes. Judgment affirmed.

COMMISSIONERS v CITIZENS NAT. BANK (1877) 23 Minn. 280.

To collect a tax. Defenses: That defendant was a national bank; that the real estate in question was occupied by it for the transaction of its business, purchased with its capital, and constituted a part thereof; that all the shares had been assessed to the holders thereof at their full value in money, without any deduction of the value of real estate; and that the real estate had been taxed at its value for the same year. Decision for plaintiffs. Certified to this court.

Cornell, J. 1. The general policy of the law is to avoid duplicate taxation. 2. Where the capital stock of a national bank is taxed in the hands of the shareholders, without deduction on account of the real property owned by the bank, used by it as a place of business, and constituting part of its capital, said real property is not taxable eo nomine by the state. Decision reversed.

Cited: 33 Minn. 536; 39 id. 509; 42 id. 146; 72 id. 222.

RHODES v WEBB (1877) 24 Minn. 292.

On a promissory note. The note was executed by defendant to M Bank, plaintiff's assignor. Defendant claimed that the note was satisfied by a transaction between T, the president, and the cashier of the bank, and himself. T, on his own account and without any authority from the bank, agreed to purchase of defendant 10 shares of the stock of the bank and to pay for them on July 1. On that day,

T directed the cashier to deliver the note to defendant and take the stock in exchange. T and the cashier had entire control of the financial affairs of the bank, and were not required to report discounting transactions to the directors. Defendant was a director of the bank. Judgment for plaintiff. New trial denied. Appeal.

Gilfillan, J. 1. A general authority to the president to transact the business and manage the affairs of a bank does not authorize him to use the property of the bank in his private business. 2. General authority in the cashier and president to bind the bank by their contracts is subject to the rule of law that an agent cannot bind his principal by a contract made on behalf of his principal with himself; the substitution of T's promise to pay the bank the amount of the note was not, therefore, binding on the bank. Judgment affirmed.

BALCH v WILSON (1878) 25 Minn. 299.

On promissory note. Defendants K and W gave to a national bank their joint note for \$500, dated April 18, 1877, and payable in one month. Some days after the maturity of the note, plaintiff was appointed receiver under the National Banking Law. On April 16, before suspension, the bank gave three notes, jointly with T & B, to defendant K, payable in 12, 15 and 18 months. The answer alleged a transfer to W of one-half interest in these notes, but did not specify the date of the transfer. Defendants claimed the right of setoff. Demurrer. Sustained. Appeal.

Cornell, J. 1. It cannot be assumed that W acquired an interest in the notes prior to the appointment of the receiver, as no such fact is alleged in the pleadings. 2. The rights and liabilities of the parties became fixed when the insolvency occurred and the receiver was appointed. 3. When the receiver was appointed, the note was overdue, and K was sole owner of the bank's notes. There was no such connection between the respective claims as would permit a court of equity to compel an equitable setoff. Order affirmed.

Cited: 57 Minn. 91.

ALLEN v WALSH (1879) 25 Minn. 543.

On stockholder's statutory liability. The M Bank became insolvent and assigned. The assets being insufficient to pay its debts, plaintiff, a creditor, sued defendant alone, to enforce his liability as a stockholder. The statute under which the bank was organized, G. S. ch. 33, sec. 21, provided that stockholders were liable individually for all the corporate debts in an amount equal to double their stock. The bank was not a bank of issue. Sec. 3 of art. 10 of the state constitution made corporate stockholders liable to the amount of stock held by them. Demurrer on the following grounds: That the statute did not apply; that it was unconstitutional; and that there was a defect of parties defendant in not joining the assignee and all the stockholders. The statutes gave a preference to billholders as against all other creditors. G. S. ch. 76, secs. 17-23, provided for an action by a creditor to enforce the stockholders' liability and for the admission of all interested persons as parties to such action. Demurrer sustained. Appeal.

Cornell, J. 1. Though G. S. ch. 33, sec. 21, may have originally applied only to banks of issue, its provisions, since the amendment in Laws 1869, ch. 85, have applied to all banks. 2. The constitution does not, in terms or by implication, forbid the imposition of a greater liability than that imposed thereby. 3. In view of the fact that the statutory liability is generally for the benefit of all creditors and the general policy of the law as expressed by other statutes is to settle the rights of all parties in one action, the stockholders and the assignee should have been joined as defendants. Affirmed.

Cited: 30 Minn. 176; 34 id. 326; 40 id. 148, 347; 41 id. 87; 44 id. 413; 48 id. 149, 169, 170; 56 id. 423; 61 id. 374, 392; 65 id. 98; 66 id. 443, 503; 70 id. 352; 72 id. 275; 73 id. 459, 460; 79 id. 223.

BALDWIN v CANFIELD (1879) 26 Minn. 43.

To remove cloud. One of the deeds was from K to defendant C and the other purported to be from the M A Association to defendant C. The M A Association was a corporation, owning nothing but real estate; K was the sole stockholder. The governing power was vested in a board of directors. K executed three promissory notes to B, giving him as security 200 shares of stock. B borrowed \$10,000 from the S National Bank, of which one of the plaintiffs was cashier, giving as security K's notes and the 200 shares of stock. Subsequently K gave M 100

shares of this stock as security for five notes. M indorsed these notes and the stock to S Bank. This stock was not transferred on the books of the corporation as required by G. S., ch. 34, sec. 49. In 1873, K delivered to plaintiff 500 shares of the stock as security for a loan. Subsequently, K caused a deed to be executed to defendant C by the directors separately, wherever they happened to be. K also gave defendant his own warranty deed of the land, though title was in the M A Association. Both deeds were recorded. K was to substitute other stock for that pledged to plaintiffs, but did not do so, and the M A Association was made a party, but not served. S Bank and its cashier were plaintiffs. Judgment for plaintiffs. Appeal.

Berry, J. 1. A provision of law that stock shall be transferable only on the books of a corporation does not incapacitate a stockholder from transferring his stock without any entry on the corporation books. 2. If the value of corporate property is impaired by a cloud upon the title, stockholders have a right to have the cloud removed. 3. The deed purporting to be from the association is a cloud. 4. K's deed cannot constitute a cloud. 5. A defect of parties must be taken advantage of by answer or demurrer. 6. Plaintiffs, as pledgees, cannot be compelled to act through the association, but may bring the action on their own account. 7. Plaintiffs are not estopped from asserting their right as pledgees. 8. There is no defect of parties. 9. Directors have no authority to act save when assembled at a board meeting, and their deed to C was therefore invalid. 10. A pledge of the stock was not a violation of the provisions of the act which prohibits a national bank from loaning on mortgage security. Judgment affirmed.

Cited: 29 Minn. 272; 34 id. 86; 38 id. 71, 89; 44 id. 187; 46 id. 266; 50 id. 38; 61 id. 312; 65 id. 521; 68 id. 126.

FIRST NAT. BANK OF ROCHESTER v BENTLEY (1880) 27 Minn. 87.

On promissory notes. S held two notes of defendants and indorsed one of them to plaintiff as collateral for a loan. When the notes became due, defendants applied to S for an extension which he agreed to give, provided they paid 15 per cent per annum. New notes were given, and a separate note given for the excess of interest over 12 per cent, the legal interest. S exchanged, with plaintiff, the new note for the old note. The plaintiff knew nothing about the usurious contract between S and defendants. Defense: Usury. The statutes declared usurious purchases of negotiable paper for value before maturity. Judgment for plaintiff. Appeal.

Gillilan, C. J. 1. The holder of negotiable paper as collateral security is as fully protected as an absolute purchaser. 2. The surrender of other security for the antecedent debt is sufficient consideration to render the holder a purchaser for value. Judgment affirmed.

Cited: 61 Minn. 493; 62 id. 64; 73 id. 235.

FIRST NAT. BANK OF ROCK ISLAND v LOYHED (1881) 28 Minn. 396.

On promissory note. The note was discounted for value before maturity, and in regular course of business by plaintiff through its cashier, who was also a stockholder and director of the corporation, which was payee and indorser. Plaintiff had no actual notice of any defense or equities on the part of defendant. The answer denied information sufficient to form a belief as to whether plaintiff was a corporation. No proof that the indorsement was actually made by the indorser's agent was given. Judgment for plaintiff. Appeal.

Mitchell, J. 1. The answer did not make it necessary for plaintiff to prove that it was a corporation. 2. Possession of a note by the indorsee is prima facie evidence that the indorsement was made by the person purporting to be the indorser. 3. The fact that plaintiff's cashier was a stockholder in the indorser was not a notice to plaintiff of defendant's equities. 4. Notice, in order to charge the indorser of negotiable paper, must be actual and not merely constructive. Judgment affirmed.

Cited: 31 Minn. 63; 37 id. 102, 405; 61 id. 275.

DAVIS v SMITH (1882) 29 Minn. 201.

Goods sold and delivered. Defendant and H were partners and kept a deposit account with L Bank. The goods in question were sold to the firm. H, individually, owed plaintiffs \$814.54 and they drew on him for the amount, payable to

their order, and sent for collection to L Bank. H paid \$500 on account out of his own funds. The bank afterward paid the remainder of the bill and charged the amount to the account of the firm. No check of the firm was drawn for the amount upon the firm account. Defendant contended that the money paid by H was firm money and was so known by plaintiff to be, when paid. Plea: Counterclaim for the amount paid plaintiff on H's debt by the L Bank, and charged by L Bank to the firm account. Judgment for plaintiff. Appeal.

Gilfillan, C. J. The money of the firm, as soon as deposited in the bank, became the money of the bank, and the bank thereupon became a debtor to the firm for that amount. The bank, in paying the balance of the draft, paid it out of its own money, and not out of the money of the firm. The party to whom it was paid did not receive the money of the firm, and no action by the firm against such party, based on title to the money, will lie. Judgment affirmed.

LEBANON SAV. BANK v HOLLENBECK (1882) 29 Minn. 322.

Foreclosure. Plaintiff, a New Hampshire banking corporation, loaned defendant H \$400 and took his note secured by a mortgage recorded in July, 1875. Not having been sealed, it was afterward sealed and re-recorded in September, 1877. In 1876, defendant H and wife conveyed the mortgaged premises to M, but the deed was not recorded until May, 1877. M knew of the mortgage and assumed payment thereof. Before the deed was recorded, plaintiff had commenced foreclosure proceedings and filed a *lis pendens*. Defendant B, a creditor of M, obtained a judgment against him in March, 1877, and bid in the property at the execution sale. B's attorney prior to his employment knew of plaintiff's mortgage, and was influenced by the defect in prosecuting B's claim to judgment and execution. Judgment for plaintiff. Appeal by defendant B.

Vanderburgh, J. 1. Unless restricted by its charter, a banking corporation may secure its loans by taking either real or personal security. 2. Equity would supply the defective execution of this instrument, reform and enforce it as a valid mortgage as against all who had notice of plaintiff's equities. 3. The recording act did not become operative, so as to affect the prior rights of plaintiff, until the deed to M was recorded, and the filing of the *lis pendens*, prior to such record, saved all plaintiff's rights as to the question of notice. 4. Plaintiff's specific equitable lien would be preferred to the general lien of a subsequent judgment. 5. Knowledge acquired by the agent prior to the agency, but actually present in his mind during the agency, is binding on the principal. Judgment affirmed.

Cited: 30 Minn. 178; 32 id. 243; 36 id. 113; 37 id. 57; 46 id. 300; 50 id. 380; 54 id. 13; 79 id. 356.

SECURITY BANK OF MINNESOTA v LUTTGEN (1882) 29 Minn. 363.

On bill of exchange. Defendants shipped flour to L & Son at Baltimore, taking bills of lading, by the terms of which the flour was to be delivered to defendants or order at Baltimore. Defendants drew on L & Son for the amount due, payable to the defendants' order 30 days after sight. The bills of exchange were discounted by plaintiff, and the bills of lading, indorsed in blank, delivered to it. Upon acceptance of the bills by L & Son, plaintiff delivered the bills of lading to them, but they became insolvent before maturity. Defendant introduced evidence of a parol agreement that the bills of lading were to be treated as security, and that plaintiff had no right to deliver them until payment. Judgment for defendant. Appeal.

Dickinson, J. 1. The transaction itself, independent of the parol agreement, did not express or import a sale upon credit, or determine that the drawees were entitled to the bills of lading upon acceptance. 2. The admission of the parol evidence, showing the express contract, did not, therefore, contradict or vary the terms of written contract. 3. The indorsement and delivery of bills of lading has no such fixed legal effect as flows from the indorsement of negotiable paper, but operates rather as a delivery of the goods. Judgment affirmed.

Cited: 35 Minn. 108.

CASSIDY v FIRST NAT. BANK OF FARIBAULT (1882) 30 Minn. 86.

On a certificate of deposit. The certificate was in favor of C, or order, payable "on the return" thereof, properly indorsed. The money deposited was the property of plaintiff, by whom it had been delivered to C, her husband, to deposit with defendant. Upon receiving the certificate, C delivered it to plaintiff, who retained it

in her exclusive possession. Before this action was brought, defendant, on demand, refused payment on the ground that the certificate had not been indorsed by C. The action was brought as on a promissory note. Judgment for plaintiff. Appeal.

Berry, J. 1. The certificate is in effect a promissory note. 2. The fact that it is payable "on the return" of the certificate does not raise a contingency affecting its character as a note. 3. Although made payable to the depositor or his order, a third person may become its owner without indorsement. Judgment affirmed.

Cited: 30 Minn. 437; 33 id. 43; 37 id. 336; 68 id. 410.

WASECA CO. BANK v McKENNA (1884) 32 Minn. 468.

Injunction. Plaintiff, a domestic corporation, sought to restrain defendant, as the county treasurer, from selling shares of its stock for taxes levied thereon. It professed to sue on behalf of all its stockholders. Judgment for defendant. Appeal.

Gilfillan, C. J. 1. Defendant can only levy on and sell the shares of stock of individual stockholders for the tax upon such shares. 2. Such sale would operate only to transfer to the purchaser title to the stock sold. 3. The wrong, if any, would be against the individual stockholders, and not against the bank. 4. As the statutes of this state require every action to be brought by the real party in interest, the bank cannot maintain this action. Judgment affirmed.

MERCHANTS NAT. BANK v HANSON (1884) 33 Minn. 40.

For the value of promissory notes. L, doing business as Bank of B, held several notes payable to himself by name or to the Bank of B. He indorsed the notes to plaintiff or order, with request to discount and credit to bank. Before maturity, the plaintiff credited the proceeds to the Bank of B, and sent the notes of B to L for collection, indorsed to Bank of B, or order, "for collection." L indorsed them before maturity to defendant for an antecedent debt. Defendant refused to deliver the notes to plaintiff, contending that plaintiff had purchased the notes, not discounting them, and the act was ultra vires. Judgment for plaintiff. New trial denied. Appeal.

Dickinson, J. 1. The enforcement by a national bank of securities acquired without authority cannot be opposed by the plea of ultra vires; it is therefore immaterial whether this was discount or purchase. 2. As defendant had express notice by the indorsement that plaintiff was the owner, his failure to make inquiries was not merely negligence, but mala fides. Order affirmed.

Cited: 36 Minn. 188; 54 id. 223; 63 id. 464.

BRANCH v DAWSEN (1885) 33 Minn. 399.

Money had and received. In July, 1869, defendants were engaged as co-partners in the banking business. W deposited \$5,000 with them in plaintiff's name. In 1880, plaintiff demanded payment which was refused. The action was commenced in 1884. Demurrer, on the ground that the action was barred under the Statute of Limitations. Overruled. Appeal.

Gilfillan, C. J. 1. It is the understanding on which deposit is made, and part of the bank's contract to repay, that, as a condition precedent to its duty to repay, the depositor shall make a demand. 2. As there is no default until such demand is made, the Statute of Limitations does not begin to run until that time. Affirmed.

Cited: 37 Minn. 336; 53 id. 314.

LENTHOLD v FAIRCHILD (1886) 35 Minn. 99.

For an accounting. Y, a warehouseman, stored wheat with authority to mingle it with other wheat, and was also engaged in buying and selling wheat on his own account. In shipping wheat, it was his custom to name defendant bank as consignee in the bills of lading, and to draw in favor of the bank on the persons to whom the wheat was finally to be delivered. The bank delivered the bills of lading to such persons upon payment of the drafts, and credited Y with the proceeds. It had no knowledge that any wheat was improperly shipped. Upon Y's failure, it was discovered that there was not sufficient wheat in storage to satisfy outstanding storage receipts. Plaintiffs, who held receipts, tendered storage charges to F, the assignee, and demanded delivery of the wheat called for in their receipts. F uncon-

ditionally refused to make delivery. N had acted as agent for Y in his wheat transactions, and both N and the bank were holders of storage receipts. The court found: 1, That F's refusal to deliver any wheat was conversion of that actually in storage; 2, that the bank, Y, and N were guilty of conversion in shipping wheat required to meet outstanding receipts; 3, that neither the bank nor N was entitled to share in the wheat on hand. Judgment for plaintiffs in accordance with the findings. Appeal by F, the bank, and N.

Gillfillan, C. J. 1. A bill of lading is merely symbolic delivery of the goods, and is no more conclusive evidence of a contract of sale than would be actual delivery of the goods. Parol evidence as to the real purpose of a bill of lading is not incompetent as tending to vary the terms of a written instrument. 2. The bank, by the bills of lading, acquired only a special property in the wheat empowering it to hold the bills as security for the payment of drafts; it was not the shipper of the wheat and, as it acted in good faith, was not guilty of conversion. 3. The unconditional refusal by F to deliver any wheat amounted to conversion of that part of the wheat in hand to which plaintiffs were entitled. 4. An agent who, acting solely for his principal and by his direction, and without knowing any wrong or being guilty of gross negligence in not knowing it, assists his principal in improperly disposing of the property of others, is not thereby liable for the conversion. Judgment reversed as to the bank; further findings directed as to N; affirmed as to F.

Cited: 39 Minn. 214, 217, 218; 43 id. 35; 63 id. 175; 83 id. 502.

THIRD NAT. BANK v STILLWATER GAS CO. (1886) 36 Minn. 75.

To impress a trust on certain funds. R, by fraud, obtained from plaintiff a loan of \$3,500, which was placed to his credit. R afterward drew out the money and deposited it with the S Bank subject to the order of his agent E. Subsequently defendant, by fraud, induced E to pay over the money to it. R died insolvent. Plaintiff seeks to impress the funds in defendant's hands with a trust in its favor. Demurrer overruled. Appeal.

Mitchell, J. 1. A person acquiring property by fraud acquires no title to it; but it is held by him, and by all persons claiming under him with notice, in trust for the original owner. 2. So long as the substantial identity of the property can be traced, it remains subject to the trust. 3. Depositing trust money in a bank, although it creates the relation of debtor and creditor between the bank and the depositor, does not change its character, or relieve the deposit from the trust. Order affirmed.

Cited: 36 Minn. 75; 37 id. 472; 59 id. 375; 73 id. 280; 78 id. 360.

BRANCH v DAWSON (1886) 36 Minn. 193.

To recover deposit. Plaintiff's husband deposited with defendant bankers \$5,000 in her name, and she claimed that she had given \$5,000 to her husband to be deposited with the defendants, which had never been repaid or returned to her. Defendant's cash book and ledger showed that this entry of \$5,000 to the plaintiff's credit was the only entry, and was made by a transfer from the husband's account. The husband never communicated to the plaintiff the fact of the deposit, never said anything about giving her money, and never gave her possession of the passbook. Judgment for defendants. Appeal.

Mitchell, J. 1. Account books are prima facie evidence of the charges therein contained. 2. The entry of the deposit in the passbook did not constitute a written contract, but was merely evidence, in the nature of a receipt, of the fact that plaintiff or some one for her had deposited that sum; and like any other receipt might be contradicted or explained by oral testimony. 3. A mere deposit of money in the name of another with a third person will not of itself be sufficient. 4. An incomplete voluntary gift creates no right which can be enforced. A gift as well as a contract requires the assent of both minds. Order affirmed.

Cited: 42 Minn. 47.

MITCHELL v EASTON (1887) 37 Minn. 335.

On certificate of deposit. Plea: Statute of Limitations. In 1876, plaintiff received a certificate of deposit payable on demand from the banking firm of S, of which defendants are surviving partners. Under the Statute of Limitations, an action of this sort is barred six years after it accrues. The last payment on the

certificate was made in 1878. No demand for the balance was made. The action was commenced in 1886. Judgment for plaintiff. Appeal.

Vanderburgh, J. The instrument is to be placed on the same footing as ordinary demand negotiable securities. All such securities are treated as due immediately, and the Statute of Limitations begins to run at once. Even though no demand be made. Judgment reversed.

Cited: 67 Minn. 372; 68 id. 410.

NATIONAL BANK OF BATTLE CREEK v MALLAN (1887) 37 Minn. 404.

On promissory notes. Defendants made two promissory notes payable to the order of N, S & Co., an incorporated company, and indorsed "protest waived, N, S & Co." Defendants contended that the indorsements were not admissible in evidence except on proof that they were made by an officer or agent having authority. The notes passed to plaintiff. A statute provided that "the possession of the note or bill is prima facie evidence that the same was indorsed by the person by whom it purports to be indorsed." Verdict for plaintiff. New trial denied. Appeal.

Gilfillan, C. J. G. S. 1878, ch. 73, sec. 89, applies to indorsement of a corporation, as well as of a natural person. The indorsement is prima facie evidence that the signature is that of an authorized agent. Order affirmed.

Cited: 61 Minn. 275.

NICOLLET NAT. BANK OF MINNEAPOLIS v CITY BANK (1887) 38 Minn. 85.

For conversion of bank stock. Defendant adopted a by-law providing that no transfer of the stock should be made, without the consent of the directors, by any stockholder who should be liable to the bank as principal debtor, or otherwise; and that the stock should be assignable only on the books of the company. K, who was indebted to defendant, without the consent of the directors, assigned the stock in question to plaintiff as security for a debt. In an action against K on his indebtedness, defendant attached K's interest in the stock. Plaintiff offered to surrender the stock certificates to defendant, and demanded a transfer on the books which was refused. The Act of 1881 prohibited any loan or discount by a bank on the security of the shares of its own capital stock. Judgment for plaintiff. Appeal.

Dickinson, J. 1. Under the Act of 1881, the defendant cannot have a lien upon the stock as security for a loan made after the passage of the act, by force of any by-law adopted by it, or by legal implication. 2. Although the assignment to the plaintiff, without a transfer on the books, did not constitute a complete transfer, yet, as between the immediate parties, the assignment was effectual. 3. One who holds stock as collateral is entitled to transfer on the books. 4. As defendant had notice of plaintiff's prior lien, its rights as attaching creditor are subordinate to those of plaintiff. Judgment affirmed.

Cited: 44 Minn. 187; 63 id. 410; 68 id. 126.

FIRST NAT. BANK OF KASSON v LA DUE (1888) 39 Minn. 415.

Injunction. Plaintiff was organized under the National Banking Act, and did business in Minnesota, of which state defendant was a resident. In an action at law a writ, of attachment was issued at defendant's instance, and plaintiff's money in New York was seized and attached. In that action, no personal service of the summons had been or could be made. Plaintiff, in the present action, sought to enjoin prosecution of the action at law. By the National Banking Act, an attachment cannot issue against a national bank before judgment in any suit in any state, county or municipal court. Injunction refused. Appeal.

Collins, J. 1. The attachment is illegal and void because the writ was issued without authority, and contrary to the federal statutes. 2. The court in which the action had been initiated had failed to acquire any jurisdiction whatsoever over the person or property of this plaintiff. This court will not grant an injunction to restrain defendant from doing that which it appears he cannot do. Order affirmed.

SECOND NAT. BANK OF ST. PAUL v HOWE (1889) 40 Minn. 390.

On promissory note. Defendants were partners. Defendant C, without the knowledge of his partner H, executed an accommodation note, in the firm name, in

favor of M, who indorsed it and had it discounted by the plaintiff. When H heard of the transaction, he notified the vice-president, before the note was discounted, that the firm rescinded the note. The vice-president assured defendant H, that M was rich and responsible. H withdrew his revocation, relying on these assurances. M failed before the note became due. The court directed a verdict for plaintiff. New trial denied. Appeal.

Collins, J. 1. Notice to the officer of the bank in regard to a business matter pertaining to the institution was adequate notice to the bank. 2. If the officer made false and fraudulent assertions which misled and induced defendant to withdraw his revocation, plaintiff cannot escape the consequences. Order reversed.

HARRISON v NICOLLET NAT. BANK OF MINNEAPOLIS (1889) 41 Minn. 488.

For damages. Plaintiff drew an order on bank as follows: "March 27, 1888. On April 14, pay to the order of E, one hundred and ninety-nine, 92-100, dollars." The order was forwarded to defendant for collection, and the money not being paid on April 14, it was protested. Plaintiff claimed that it was protested before maturity, as he was entitled to three days of grace. Demurrer. Sustained. Appeal.

Mitchell, J. 1. It is an essential characteristic of a check that it is payable on demand. 2. This instrument is a bill of exchange and entitled to grace. Reversed. Cited: 59 Minn. 508.

MERCHANTS NAT. BANK OF MINNEAPOLIS v GASLIN (1889) 41 Minn. 552.

On judgment. Defense: That plaintiff was dissolved prior to bringing the action. The stockholders, by a two-thirds vote, had passed a resolution that plaintiff go into liquidation, and appointed a trustee to wind up its affairs. Judgment for plaintiff. New trial denied. Appeal.

Gilfillan, C. J. 1. The resolution and the appointment of a trustee did not dissolve the corporation, nor affect its capacity to collect its assets and settle its affairs. Judgment affirmed.

STREISAGUTH v NATIONAL GERMAN-AMERICAN BANK (1890) 43 Minn. 50.

Money had and received. Plaintiffs deposited with defendant for collection their draft for \$137.52 on a mercantile firm at L. Defendant sent the draft to its correspondent at L, to whom it was paid by the drawees. The correspondent became insolvent before remitting the proceeds of the draft. Judgment for plaintiffs. Appeal.

Collins, J. A bank which receives paper for collection is responsible for the default, failure, or neglect of its correspondent. Judgment affirmed. Cited: 75 Minn. 538.

TRIPP v NORTHWESTERN NAT. BANK (1891) 45 Minn. 383.

To recover money. Defendant held a number of promissory notes against the E Co., some of which were not due. On January 20, E Co. gave defendant a demand note without grace for the amount of these notes, antedating it as of December 24. On the same day, E Co., having made a sale of its stock, deposited the check received for the proceeds with defendant. The next morning the amount of the check was placed to E Co.'s credit, and on the same day the amount of the demand note was deducted by defendant from E Co.'s deposit and applied in payment thereof. An officer of E Co. drew out the balance. The Act of 1881 forbade preferences by insolvents. On February 3, the board of directors of E Co. passed a resolution authorizing the officers to make an assignment for the equal benefits of all creditors, and plaintiff was appointed assignee. Plaintiff's demand for a jury trial was denied. Judgment for defendant. Appeal.

Mitchell, J. 1. The resolution of the board of directors was broad enough to authorize the officers to make an assignment under the law of 1881, if the exigencies of the corporation required it, even though the facts, which would permit such assignment, did not exist when the resolution passed. 2. The right of a bank to appropriate the credit due a depositor to the payment of its claims against him is not peculiar, but rests upon the ordinary law of setoff. 3. No devise, by which a preference in conflict with the law is sought to be secured, will be allowed to stand. 4. An action to recover money wrongfully paid by an insolvent to a preferred creditor, is an action for money only and triable by a jury. Judgment reversed. Cited: 57 Minn. 91; 68 id. 288.

MERCHANTS NAT. BANK OF ST. PAUL v McNEIR (1892) 51 Minn. 123.

On promissory note. N gave her \$5,000 note to A Bank, which indorsed it to plaintiff, who discounted it and paid the proceeds to A Bank. The day before this note became due, N gave her note for \$10,000 to P, cashier of A Bank, payable to his order at plaintiff bank in six months. On the same day, P presented this last note at plaintiff bank to be discounted, with the following indorsements in his handwriting, "P. F. Pratt," and "First National Bank of Anoks, P. F. Pratt," which was his usual way of signing his name as cashier. Plaintiff discounted the note in good faith, and, after deducting the amount of the first note, paid P, who claimed to act in his official capacity, the balance. The notes were given by N to P for his individual use and accommodation, of which plaintiff had no knowledge. The A Bank became insolvent, and defendant was appointed receiver. Judgment for plaintiff. New trial denied. Appeal.

Vanderburgh, J. The fact that P appeared to be the first indorser and the bank the second indorser, was not, of itself, a circumstance so extraordinary or suspicious as to subject plaintiff to the imputation of bad faith in receiving the paper. Order affirmed.

Cited: 54 Minn. 330; 60 id. 371; 64 id. 556; 65 id. 112.

JAGGER v NATIONAL GERMAN-AMERICAN BANK (1893) 53 Minn. 386.

Negligence. Plaintiff left with the defendant for collection a note made by A, and indorsed by C and B. At maturity it was not paid, but defendant did not protest it or give notice to the indorsers of non-payment. A was insolvent and had no property. Defendant offered to prove that plaintiff knew of the dishonor of the note, and on the day the note fell due, the maker notified one of the indorsers of the dishonor of the note. Defendant's offer to prove (in support of the accuracy of an entry by its clerk) that the clerk was a careful man, was denied. Judgment for plaintiff. New trial denied. Appeal.

Mitchell, J. 1. Defendant, having taken the paper for collection, was bound to take the necessary steps to fix the liability of the indorsers. 2. Mere knowledge by an indorser of the dishonor of paper is not notice. 3. Notice of dishonor must come from one who is entitled to look to the party for payment, and must inform him that the note was duly presented for payment; that it had been dishonored; and that the holder looks to him for payment. 4. Plaintiff, having intrusted the note to defendant, was not bound to give notice of dishonor himself. 5. Evidence that a clerk is careful is not admissible that an entry made by him is correct. Judgment affirmed.

Cited: 54 Minn. 468.

WEST v ST. PAUL NAT. BANK (1893) 54 Minn. 466.

Damages for negligence. Plaintiff owned a note secured by mortgage, and before its maturity left it with defendant for collection. There was an indorser, and when it fell due, defendant failed to present or protest it. Plaintiff foreclosed the mortgage and bought in the property for less than the amount due. No fraud on her part was alleged or proved. She then sued the bank to recover for negligence, claiming that the maker was insolvent, and that the solvent indorser had been released by failure to protest the note. The evidence tended to show that four months after the note fell due the maker was reputed insolvent, and was so reputed in the previous spring. Judgment for plaintiff. New trial denied. Appeal.

Dickinson, J. 1. In receiving the note for collection, the bank assumed the duty of doing whatever was necessary to charge the indorser, and for a neglect of such duty it was liable. 2. Plaintiff was obliged to prove insolvency of the maker, not as a cause of action, but as a measure of damages. 3. Evidence of general reputation was competent to prove insolvency. 4. Plaintiff was not bound to sue the maker immediately after the note fell due, but might do so within a reasonable time; and four months does not appear to be an unreasonable time therefor; and evidence of the insolvency of the maker within that time was proper. 5. In the absence of fraud the fact that plaintiff bid in land for less than the debt was immaterial. Judgment affirmed.

VAN VLISSINGEN v COUNTY COMMISSIONERS (1893) 54 Minn. 555.

Replevin. B and K were bankers under the name of M Bank. The bank was appointed one of the depositaries of the county funds, and gave a bond for \$25,-

000 which was accepted by defendants. K assigned to the county attorney a note and mortgage for \$6,000, and \$2,000 worth of stock as additional security to cover possible additional deposits. The county attorney, after the bank failed, delivered the collaterals to the county auditor and reported the facts to the defendant, which authorized him to sell the securities. Under the statute, as a condition precedent to the lawful deposit of the public funds by the county treasurer, a bond for two years was to be deposited with him, signed by five freeholders, and approved by the board of county commissioners. If the board of auditors at any time deem the security insufficient, it may require a new bond which also must be accepted by the county board. Plaintiff was appointed receiver of the bank, and brought this action to obtain possession of the stock and securities. Judgment for defendants. New trial denied. Appeal.

Vanderburgh, J. The assignment was intended to secure a contemplated excess of deposits over and above the amount which the bank was entitled to receive by virtue of its bond. Such an arrangement the law will not sanction. The kind of security which a bank is required to give as a condition of receiving a deposit must be of the character described. There is no discretion or authority to receive any other. The provisions are mandatory. Judgment reversed.

Cited: 61 Minn. 246.

STATE OF MINNESOTA v BANK OF NEW ENGLAND (1893) 55 Minn. 139.

Injunction and receiver. Defendant, a banking corporation, became insolvent owing plaintiff and others. At the time it owned promissory notes and other property worth over \$100,000. On the same day that the summons and complaint and the order to show cause were served on defendant, it filed an assignment in trust for its creditors under the Laws of 1881. The Act of 1878, ch. 76, provided for action by the State against an insolvent banking corporation. Application denied. Appeal.

Gillfillan, C. J. 1. The action under the Act of 1878 is given for a remedy to which the creditor is entitled as a matter of right, and which does not rest in the discretion of the court. It is the duty of the court to make the action effectual, and it must appoint a receiver and issue an injunction, when it has been determined that a case exists under ch. 76. 2. No subsequent action by the corporation, by making an assignment, can defeat or impair a remedy by such action. Order reversed.

Cited: 57 Minn. 557; 58 id. 436; 66 id. 382; 73 id. 215, 461; 84 id. 151.

IN RE STATE BANK, INSOLVENT (1894) 56 Minn. 119.

For possession of drafts. The application was to compel delivery of two drafts to the petitioners, who were depositors in the insolvent bank, of which F was assignee. Petitioners deposited in the bank with unrestricted indorsements two drafts payable in 60 days, both of which were credited in the petitioners' passbook. Both drafts were accepted, but before maturity thereof the bank suspended payment. The petitioners notified the firms of the bank's suspension, and requested them not to pay the drafts. The bank's passbooks contained a statement that commercial paper was received by the bank for deposit only as a collecting agent. Later the bank made an assignment to F. The petitioners demanded of F the return of the drafts, which was refused. At the time of the bank's failure, petitioners had on deposit about \$5,000, including the credits on the two drafts. Order that the drafts be delivered to petitioners. Appeal.

Mitchell, J. 1. If an indorsed draft is delivered to a bank for collection, the bank does not become the owner thereof. 2. A credit of the amount of a draft, bearing unrestricted indorsement, is not conclusive evidence of transfer of title to the bank. The intention of the parties to treat the deposit as for collection only, may be proved. Order affirmed.

Cited: 56 Minn. 119; 58 id. 144; 74 id. 474; 75 id. 188.

ST. PAUL & MINNESOTA TRUST CO. v JENKS (1894) 57 Minn. 248.

On promissory note. The defendant set up that, at the request of the cashier of the W Bank, he purchased certain stock of the bank offered for sale on the market, it being agreed that the bank should furnish the necessary money therefor, and take defendant's note. The note was to be held by the bank until the stock

could be sold. The bank became insolvent and made an assignment to the plaintiff. Demurrer. Sustained. Appeal.

Collins, J. The bank could not have purchased the stock and shares, nor could it enter into any agreement, whereby the defendant could purchase and hold the shares for it, or in its behalf. Order affirmed.

IN RE SEVEN CORNERS BANK (1894) 58 Minn. 5.

To pay over fund. On July 31, M & D, the petitioners, deposited a check with the insolvent bank for collection and credit. The check was paid the next day through the clearing house, by applying it against checks upon the insolvent bank. On the same day the bank made an assignment to W, in trust for creditors. He accepted the trust and qualified. Neither the check nor the proceeds came into his possession. M & D moved to have W pay over to them the proceeds of the check. Motion granted. Appeal.

Gilfillan, C. J. There existed nothing but a cause of action against the bank for conversion, and it stands on the same footing as any other claim upon the assigned assets, based on a conversion of money or other property. Order reversed.

Cited: 70 Minn. 241.

SECURITY BANK v NORTHWESTERN FUEL CO. (1894) 58 Minn. 141.

On check. The defendant gave its check on the Bank of M payable to the order of the M W Co. On the same day that the company received the check, it deposited it with the plaintiff indorsed, "For deposit in the Security Bank to the credit of the M W Co." The next day the company overdraw its account with plaintiff, and this overdraft has never been paid. On defendant's check being presented, it was dishonored, the defendant having stopped payment. The company shortly after became insolvent. Judgment for plaintiff. New trial denied. Appeal.

Mitchell, J. An indorsement "for deposit" is, in the absence of a different understanding, not restrictive or qualified, but merely a request and direction to deposit the sum to the credit of the customer, and passes the absolute title to the bank. Order affirmed.

Cited: 74 Minn. 474.

HENCKE v TWOMEY (1894) 58 Minn. 550.

To determine claims to real property. M was the owner of half of a lot of land and of fifteen shares of bank stock. B was appointed receiver of the bank and made an assessment on the stock. B commenced an action against M to recover this assessment on her stock, the summons being served on her by mailing and publication. On affidavit that M was a non-resident, B obtained an attachment against the land. Judgment was obtained against M, who did not appear or answer, and the land was sold under the execution, B becoming the purchaser as receiver. Plaintiff claims through the receiver, and defendant through M. Under the statute, in actions for the recovery of money, the summons could be served on a nonresident by publication only when the action arose on contract. Judgment for plaintiff. Appeal.

Mitchell, J. A bank stockholder's liability is one arising on contract within the meaning of the statute. Judgment affirmed.

DUNN v STATE BANK (1894) 59 Minn. 221.

To recover money paid and cancel a stock subscription. K, as president and principal stockholder of defendant bank, fraudulently procured the capital of the bank to be increased, and, by means of false representations, sold the plaintiff some of the new stock. Six months thereafter, the bank became insolvent and the defendant H was appointed assignee. The plaintiff alleged that the bank was insolvent when he purchased the stock; but that he had no notice of this fact until a few days prior to the commencement of suit. Defendants demurred, alleging no cause of action. Overruled. Appeal.

Canty, J. 1. Neither the bank nor its assignee is in any way responsible for the false representations made to the plaintiff by the president. 2. Plaintiff's obligation, as a stockholder, was to use a high degree of care and diligence to see that the creditors were not deceived by his conduct, and he was guilty of laches in not doing so. 3. After the bank became insolvent, the rights of the creditors became

vested and they are in a position to assert them. Until those rights are satisfied, the plaintiff is not entitled to any relief. Order reversed.

Cited: 67 Minn. 273, 279; 75 id. 278; 77 id. 263.

ST. PAUL & MINNESOTA TRUST CO. v HOWELL (1894) 59 Minn. 295.

On promissory note. Plea: Statute of Frauds. The defendant gave its note to the F Bank, payable in 90 days, and delivered to the bank a certificate for 22 shares of the capital stock of the C I Co., indorsed in blank. The defendant afterward made an oral agreement with S and L, president and cashier of the bank, to sell them the stock, and they agreed to pay the note. The bank became insolvent and made an assignment to the plaintiff. Among the assets, this note was found with 11 different indorsements, dated 90 days apart, and stating "interest paid and time extended 90 days." The defendant never paid any interest and never asked for or knew of the extensions. S and L paid the interest and made the indorsements. Judgment for defendant. New trial denied. Appeal.

Mitchell, J. 1. The evidence was such as to justify a verdict that there was sufficient delivery and acceptance by the officers of the bank to take the transaction out of the statute. 2. The bank was chargeable with constructive notice of the fact that these officers were interested in the note, and were making the extensions in their own interests, and hence the bank must be deemed to have ratified their acts in making them. Order affirmed.

GERMANIA BANK v BOUTELL (1895) 60 Minn. 189.

To recover money paid on a forged check. O and C were customers of plaintiff bank, in which they kept a large deposit. S, an employee of O & C, called on defendant, B, with a check payable to his order and purporting to be drawn by O & C on plaintiff bank. S and B indorsed the check and presented it, and had it cashed by defendant bank. Both O & C and the plaintiff bank were a few blocks away, but no inquiries were made of them. The defendant bank presented the check the next day to the plaintiff, which paid it. The check was forged, but defendant bank did not know this. Demurrer. Sustained. Appeal.

Mitchell, J. Where a banker, on whom a check has been drawn, pays a check upon which the drawer's signature has been forged, he cannot recover back the amount, if the party to whom he paid it was a bona fide holder. Order affirmed.

NORTHERN TRUST CO. v ROGERS (1895) 60 Minn. 208.

On promissory note. The bank, being insolvent, closed its doors on May 15, and assigned to plaintiff. Among its assets was a note of which defendant R was the maker and defendant P an indorser. On May 13, R received a check from one of the bank's depositors, but did not present it for payment up to the time the bank closed its doors. The answer set up this check as a counterclaim. Plaintiff demurred. Overruled. Appeal.

Mitchell, J. Where the drawee bank becomes insolvent before presentment of the check, the holder is not entitled to set off the check against his indebtedness to the bank. Order reversed.

Cited: 61 Minn. 232.

HAUGAN v SUNWALL (1895) 60 Minn. 367.

On promissory note. The note was made by defendant, payable to the A Bank, and by the latter delivered before maturity to the plaintiff, as treasurer of the city of M, by the cashier of the bank as collateral security for a deposit of city money. The transfer of these securities was made by the cashier, without express direction or authority from the directors, a few days before the bank failed. The defendant offered to prove that plaintiff, at the time of the failure, had on deposit \$800, which he claimed should be set off against the note. Refused. The defendant contended that the cashier had no power to transfer the note. Judgment for plaintiff. Appeal.

Collins, J. 1. The indorsee of negotiable paper, taken before maturity as collateral security for an antecedent debt in good faith and without notice of defenses which might have been available between the parties, holds the same free from such defenses. 2. Prima facie, the cashier must be deemed to have authority to transfer and indorse negotiable securities held by the bank for its use. 3. The act of the cashier was merely voidable and can only be questioned by the assignee, not by the defendant. Judgment reversed.

Cited: 73 Minn. 235; 82 id. 7.

HAHN, ASSIGNEE v PENNY, ASSIGNEE (1895) 60 Minn. 487.

To recover proceeds of promissory notes. The S Bank closed its doors, being indebted to the A Bank. The S Bank subsequently made an assignment to the plaintiff. Shortly before closing its doors, the S Bank delivered to the A Bank, for an alleged pre-existing indebtedness a large number of promissory notes. Subsequently the A Bank became insolvent, and made an assignment to the defendant. In order to prove the insolvency of the S Bank, the court permitted the schedule of its liabilities filed in its assignment proceedings to be introduced in evidence. The president of the S Bank was not permitted to testify as to the reputation of the S Bank in financial circles as to its solvency previous to its failure. Judgment for plaintiff. Appeal.

Canty, J. 1. It was error to admit the schedule in evidence. 2. Evidence of reputation of the bank was competent as tending to prove solvency, and also as having some tendency to prove that the A Bank did not have knowledge or reasonable cause to believe that the S Bank was insolvent. 3. The opinion of a witness, who has examined the affairs of a bank, is not competent to prove its solvency or insolvency. Judgment reversed.

Cited: 60 Minn. 487; 62 id. 117; 64 id. 465; 84 id. 12.

PENNEY, ASSIGNEE v HAUGAN (1895) 61 Minn. 279.

Replevin for notes. The bank was a small institution and had been crippled by the failure of a state bank which held \$38,000 of its assets. The day following the failure of the state bank, the defendant went to the bank to draw his money, \$12,000, and being refused, demanded collateral. The cashier turned over to the defendant the entire discounts of the bank, from which he chose the notes in question, amounting to \$17,000. The insolvent law forbade preferences. The bank assigned to plaintiff. Judgment for defendant. Appeal.

Mitchell, J. To permit an insolvent bank to secure one depositor would be not only against natural equity, but directly in the teeth of both the letter and spirit of the insolvent law. Judgment reversed.

Cited: 64 Minn. 180; 66 id. 468; 68 id. 228.

STATE v KORTGAARD (1895) 62 Minn. 7.

Indictment for embezzlement. Defendant, who was president of a bank, was indicted under statute providing that "in any prosecution for the offense of embezzling money of any person, by a clerk, agent, or servant of such person, it shall be sufficient to allege generally in the indictment an embezzlement of money to a certain amount, without specifying any particulars as of such embezzlement." By the same statute, evidence may be given of embezzlement within six months next after the time stated in the indictment. The defendant contended that the statute was not applicable to bank officers, and, if applicable, that the president had not the possession necessary to sustain embezzlement. Evidence was given of embezzlement on the date alleged, and also on another date within six months thereafter. Verdict, guilty. Appeal.

Mitchell, J. 1. Proof of an offense committed on the date alleged does not preclude proof of other offenses committed within six months thereafter. 2. The word "person" in the statute applies to banks, and a bank officer may be convicted under it. 3. The president has sufficient possession and control to meet the requirements of the offense. 4. Where funds are procured by the president of a bank under the guise of loans or overdrafts, the presumption is that the intent was to defraud. 5. When the act proved is indifferent the intent must be proved, but when the act is criminal, the intent is presumed from the commission of the act. Affirmed.

Cited: 81 Minn. 184.

HARPER v CARROLL, ASSIGNEE (1895) 62 Minn. 152.

To enforce the liability of a stockholder. The plaintiff, a creditor of the C Bank, brought suit under the Laws of 1894, sec. 76, against the defendant and other stockholders. The statute provided that stockholders should be liable to the extent of double the amount of stock owned, for all debts of the bank for one year after a transfer of his stock; and that, if the action was commenced within one year, the right was complete. Defendants ceased to be stockholders before plaintiff became

a creditor. Plaintiff contended that defendant was liable for all debts incurred during the year subsequent to the transfer, and such liability continued for six years from the end of the year. Demurrer. Sustained. Appeal.

Collins, J. 1. The statute imposes personal liability only for such debts as exist at the time of the transfer. 2. If the conditions exist which authorize the commencement of the action under the statute, the right is complete, and the action can be brought within six years thereafter. Order affirmed.

Cited: 64 Minn. 388.

STEPHENS v OLSON } (1895) 62 Minn. 295.
STEPHENS v OLSTAD }

On promissory note. Plea: Usury. The plaintiffs were engaged in the banking business under the name of S & C. They employed H as cashier and intrusted to him the entire management of the business. The defendant obtained a loan of money from the bank through H, who charged him in excess of 10 per cent. Such excess in each instance being included in the note. Before the notes fell due, a new partnership was formed by which four new partners were added. None of these partners knew the notes were usurious. The plaintiffs never gave the cashier authority to charge more than 10 per cent, and, in fact, expressly instructed him not to do so. New trial denied. Judgment for plaintiffs. Appeal.

Mitchell, J. 1. The cashier exacted the "bonus" in the line of his employment and in the name of the plaintiffs, and the notes were usurious in the hands of the plaintiffs, though the cashier disobeyed his instructions in exacting usury. 2. The plaintiffs cannot avail themselves of the benefit of contracts made in their behalf by the agent, and at the same time repudiate his acts in part as being unauthorized. 3. A change in the partnership, and the new parties purchasing an interest, does not constitute a purchase of commercial paper in the usual course of commercial transactions. Order reversed.

INTERNATIONAL TRUST CO. v AM. LOAN & TRUST CO. (1895)
62 Minn. 501.

To sequester assets and enforce stockholder's liability. Defendant, Am. L & T Co., being insolvent, made a general assignment of its property under the state insolvent law. The assignee qualified and took possession, and was proceeding to administer the estate, under the direction of the court, when plaintiff, a creditor, brought this action, and asked for an order appointing a receiver. The stockholders demurred: 1, That, as the corporation was not a bank of issue, the provisions of art. 9, sec. 13, of the constitution did not apply, and although not banks of issue, they are corporations "embracing banking privileges," within art. 10, sec. 1, and therefore sec. 3 of the same article did not apply to make them liable. Application for receiver denied. Demurrer overruled. Appeal.

Mitchell, J. 1. The defendant is not a corporation "embracing banking privileges" within the meaning of the constitution, and the stockholders are liable. 2. Under G. S. 1878, ch. 76, the plaintiff has no right to have a receiver appointed to take the assets from the hands of a prior assignee. Order refusing appointment of receiver affirmed. Order overruling demurrer reversed.

STATE OF MINNESOTA v SMITH (1895) 62 Minn. 540.

Under penal code, sec. 467. Defendant was brought before a justice on a warrant charging him jointly with his codefendant and partner with having received a deposit in their bank, knowing that they and the bank were insolvent. Defendant was convicted and sentenced. The case was moved for trial at the next term, and defendant moved to be discharged on the grounds: 1, That the complaint did not state a public offense, as the act was such as could only be committed by one person, and two persons were joined in the complaint; 2, that, since the commission of the offense charged, sec. 467 has been repealed. The law of 1894 provides, "Whenever a law is repealed which repealed a former law, the former law shall not thereby be revived, unless it is so specially provided; nor shall such repeal affect any right which accrued, any duty imposed, any penalty incurred, nor any proceedings commenced under or by virtue of the law repealed." The court certified the questions arising upon the motion to this court.

Start, C. J. 1. If the complaint charges defendant with the crime, it is immaterial who else may have been charged with joining him in the act. 2. When a

repeal is enacted either directly or by way of amendment accompanied by no special saving clause, the general and permanent saving clause contained in an existing and prior statute attaches to the repeal or amendment, unless a contrary legislative intent plainly appears from the repealing statute or amendment. Rulings affirmed.

SVENDSEN v STATE BANK OF DULUTH (1896) 64 Minn. 40.

To recover damages for refusal to pay check. Defendant bank had funds of plaintiff on deposit. Through an error in bookkeeping, defendant was led to dishonor one of plaintiff's checks for want of funds. The plaintiff did not claim any special damages, but sought to recover substantial general damages. The court directed a verdict for nominal damages. Plaintiff's motion for new trial denied. Appeal.

Canty, J. To refuse to honor a merchant's check is actionable per se, and general damages may be recovered for such a slander. Order reversed.

BOARD OF COUNTY COMMISSIONERS v STATE BANK (1896) 64 Minn. 180.

On bond. The plaintiff designated the defendant bank as a depository of the county funds, and deposited the county money there pursuant to the statute. The bank gave the bond in question with its codefendants as sureties. The condition of the bond was that the bank would pay interest upon the monthly balances of the deposits, and hold the funds subject to draft and payment at all times on demand. The answer of the sureties alleged that the board of auditors, the only body that could legally appoint the bank a depository, never designated the bank as such. Demurrer to answer. Overruled. Appeal.

Start, C. J. If the principal in the bond was a de facto depository of the county funds, and they were actually deposited with the principal as such depository in reliance upon the bond, the sureties were liable in case of default, although in law the principal was never designated as a depository. Order reversed.

Cited: 67 Minn. 115; 75 id. 492.

STATE v BELL, REC'R (1896) 64 Minn. 400.

For statutory preference. The state treasurer selected the C Bank as a state depository, depositing state funds therein. Subsequently the bank became insolvent, and the defendant became its receiver under a statute, which provided that if any treasurer or other person becomes insolvent, the debt of the state shall be paid first. Judgment for plaintiff. Appeal.

Canty, J. The state is a preferred creditor. Affirmed.

Cited: 70 Minn. 395, 397.

FITZGERALD, ASSIGNEE v STATE BANK OF DULUTH (1896) 64 Minn. 469.

To recover a deposit. At a meeting of the creditors of the embarrassed firm, of which the cashier of the defendant bank was chairman, it was agreed that M should have charge of the business pending C's absence in Europe. At the cashier's suggestion, M was instructed to deposit the money received by him in two banks, of which defendant was one, and that he should pay nothing on account of existing claims, but in case of an assignment to turn the money over to the assignee. The firm assigned to the plaintiff. The firm was indebted to the defendant on notes, and the bank claimed a setoff on the money deposited by M. Judgment for plaintiff. Appeal.

Collins, J. 1. The deposit was in the nature of a special deposit for a well-understood object, which was known to defendant. 2. The bank would be estopped from claiming a setoff and thus indirectly obtain a preference. Judgment affirmed.

PALMER v BANK OF ZUMBROTA (1896) 65 Minn. 90.

Injunction and appointment of receiver. Defendant suspended payment, and its stockholders voted to increase its capital stock. The bank again suspended. The plaintiff held both old and new stock, was a director and depositor, and was appointed receiver. T, a creditor, obtained leave to intervene and file a supplemental complaint on behalf of himself and the other creditors, bringing in the stockholders as defendants. The plaintiff moved to set aside this order. Denied. Plaintiffs

motion to file an amended complaint, setting up the facts stated in T's complaint, was denied. The defendant stockholders demurred on the ground that there was another action pending for the same cause, and there was a defect of parties, in that the bank was not made a party defendant. Overruled. The bank moved to set aside the original judgment against it. Certain intervening creditors moved to be made parties plaintiff. Denied. Appeal.

Collins, J. 1. The plaintiff failed to make the stockholders codefendants to determine their liability, and any creditor had the right to do so, on obtaining leave to file a supplemental complaint. 2. There was and is but one action or proceeding pending, the one instituted by the plaintiff, and the bank was already a party. The complaint stated facts sufficient in alleging they were stockholders. 3. After the stockholders were brought in, the receiver was no longer authorized to bring suits against them. 4. Where the creditors file their claims in the form of an intervenor's complaint, under oath, they become parties to the proceedings. Order affirmed.

Cited: 66 Minn. 445; 70 id. 352; 73 id. 465.

AMERICAN SAV. & L. ASS'N v FARMERS & MERCHANTS STATE BANK
(1896) 65 Minn. 139.

To enforce the liability of stockholders. The defendant became insolvent and made a general assignment. The plaintiff, a creditor, without having obtained a judgment against the bank, brought this action under the laws of 1878, ch. 76, against all the stockholders, and prayed for the appointment of a receiver for the purpose of enforcing the statutory liability against the stockholders. Demurrer. Overruled. Appeal.

Buck, J. 1. A creditor of a corporation can bring this proceeding against it and its stockholders, without first obtaining a judgment of law against it, and having the execution returned nulla bona. 2. A stockholder's liability is not a corporate asset, and it may be reached, through a proper proceeding, by a receiver of the corporation bringing in the stockholders of the corporation, which could not be done in mere insolvency proceedings. 3. Sec. 5904 is merely an extension of the remedy to such creditors as may choose to proceed to judgment against the corporation before resorting to the equitable proceeding provided by statute. 4. The stockholders could be made parties at any time after the complaint was filed. Order affirmed.

Cited: 66 Minn. 383.

BLANKENSHIP v FIRST NAT. BANK (1896) 66 Minn. 256.

This case is governed by *Endres v First Nat. Bank of Breckenridge*, 66 Minn. 257.

ENDRES v FIRST NATIONAL BANK (1896) 66 Minn. 257.

For penalty for usury. The complaint alleged that "plaintiff paid, and defendant knowingly received excessive interest." U. S. R. S., sec. 5197, forbade national banks to take excessive interest. Defendant demurred, in that the court had no jurisdiction, and because no cause of action was alleged. Overruled. Judgment for plaintiff. Appeal.

Collins, J. 1. Under the Act of Congress of 1882 a state court has jurisdiction. 2. The complaint stated a cause of action. Judgment affirmed.

STATE v FARMERS & MERCHANTS STATE BANK (1896) 66 Minn. 301.

On bond. The defendant bank, a state depository, gave a bond, on which the other defendants were sureties, and received deposits of state funds. Subsequently, the bank failed without repaying the funds. The funds were deposited in the name of J B, state treasurer, not otherwise. G. S. of 1894, sec. 344, provides for the deposit of state funds by the state treasurer "in the name of the State of Minnesota." Sec. 12 of the constitution provides that if any of said officers shall deposit in his own name, or otherwise than in the name of the State of Minnesota, every such act shall constitute an embezzlement. The condition of the bond was that the bank "shall well and truly pay over all moneys belonging to the state of Minnesota which may be deposited with said bank by said treasurer of said state upon the order of said treasurer, or other lawful authority." The defendants contended that, by depositing of the funds in the treasurer's name, the sureties were not liable. Judgment for plaintiff. Appeal.

Canty, J. 1. Such extra precaution for the safety of the public funds cannot be regarded as a limitation on the contract liability of these sureties. 2. It must be presumed that the bank knew that the funds were state funds, and it was its duty to enter the deposit on its books in the name of the State of Minnesota. 3. Failure of duty on the part of the bank cannot relieve the sureties. Judgment affirmed.

MINNEAPOLIS BASEBALL COMPANY v CITY BANK (1896) 66 Minn. 441.

Sequestration. The action was originally commenced against the bank alone, under the provisions of the Act of 1894, ch. 76, for the sequestration of its assets and the appointment of a receiver. Two creditors intervened and filed their cross bill seeking to enforce the double liability of the stockholders, naming them as defendants. They moved to have the stockholders joined as defendants. The receiver filed a supplemental complaint asking that the stockholders be made parties. Granted. Appeal.

Start, C. J. The liability of the stockholders for the corporate debts is not, and never can be, a corporate asset; for it is due directly to the creditors, and the receiver cannot enforce it. Reversed.

MAHONEY v HALE (1896) 66 Minn. 463.

To set aside assignment of notes. The bank examiner ordered an assessment of \$35,000 on the stock of the I A Bank on December 9. The bank was hopelessly insolvent. On December 21, the bank was indebted to the loan association, of which defendant was receiver, for over \$78,000. The managing director of the bank was president of the association. On that day the directors of the bank and of the association arranged to have the latter furnish \$35,000, of which \$10,000 should be a loan to one of the bank's officers, who would take title to and give a mortgage on the bank's real estate. The bank was to give the association the notes in question as security. On December 23, the president of the association selected notes belonging to the bank to the amount of over \$156,000, and took possession by putting them aside in the bank safe. No entries were made of the transaction in the books of either institution. The notes were carried by the bank as part of its assets. On January 14, 1896, the association went into the hands of the defendant as receiver. On that day the president of the association delivered the notes to him. On January 15, 1896, the bank made an assignment to the plaintiff. Judgment for plaintiff. Appeal.

Collins, J. 1. The notes were assigned with a view to giving a preference over other creditors upon a pre-existing debt, and at the time the association had reasonable cause to believe the bank insolvent. 2. The possession was that of the bank, and the association could not claim that the notes were pledged to it. 3. To constitute a pledge, the pledgee must take and retain actual possession. Judgment affirmed.

HARPER v CARROLL (1896) 66 Minn. 487.

For bank stockholders' liability. Plaintiff, a creditor, sued all the resident stockholders to enforce their double liability which, under sec. 2501, G. S., 1894, continued for one year after transfer. A receiver was appointed. During the year preceding the assignment, there had been many transfers of stock, some being transferred several times. Until five weeks before the failure the bank had issued demand certificates of deposit; these were taken up and time certificates substituted. Stockholders, who had transferred their stock, contended that, being sureties for the debts, these extensions released them. Defendant S within the year transferred stock to G, who transferred to the bank, but neither of these transfers was entered of record. The court held S liable as a transferrer only. C had pledged stock to H & Co., but the fact of pledge was not of record; and the court held H & Co. liable as owners. This stock had subsequently been transferred to H, and on the same day by H to J and J to S; the transfer to J did not appear of record, so that H appeared to have been owner of record for six months. He filed a cross bill against J, as owner of other stock, seeking to make him primarily liable. J defaulted, but no judgment was entered thereon against him. H assigned this as error. Some of the defendants were creditors of the bank; and the court decreed the judgments against them to be liens on the amounts due from the bank to them. These defendants objected to the decree that the sums realized on their claims against the bank should be applied pro tanto toward the payment of judgments against them, and distributed among those claimants against whom no

judgment was rendered, ratably as in the decree provided. It was contended that the latter clause would compel those defendants to pay the judgments against them without participating as creditors. Four days before the trial plaintiff discovered that two nonresident stockholders owned real estate in the state, liable to attachment; but it did not appear that plaintiff had failed to use due diligence to discover this earlier. Defendants contended that the case should await the acquiring of jurisdiction by attachment over these nonresidents. This the court denied. Defendants objected to allowing receiver's fees and expenses, or any expense other than statutory costs, disbursements, and interest. Within the year after assignment, defendant F transferred his stock to defendant J H, who died insolvent before judgment. The court held that F was not liable on the first assessment. Judgment was ordered against all the present and prior stockholders for their double liability, the aggregate of judgment being \$513,200. The defendants were divided into two classes, the first comprising the present, and the second the prior stockholders; the judgments against the first to be enforced in full, if necessary, to pay the debts; and then against the second in the order of transfer of the stock, commencing with the latest. The court retained no control over the executions, and did not provide for execution in any case for less than the entire judgment, except that the amount to be collected from a transferrer should be reduced by deducting amounts collected from his transferee; and that, if such amount were insufficient to pay the debts existing when the transfer was made, the difference should be collected from the transferrer, without regard to the succeeding owners of the same stock, in effect making them liable for stock never owned by them. The court also held that such transferrer was not liable at all if, before being reached in the order of liability adopted, enough had been collected from others to pay in full the claims of creditors existing on the day of transfer. No allowance was made for the dividends paid by the assignee, nor for debts paid after but existing when a transfer was made, in adjusting the liability of the prior stockholders. Appeals were taken by certain defendants from an order denying a new trial, and by others from the judgment; and it was contended that the entry of judgment against part only of the defendants released them all. The point was first raised on appeal that the judgment as entered did not conform to the decision. The judgment provided that persons who had paid more than their share could apply for contribution from others paying less. Judgment for plaintiff. New trial denied. Appeal.

Canty, J. 1. The creditors are entitled to one judgment for the full amount of the statutory liability. The judgment was right; but the execution of it should not be left to ministerial officers, but should issue under orders of court, at first for each stockholder's pro rata share of the debts and expenses, and then for such additional pro rata as would be necessary by reason of failure to collect from any stockholders; and when the full amount was paid, the balance of the judgment should be satisfied. 2. It is in the discretion of the court to permit any defendant to stay the docketing of a judgment on giving a bond to pay the judgment as required. 3. The judgment as entered was erroneous, in that it allowed creditors to collect twice for the same stock, from the transferee and the transferrer; and in that it required the judgment against all the later transferrers, not of the same, but of different stock, to be first exhausted before proceeding against the earlier transferrer of the same or any other stock. 4. The liability of each transferrer of stock is secondary only to the liability of the succeeding holders of the same stock, and depends on the number of subsequent transfers of the same stock, and not on the date of transfer. 5. The transferrer is liable for his proper share of the debts existing at the time of the transfer, regardless of whether others have paid in full; and this share is the balance remaining after deducting dividends declared, and claims since paid, and, should be the whole of such balance, in the ratio which his stock bears to all of the stock of all solvent present and prior stockholders, contributing to the satisfaction of the same balance; not exceeding the amount of the judgment against him; prior transferrers to him contributing a less, and subsequent transferrers to him a greater, part of this same balance; the liabilities being less or greater according to the date of the transfer. The amount so collected should be distributed ratably among the creditors. 6. The present solvent stockholders are proportionately liable to the extent of the judgments against them, for all debts existing at the time of the failure, with interest and expenses, after deducting dividends. 7. The law is not unconstitutional. 8. The burden was upon the defendants to show that the extensions on the certificates of deposit were made without their consent. 9. Defendants continued to be a stockholder up to the failure so far as creditors were concerned, as the transfer of his stock had not been

registered. 10. H & Co. are liable as transferrers for the debts existing at the time of the transfer to them as well as for debts incurred while the stock stood in their name. Although in fact only pledgees, as to creditors they were owners of the stock. 11. The creditors need not undertake to enforce the liability against J or to accept the benefit thereof from H as they are entitled to look solely to persons who are stockholders of record. 12. The judgment, declaring a lien against defendants who were also creditors of the bank, was in that respect correct; but the other provision on that subject is so ambiguous as to be meaningless, and must be disregarded. 13. It is a sufficient excuse for failure to join a defendant that he is a nonresident and defendants were not entitled to a stay until jurisdiction by attachment was obtained against the two nonresident property owners. 14. As the statute provides for the appointment of a receiver, it implies that his expenses may be recovered in addition to the statutory costs and disbursements. 15. The stockholders' liability is several and not joint, and while defendants are entitled to have one entire judgment entered against them, it need not be entered against all at the same time; and the entry of judgment against some of the defendants without its entry against others, who have stayed the entry by appealing from the order denying a new trial, does not release the defendants. 16. If the judgment entered does not conform to that ordered, the error is that of the clerk and not of the court, and defendants are not in position to raise the point. 17. The provision requiring contribution by those who had paid less to those who had paid more than their share was proper. 18. The defendant F was liable on the first assessment for the debts existing at the time of his transfer to J H. Judgment modified.

Cited: 70 Minn. 75; 72 id. 282, 315; 73 id. 458, 459, 461, 465, 466; 74 id. 362; 75 id. 147.

STOLZE v BANK OF MINNESOTA (1897) 67 Minn. 172.

To recover the balance of a deposit. The deposit was made in the D Agency, a bank. Plaintiff was its assignee. The answer admitted the deposit, but claimed a setoff for loans and accommodations on unpaid promissory notes indorsed by the agency as security for the loans. The deposit had been assigned to plaintiff before the notes fell due. The plaintiff contended that the insolvent made an absolute sale by his indorsement of the notes to the defendant. Judgment for defendant. Appeal.

Start, C. J. 1. If the agency was liable as indorser only, its liability cannot be offset. If the bank's claim was absolute, it had the right to an equitable offset against the deposit. 2. Whether this transaction was a sale of the paper or a loan, was a question of fact. Judgment affirmed.

Cited: 69 Minn. 199; 71 id. 396.

COUNTY COMMISSIONERS v CITIZENS BANK (1897) 67 Minn. 236.

On bond of surety. Defendant was designated a depository of county funds for two years and gave the bond in question for its faithful performance. Before executing the bond, which was for a second term, the bank gave a draft for a deficiency due the county, with the understanding that it was not to be presented, but was to be subsequently returned to the bank and credited as a deposit. This agreement was performed. Excluding the amount of the deficiency for the first term, the county drew out more money than it deposited during the second term for which the bond was given. Judgment for defendant. Appeal.

Mitchell, J. 1. The sureties were liable only for funds deposited during the second term, but they continued liable for such funds until paid, although payment was not made until after the second term expired. 2. When payments are made on that account, the sureties have no right either in law or equity to control the appropriation of them, or require that they shall be applied on deposits made under their bond. Judgment reversed.

Cited: 68 Minn. 425; 75 id. 494, 495.

OLSON v STATE BANK (1897) 67 Minn. 267.

To enforce the liability of stockholders. In 1892, the stockholders of the defendant bank voted to increase the capital stock to \$100,000, and the additional stock was subscribed and paid for by the defendants. K, the president and general manager, subscribed for 220 shares, part of which, between August, 1892, and July, 1893, he sold to several of the defendants, N, W, and K, on false representations as to the

bank's solvency. At the time of the increase the bank was hopelessly insolvent owing to the defalcations of K, and a year thereafter made an assignment. An examination would have disclosed the condition of the bank, but none was ever made. K was city treasurer at the time, paid for his stock with money belonging to the city. The stock was issued to defendants before the bank examiner had certified that the bank had complied with the law. The defendants contended that they were induced to purchase the stock by fraudulent representations which entitled them to rescind the contract; that the stock, being illegally issued, was absolutely void, and never had had any legal existence as stock. Judgment for plaintiff. New trial denied. Appeal.

Mitchell, J. 1. The defendants were guilty of laches in not sooner discovering the insolvency of the bank. 2. The power to issue the stock existed, and the creditors could assume that all the subsequent requirements of the statute had been fully performed. 3. As against creditors, the right to rescind no longer exists. Order affirmed.

Cited: 72 Minn. 278; 75 id. 278; 77 id. 115, 263.

TOWLE v STARZ (1897) 67 Minn. 370.

On certificate of deposit. On July 27, 1893, the defendant deposited in the Z Bank \$2,000, receiving the certificate of deposit, payable to the order of himself on the return of the certificate properly indorsed. The fund was to be left six months, and was not to be subject to check. The defendant indorsed it over to the plaintiff, who presented it for payment on January 31, 1894. Payment being refused, notice of dishonor was given to the defendant. Judgment for defendant. Appeal.

Mitchell, J. 1. Payment was demandable at the expiration of six months, and, as between the holder and indorser, the certificate matured at that date. 2. This was "time" certificate. 3. Payment should have been made on the last day of grace, which was January 30. Judgment affirmed.

STATE v MERCHANTS BANK (1897) 67 Minn. 506.

For forfeiture of a bank's charter. The petition alleged that the president of the bank was indebted to it in a sum in excess of 15 per cent of its capital stock. A receiver was appointed, and a notice was given to the creditors to present their claims and become parties to the action. K, a creditor, with leave of the court, filed a cross bill bringing in the stockholders of the bank for the purpose of enforcing their double liability. R. S., sec. 5904, authorizes a creditor, after judgment, to enforce such liability, whether the action was commenced by a creditor or by the attorney-general. It provided that, if the latter took action, such creditor may, upon his application, be made complainant therein, and may make the directors and stockholder sought to be charged, defendants. The stockholders demurred to the complaint of intervention. Demurrer. Overruled. Appeal.

Canty, J. 1. It can make no difference to the stockholder whether their liability is enforced in a suit brought by a creditor or in one brought by the attorney-general. 2. The intervener's complaint was properly allowed and is not demurrable. 3. The creditors were entitled to proceed independently, or to intervene in the action by the State. 4. The creditors were not obliged to procure a judgment before bringing the action. Order affirmed.

FRANCOIS v LEWIS (1897) 68 Minn. 409.

To recover the amount of a deposit. The C Bank, organized under the laws of this state, issued to the plaintiff a certificate of deposit, stating that she had deposited \$2,600, payable to the order of herself four months after date, on the return of the certificate properly indorsed; interest at 6 per cent per annum. Before the delivery of the certificate, and for the purpose of giving it credit, the defendant indorsed it. Payment was demanded, but no part was paid except the interest. Demurrer to reply. Overruled. Appeal.

Start, C. J. State banks are expressly authorized by the Statute of 1894 to pay interest on deposits. There is no limitation on the banks expressed or implied to issue such certificates, and as there is express power given to receive deposits and pay interest thereon, and to exercise all powers incident to the banking business, it must be implied that they have the power to make agreements as to the terms upon which such deposits will be received. Order affirmed.

Cited: 68 Minn. 473.

BOARD OF COMM'RS v IRISH-AMERICAN BANK (1897) 68 Minn. 470

On bond. The plaintiff board deposited public funds with the defendant, receiving a certificate acknowledging the receipt of the money, and making the amount payable to the plaintiffs, five months after date. The defendant also gave a bond conditioned to pay over to the board, or to its order, on proper warrant or check, on demand, all such moneys of said board as may be in its possession. Before the certificate matured, the bank suspended payment. Defendants demurred, on the ground that no demand was alleged to have been made; and that the liability created by the certificate was not one contemplated, or within the conditions of the bond. Overruled. Appeal.

Collins, J. 1. The liability of the sureties was fixed when the bank was in default, and no demand on the bank or on the sureties was required. 2. If the board was authorized to make a time deposit, and to accept the certificates in question, the deposit and certificate were valid under both statute and bond. Otherwise, the deposit was in legal effect on demand. Order affirmed.

SWEETSER v PEOPLES BANK (1897) 69 Minn. 196.

To recover the amount of a deposit. R was indebted to the defendant, and in order to obtain an extension of time in March, executed a trust deed to it, conveying real estate as security for the debt. By the terms of the deed, the amount due was to be paid within one year. The notes were to be renewed. When a \$1,000 note became due, R failed to pay or renew it, whereupon, in July, the defendant applied \$893, which R had on deposit, toward the payment of the note. Thereafter R made an assignment to the plaintiff, who demanded of the defendant the sum applied to the payment of the note, which was refused. Judgment for defendant. New trial denied. Appeal.

Buck, J. If the debtor was insolvent, a bank might set off, as against such depositor's account, a debt not yet due. Order affirmed.

BOARD OF COMM'RS v MANUFACTURERS BANK (1897) 69 Minn. 421.

On bond. The defendant was designated a depository of the county funds pursuant to the Law of 1894, and gave a bond in which the cashier, as principal, and sureties bound themselves. Sec. 2499 of the Law of 1894 provides that contracts made by banks established under that act, shall be signed by the president and cashier of the bank. It was not shown that the bank was organized under the act. It was not alleged that the bank had received any of the county funds after the bond had been approved by the county board. Demurrer to complaint. Overruled. Appeal.

Canty, J. 1. Even if the bond should not comply with the statute, it was a good common law bond. 2. The bond is not the contract with the county, but a security collateral to that contract. 3. The complaint is demurrable, because it did not state that the money was received after the bond was approved. Order reversed.

BAXTER v COUGHLIN (1897) 70 Minn. 1.

Damages for fraud. The plaintiff alleged that the defendants, directors of a bank, by an officer employed by them, received from him on deposit large sums of money, they then knowing that the bank was insolvent; that thereafter the bank made an assignment for the benefit of its creditors; that by reason of the wrongful acts of the defendants the money was wholly lost to him. The Laws of 1895 provides that any director who shall receive money on deposit in such bank knowing that the bank is insolvent, shall be guilty of a felony. Demurrer to complaint. Overruled. Appeal.

Start, C. J. Defendants were liable to those for whose protection the statute was enacted, for any damages resulting proximately for such disobedience or neglect. There was a sufficient allegation that the directors themselves received the money, within the meaning of the statute. Order affirmed.

Cited: 70 Minn. 22, 166.

BISHOP v MAHONEY (1897) 70 Minn. 238.

For preference. The plaintiff sent A, a banker, a note for collection. A took a check in payment of the note; deposited the check in the I Bank, and sent the plaintiff his draft. A failed. The bank refused to pay the draft, and the plaintiff

obtained judgment against the I Bank, which was never entered. Some time afterward the I Bank failed, and the defendant became its receiver. Thereupon the plaintiff applied for an order to have the defendant pay over this sum or to retain it until a final determination of an action against the bank. The affidavit merely stated that the sum was held by the bank in trust, and had passed to the receiver. A counter affidavit stated that on the day A deposited the check, nine months before the failure, the proceeds were mingled with other money of the bank and were not kept separate. The statute forbade a preference among creditors of an insolvent. Plaintiff failed to show that the fund had gone into the necessary hands. Application denied. Appeal.

Canty, J. The burden was on the plaintiff to trace the trust fund into the hands of the receiver in some form. If the fund went to augment the trust estate, the *cestui que trust* has a lien on its general assets. Order affirmed.

Cited: 70 Minn. 396; 71 id. 307; 78 id. 360.

UELAND v HANGAN (1897) 70 Minn. 349.

To enforce the liability of a stockholder. The plaintiff, as receiver of the W Bank, an insolvent corporation, brought this action against stockholders, for the purpose of ascertaining the liability of each to creditors, and to obtain judgment for the amounts so ascertained, and to compel payments by them of sums equal to twice the par value of the stock held by each. Demurrer. Overruled. Appeal.

Collins, J. 1. Under the laws of 1894, ch. 76, a receiver may maintain this action. 2. If the petition filed by a receiver had a statement of facts, which, if alleged by a creditor, would have been sufficient, it states a cause of action against the stockholders. This petition complies with this requirement. Order affirmed.

Cited: 70 Minn. 356, 376, 421; 71 id. 500.

ANDERSON v SEYMOUR (1897) 70 Minn. 358.

To enforce stockholders' liability. The plaintiff, as a creditor of the Bank of M, brought this action on behalf of herself and all other creditors. The bank was organized prior to 1896, when it became insolvent, and defendants S and L were appointed its receivers. The law of 1895 conferred upon receivers the right to enforce the stockholders' liability, and by sec. 29 of the act it is made applicable to banks then existing and doing business in the state. Demurrer. Sustained. Appeal.

Collins, J. The Law of 1895 is constitutional and broad enough to include stockholders of banks organized prior to its becoming a law. The receiver can enforce the liability whether double or single. The receiver has the primary exclusive right to institute a proceeding against the stockholders. Order affirmed.

Cited: 70 Minn. 421; 79 id. 223.

STATE v NORTHERN TRUST CO. (1897) 70 Minn. 393.

Insolvency proceedings for preference. The defendant became insolvent and the trust company was appointed assignee. The State filed a claim for money deposited by the state treasurer, for which the bank was indebted when it failed. The State's claim was made a preferred one, and the assignee was directed to pay \$1,000 immediately and other sums thereafter. The assignee paid the \$1,000, but no more, although it collected nearly \$2,000 over all expenses. Subsequently the trust company made an assignment to F, and H was appointed assignee of the bank. The time for filing claims against the trust company expired. The State made application to file its claim against the trust company for money collected as assignee and to have said claim declared a preferred one. Application denied. Appeal.

Buck, J. 1. Because the claim was a preferred one, the title to the assets did not rest in the State. 2. The money converted by the trust company was the money of the bank. 3. The State is concluded by the finding of the court, and we see no reason for disturbing it. 4. The State should be permitted to file a claim as a general creditor. Order affirmed.

STATE v BANK OF NEW ENGLAND (1897) 70 Minn. 398.

Petition to enforce stockholders' liability. The stockholders of the defendant bank voted to increase the capital stock from \$50,000 to \$100,000. Shortly afterward the bank became hopelessly insolvent, and a receiver was appointed on the

application of the State. Among the certificates issued for new stock was one for 50 shares, made out in the name of defendant C, but not delivered. Some months after its date, the president of the bank obtained a loan from C, and gave this certificate of stock as security. When the president paid the loan, C surrendered to him the certificate indorsed in blank, and the bank canceled it. C held the stock as collateral security for the payment of the note. H, in his own behalf and in behalf of other creditors of the bank, brought this suit against the stockholders to enforce their liability. Judgment for plaintiff. Appeal.

Buck, J. The defendant is not relieved from liability as a stockholder, because he held the certificate of stock as collateral security for a debt. Judgment affirmed.

DENT v MATTESON (1897) 70 Minn. 519.

Petition to collect assessment on bank stock. W M dies intestate, possessed of 10 shares of stock of the F Bank. H's administrator distributed the stock to the defendants, the heirs and next of kin. When the time for filing claims against the estate had expired, the F Bank became insolvent, and the plaintiff, as receiver, sought to collect an assessment against the stock in the hands of the defendants. Demurrer. Overruled. Appeal.

Canty, J. The claim was a contingent one, which became absolute only after the estate had been distributed. But the double liability of a stockholder survives his death, whether the bank's indebtedness arose before or after that time. The liability continues until the stock is transferred on the books of the bank. Defendants are therefore liable. Order affirmed.

FORT DEARBORN NAT. BANK v SEYMOUR (1898) 71 Minn. 81.

Money had and received. Plea: Setoff. The S Bank, of which defendant was receiver, had collected money for the plaintiff. By way of setoff the defendant alleged the following facts: D, cashier of the S Bank, and secretary of a land company, had sent to the plaintiff a demand note of the land company's, and had consented to its being placed to an inactive account of the S Bank, held by plaintiff. The note was accompanied by a letter clearly indicating that D was acting individually and not as cashier of the S Bank. D then gave the land company the amount of the note. None of the directors of the S Bank had knowledge of the transaction. The defendant claimed the right to set off to the amount paid the land company. The credit drew 2 per cent interest. Judgment for plaintiff. Appeal.

Mitchell, J. 1. The transaction was fraud, both in fact and in law, and the plaintiff is chargeable with knowledge thereof. 2. The S Bank was not chargeable with knowledge of an act done by its cashier beyond the scope of his authority. 3. The fact of interest being paid is immaterial, and cannot amount to a ratification since none of the disinterested officers of the S Bank knew the facts. Judgment reversed. Second appeal.

S. c.: 75 Minn. 100, post p. 659.

CITY OF ST. PAUL v SEYMOUR (1898) 71 Minn. 303.

Petition to declare trust. The plaintiff kept in the Bank of M a general and a special account. The funds in the latter account were kept solely for the purpose of payment of interest on the city's bonded indebtedness to the C Bank. The Bank of M became insolvent in 1896, having \$22,000 in this special account to the plaintiff's credit. The plaintiff filed its petition in the insolvency proceedings asking that this balance be declared a trust fund in the hands of the receiver, the defendant. This trust fund never came into the hands of the receiver, having been used to pay debt. Petition dismissed. Appeal.

Canty, J. As the trust fund in question never went directly to augment the assets of the insolvent trustee, the plaintiff is not entitled to have the amount due it declared a lien or trust on other assets or funds in the hands of the receiver, with which the plaintiff's funds were never commingled. Order affirmed.

BECKER v SEYMOUR (1898) 71 Minn. 394.

Petition to recover a deposit. The plaintiff gave his promissory note to the Bank of M for \$500, which, to secure a loan, transferred it to the Bank of S. The Bank of M became insolvent, before repaying this loan, and defendants were appointed receivers. At the time the bank failed, it was indebted to the plaintiff for

\$170 on open deposit account. When the note fell due, the plaintiff paid to the Bank of S, the pledgee, the whole amount of his note except \$170, which he claimed was offset by his deposit in the bank of M. The pledgee refused to allow the setoff, whereupon the plaintiff paid under protest. The pledgee returned to the receivers a large amount in collaterals. The plaintiff filed a petition for an order requiring the receivers to refund him the sum of \$170. Granted. Appeal.

Start, C. J. Plaintiff was equitably entitled to have left unpaid on his note in the hands of the pledgee, a sum equal to his deposit, so that, when the note was returned to the receivers, his offset would be available, unless its payment was reasonably necessary to protect the interest of the pledgee. Order affirmed.

MERCHANTS NAT. BANK v ALLEMANIA BANK (1898) 71 Minn. 477.

Petition to declare a trust. The W Co. borrowed \$5,000 from the defendant bank, for which it gave its demand note, and as security delivered a large number of former's notes. As these notes matured, they were sent to the W Co. for collection, which remitted the proceeds to the defendant bank, which failed to indorse the payments. The defendant bank fraudulently represented to the plaintiff bank that the note was almost unpaid, when, in fact, it was almost wholly paid, and plaintiff bought the note. Defendant mingled all the money on these payments with its other funds, but kept a special account of these payments. The defendant and the W Co. both became insolvent, and a receiver was appointed, who is a defendant. The plaintiff contended that the proceeds of the collateral constituted a trust fund for its benefit. Judgment for defendant. Appeal.

Canty, J. 1. The proceeds of the collateral were paid to the defendant as payments on the note, and when it converted the funds thus received to its own use, as it had a right to do, it was simply applying them in payment. The neglect to indorse the payments on the note did not make it any less a payment. 2. Having a right to convert the money to its own use, it cannot be a trust fund so far as plaintiff is concerned. Judgment affirmed.

MERCANTILE NAT. BANK v MACFARLANE (1898) 71 Minn. 497.

Attachment. The defendant was appointed receiver of the S Bank. The plaintiff, a bank, held commercial paper discounted and indorsed by the S Bank not yet due, for \$62,000, and the S Bank had money on deposit with defendant. After the insolvency, the plaintiff attached the deposit and applied the discounted paper as collected, to reduce the debt. The plaintiff filed its claim with the receiver for over \$33,000, on which the receiver allowed nearly \$28,000. The plaintiff appealed to the district court. The court found that the amount due plaintiff was \$32,269, and that before being allowed to participate in any dividends the plaintiff must account to the defendant for all moneys paid as principal upon the notes held by it, the amount collected to be deducted from the claim, and the unpaid balance to be the sum upon which dividends were to be computed and paid. Judgment accordingly. Cross appeals.

Collins, J. 1. The relations between the insolvent indorser and the plaintiff indorsee were analogous to those of principal and surety. 2. The sum actually remaining unpaid must be the basis upon which the dividend is to be computed. 3. The plaintiff may proceed against the insolvent estate, and also against the other parties to the obligation, until his debt is fully collected. 4. Upon full payment of the obligation, the insolvent estate is subrogated to all the creditors' rights as against prior parties. Judgment affirmed.

Cited: 77 Minn. 335.

PALMER v BANK OF ZUMBROTA (1898) 72 Minn. 266.

Sequestration proceedings. Defendant bank organized under G. S., 1878, ch. 33, suspended payment in 1893, and the creditors agreed in writing to extend the time of payment one year. Under the Act of 1885, "an act to provide for the extension of the terms of corporations," the stock was increased and the stockholders' resolution was filed with the register, but was not signed or acknowledged by the members, as required by law. Creditors took most of the new stock in lieu of their claims. The bank failed, a receiver was appointed, and proceedings instituted to terminate the bank's affairs. The creditors intervened. The original articles made no provision for increasing the capital. The constitution required the object of every law to be expressed in its title, and that every law should be passed

by a two-thirds vote of the legislature. The Act of 1881, amending the Act of 1878, was not passed by two-thirds vote of the legislature. The receiver assumed to pass upon the claims of the creditors, and also on claims that had not been presented. C purchased many of the claims at 15 per cent of their original face value, and was allowed their face value. Interest was not allowed prior to the time of entry of the judgment. Judgment for creditors. Appeal.

Canty, J. 1. Act of 1885 is unconstitutional in so far as it attempts to give authority to amend articles of incorporation in other respects than by extending the time of existence. 2. The Act of 1881 is unconstitutional. 3. The Act of 1878 authorized banks to increase their capital stock from time to time. 4. But the act was not complied with, for the articles were not properly signed and acknowledged. 5. But as to creditors, who have become such on the faith of the new stock, the holders of the same are estopped to deny its validity. 6. But as to creditors who became such, before vote to increase the stock, the holders of the new stock can assert its invalidity. 7. As to such creditors, the new stockholders can rescind and be restored to their position as creditors. 8. The court and not the receiver is the proper party to pass upon these claims. 9. Judgment should be only for those who filed their claims. 10. The price paid by C was not so inadequate as to prevent him from receiving the face value of the claims. 11. Interest should be allowed from the filing of the judgment. 12. The new stockholders as creditors against the old stockholders are entitled to the full amount of the double liability of the latter. Judgment accordingly.

BRUSEGAARD v UELAND (1898) 72 Minn. 283.

Petition to declare a trust. Prior to December, 1896, petitioner was accustomed to remit to the W Bank drafts and checks of other banks, with the understanding that his remittances should be credited to his account, and, if any such drafts or checks should not be paid, the same would be charged. He sent three checks to the bank which were received on December 28, and sent to S Bank for collection. The S Bank paid the proceeds of the checks to the bank's receiver. The W Bank became insolvent and defendant was appointed receiver in December, 1896. The petitioner asked the court to declare a trust on the proceeds of the checks on the ground that the officers knew at the time of receiving the checks that the bank was insolvent. The bank was in fact insolvent at the time, but petitioner failed to prove that its officers knew that fact. Petition denied. Appeal.

Canty, J. 1. The title to the checks vested in the bank at the time it received them, subject to the condition that, if they were not paid on presentation, they would be charged back. 2. As this condition never became operative, the bank's title has never been divested. 3. As the petitioner failed to establish fraud in the receiving of the checks, he cannot recover. Order affirmed.

Cited: 74 Minn. 474.

TOMLINSON v NATIONAL GERMAN-AMERICAN BANK (1898) 73 Minn. 117.

For money had and received. The plaintiffs kept an account at the U Bank, which suspended payment of nine outstanding checks, drawn on the bank by plaintiffs. One had been presented and certified, but not paid, six days before the failure. The plaintiffs made arrangements with defendant bank to open an account with it, and requested the cashier to pay the outstanding checks. The defendant paid the certified check and charged it to the plaintiffs' account. To this plaintiffs objected, and sued to recover the amount. Judgment for plaintiffs. New trial denied. Appeal.

Canty, J. In paying the certified check, defendant was at fault. Order affirmed.

FIDELITY MUT. LIFE ASS'N v GERMANIA BANK (1898) 74 Minn. 154.

On deposit. The plaintiff, to enable C to obtain money from the defendant bank, deposited \$500, and agreed that the money should be security for money loaned or advanced to C on his promissory note, or the notes of others; and that it should remain with the defendant as long as it was discounting notes for C. Thereafter C had his note for \$500 discounted by the defendant. Defendant informed plaintiff that its understanding was that the deposit was subject to call by the plaintiff, less the amount used in discounting notes for C. To this plaintiff did not reply, but kept silent for more than two years. The plaintiff then drew its check on defendant for the amount of the deposit, and payment

was refused. No part of the note was paid. The court found that the deposit was security for money to be loaned by defendant to C on his notes. Judgment for defendant. New trial denied. Appeal.

Start, C. J. The terms of the deposit were ambiguous, but the defendant parted with its money on reliance upon them. The plaintiff, having acquiesced in the construction of the terms of the deposit given to it by the defendant, is bound. Order affirmed.

LANDIN v MOORHEAD NAT. BANK (1898) 74 Minn. 222.

Money had and received. The cashier of defendant, a bank, shipped in its name a car load of wheat to Duluth, for sale on account of the plaintiff's brother and F. This wheat was sold, but never paid for, as the bank, on which the purchaser gave his check, failed. Shortly after this, the cashier shipped another car load of wheat in the name of the defendant, for sale on account of the plaintiff, who was the owner. This wheat was sold and paid for. The cashier, assuming that the money was the proceeds of the first car load, though he had in his possession the means of ascertaining the facts, paid it to plaintiff's brother and F. The cashier was acting without the scope of his duty. Judgment for plaintiff. Appeal.

Mitchell, J. If the bank received the proceeds of the plaintiff's wheat, it must account to him for the money thus received. The fact that it has, through its cashier, without any fault or procurement of the plaintiff, paid over the money to the wrong party, in no way releases it from this liability. Judgment affirmed.

FARMERS NAT. BANK v BACKUS (1898) 74 Minn. 264.

Foreclosure of mortgage. Plaintiff, a bank, commenced the proceedings against defendant, and petitioner was appointed receiver in the action. Defendant appealed from the decision, gave an appeal bond to plaintiff, and collected the income from the property. Plaintiff recovered on the bond for damages for the income the petitioner was unable to collect. Petitioner contended that the amount he had collected was small, and that plaintiff should pay his fees and expenses. Plaintiff contended that its charter expired by limitation before the service of the petitioner's claim, and that the court did not have jurisdiction, and further that a receiver's fees and expenses are solely chargeable to the funds coming to his hands. Order for the petitioner. Appeal.

Start, C. J. 1. A national bank, after the expiration of the time limit of its charter, continues to exist as a person in law, capable of suing and being sued, until its affairs are completely settled. 2. Under the special circumstances of this case the plaintiff must pay the receiver's fees and expenses, for the property out of which he would have taken his pay did not come into his hands. Order affirmed.

FORT DEARBORN NAT. BANK v SEYMOUR (1898) 75 Minn. 100.

Money had and received. Facts stated in 71 Minn. 81, ante p. 656. Second appeal, additional facts appearing as follows: The money advanced to the land company was given before the land company's note was discounted by the plaintiff and charged to the S Bank. The plaintiff contends that therefore the S Bank was not injured by the transaction; and that S Bank had not discounted the land company's note, and sent it to the plaintiff for rediscount. Judgment for defendants. Appeal.

Canty, J. 1. The S Bank was injured by the fraud. 2. The trial court was warranted in finding that the note had not been first discounted by the S Bank, the letter written by D being sufficient evidence that the transaction was conducted by him personally. Judgment affirmed.

DICKSON v KITTSON (1899) 75 Minn. 168.

On promissory notes. B, the general manager of the M Savings Bank, entered into an agreement with the defendants, whereby, for the consideration of \$22,000, he agreed to assign to them an undivided one-half interest in the charter, franchises, business, and profits of the bank, and to give them equal representation on the board of trustees. The defendants gave the notes in suit, payable to the order of the bank. B turned the notes over to the bank and the trustees surrendered certain assets, which B appropriated to his own use. Two of the trustees resigned, and the defendants were elected members. The defendant K contended that there was

no consideration for the notes. The bank failed and plaintiff was appointed receiver. Verdict for plaintiffs. Motion for a new trial. Denied. Appeal.

Mitchell, J. 1. The contract was void on the grounds of public policy, and the notes were equally void, because given for an illegal consideration. 2. The bank did not occupy the position of an innocent indorsee, for the notes were made payable directly to it, and plaintiff, its assignee, stands in no better position than his assignor. Order reversed.

Cited: 75 Minn. 205; 77 id. 63.

BOARD OF COUNTY COMM'RS v SECURITY BANK (1899) 75 Minn. 174.

On bond. The treasurer of S County deposited with the defendant bank \$13,000, part of a sinking fund belonging to the county, and took from the bank a certificate of deposit payable on time at 3 per cent. The defendant bank and the other defendants, as sureties, executed a bond to the plaintiff to secure the payment of the funds deposited, and on which the bank was to pay 2 per cent on monthly balances as the law required. The bank became insolvent, owing the county nearly \$50,000, and a receiver was appointed. The county never filed or presented its claim, or complied with conditions to enable it to share in the assets of the bank. This omission was without the knowledge or consent of the defendant sureties. Judgment for plaintiff. Appeal.

Mitchell, J. 1. The failure of the county officials to file a claim was at most the negligent omission to perform a duty which they owed to the public, and which, if performed, would have reduced the loss of the defendant sureties. 2. The negligence or misfeasance of public officers as to sureties on official bonds, given to secure the public, is not chargeable to the public. 3. The deposit was subject to draft and payable on demand, notwithstanding the void and illegal provision as to time of payment attempted to be incorporated in the contract. Judgment affirmed.

Cited: 75 Minn. 493.

SOUTH PARK F. & M. CO. v CHICAGO & G. W. RY. CO. (1899) 75 Minn. 186.

To recover a draft. The plaintiff drew on defendant for \$910, payable in 30 days, to its own order, and the defendant accepted. The plaintiff indorsed the draft to the Bank of M for collection, and the amount was credited to plaintiff. The bank became insolvent and receivers were appointed. It owed the defendant on open account more than the amount of the draft. The defendant refused to pay the draft claiming a right to set off against it the amount due it from the bank. The plaintiff appeared in the receivership proceedings, and asked the court to order the receivers to return the draft to him. Petition granted. Appeal.

Mitchell, J. The draft was delivered for collection and credit. The credit at the time of deposit was merely provisional, and, therefore, the title to the draft never passed from the plaintiff. Order affirmed.

RICHARDS v MINNESOTA SAV. BANK (1899) 75 Minn. 196.

Against stockholders as partners. Defendants were a savings bank and its stockholders. In 1873, two trustees acquired from the other trustees all the assets of bank, except its charter, and transferred them to the U Bank. Up to 1889, the U Bank did no business except to close its account with its customers. In 1889, D, claiming to be the sole surviving trustee, sold the charter of the U Bank to B and others, who elected a board of trustees. The board changed the name to the R Bank, and subsequently to the M Bank, which, until 1897, continuously did business as a bank. The plaintiffs dealt with the bank depositing their money with it. The Act of 1889 authorized savings banks to change their names and places of business. Judgment for plaintiff against the bank, and judgment for defendant shareholders for costs. Appeal.

Start, C. J. 1. The non-user of a corporate franchise does not work a dissolution. The U Bank was a de jure corporation. 2. The attempted change in the name of the corporation and its place of business, if void, because unauthorized, could not affect the existence of the corporation. 3. If the Act of 1889 was unconstitutional, it gave the U Bank color in law for changing its name, and place of business. Judgment affirmed.

ATWATER v STROMBERG (1899) 75 Minn. 277.

On promissory note. The defendant delivered his promissory note to a national bank, which before maturity suspended payment and the plaintiff was appointed receiver. At the time of delivering the note, the bank issued and delivered to the defendant its certificates for seven shares of its capital stock at par. At the same time the president of the bank delivered to the defendant an instrument reciting that he had purchased the stock with the note, and when the note fell due he could exchange the stock shares for it. U. S. R. S., sec. 5201, prohibited a national bank from taking or acquiring its own shares. Judgment for plaintiff. New trial denied. Appeal.

Collins, J. 1. When the corporation became insolvent, the rights of the creditors became fixed as to all stockholders. The defendant necessarily assumed the risk that might happen when he took the stock. 2. The stockholders of a corporation cannot directly or indirectly release themselves, or discharge their liability as such, by means of agreements with one another, or with the corporation. 3. That part of the agreement which gave the defendant an option to exchange his stock shares for the notes was in direct conflict with the United States Statutes. Order affirmed.

HOVE v BANKERS EXCHANGE BANK (1899) 75 Minn. 286.

For leave to file claim. The plaintiff was a stockholder and depositor in defendant, an insolvent bank. The president of the bank advised him of the danger of the bank's failing. Whereupon the plaintiff and the president entered into an arrangement by which the president transferred interest bearing securities, including a worthless certificate of deposit, to the plaintiff, who gave his check for the amount of his deposit. Meanwhile the time for the creditors to file their claims had expired. This application was made on the ground that fraud was committed in inducing the plaintiff to take the worthless certificate of deposit, and that the order to file claims failed to comply with the laws of 1894. Motion denied. Appeal.

Collins, J. 1. Having assumed in his moving papers that a valid order had been made requiring the filing of claims, plaintiff must abide by the allegations of that application. 2. Plaintiff's neglect to file his claim against the defendant was not excused. Order affirmed.

MINNEAPOLIS S & D CO. v METROPOLITAN BANK (1899) 76 Minn. 136.

For damages. The defendant bank advertised in its passbook that in receiving checks and drafts on deposit, it acted only as agent; and in forwarding items to other points, it selected agents who were responsible according to its judgment; but assumed no risks of their agents' omissions, negligence, or failure. The plaintiff deposited with the defendant a check drawn on the M Bank, the only bank at M, which the defendant mailed to that bank for collection. This bank was reputed to be responsible, and when the check was received, the payor had sufficient funds there to meet it. The M Bank sent its draft on the N Bank to the defendant, but before it was presented, the M Bank failed. The defendant might have collected the draft through an express company, which had offices at M, and was in the habit of receiving checks for collection. Judgment for defendant. Appeal.

Collins, J. The defendant was obliged to exercise reasonable care and diligence, and it did not do so in sending the drafts to the party most interested against the payee and principal, thus placing such principal entirely in the hands of its adversary. Judgment reversed.

WATT v FIRST NAT. BANK OF LAKE BENTON (1899) 76 Minn. 458.

To recover usury paid. The plaintiff borrowed money of the defendant, a bank, and gave his promissory note. The interest charged was usurious. After payment of the note, with the excessive interest, the plaintiff brought this suit for the penalty, under the National Banking Act, which provides that in case usury has been paid, the person by whom it has been paid, may recover twice the amount of the interest thus paid from the association taking or receiving same. Judgment for plaintiff. New trial denied. Appeal.

Mitchell, J. The amount of the recovery is twice the entire interest paid, and not merely double the excess paid over the legal interest. Order affirmed.

SELOVER v FIRST NAT. BANK (1899) 77 Minn. 140.

To recover a deposit. H, the president of the M Bank, borrowed \$4,000 from the defendant, a bank, giving as collateral security 50 shares of the capital stock of the M Bank, and directing that the amount of the loan be credited to the M Bank. Subsequently, the attorney-general instituted proceedings to forfeit the charter of the M Bank. On the same day, the defendant notified both H and the M Bank that it rescinded the loan to H and canceled the credit given, and tendered the stock to H. The credit given to the M Bank had not been drawn upon. The receiver of the M Bank sold the claim to the plaintiff. The defendant contended that H obtained the loan by fraudulently representing the stock to be worth par, when, in fact, it was worthless. The plaintiff contended that on the faith of the credit, he had given credit to H, and that the defendant was estopped as against the bank and himself to set up that defense. Judgment for defendant. Appeal.

Canty, J. M Bank did not part with anything which can be urged as the basis of any such estoppel against the defendant. Its defense is good. Judgment affirmed.

STATE v JOHNSON (1899) 77 Minn. 267.

Indictment for passing a worthless check. The defendant was secretary of a milling company which did its banking business with the Bank of W. The bank allowed the company to overdraw its account from time to time. The account of the company was overdrawn "off and on," before the check was made. On June 15, 1898, this overdraft amounted to \$4,600, and the cashier wrote the company about it. The next day the defendant and the president gave the bank a note for \$5,000 secured by stock of the company. The company made other deposits and drew more checks. Nothing more was said about overdrafts. On July 20, 1898, the defendant drew a check for \$150, which was cashed, and the money used in the business. This check was presented to the bank and payment refused. Two days subsequently to the making of this check, the bank cashed 11 checks for the company. G. S., 1894, sec. 6711, a person who willfully with intent to defraud by color or aid of check, when such person knows the drawer or maker thereon is not entitled to draw on the drawee for the sum specified, is guilty of stealing the same. Verdict guilty. Appeal.

Start, C. J. 1. If the defendant, when he negotiated the check, had reason to believe, and honestly did believe, that he had authority to draw it, and that the check would be paid in the ordinary course of business, he is not guilty of obtaining money by false pretenses, although the check was not paid for want of funds. 2. The verdict is clearly unsupported by the evidence and it is set aside. Judgment reversed.

HASLAM v FIRST NAT. BANK OF MINNEAPOLIS (1900) 79 Minn. 1.

To compel transfer of stock. The plaintiff purchased from S two certificates of stock of the defendant bank, and brought this action to compel transfer on the books. O intervened, claiming title to the stock, by virtue of a sale under execution against S. Plaintiff did not claim as pledgee, but as owner. The plaintiff and the intervener entered into a stipulation that, if the verdict were for the plaintiff, it should be that the plaintiff was the owner of the shares, and that the bank issue a certificate to him; and if for the intervener, it should be that the intervener is the owner. Judgment for the intervener. New trial denied. Appeal.

Lewis, J. The plaintiff could maintain the action as pledgee or owner, but after the intervener pleaded in the action, an issue was raised directly on the validity of the sale to the plaintiff. It was incumbent upon the plaintiff to apprise the court and the intervener, that he intended to claim title as pledgee and not as owner. Order affirmed.

SEYMOUR v BANK OF MINNESOTA (1900) 79 Minn. 211.

For stockholders' liability. The plaintiffs were appointed receivers of the Bank of M, and sought to enforce the stockholders' liability for double the amount of their holdings for the payment of certificates of deposit issued before and after August 1, 1895. The certificates were given in place of old certificates, and were payable in six months. The bank was apparently solvent at the time of giving these renewals, and was prepared to pay cash for all certificates presented for payment. The Act of 1895 covered all the banks then existing, and sec. 145 reduced the stockholders' liability to a single liability, and revoked the authority of banks

to issue notes for circulation. The Act of 1895 took effect on August 1, 1895. Judgment for plaintiffs. Appeal.

Lovely, J. 1. It was competent for the legislature to revoke the unused authority of the banks in this state to issue notes for circulation, and such was the effect of the Law of 1895. 2. The new certificates were a new contract, upon which the rights of their owners must be based. 3. As to certificates issued before the statute took effect, the stockholders were liable for the debts of the corporation in a sum double the amount of the par value of the stock. Judgment affirmed.

ABEL v ALLEMANNIA BANK (1900) 79 Minn. 419.

On certificate of deposit. The plaintiff was a depositor in the defendant bank, when it became insolvent. Prior to the Statute of 1897, the plaintiff signed an instrument for a composition by the creditors of the bank, and delivered it to S, the president of the bank, who acted for her in all subsequent proceedings, but of which she had no notice. The law of 1897 provided that a reorganization of an insolvent estate which impairs or reduces the amount of the creditor's obligation cannot be effected, so as to bind a creditor without his consent. Several months after the passage of the act a majority of the creditors instituted proceedings under it, which resulted in a final reorganization. S sent the plaintiff five certificates, payable under the reorganization, on the receipt of which she notified the bank that she was dissatisfied with the settlement and sued for the original deposit. Judgment for plaintiff. Appeal.

Lovely, J. The plaintiff, not having directly, or through her agent, authorized the proceedings for reorganization, is not bound by the judgment entered therein. Order affirmed.

BAXTER v COUGHLIN (1900) 80 Minn. 322.

To enforce the liability of directors. The defendants were directors in the A Bank, which suspended payment, owing the plaintiff \$32,000. The complaint alleged that the money was received by the directors as a deposit with knowledge that the bank was insolvent. The court charged that all the directors stood on the same footing, and that if one was liable, all were liable. Verdict for plaintiff. New trial granted. Appeal. Subsequent to the order granting a new trial, the plaintiff moved to strike from the records the bill of exceptions theretofore allowed, and also to strike out the order allowing the same. Motion denied. Appeal.

Brown, J. 1. So far as applicable to the questions therein presented, the bill of exceptions must be taken as having been regularly settled and allowed. 2. The court erred in holding that if one director was liable, all were liable. Order affirmed.

GERMANIA BANK OF MINNEAPOLIS v OSBORNE (1900) 81 Minn. 272.

On promissory note. Defendant pleaded as a counterclaim that, to induce him to purchase four shares of plaintiff's bank stock, in order to have him remain a director, the plaintiff agreed that it would receive the defendant's promissory note payable in 90 days, and renew it from time to time; that if the defendant ceased to be director, the plaintiff would purchase the stock at the same price. The note in question is the last renewal of the original. The defendant, having resigned as director, tendered the stock and demanded his note, which was refused. The defendant was not permitted to prove these facts, on the ground that the oral testimony tended to vary the terms of the note. Verdict for plaintiff. New trial denied. Appeal.

Lewis, J. Under the issue tendered by the counterclaim, the question of the right to enforce payment of the note was raised, hence the evidence offered did not tend to change the terms of the written instrument. Order reversed.

STATE v CLEMENTS (1901) 82 Minn. 434.

Indictment for receiving deposits after the bank was insolvent. The F Co. Bank conducted business as a partnership composed of the defendant, G and T. The partnership was subsequently dissolved and the defendant withdrew therefrom. G and T continued the business until the bank closed its doors with nothing to show for large sums of money deposited. The bank's books showed that it had been insolvent for some time. No announcement of the dissolution was given in the local papers, nor was any effort made to publish it to the depositors. Defendant

received large sums in excess of the bank's earnings before and after the firm dissolved. These payments were fraudulently concealed. The defendant, after the dissolution, but before the deposit in question was made, stated that he was still connected with the bank. Laws of 1895, ch. 219, provided that any one connected with a banking concern who received deposits while such institution was insolvent, whether as an ostensible partner or as a secret conspirator with the actual operator, was guilty of a felony. G. S., 1894, sec. 5767, provided that a conviction could not be had on the testimony of an accomplice, unless he was corroborated by such other evidence as tends to convict the defendant. Verdict, guilty. Appeal.

Lovely, J. 1. The statute covers every relation between the person actually accepting the deposits during the insolvency and any one who directly or indirectly co-operates with him in that act. 2. It was proper to introduce in evidence the summaries of the amounts properly classified upon the claims of the State. 3. While the corroborating evidence must be such as tends to show some connection by defendant with the criminal acts complained of, yet all the guilty elements of the crime testified to by the accomplice need not be supported by corroborative evidence. 4. The court did not err in defining insolvency to mean an inability to meet liabilities in the usual course of business. Order affirmed.

ROSTAD v UNION BANK OF ST. PAUL (1902) 85 Minn. 313.

On check. C deposited \$750, which he had received from X, with the defendant, a bank, in his own name, for immediate payment to the plaintiff. He mailed, on the same day, a check to the plaintiff in North Dakota, which the plaintiff in due course had presented for payment at the defendant. In the meantime C's deposit had been garnisheed, and payment was refused. Subsequently C presented his own check for \$472, which was paid. The plaintiff filed a complaint in intervention in the garnishee proceedings, a copy of which was served on the defendant. The defendant's cashier wrote several times about the plaintiff's check, but made no mention of the check cashed for C. Judgment for defendant. Appeal.

Collins, J. All the essential elements of an estoppel in pais were presented in this case, and the court erred in not ordering judgment for the plaintiff. Judgment reversed.

MISSISSIPPI

McGUFFIE v PLANTERS BANK (1829) 1 Freem. Ch. 383.

For an injunction in restraint of execution. The bill alleged that the bond upon which execution issued was not complainant's act and deed, but was executed by some other person for him, without his knowledge. The answer made by bank, under its corporate seal, was verified by cashier, who swore to the truth of the allegations therein contained, on information and belief. The cashier was not a party defendant. Injunction granted. Motion to dissolve.

Buckner, C. 1. The cashier of a bank is not necessarily one of the corporators, and therefore not a defendant to the bill. 2. An injunction will not be dissolved on the affidavit or answer of one not a party to the bill. 3. The answer, professing to be made upon information and belief, is not sufficient to disprove the positive allegations of the bill. 4. The positiveness of the denial of the answer cannot vary its character, where it is apparent that the defendant could not have been personally cognizant of the facts charged. Motion overruled.

PLANTERS BANK v SNODGRASS (1840) 5 Miss. 573.

Assumpsit. Indorsee against indorser. The uniform practice of plaintiff, a bank, in computing interest, was to use Rowlett's Tables, which reckoned 360 days for a year. No evidence of a design to evade the law was introduced. The debt was large, and the computation slightly overran the rate allowed. Usury was pleaded. Demurrer to plea. Overruled. Judgment for plaintiff. Error.

Trotter, J. 1. The mere taking of too much because of a usage, not assented to, is not necessarily usury. 2. The intent is material, and while usage will not excuse a violation of law, it is material to explain the *quo animo*, and with the smallness of the excess repel an inference of a corrupt design. Judgment reversed.

Cited: 6 Miss. 809; 7 id. 623; 11 id. 782; 12 id. 84; 16 id. 178, 185, 191, 196; 67 id. 150.

PLANTERS BANK v MARKHAM (1841) 6 Miss. 397.

On a note. Defendant's note, in favor of N, payable at C Bank, was indorsed to plaintiff, a bank. The notary presented the note at the C Bank during business hours, and payment was refused. He protested it before three o'clock for non-payment. The custom of the bank was to keep its doors open for business until three o'clock, and all persons having notes payable there that day had until that time to pay them. The parties knew of the custom. Judgment for plaintiff. Error.

Trotter, J. 1. Where a contract is made with a banking corporation, or a note is made payable there, the usage and custom of the bank, when known to the parties, constitute a part of the contract. 2. Since, by the custom of the bank, the note was not due until the expiration of business hours, to demand payment before that time, without leaving the note in the bank, was premature, and not sufficient to bind the indorsers. Judgment reversed.

Cited: 14 Miss. 473.

FORNIQUET v WEST FELICIANA R. R. CO. (1842) 7 Miss. 116.

Assumpsit. Payee against maker, on a note payable four months after date. Defendant offered evidence to show that 8 per cent, by including the days of grace, was charged. Proof of official capacity of bookkeeper, the books of account were offered. This evidence was excluded. The plaintiff's charter allowed it to charge 7 per cent on four months paper, and 8 per cent on notes for a longer time. Judgment for plaintiff. Error.

Sharkey, C. J. 1. The statute providing for 7 per cent applies to notes payable in four months with grace. 2. Proof of the official capacity of the person making out an account is sufficient to make the account admissible. Judgment reversed.

COMMISSIONERS OF THE SINKING FUND v WALKER (1842) 7 Miss. 143.

On a note. The defendants made their note, payable at the P Bank, for a loan from S, auditor of the State of Mississippi, W, president of the bank, and M, cashier of the bank, as commissioners of the sinking fund. By sec. 10 of the charter of the P Bank, provision was made for the creation of a sinking fund. The state was to sell bonds and apply the proceeds to the purchase of stock; and it was declared that the surplus of the semiannual dividends, after paying the interest on the bonds, should constitute a sinking fund, under management of the auditor, president, and cashier of the bank, for redemption of the bonds. Defendant contended: 1, That the state had no power to appoint trustees; 2, that plaintiffs could not act as such; 3, that there was no trust created; 4, that the trustees could not sue at law. Judgment for defendants. Appeal.

Sharkey, C. J. 1. The state, by legislative enactment, may directly, or through agents properly appointed, convey in trust, and appoint trustees. 2. Corporations may hold as trustees. The trust was confided to the president and the cashier, in their official capacity, to identify the persons who should execute the trust. 3. A trust was created by conveying the sinking fund to plaintiffs to manage. 4. A trustee can sue at law in all cases concerning the trust property. Judgment reversed.

Cited: 8 Miss. 13; 20 id. 105, 583; 21 id. 410, 425.

GRAVES v MISSISSIPPI & ALABAMA R. R. CO. (1842) 7 Miss. 548.

On a note payable to plaintiff, a railroad and banking company, which sued to use of M. Declaration alleged that defendant made the note to the plaintiff, but did not pay it. Defendant pleaded non-assumpsit and filed a setoff. Plaintiff proved that the note was given to J, and that it had never been discounted at the plaintiff bank. Judgment for plaintiff. Error.

Sharkey, C. J. A note made payable to a fictitious person, or to a third person, in such case, a bona fide holder may sue in the name of the nominal payee, and oral evidence is admissible to prove the transaction, though it contradicts the formal allegations of the declaration. Judgment affirmed.

CAMPBELL v MISSISSIPPI UNION BANK (1842) 7 Miss. 625.

Assumpsit on a note payable at and discounted by the plaintiff, a bank, for the accommodation of defendants, the makers. Defendants pleaded: 1, That the

plaintiff having failed to honor its bank note, the governor declared its charter forfeited; 2, that the supplemental act, changing the charter, was not passed according to the formalities and terms of the constitution; 3, that the note was given for a loan on post notes, while only loans on demand notes were authorized by the charter; 4, that a majority of the stockholders refused to accept state bonds essential to issue notes, and that they were not, in fact, stockholders; 5, that the post notes were void for containing the phrase, "the faith of the state pledged;" and, 6, that the charter was void for having been published 10 weeks, instead of three months, as required by the constitution. By a statute, the bank could use its name to terminate its affairs, after the governor had declared the charter forfeited. Demurrer to pleas. Sustained. Judgment for plaintiff. Error.

Sharkey, C. J. 1. The governor's proclamation puts an end to the banking privilege, but does not dissolve the corporation. 2. The void supplemental act does not affect the charter. 3. The charter contains nothing to show that loans were confined to notes payable on demand. 4. The fourth plea is inconsistent. 5. The notes were not void. 6. The charter was valid, regardless of the time of publication. Judgment affirmed.

MONTGOMERY v COMMISSIONERS OF THE SINKING FUND (1843) 8 Miss. 13.

The commissioners of the sinking fund of the Planters Bank have the right to lend, sue for, and recover money loaned on a note. A plaintiff may discontinue his action as to one of a number of joint and several defendants, and proceed against the others to judgment.

MISSISSIPPI R. R. CO. v SCOTT (1843) 8 Miss. 79.

On a note. The defendants made the note and had it discounted by the plaintiff, a railroad and banking company, which gave a certificate of deposit for the proceeds thereof. The defendant bought stock in the plaintiff's branch at G, paying therewith 10 per cent on the amount of stock subscribed for, with the certificate. Judgment for defendant. Error.

Per curiam. If the defendants chose to take a certificate of deposit instead of money, this will not discharge them from liability, and it is immaterial what they may choose to do with the certificate. Judgment reversed.

HARPER v CALHOUN (1843) 8 Miss. 203.

On a note by an assignee against the maker. Pleas: Payment and setoff. The M Co., a bank, through its cashier, assigned the note to the plaintiff. Defendants claimed to offset notes issued by a bank, and the amount paid on a subscription of bank stock. The defendants contended that the cashier was not the proper person to indorse the note. Defendants put in evidence a letter written to the cashier of the M Co., asking him to ascertain from the directory, whether he would be permitted to relinquish stock to the amount of his liabilities to the institution. R, a director, replied, "the cashier will say to C that the board agree to the above proposition," and proved that it was the custom of the M Co. to receive from its debtors, who were subscribers for stock, payment of their debts in that way. Judgment for defendants. Error.

Per curiam. 1. The mere ownership of the stock did not entitle the defendant to avail himself of it as a setoff against a note given to the M Co. 2. One director could not bind the board, and his letter was not such an open proposition as to make its acceptance binding on him. 3. The custom would not amount to a contract. 4. The cashier was the proper officer to transfer and indorse the bills receivable of the company, and his indorsement is sufficient to pass the interest in the note. Judgment reversed.

BONNELL v COVINGTON (1843) 8 Miss. 322.

On a note, payable in current notes of certain banks. The plea set up tender of payment, but did not aver that the notes tendered were "current" notes. Demurrer. Overruled. Judgment for plaintiff. Error.

Clayton, J. 1. The plea is defective in not alleging that the notes tendered were current. 2. If there was any difference between the current notes of those banks and specie, the defendant should be allowed the benefit of it. Judgment reversed.

Cited: 10 Miss. 495; 17 id. 462; 40 id. 547.

COMMERCIAL & RAILROAD BANK v HAMER (1843) 8 Miss. 448.

Case for negligence in collection of a note. The plaintiff placed the note with defendant, a bank, for collection, with instructions to protest, if payment was not made on due day. Payment was not made, and the note was placed with the defendant's notary for demand and protest. The notary took the note, after business hours, to the P Bank, where it was payable, and found the doors closed. He entered by a side door, and presented the note to the teller, who refused payment because there were no funds to meet it. Plaintiff sued the makers and indorsers, and was nonsuited. All parties, except one indorser, who since became insolvent, were insolvent at the maturity of the note. It was customary for notaries to protest notes after business hours. Judgment for plaintiff. Error.

Sharkey, C. J. 1. A bank which receives a note or bill for collection is bound to use due and proper diligence in making demand and giving notice. 2. Though the presentment was made after banking hours, there was a person stationed there for returning an answer, and the demand was sufficient to hold the indorsers. Judgment reversed.

Cited: 10 Miss. 231; 21 id. 239; 52 id. 680.

COMMERCIAL BANK OF MANCHESTER v NOLAN (1843) 8 Miss. 508.

On a note. The plaintiff, a bank, discounted the defendant's note, reserving 8 per cent interest. At the same time, the plaintiff received from the defendant, cotton, which was to be shipped to Liverpool for him, with the understanding that he was to be credited with the net proceeds of the cotton, including foreign exchange; but the plaintiff was to have the domestic exchange, if in favor of New York, as compensation for its trouble. Plaintiff's charter empowered it to charge 8 per cent interest. The court charged, that if the plaintiff took more than the interest allowed by its charter, by contract either expressed or implied, the contract sued on was usurious and totally void. Judgment for defendant. Error.

Clayton, J. 1. Where, besides the loan contract, there is, by way of pledge or mortgage, collateral security as accessory to the payment of the debt, some fair and just compensation for labor, trouble, and expense may be stipulated for, and the contract will not be usurious. 2. When a bank discounts a note in the usual course of business, if it commits usury, the interest alone is forfeited. Judgment reversed.

Cited: 12 Miss. 82, 83, 84, 85; 16 id. 173, 178, 179, 181, 183, 185,; 20 id. 459; 21 id. 411; 35 id. 55, 630; 41 id. 511; 51 id. 812; 1 S & M Ch. 646.

TIERNAN v COMMERCIAL BANK (1843) 8 Miss. 648.

Assumpsit on a bill of exchange sent to the defendant, a bank, for collection. The bill was sent to the defendant by the Bank of O for collection, and was placed in the hands of the notary in the usual course of business. The notary failed to present the note and gave notice of protest and the indorser was discharged. Judgment for defendant. Error.

Clayton, J. 1. A bank of necessity depends upon its agents, and in this instance the defendant selected a notary, an officer created for public convenience, one authorized to give notice and make protest, and no agent could have been selected with more propriety for the performance of this duty. 2. The defendant was not negligent. Judgment affirmed.

Cited: 15 Miss. 598, 599, 600; 17 id. 487; 34 id. 52, 54; 61 id. 117.

CROCKET v YOUNG (1843) 9 Miss. 241.

On a note against makers. The consideration of the note was goods sold by S to one of the makers. The note was made payable to the bank at the request of S, and discounted for his benefit. Plaintiff, who held large claims against the bank, received this note and others in payment, and an equal amount in notes of the bank was delivered. The transfer was made by the cashier of the bank, by the authority of the board of directors. Defendant did not file any account of the offsets, nor introduce any proof to support the issue tendered. Judgment for defendant. Appeal.

Per curiam. 1. An incorporated bank may, by the indorsement of the cashier, transfer a negotiable promissory note. 2. There was no evidence to sustain the verdict. Judgment reversed.

ROBINS v EMBRY (1843) 1 S & M Ch. 207.

Injunction in the supreme court. The C & Ry. Bank was incorporated with power to build a railroad within a given time. Before completing the road it made a voluntary assignment having two express objects, viz., payment of debts, and completion of road to save charter. Defendants obtained judgment and levied execution. Complainant filed this bill to enjoin the sale. Defendants demurred on the ground that the assignment was void.

Buckner, C. 1. The property of an insolvent corporation is a trust fund and may be assigned for the benefit of all creditors equally—whether preference may be given, quere. 2. The authority given to the trustees to borrow money to complete the road was for the purpose of devoting the profits to the payment of debts and to preserve the charter, and was valid; but the question is one which the creditors cannot raise in this proceeding. 3. The power of appointment to fill a vacancy, coupled with a stipulation that failure to appoint a trustee should not affect the trust, will not alone invalidate the assignment. 4. What is a reasonable time for filing claims and making distribution must depend on the nature and circumstances of each case. 5. The authority to compromise was proper. 6. The corporation not being dissolved by assignment nor the franchise itself assignable, it devolved on the corporation to operate, but the profits and earnings became a trust fund for the creditors. A double agency was therefore proper. 7. The restriction as to the payment did not discriminate, and was but a means to secure honest creditors from the allowance of unjust claims. 8. It is sufficient description of property to give precise information of its nature and extent by reference and inquiry. A creditor may call for a more detailed schedule, but its omission does not invalidate the assignment. 9. Stipulation, requiring a submission of accounts, will not render the assignment void. 10. The reservation of necessary expenses to the officers managing the corporation, if applied to only the banking part, would seem to be an illegal reservation, tending to hinder and delay creditors; but where the banking had ceased and the operation confined to the necessary management of the railroad, the circumstance that the profits of the road are to be applied until the debts are paid, relieves the reservation from the illegal intent. Demurrer overruled.

BOISGERARD v WALL (1843) 1 S & M Ch. 404.

To foreclose a mortgage. Defendant and more than a hundred others formed a partnership with shares. Subscribers gave the firm mortgages to secure unpaid subscriptions, and any liabilities of the firm which might accrue within 15 years. Defendant's mortgage for \$23,000, payable in instalments of 5-10-15 years, passed with many others to complainant, under an agreement of loan and repayment, which the company failed to perform. Suit was brought against W alone, before the five years had elapsed. Demurrer for nonjoinder, and that debt was not due.

Buckner, C. 1. Where parties are so numerous as to render it inconvenient, all need not be joined. 2. The rule does not apply here, other partners having no interest. 3. The mortgage secures the debts of all creditors of the firm. 4. It applies to future debts. 5. Suit was not premature. Demurrer overruled.

Cited: 19 Miss. 588.

MONTGOMERY v COMMERCIAL BANK (1843) 1 S & M Ch. 632.

For an injunction and rescission of a deed of assignment. Complainants were stockholders in C Bank. At a meeting of stockholders, at which complainants were not present, it was agreed to make an assignment for creditors, and assignment was made to F & M, defendants, as trustees. An injunction was granted by a circuit judge, whose district did not embrace the county where the bank was situated. The chancellor was related to F, one of the assignees, and a special chancellor was appointed under the Act of 1840. Laws of 1840 provided that no bank shall transfer by indorsement or otherwise any note, bill receivable, or other evidence of debt. By statute, circuit judges could grant injunctions in their districts. Motion to dissolve the injunction.

Miles, S. C. 1. The legislature has the power to provide means of trying cases of an equitable character, which the chancellor for any reason is incompetent to try. 2. A circuit judge had no power to grant the injunction. 3. The legislature, by the Act of 1840, did not intend to operate on or prevent general assignment for the benefit of creditors, but intended alone to prevent partial and fraudulent assignments. Motion granted.

COMMERCIAL AND RAILROAD BANK v ATHERTON (1844) 9 Miss. 641.

Assumpsit on a note. Pleas: Non-assumpsit, payment, and setoff. The note was executed by the defendant to the plaintiff, a railroad and banking company. The defendant proved that on the day the note matured, the bank notes of the plaintiff were worth about 60 cents on the dollar for specie or its equivalent, and offered no further evidence. The court charged, that in finding for the plaintiff, they must assess the damages calculated at the value of the bank notes of the plaintiff in specie. Judgment for plaintiff for part of the claim. Error by plaintiff.

Clayton, J. 1. The mere fact that the plaintiff's bills were depreciated when the note came due, is no reason why the plaintiff should not recover the full amount of the debt. 2. The admission of the testimony and the charge were erroneous. Judgment reversed.

HUGHES v GRAND GULF BANK (1844) 10 Miss. 115.

Assumpsit on bank notes. The action was commenced before a justice of the peace. The justice filed the notes in the circuit court, with the appeal bond. The declaration in the circuit court contained the common counts for money had and received, and money paid. The notes were filed with the declaration, and also an account of the items of the demand, specifying four bank bills of the defendant, for \$10 each, payable to C or bearer, and severally dated. The plaintiff offered in evidence three notes payable to C and one payable to R or bearer, all of which were ruled out by the court because they were differently dated from those declared upon, and were not the notes described in the bill of items. Judgment for defendant. Error.

Thacher, J. The wrong description in the bill of items, as to date and name of payee, was not a good reason for ruling out the notes, because the notes themselves, filed with the declaration, were correctly described in the warrant of the justice of the peace, showing the cause of action. Judgment reversed.

COHEA v HUNT (1844) 10 Miss. 227.

Assumpsit on a note against the maker and indorser. A demand at the bank where the note was payable was not made until after business hours on the day it became due, and the cashier at that time stated that no funds had been deposited to pay it. Notice of non-payment and demand was immediately given to the defendant personally. There was a custom of considering notes dishonored at this bank, if not paid within business hours. The court charged that, if the bank had regular business hours, and notes payable there were, by the custom of the bank, considered dishonored unless paid within such hours, it is not sufficient evidence of presentment and demand to charge the indorser in this case, if the note were not presented and demanded until after the close of banking hours. Judgment for defendant. Error.

Clayton, J. If a note be presented for payment at a bank at which it is payable on the day it falls due, but after banking hours, still if the officers of the bank be in attendance, and give answer that there are no funds on deposit and that there have been none during the day to pay the note, it is a sufficient demand. Judgment reversed.

Cited: 21 Miss. 240.

GASQUET v WARREN (1844) 10 Miss. 514.

To have a judgment marked satisfied. The defendant had recovered a judgment against plaintiff, and issued execution to the sheriff. The plaintiff had paid this to the sheriff in bank notes below par. The plaintiff moved to have the judgment satisfied of record. Plaintiff put in evidence a receipt signed by the sheriff, that the payment was in bank notes. The defendant and his attorney were not shown to have consented to take depreciated notes. Judgment for plaintiff. Appeal.

Sharkey, C. J. 1. The law requires the sheriff to collect in money, and bank note can only be received by express authority of defendant. 2. The receipt was not conclusive. Judgment reversed.

Cited: 11 Miss. 284; 19 id. 300; 23 id. 160; 43 id. 298.

TRIBLE v BANK OF GRENADA (1844) 10 Miss. 523.

On a note. The note, payable to plaintiff bank, had been given to M for a valuable consideration to be discounted at plaintiff. The note was not discounted,

but was held by M, who brought the action in the name of plaintiff against the maker. The defendants set off unpaid notes of plaintiff. Judgment for plaintiff. Error.

Per curiam. It is competent for the real holder of a note made payable to a bank, to bring his suit in the name of the bank, and resist an offset in the notes of the bank by proof that the note never belonged to the bank. Judgment affirmed.

RIGGS v DYCHE (1844) 10 Miss. 606.

Assumpsit on a draft. W, the defendant's intestate, was indebted to the M Bank, and gave in settlement a draft on H, who accepted for the accommodation of W. The draft was not paid at maturity, but a few months later W presented to the M Bank, to pay the draft, bills of the M Bank. The M Bank had sent the draft to Alabama to be collected from H, and refused to accept the bills. F, a creditor of the bank, attached the draft in garnishee proceedings. It was sold at public sale to the plaintiff, to satisfy the judgment of F against the bank. Notice of the sale had been published in Alabama. There was no evidence that defendant had actual notice. Defendant offered to pay the draft to plaintiff with the issues of the M Bank. The Act of 1842, in effect when plaintiff acquired title to the draft, provided that judgments in all garnishment proceedings against debtors to banks should be payable in the issues of the bank. Plaintiff contended that he had a bona fide claim to the full amount of the draft, which was not subject to any setoffs. Judgment for defendant. Appeal.

Per curiam. 1. The defendant's right of setoff could not be cut off, except by actual notice of the proceedings. 2. The relative situation of the parties is precisely the same as though the defendants had been called on by a garnishee summons. Judgment affirmed.

WOOD v ROBINSON (1844) 11 Miss. 271.

To have a judgment marked satisfied. The defendant had recovered a judgment against plaintiff. Several executions had been issued at different periods. The sheriff had credited on the execution at various times different sums until the whole appeared paid. Part of the sums credited were in bank bills below par. The plaintiff had instructed that payment be received in specie only. At the time the sums were credited, the sheriff had no execution in his hands. Judgment for defendant. Error.

Per curiam. 1. The sheriff had no right to receive anything but specie in payment. 2. A sheriff has no authority to receive payments or take property without an operative execution in his hands. Judgment affirmed.

PAYNE v BALDWIN (1844) 11 Miss. 661.

Reversed in 6 How. (U. S.) 332.

BANK OF MISSISSIPPI v WRENN (1844) 11 Miss. 791.

Motion to dismiss for want of service of citation. The original charter of the plaintiff, a bank, expired December 31, 1834. By subsequent legislation, the period of expiration was postponed. The Act of 1841 provided that the corporation should have full power to prosecute to final judgment all suits and actions necessary for the recovery of debts due to it prior to December 31, 1837, and to sue out and continue all necessary legal process to enforce payment, until January 31, 1844, after which this suit was begun.

Thacher, J. It is clear that under the Act of 1841 the corporation ceased to exist on January 31, 1844, for any purpose, and this suit is therefore abated. Judgment accordingly.

Cited: 14 Miss. 527.

PLANTERS BANK v SHARP (1844) 12 Miss. 17.

Reversed in 6 How. (U. S.) 301.

PLANTERS BANK v SHARP (1844) 12 Miss. 75.

Assumpsit on a note. The former cashier of the M Branch of the plaintiff bank testified that the note was given in renewal of another note, on payment by the

defendant of one-fourth of the old note, and the discount at 7 per cent on the renewal; that individual members of the board of directors authorized him to renew in that way; that the calculation was made according to Rowlett's Tables. The teller of the branch bank testified that the note was laid before the board of directors for renewal and passed. There was some evidence that the renewal had not been properly authorized by the board of directors. The court charged: 1, That if they believed usurious interest had been taken upon the discount of the note sued on, or upon the former note, it rendered the contract void; 2, if the cashier discounted the note, the transaction was illegal, and they must find for the defendant; 3, unless the board of directors discounted the note, they must find for the defendants. Judgment for defendants. Error.

Clayton, J. 1. The contract was usurious, but not void, and the bank may recover the principal sum without interest. 2. The plaintiff has control of its branches and if the note was not discounted by a competent number of the directors, it was nevertheless in the power of the plaintiff to ratify the act, and when so ratified, it became obligatory on all parties concerned. Judgment reversed.

Cited: 16 Miss. 179, 183; 51 id. 189.

LAKE v MUNFORD (1845) 12 Miss. 312.

Assumpsit. Plaintiff deposited with defendants, an unincorporated bank, money, receiving a certificate of deposit signed by D as agent for B and C, commissioners appointed by it, and authorized to sign such certificates, and also to terminate the affairs of the bank. At a meeting the members signed the constitution and by-laws, and authorized the issue of 10,000 membership tickets. At a later meeting, the defendants were elected members. Defendants contended that they were not members. Plaintiff proved that tickets for which the certificate was given were issued at the first meeting. One of defendants' witnesses was a partner in the firm. Judgment for plaintiff. Error.

Clayton, J. 1. After the dissolution, neither the commissioners nor their agent had any authority to bind the members of the institution by any new undertaking. 2. The certificate was no evidence against them, unless given for tickets for which they were liable. 3. The partner was a competent witness. Judgment reversed.

Cited: 16 Miss. 129; 18 id. 595; 20 id. 159.

COMMERCIAL BANK OF RODNEY v STATE	} (1845) 12 Miss. 439.
COMMERCIAL BANK OF MANCHESTER v STATE	
STATE v BANK OF PORT GIBSON	
STATE v GRAND GULF BANK	

Quo warranto under the Act of 1843. The information in each of the four cases was filed by the district attorney in the proper district, and process and injunction issued as prescribed in that act. The act provided that every district attorney, on the affidavit of a credible person that any state bank had violated its charter, should file an information in the nature of a quo warranto, and procure an injunction against the collection, by such bank, of its debts; that clerks of circuit courts should issue such injunctions. In each case, an information was filed, based on affidavit, to the effect that each bank had failed to pay its debts in specie, and had violated its charter in other respects. The constitutionality of the act was denied in each case, and on appeal the four cases were argued together. In the first case, the bank moved to quash the injunction. Overruled. Error. In the second case, the bank moved to quash the injunction. Overruled. Appeal. In the third and fourth cases, the defendants moved to quash the proceedings. Motion granted. Appeal.

Thacher, J. 1. The statute is constitutional, and the State had a right to the injunction. 2. The bank charter is a contract within the meaning of the constitution of the United States, but the mode of procedure does not violate that contract. 3. The injunction is not the equity writ of injunction, but a general remedy in a particular class of cases, which is a legitimate use of legislative power. 4. This proceeding is exclusively a civil proceeding. 5. The statute in question is in all respects constitutional. In first case, judgment affirmed. In the other three cases, judgments reversed.

Cited: 14 Miss. 527, 532; 16 id. 70; 21 id. 515, 516, 517, 518.

KING v ELLIOTT (1845) 13 Miss. 428.

Garnishment. The plaintiffs obtained a judgment against the M Co. They thereafter filed an affidavit that it had no visible property on which a levy could be made, and sued out process of garnishment against the defendant. Defendant answered that the M Co. was an incorporated state bank; that he was one of the subscribers to the stock, and on his subscription he owed the company instalments and interest amounting to \$1,160; that he was entitled to pay the same in the bank notes of the company. The capital of the bank was required to be paid in specie, by the acts of 1840 and 1842. Judgment for defendant. Error.

Sharkey, C. J. The payment of capital stock in specie is an essential requisite to the existence of a bank, and the defendant therefore has not the right to pay the plaintiffs in the notes of the bank. Judgment reversed.

Cited: 21 Miss. 562; 23 id. 90.

HAYNE v BEAUCHAMP (1846) 13 Miss. 515.

Garnishment. The plaintiffs having recovered a judgment against the M Co., and being unable to realize the money by execution, issued garnishment against various debtors of the M Co., one of whom was the defendant, who answered denying all indebtedness to the company, and averring that, when the books were opened for a branch bank at R, he entered his name for stock, for which he gave a note for \$1,000, which was required of him as 10 per cent of his subscription; that the note was unpaid and in the hands of the M Co.; that the note was given in violation of the charter, which required one-tenth to be paid in specie; that he had no certificate that he was a stockholder; that he had never been legally a stockholder, because of the R Branch never having had a legal existence. The defendant proved that the note was given in lieu of the 10 per cent; and that it was with the defendant's consent discounted by the parent bank of the M Co., for the purpose of applying it to the purchase of stock. The court charged that if 10 per cent was not paid in cash, either in specie or bank notes, then it was an evasion of the terms of the charter and was not a legal subscription; and that if the agreement was that the proceeds of the note should be checked out and applied to the payment of stock at the branch, then the whole contract was in violation of the charter. Judgment for defendant. Error.

Sharkey, C. J. 1. Payment of 10 per cent under the charter was a condition precedent, and without its performance the subscriber acquired no rights and incurred no obligations. 2. If by the defendant's consent the note was discounted and the proceeds applied to payment for stock, he is a stockholder to that amount, not by virtue of his original subscription, but by purchase, and he is bound to pay the note. 3. A bank may loan money, which may be returned to it as a contribution to the capital stock, if the transaction is bona fide. Judgment reversed.

Cited: 21 Miss. 561; 23 id. 91; 25 id. 533; 32 id. 368; 53 id. 661.

PAYNE v COMMERCIAL BANK OF NATCHEZ (1846) 14 Miss. 24.

Assumpsit on a note, against indorsers. Plea: That the plaintiff, a bank, had discharged defendants from liability by giving time to the maker. The defendants proved that, after this note matured, the maker gave the plaintiff a note for a larger amount, payable three days after date, which was to cover all his indebtedness to plaintiff. The plaintiff proved that the maker of the note offered to confess judgment for the full amount due the plaintiff, and to bind thereby all his property in Louisiana. The cashier agreed that when such judgment was confessed, so as to bind all his property, the paper of the maker should be delivered to him. The maker then sold all his property and confessed judgment. Prior to this the maker of the note had given bank stock as security for his indebtedness to the bank. This stock was sold with the other property of the maker, but the bank did not receive the proceeds. Defendants contended, but did not plead, that the sale of the stock was a payment. Judgment for plaintiff. Error.

Sharkey, C. J. 1. The acts of a cashier were binding, as they were performed in discharge of his ordinary duties. 2. The indorser was not discharged, for there was not a positive and binding agreement, sufficient to bind the creditor and prevent him from asserting any remedy. 3. As to the bank stock sold under execution, defendants should have pleaded it as payment of so much. Judgment affirmed.

Cited: 18 Miss. 344; 20 id. 537; 25 id. 155; 34 id. 673; 48 id. 89; 52 id. 260, 637, 638.

DAVIS v PRYOR (1846) 14 Miss. 114.

Mandamus. Under several executions against the M Bank, the defendant, a sheriff, sold land belonging to the bank to plaintiff for \$1,000, which was more than the amount of the executions. The plaintiff tendered to the defendant the amount of the executions in silver money, and the remainder of the purchase price in the notes of the bank, which the defendant refused to receive. The defendant resold the property. Application was then made for a mandamus to compel defendant to make title to the plaintiff. Motion overruled. Error.

Thacher, J. As the executions could only be satisfied by specie funds, the defendant was compelled to sell the property for such funds. Judgment affirmed. Cited: 72 Miss. 633.

SMITH v MISSISSIPPI AND ALABAMA R. R. CO. (1846) 14 Miss. 179.

Assumpsit on a note. Pleas: Non-assumpsit and payment, with notice of setoff. The note was made payable to the plaintiff, a railroad and banking company, which sued for the use of B, to whom it had been assigned. The defendants proved that they had delivered to their counsel a receipt for two bales of cotton, signed by the plaintiff's president, showing a credit on the books of the plaintiff for the value thereof. Their counsel testified that the receipt had been in his possession, and that he had lost it. The defendants' request that proof of the contents of the receipt might be given, and that the bank was not legally incorporated, was refused. Judgment for plaintiff. Error.

Clayton, J. 1. The question as to the proper organization of the bank, and as to fraud in the taking of its stock, cannot be investigated in this mode of proceeding. 2. The defendants, having proved the loss of the receipt, were entitled to prove its contents, and to prove the delivery of the cotton by other testimony. Judgment reversed.

Cited: 50 Miss. 728; 51 id. 598; 59 id. 172.

STATE v COMMERCIAL BANK (1846) 14 Miss. 218.

Quo warranto. Plea: Defendant's charter. Replications, averring that the defendant had fraudulently accepted in payment of stock the notes of non-specie-paying banks. Rejoinder: That after the notes had been taken in payment of the stock, the legislature, knowing the facts, passed a law continuing the bank and waiving the forfeiture. The court refused to charge that, if it was agreed between the cashier and W that W should procure notes of the defendant, which was a non-specie-paying bank, that the cashier should receive the notes and pay their amount in specie, and immediately receive back the specie, without W's being at liberty to take the same from the bank, the finding must be for the plaintiff. After judgment was rendered, plaintiff moved for judgment non obstante veredicto, on the admission in the rejoinder that the defendant had forfeited its charter. Motion overruled. Judgment for defendant. Error.

Sharkey, C. J. 1. The motion for judgment non obstante veredicto must precede the entry of judgment. 2. There being evidence that the cashier's authority was limited, the charge was properly refused. Judgment affirmed.

Cited: 14 Miss. 39; 31 id. 62.

HENDERSON v MISSISSIPPI UNION BANK (1846) 14 Miss. 314.

Assumpsit on a note. Plea: Nul tiel corporation. The plaintiff read to the jury the note, and the act of incorporation of the plaintiff, and proved a user under the act. Demurrer to the evidence. Overruled. Judgment for plaintiff. Error.

Thacher, J. The demurrer was properly overruled, since the evidence offered was proper and sufficient on behalf of the plaintiff, under the state of the pleadings. Judgment affirmed.

COMMERCIAL BANK v CHISHOLM (1846) 14 Miss. 457.

On a note. Plea: Payment. The plaintiff offered in evidence the note, on which was the indorsement "received on this note \$6,711.39, it being proceeds of 200 bales of cotton sold on account thereof." The defendants then offered to show the market price of cotton in Liverpool during the period in which the cotton in question was sold; also, the average weight of bales of cotton. The plaintiff offered the account of sales rendered by the agents of the plaintiff, by whom the

cotton had been sold. The defendant offered evidence to prove the rate of sterling exchange on New Orleans. Judgment for defendants.

Clayton, J. 1. The evidence relating to the quality, average price and weight of bales of cotton was free from objection. 2. The account of sales in itself was not evidence. 3. There being no proof as to the kind of money loaned, evidence in regard to the value of the notes of the plaintiff bank was erroneously admitted. Judgment reversed.

HARRISON v CROWDER (1846) 14 Miss. 464.

On a note against maker. The note was made by B and indorsed to plaintiff by H, payable at the C Bank. The note was presented by the notary of the bank, who had no recollection of the time when presentation was made, but it was before 2 p. m., the closing hour. The court charged, that if the note was in the bank before closing hour, or some reasonable time before its doors were closed, or at the close of business hours, and a demand was made by the notary, the verdict must be for the plaintiff. By a custom of the bank, debtors had until expiration of banking hours to pay. Judgment for plaintiff. Error.

Sharkey, C. J. 1. By making a note payable at a particular bank, the parties are presumed to consent to be governed by such customs as may prevail in the bank. 2. A constructive demand at a bank must be made at the close of the business hours, for the maker has until that time to deposit money to pay the note. Judgment reversed.

Cited: 21 Miss. 240.

NEVITT v BANK OF PORT GIBSON (1846) 14 Miss. 513.

On motion to revive suit. The defendant on May 15, 1841, obtained a judgment at law against the plaintiff, who filed his bill to enjoin it on May 1, 1844. On the final hearing, the injunction was dissolved. Appeal. While the appeal was pending, judgment of forfeiture of franchise was rendered therein, under the Act of 1843, and P and M were appointed trustees. The Act of 1843 provided that when a bank charter was forfeited, its debtors should not be released, but that trustees should be appointed to collect the debts and apply the proceeds to pay the bank debts. Thereafter these trustees moved that this case be revived in their names, as representatives of defendant. Plaintiff contended that the act was unconstitutional, as impairing the obligation of the contracts of the bank with its debtors; that the law was defective in not stating in what name suits for collecting the debts should be brought; that the suit could not be revived in the name of the trustees; and that the law was imperfect in providing that the assets should be distributed as thereafter directed, and then failing to make such direction.

Clayton, J. 1. The act did not impair the contracts between the defendant and its debtors, and they have no right to complain. 2. The suits should be in the name of the trustees, whether so stated in the act or not. 3. The act made the assets of the bank a trust fund, and made it the trustees' duty to collect the debts, and such a trust is enforceable in equity. Motion sustained.

Cited: 16 Miss. 49, 62, 63, 65, 67, 69, 71, 173; 17 id. 429; 18 id. 507; 20 id. 524; 21 id. 160, 518, 520; 24 id. 198, 324, 328, 333, 334; 40 id. 35; 41 id. 131.

COMMERCIAL BANK v STATE (1846) 14 Miss. 599.

Quo warranto. Plea: Defendant's charter. Replication: That defendant had failed to resume specie payments, as required by the Act of February 21, 1840. The charter provided a penalty for refusal to pay its notes in specie, and that the capital stock should be paid in notes of specie-paying banks, or in gold or silver. The petitioner's affidavit alleged that the defendant was an incorporated bank. The bank demurred. Overruled. Judgment of forfeiture. Appeal.

Sharkey, C. J. Although the charter did not in terms require specie payments, such payments were obviously considered a paramount duty, and a refusal to pay in specie was a cause of forfeiture. Judgment affirmed.

Cited: 15 Miss. 177; 20 id. 532; 21 id. 579; 51 id. 605, 622.

PLANTERS BANK v STATE (1846) 14 Miss. 628.

To dismiss a proceeding in the nature of quo warranto. The proceeding was instituted under the Act of 1843, for a violation by the defendant, a bank, of its

charter, and the circuit court declared the charter forfeited. On February 23, 1844, the legislature passed an act providing that if either defendant or M Bank would surrender their charters, the governor would appoint commissioners to terminate their affairs. In this act, no reference was made to the Act of 1843. This motion was made on the ground that the Act of 1844 repealed the Act of 1843.

Clayton, J. The mere fact that the Act of 1844 mentioned the defendant as an existing institution does not repeal the Act of 1843, under which the defendant lost its charter. Motion denied.

Cited: 15 Miss. 178; 16 id. 60, 72; 23 id. 74; 41 id. 745; 49 id. 7.

PLANTERS BANK v STATE (1846) 15 Miss. 163.

Quo warranto, under the Act of 1843. The defendant pleaded the acts of the legislature incorporating it. Replication recited the Act of February 21, 1840, requiring banks to pay specie from and after January 1, 1841, and averred that the defendant had put notes in circulation, which it had refused to redeem in specie upon demand. The defendant contended that the banks were trustees and not subject to common-law rules as to corporation. Motion to dissolve the injunction. Overruled. Judgment for plaintiff. Appeal.

Clayton, J. The failure to comply with a material condition of the charter was a ground of forfeiture, and of this character is the failure of a bank to redeem its notes in specie. Judgment affirmed.

Cited: 16 Miss. 72.

COMMERCIAL BANK v THOMPSON (1846) 15 Miss. 443.

On promissory note. Plea: Non-assumpsit. The note was made by the defendant payable to the plaintiff bank, which obtained judgment thereon in the name of P, its assignee. Execution issued, a levy was made, a forthcoming bond given and forfeited. The defendants then paid into court the amount of the execution with interest, in the notes of the plaintiff, and moved to have the execution satisfied. By statute, banks were prohibited from assigning any evidence of debt, and required to receive their notes in payment of debts; and an objection for failure to do so was taken by a plea in abatement. Motion sustained. Error.

Sharkey, C. J. The act prohibiting the assigning of notes by banks, and requiring them to receive their notes in payment of debts, was intended for the benefit of the makers of the notes; but, by failing to plead in abatement, the defendant ratified the assignment. Judgment sustaining motion reversed.

AGRICULTURAL BANK v COMMERCIAL BANK (1846) 15 Miss. 592.

Action for negligence in failing to properly demand payment and give notice of protest of a note sent by plaintiff, a bank, to defendant, a bank, for collection. Defendant delivered the note in proper time to a notary for presentation. The notary presented the note for payment at the bank, when payable, before noon on the last day of grace, and payment being refused, protested it after 2 p. m., when the bank closed. There was no evidence that the notary was intoxicated on that day, though he frequently was in such condition. Judgment for defendant. Error.

Sharkey, C. J. The plaintiff should have established the negligence more definitely by proof that the notary was drunk at the time, or that his habits were so universally intemperate as to disqualify him for the discharge of an official act. Judgment affirmed.

Cited: 34 Miss. 52; 61 id. 117.

ROBSON v BENTON & MANCHESTER R. & B. CO. (1846) 15 Miss. 724.

Bill by bank creditors to restrain bank debtors from paying their debts to the bank. The complainants had recovered judgment against an insolvent bank, and filed this bill to subject a judgment, which the bank had recovered against the defendants, to the payment of their judgment. The defendants offered to make payment in the notes of the bank, which, at the time this bill was filed, were worth 56 cents on the dollar. The plaintiff claimed payment in specie. By the Act of 1840, all banks in the state were compelled to receive their own notes in payment of bills receivable, and in payment of other claims, at their nominal value. The Act of February 25, 1842, extended the right to pay in bills of the bank to debtors

and garnishees. This proceeding was begun in May, 1840, and the decree was rendered on February 28, 1842. Decree, that the defendants be permitted to pay in notes of the bank; that their value, at the time of this decree, be regarded as a discharge at par. Appeal.

Sharkey, C. J. 1. The Act of 1840 does not embrace any payments except such as were to be made to the banks. 2. The decree should be rendered according to the rights of the parties at the beginning of the suit, and the Act of 1842 does not apply. 3. Defendants must pay complainants 56 cents on every dollar they owed the bank, and thus discharge each dollar of debt to the bank. Decree reversed.

Cited: 26 Miss. 612; 45 id. 244.

COMMERCIAL BANK v CHAMBERS (1847) 16 Miss. 9.

Motion to revive an action in the name of the trustee of plaintiff bank, after the forfeiture of its charter. In a suit on a promissory note made by the defendants, judgment was rendered for the defendants in 1842. The plaintiff sued out a writ of error, pending which the charter of the plaintiff was declared forfeited. The defendants contended that the right of the trustee to revive under the Act of 1843 was revoked by the provisions of the Act of 1846, which required the trustee to sell all the property of the defunct bank. The trustee contended that the Act of 1846 was invalid, in that it impaired the obligation of contract.

Sharkey, C. J. 1. Trustees appointed under the Act of 1843 were entitled to have suits revived in their names. 2. That portion of the Act of 1846, which relates to the sale of property of banks, cannot operate as to banks whose charters had been forfeited and trustees appointed prior to the passage of the last act. Motion sustained.

GRAND GULF BANK v ARCHER (1847) 16 Miss. 151.

Assumpsit on a note. Plea: That the note was given on an illegal agreement that the defendants should deliver to the plaintiff cotton to be sent to a foreign market to be sold on account of defendants, at their expense, and after payment of all charges the plaintiff should, in addition to the 7 per cent taken at the time of discount, receive all the profits which could be made by the sale of the domestic exchange between Grand Gulf and New York, which exchange was worth 10 per cent premium. The acts of 1805, 1817, 1818, and 1822 provided for the forfeiture of the interest only, in usurious loan contracts where the rate of interest was reduced to writing. The courts charged the jury to find for the plaintiff, unless there was a shift or device resorted to by the parties to evade the law, and by which a greater rate than 7 per cent was allowed. Judgment for defendant. Error.

Clayton, J. 1. Breach of the charter is no defense to this action, as that question can only be raised in a direct proceeding by the state. 2. If the plaintiff was to receive, without putting any part of the principal to hazard, more than allowed by its charter, then it could recover only the principal sum lent. Judgment reversed.

Cited: 16 Miss. 541, 542, 551; 27 id. 269.

BONDURANT v COMMERCIAL BANK OF NATCHEZ (1847) 16 Miss. 533.

Assumpsit on a note. Plea: That the plaintiff, a bank, was indebted to the defendants for 100 bales of cotton, out of which they were willing to allow the full amount claimed. The money was loaned on the cotton, which was shipped to Liverpool. A credit on the note was the proceeds of that cotton. The loan was made in notes of other banks, which circulated as money, but which were about 20 per cent below par at the time. Judgment for plaintiff. Error.

Clayton, J. Every attempt by a bank to put upon a borrower bank bills not its own, below par at the time and place, is usurious, unless the bank by its contract and loan engages to make the notes as good as cash, and the use which a borrower makes of the money is immaterial. No more than the specie value of the notes at the time they were lent can be recovered, without interest. Judgment reversed.

Cited: 16 Miss. 551; 20 id. 290; 27 id. 269, 820, 821; 28 id. 181.

COOK v BANK OF LEXINGTON (1847) 16 Miss. 543.

Assumpsit on a note. Defense: Usury, in that the loan was made in notes of another bank, which notes were proved to have been worth 20 per cent below specie par. The notes were paid out on the same day by the defendant, in satisfaction of a debt at face value. Judgment for plaintiff for full amount, with interest. Error.

Clayton, J. If the notes loaned were below par, the contract was usurious and the plaintiff can recover no more than the specie value of the notes, at the time they were lent, without interest. Judgment reversed.

Cited: 20 Miss. 288; 27 id. 820; 28 id. 181.

ARTHUR v COMMERCIAL AND RAILROAD BANK (1848) 17 Miss. 394.

Bill to restrain the collection of judgment at law. The bill alleged that the defendant, a railroad bank, had assigned all its property to complainants for the benefit of creditors; that the complainants accepted the trust and had provided funds to complete work which was unfinished at the time of the assignment; that the other defendants had obtained judgments against the bank, and had levied on property belonging to it before the assignment. The deed of assignment provided that the trust was to continue until the profits were sufficient to pay the debts, and gave the assignees no power of sale. It provided for a preference to be given to the person who should advance the funds to complete the unfinished work. Demurrer. Overruled. Injunction granted. Appeal.

Clayton, J. 1. A bank may make an assignment for the payment of its debts, and may prefer certain creditors. 2. The sale or assignment of the road does not carry the franchise, which cannot be assigned without the state's consent, and does not work a dissolution of the corporation. 3. The assignment tends to lock up the estate indefinitely, and thereby hinder and delay creditors, and is therefore void. Decree reversed.

BESANCON v SHIRLEY (1848) 17 Miss. 457.

On promissory note against makers and indorsers jointly. The instrument sued on contains an unconditional promise to pay a certain sum in state bank notes, at a designated day, at any bank in the state. The plaintiff was a bona fide holder of the note, which was duly protested for non-payment. The state banks had suspended payments. Defense: That the instrument was not a promissory note. Demurrers. Sustained. Judgment for plaintiff. Error.

Sharkey, J. 1. All written promises to pay money, or other specific thing, are negotiable by assignment, and alike an evidence of indebtedness. 2. A general judgment sustaining a demurrer extends and applies only to the pleadings demurred to. 3. The holder is not required to notify the makers in what particular bank he will place the note, and if payment is demanded at any bank in the state, even a branch bank, it is sufficient. Judgment reversed.

Cited: 23 Miss. 235.

KILLINGSWORTH v COMMERCIAL BANK (1848) 17 Miss. 628.

Assumpsit on promissory note. The note was given to plaintiff, a bank, as renewal in part of another note, and was made payable 12 months after date for the amount of the balance due on the old note, including interest for 12 months. The note had more than 12 months to run from its date, but less than that time after it was discounted. The rate of discount reserved was 8 per cent. The plaintiff was entitled under its charter to charge 8 per cent on loans having more than 12 months to run. The court charged that after a note due to the plaintiff passed maturity, it should bear 8 per cent interest, and it was lawful to renew such a note at that rate. Judgment for plaintiff. Error.

Per curiam. The renewal note was a new contract, and could not entitle the plaintiff to 8 per cent, unless it had more than 12 months to run, and the discount must be regulated according to the time it had to run from the time of discount. Judgment reversed.

GRAND GULF RAILROAD & BANKING CO. v STATE (1848) 18 Miss. 428.

Quo warranto under the Act of 1843. The defendant pleaded its charter, and the amendatory Act of 1840, by which the right was reserved to the legislature, on failure of the defendant to redeem its notes in specie, to amend or repeal the char-

ter without a previous finding of the facts by a court. Replication: That before the commencement of this proceeding, the defendant had made an assignment for the benefit of creditors. Rejoinder: Continued use of franchises. Demurrer to rejoinder. Sustained. Judgment of forfeiture, appointing trustees and ordering the defendant to deliver all its property to them. Appeal.

Clayton, J. The assignees under the deed of assignment are entitled to the property of the defendant, and the trustees appointed on judgment of forfeiture can take only what did not pass by the deed of assignment. Judgment reversed.

Cited: 20 Miss. 485, 524; 35 id. 62.

FREEMAN v WINCHESTER (1848) 18 Miss. 577.

Bill to recover a subscription to the capital stock of a bank. The bill alleged that, in a proceeding in chancery against the M Co., a bank, the plaintiff had been appointed receiver with power to take possession of the notes and other evidence of debt due the company, and to sue for and collect all moneys due the company; that the defendant had, in 1837, subscribed for stock of the company, part of which was unpaid. The prayer was for a discovery of the amount due, and that the defendant be decreed to pay the amount found due. Demurrer. Sustained. Appeal.

Sharkey, C. J. The receiver is not authorized to sue in chancery for the collection of a purely legal demand such as defendant's liability on his subscription. Decree affirmed.

ABBOTT v AGRICULTURAL BANK OF MISSISSIPPI (1848) 19 Miss. 405.

Assumpsit on a note made by defendant to plaintiff, a bank, and payable in the notes or issues of the bank. Defendant's offer to prove that the notes or issues of plaintiff bank were, at the time of the maturity of the note, greatly depreciated in value, being below par at the time of the trial, was refused. Judgment for plaintiff. Error.

Per curiam. Where a bank sues on a note payable in its own issues, it is bound to take its own notes in payment even after judgment. Judgment affirmed.

Cited: 40 Miss. 547.

MONTGOMERY v GALBRAITH (1848) 19 Miss. 555.

Detinue. The P Bank made an assignment of all its assets for the benefit of creditors. Thereafter, quo warranto proceedings were instituted under the Act of 1843, and its charter was declared forfeited and trustees appointed. The trustees were the plaintiffs in this action. The defendants were the assignees under the deed of assignment. The notes and bills demanded were in possession of the defendants by virtue of that deed. The plaintiffs contended that assignment was void: 1, Because the Act of 1840 prohibited the transfer by any bank of any note, bill receivable, or other evidence of debt; 2, because the deed empowered the assignees to sell the bank notes of the bank, which was fraudulent in law. Judgment for plaintiff. Appeal.

Clayton, J. 1. The Supreme Court of the United States has declared the prohibitory Act of 1840 unconstitutional. 2. The deed is not fraudulent on its face; and, not being in itself an improper appropriation of the assets, is not fraudulent in law. Judgment reversed.

Cited: 28 Miss. 128, 409.

YOUNG v HUGHES (1849) 20 Miss. 93.

On a note, made by defendant to plaintiff, as commissioner of the sinking fund of the state. By the charter of the P Bank, a portion of the dividend accruing on the stock was directed to constitute a sinking fund, under management of the auditor, president, and cashier of the bank, for redemption of the state bonds, issued to obtain funds to pay for stock subscribed by the state. Later, by statute, the management of this fund was vested in a person called state commissioner, with power to manage the same, and to enforce payment by suit or otherwise. Demurrer. Sustained. Judgment for defendant. Error.

Clayton, J. The terms of the statute are sufficient to convey the legal title, and the state commissioner is fully authorized to sue for and collect the debts due the fund. Judgment reversed.

Cited: 20 Miss. 583; 21 id. 425, 597.

STATE v COMMERCIAL AND RAILROAD BANK (1849) 20 Miss. 276.

Quo warranto under the Act of 1843. The assignees of the bank were made parties to the proceeding. The bank moved to quash, on the ground that it was excepted from the operation of sec. 5 of the Act of 1843, which enacted that "the provisions of this act shall not extend to the funds which legitimately belong to the State of Mississippi, or to the Commercial & R. R. Bank, so as to affect the railroads and their operations." The assignees made a similar motion, setting forth the deeds of assignment, which had been duly recorded. Motions sustained. Appeal.

Thacher, J. 1. The statute does not exempt this corporation from its operation, but merely limits the judgment to forfeiture of its banking franchises, and the motion should have been sustained only so far as the railroad and its operations were concerned. 2. The same principle holds as to the motion made by the assignees. Judgment reversed.

BANK OF THE UNITED STATES v STATE (1849) 20 Miss. 456.

To enjoin the collection of a tax assessment on a loan made by plaintiff, a bank in another state, to the C Bank of Vicksburg, to enable it to complete its road. The Act of 1841, sec. 1, provided that an ad valorem tax of one-fourth of 1 per cent be assessed on all money loaned at interest by individuals, or employed by them in the purchase of notes and bonds. Sec. 2 exempted certain property, but has no reference to money loaned. Plaintiff contended that it did not come within the act, under the term "individuals." Decree for defendant. Error.

Clayton, J. 1. The exceptions contained in the statute show that all property not falling under the exceptions is liable to a tax. 2. The term "individuals" included complainant. 3. The law operated on this loan, although passed after the loan was made. Decree affirmed.

Cited: 43 Miss. 770.

GRAND GULF BANK v WOOD (1849) 20 Miss. 482.

On a note. While the suit was pending, the plaintiff, a railroad and banking company, made a deed of assignment of its effects, including the note. Thereafter, in a proceeding under the Act of 1843, the charter of the plaintiff was declared forfeited, and trustees appointed. Subsequently, the judgment of forfeiture was amended so as to authorize these trustees to take only the property not contained in the assignment. The defendants moved that the suit be abated; and at the same time, the assignees moved that the suit be revived in the name of the trustees, for the use of the assignees. Motion to revive overruled. Motion to abate, sustained. Error.

Thacher, J. The trustees appointed under the judgment of forfeiture took no interest, either legal or beneficial, in the note, and hence were not entitled to be made parties. Judgment affirmed.

Cited: 20 Miss. 526; 21 id. 568; 35 id. 62.

GRAND GULF BANK v JEFFERS (1849) 20 Miss. 486.

On a note made by defendant to plaintiff, a bank, brought in plaintiff's name for the use of its assignees. Thereafter judgment of ouster was rendered against plaintiff, and the assignees of the bank asked that the suit might be revived in the name of the trustees, at the time judgment was rendered against it, and that the suit be prosecuted for their benefit. Defendant asked that the suit be abated, on the ground that the charter had been forfeited. Judgment for defendant. Error.

Clayton, J. The dissolution of the corporation did not cause the suit to abate. Judgment reversed.

Cited: 35 Miss. 62.

BACON v COHEA (1849) 20 Miss. 516.

On a note against makers. The note was made payable to the P Bank, and came into possession of the plaintiffs under a deed of assignment, without indorsement. After the assignment, a judgment of forfeiture was rendered against the bank under the Act of 1843. Demurrer, on the ground of want of jurisdiction. Sustained. Appeal.

Sharkey, C. J. 1. The transfer of a note, not payable to order or bearer, passes but an equity, whether indorsed or not. 2. Suit at law could not have been brought in the name of the dissolved corporation, nor in the name of the trustees

appointed under the judgment of forfeiture, and there was, therefore, no remedy at law. 3. A court of chancery is the only court in which the right can be asserted. Decree reversed.

Cited: 21 Miss. 46, 568; 26 id. 457; 28 id. 127; 35 id. 176; 44 id. 93.

ROBERTSON v HOY (1849) 20 Miss. 566.

On a note against makers. The suit was commenced by the C Bank while quo warranto proceedings, under the Act of 1843, were pending, and after issue of injunction, but before judgment of forfeiture was entered. After entry of that judgment, the trustee thereunder moved to revive this suit in his name. The defendants moved to dismiss, on the ground that the bank was enjoined from the collection of its debts at the time suit was instituted. Motion sustained. Error.

Sharkey, C. J. An injunction operates, not upon a cause of action, but as a restraint upon the person, and the corrective is not by dismissing the suit at law, but by a proceeding to punish for contempt. Judgment reversed.

Cited: 21 Miss. 515, 521.

PACK v THOMAS (1849) 21 Miss. 11.

On a check drawn by defendant to plaintiff's order on Branch of the C Bank. At the time, defendant had no funds in the bank, except that he had deposited a sufficient sum in the depreciated notes of the B Bank. The bank informed defendant that it received such notes on deposit only, and that the bank would pay out the same funds as a kind of special deposit, and would not pay cash. Defendant made effort to prove that plaintiff had agreed to take depreciated notes of the B Bank in payment of the check. The court refused to charge that plaintiff could recover if defendant, when he drew the check, only had on deposit the bank notes, and he knew that the bank would not pay out cash on them. The court charged that, if defendant had reasonable grounds for believing the check would be paid, he was entitled to notice of dishonor; that, if defendant was injured by lack of notice, plaintiff could not recover; and that, if the bank notes were deposited with plaintiff's authority, and he took the check on the faith of them, defendant was entitled to notice of dishonor. Judgment for defendant. Error.

Sharkey, C. J. 1. The operation of an instrument cannot be varied by showing that a different intent ever existed at the time it was made. 2. A check for cash cannot be paid in depreciated bank notes, and the instruction should therefore have been given. 3. The defendant, having shown no injury, was not entitled to notice of dishonor. 4. At the most, defendant would only be discharged to the extent of the actual injury he sustained. Judgment reversed.

DEAN v YOUNG (1849) 21 Miss. 118.

On a note made by H to plaintiff, sinking fund commissioners, constituted of the president and cashier of the P Bank. R, cashier of the branch bank, received a deposit from H of depreciated Union Bank notes, in payment of the note, for which R gave a receipt as cashier. The parent bank refused the payment. R was a special agent to collect debts due the fund. Debtors often made payments at the branch bank and, for the sake of convenience, requested R to inform the parent bank and have the credit properly applied. H died, and the action was brought against defendant, his executor. Plaintiff contended that R was an agent authorized to receive payment, and competent to testify. Judgment for plaintiff. Error.

Clayton, J. 1. The agent was a competent witness to testify to facts out of the usual and ordinary course of business, or to deny or contradict the effect of those acts which he has done as agent. 2. The cashier was not authorized to receive such a payment. Judgment affirmed.

GOODLOE v GODLEY (1849) 21 Miss. 233.

On a note by indorsee against indorser. On a note payable at the Branch Bank of Alabama. It was presented; payment was refused, and it was protested. Plaintiff was ignorant of the indorser's residence at the time of the protest. The notary sent notices of protest to the place where note was dated, to the maker, and first indorser, from information received from the cashier and other officers of the bank. The court charged that if the holder of the note was ignorant of the residence of the indorser at the time of protest, and could not ascertain it after

diligent inquiry, notice sent to place where note was dated was sufficient. The court refused to charge: 1, That plaintiffs cannot avail themselves of ignorance of defendant's residence, if the bank, holding the note for collection, through any of its officers, had knowledge of such residence; 2, that it is not sufficient to charge the indorser in this case, that inquiries were only made where the note was payable; and proof of diligent search for the defendant's residence will not support the averment that notice was given the indorser. The demand was made by the notary after banking hours, and the proper bank officer stated that no funds were deposited to meet the note. Judgment for plaintiff. Error.

Clayton, J. 1. The given instruction was proper. 2. The bank was not chargeable with notice of the residence of the indorser of a note held by it for collection, by the knowledge of one of its clerks not intrusted with the duty of collecting. 3. Inquiry at the place where the paper is payable was sufficient to charge the indorser. 4. The evidence in excuse of the notice was admissible and was sufficient. 5. The demand was sufficient. Judgment affirmed.

LEWIS v ROBERTSON (1850) 21 Miss. 558.

On a note. The defendant was a stockholder of the bank, having paid the first call on his stock in specie. The bank discounted the note sued on, and with the proceeds the defendant paid the second call. Thereafter a judgment of forfeiture was rendered against the bank, and the plaintiff was appointed trustee. The defendant pleaded forfeiture, alleging that the note was the property of the bank at the time of the forfeiture. Demurrer. Sustained. Defendant contended that the note was void because given in payment of stock, and that the forfeiture of the charter prevented defendant from obtaining the stock, which had not been delivered to him. Judgment for plaintiff. Error.

Clayton, J. 1. The first call on the stock having been paid in specie, the subscription was valid, and the defendant became bound on the note. 2. The dissolution of the bank makes no difference in the result. The trustee succeeds to all the rights of the bank, and the stockholders are bound to pay up all arrears for stock to form a fund for payment of debts. Judgment affirmed.

Cited: 32 Miss. 368.

STATE v COMMERCIAL BANK OF MANCHESTER (1850) 21 Miss. 569.

Quo warranto under the Act of 1843. The defendant pleaded its charter. Three replications were filed, alleging that the defendant had made an assignment of all its property, in trust; and that the assignment was made with intent to violate the law. The rejoinders averred that the defendant was not insolvent; that it had continued to pay specie on all its demands; that nearly all its debts were paid before the filing of the information herein; that the assignment was made pending a quo warranto proceeding, to prevent the extinguishment of its assets in case judgment was rendered in its favor. Demurrer. Overruled. Judgment for defendant. Appeal.

Clayton, J. As the demurrer admits that the defendant is not insolvent, an assignment made during the pendency of a quo warranto, to prevent the extinction of its assets in event of judgment of forfeiture, is not sufficient cause of forfeiture in this proceeding. Judgment affirmed.

COMMERCIAL BANK OF MANCHESTER v BONNER (1850) 21 Miss. 649.

On a note. The defendant and D were sureties on a note of B, on which the plaintiff, a bank, had brought suit. B, being insolvent, the defendant, and D agreed to divide the debt between them, each to give his note to the plaintiff for his half. The notes were made and left at the plaintiff, and the suit on the original note was dismissed some months thereafter. In the meantime, the defendant applied to one of the plaintiff's directors for a return of his note. The agreement was not entered upon the minutes of the board until a subsequent date. The court refused to charge: 1, That if any demand was made by the defendant, unless it was made of some legally authorized agent of the bank, it was of no avail; 2, that a bank can receive notes and agree to propositions at the board, without an entry upon the records; but the same may be entered subsequently, and if any agreement to a former proposition, it will relate back to the time of receiving the original proposition. Judgment for defendant. Error.

Clayton, J. 1. The defendant could not withdraw the note, unless he put the

plaintiff in the situation it previously occupied in regard to the former suit. 2. The charges requested state the law correctly, and should have been granted. Judgment reversed.

PAYNE v BULLARD (1851) 23 Miss. 88.

To enforce payment of stock subscription by a creditor of the bank. In 1838, the defendant subscribed for 40 shares of the stock, 20 to be paid for in land, and 20 in money. He made the first payment of 10 per cent. While his holdings were in this shape, the bank became insolvent. The plaintiff recovered a judgment against the bank on its notes, and on return of execution nulla bona, filed this bill. The defense was: 1, Adequate remedy at law by the process of garnishment; 2, Statute of Limitations; 3, that the defendant was the owner of but two shares, payable in money, and that they were fully paid. Decree for plaintiff. Appeal.

Clayton, J. 1. In cases where equity originally possessed jurisdiction, such jurisdiction is not taken away by a statute conferring jurisdiction on a court of law. 2. Stock subscribed in a bank is in the nature of a continuing, subsisting trust, to which the Statute of Limitations has no application. 3. It was incumbent on defendant to show affirmatively that the reduction in number of his shares, paid for in money, was made before the liability of the bank accrued on the notes, and this he has not done. Decree affirmed.

CHAMBLISS v ROBERTSON (1852) 23 Miss. 302.

Assumpsit on promissory note, payable to the C Bank, seven months after date. The plaintiff was trustee of the bank, appointed on forfeiture of charter. Interest at 8 per cent was calculated on the note from maturity to time of judgment. The defendant contended that the clause in the bank's charter, "The corporation shall have power to make discounts on notes having less than 12 months to run, at the rate of 7 per cent per annum," limited the interest which the bank could charge to 7 per cent. Judgment for plaintiff. Error.

Fisher, J. 1. The clause referred to in the charter is not a rule of interest, but only applies to discount on notes having less than a year to run. 2. The makers were liable to pay the rate of interest fixed by the lex loci, from the time the debt became due. Judgment affirmed.

COULTER v ROBERTSON (1852) 24 Miss. 278.

On a note payable to the C Bank. The charter of the bank was forfeited and plaintiff was appointed a trustee, under the Act of 1843, which provided that such trustee "shall sue for and collect all debts due such bank, and to sell all property owned by such bank, the proceeds to be applied to the payment of the debts of the bank." The defendant pleaded that the trustee had collected, of the debts and effects, sufficient money to pay all debts of the bank, wherewith he had paid the same, and that he did not have title to sue. Demurrer. Sustained. Judgment for plaintiff. Error.

Smith, C. J. 1. On the dissolution of a banking corporation, the debts are extinguished from necessity. 2. Stockholders, not being creditors, are not included in the act. 3. A trustee never takes a greater estate than is required for the purpose of the trust, which was ended by the payment of the debts. Judgment reversed.

Cited: 35 Miss. 115; 56 id. 173, 174.

O'DONNELL v BAILEY (1852) 24 Miss. 386.

Injunction to restrain collection of tax. The town of Y levied a tax on the capital stock of the C Bank. This bill for injunction was brought by plaintiff, as assignee of the bank, against the president of the council of the town, alleging inability to levy such tax. The act of incorporation gave the town the right to collect taxes at a given rate on taxable property, real or personal, situated within the town. The capital stock of the bank was exempt from taxation for one year, after which time the legislature might, by the terms of the charter, impose a tax for state purposes. Decree for injunction. Error.

Smith, C. J. 1. The charter of the bank is a contract between the state and the stockholders, and will be protected. 2. The only tax, therefore, that can be imposed on the bank is for state purposes. The taxing power cannot be delegated

to a municipal corporation. 3. The state cannot authorize a town to collect a tax which the town itself could not levy. 4. Moreover, the legislature did not so intend, because the town was incorporated subsequent to the bank and while its stock was still exempt. Decree affirmed.

Cited: 43 Miss. 770.

BAILEY v FUQUA (1852) 24 Miss. 497.

Injunction to restrain a sale for taxes. The C Bank paid a tax of one-fourth of 1 per cent on 60 per cent of its entire capital stock, including its real and personal property. In 1847, Y County sought to recover alleged arrears on 40 per cent of its capital stock, on the ground that it was taxable at its face value, and was about to sell the bank's property to collect the same. The bank obtained an injunction restraining the sale. Injunction dissolved. Appeal.

Yerger, J. The intent of the legislature in taxing bank stock was to levy an "ad valorem" tax, or a tax on the value of the stock, and nothing more. Neither at common law nor by statute has the state a lien on personal property for the collection of taxes. But the bank cannot recover taxes heretofore paid on its personal property. Decree reversed.

Cited: 43 Miss. 770.

BINGAMAN v ROBERTSON (1853) 25 Miss. 390.

On promissory note against makers. The note was executed to the C Bank. Prior to the commencement of this suit, the charter of the bank was declared forfeited and the plaintiff was appointed trustee, under the Act of 1843. The defendants pleaded in bar, that an order of sale, embracing the note sued on, had been procured by the district attorney, directing the plaintiff, as trustee, to sell the assets of the bank. Judgment for plaintiff. Error.

Yerger, J. 1. The legal title to all the property of the bank rested in the plaintiff, as trustee, and he was empowered to sue for and collect the note in controversy. 2. An order of court commanding him to sell is not a prohibition to sue. Judgment affirmed.

HOLT v BACON (1853) 25 Miss. 567.

Bill to enforce collection of a judgment at law. The plaintiffs alleged that the P Bank had recovered a judgment against the defendants; that the judgment had been transferred to the plaintiffs; that thereafter the P Bank had been judicially ousted of its charter, and prayed for a decree for the amount of the judgment. The transfer of the judgment had been made to the plaintiff by a cashier of one of the branches of the bank. Decree for plaintiff. Appeal.

Fisher, J. 1. Prima facie, the cashier of a bank has no authority to transfer judgments; his authority extends only to negotiable instruments. 2. The president and directors were the only persons who could legally make the transfer, and if the cashier acted as their agent in the matter, this fact should have been shown. Decree reversed.

RAILEY v BACON (1853) 26 Miss. 455.

Bill to enforce payment of promissory notes. The bill alleged that the notes were made by the defendants, payable to the order of the P Bank, and were transferred by delivery to the plaintiffs; that the charter of the bank had been declared forfeited; and that, the legal title not having passed to plaintiffs, they had no remedy at law. Demurrer, for want of jurisdiction and want of equity. Overruled. The defendants answered that they were entitled to discharge the notes in issues of the bank, and made tender of the same. Decree for payment in specie. Appeal.

Fisher, J. 1. The bank could have been required to take its issue in payment for these notes, and the equitable assignees, therefore, can recover no more than the assignor could have recovered. 2. The tender of issues of the bank in court was a good offer to perform, and must be accepted. Decree reversed.

WHITNEY v FREELAND (1853) 26 Miss. 481.

Bill to recover possession of the assets of the C Bank. The plaintiff was appointed a trustee of the bank on judgment of forfeiture. The defendants were in possession under a deed of assignment, executed prior to the dissolution of the bank. The plaintiff alleged that the deed of assignment was fraudulent upon its

face. The defendants, in their answer, offered to pay the demands of any other creditors. A majority of the creditors assented to the assignment to defendants. Decree for defendants. Appeal.

Handy, J. 1. The assignment is fraudulent only at the instance of the creditors. 2. If plaintiff, as trustee, on behalf of dissenting creditors, attacks the assignment, the defendants have the right to pay the claims of the dissenting creditors, which they offer to do in their answer. Decree affirmed.

KNOX v BANK OF UNITED STATES (1854) 27 Miss. 65.

To foreclose a mortgage. Plaintiff, a bank, incorporated under Pennsylvania laws, whose charter prohibited it from charging interest exceeding the rate of 6 per cent, made a contract in another state charging a greater rate of interest. No notice to take the account was given. Decree for plaintiff for sale for cash. Appeal.

Handy, J. 1. The prohibition was confined to the State of Pennsylvania, and the contracts made in other states were valid under its charter. 2. A sale for cash on a foreclosure, without the consent of the parties appearing on record, is erroneous. 3. No notice was necessary. Judgment reversed.

MAURY v INGRAHAM (1854) 28 Miss. 171.

On promissory notes against maker. The notes were given to the plaintiffs, as assignees of the G Bank, in renewal of a note given to the bank for a loan, made in the notes of the bank, at face value, at a time when the bank had suspended specie payment, and their real value was below par. By the charter, the bank was permitted to lend either its capital paid in, or its notes to twice the amount of the actual capital, and the rate of interest charged on the loan in question was authorized. Judgment for plaintiff. Error.

Fisher, J. The bank's failure to pay specie on its notes, when presented for redemption, does not deprive it of the right to make loans. Judgment affirmed.

ROBERTSON v AGRICULTURAL BANK (1854) 28 Miss. 237.

To prevent the allowance of claims in insolvency. C became insolvent. Before the time had expired for filing claims, a court order extended the time beyond the statutory six months. Notice was not posted, as required by law. After the time set by the order had expired, the defendants filed their claims, which were allowed by the commissioner. Plaintiff, a bank, also a creditor, whose claim had been allowed, filed exceptions. The defendants raised no objection to the regularity of notice. They excepted to the plaintiff's claim, on the ground that the bank's charter had expired. Judgment had been taken against the insolvent in the name of the bank, and revived in the name of the trustee. Decree for the plaintiff. Exceptions.

Handy, J. 1. By their appearance under the notice as claimants, the defendants waived any objection to it on the ground of irregularity. 2. The party, claiming the judgment, was capable in law of asserting it. Decree affirmed.

INGRAHAM v SPEED (1855) 30 Miss. 410.

Ejectment. The G Bank made a loan upon the land in question. Subsequently, an act was passed prohibiting banks from purchasing and holding real estate, with the provision that this should "not prevent any bank from taking mortgages or other liens on land or other property to secure debts already existing." Thereafter, the bank purchased the property at a sheriff's sale, under an execution in its favor. The plaintiff was the bank's assignee, and as such took a sheriff's deed. The defendant's objection to the admission of the sheriff's deed sustained. Judgment for defendant. Error.

Handy, J. The legislature, in saving the right to banks to take mortgages and other liens on property to secure their debts, recognized the right to use and enjoy such securities in any manner allowed under existing laws, and to give to banks the full benefit of them. Judgment reversed.

Cited: 48 Miss. 234.

MANDEVILLE v BRACY (1856) 31 Miss. 460.

Bill to enforce payment of a judgment in favor of P Bank against the defendants. The bill alleged that the complainants, as assignees of the bank, were the equitable holders of the judgment; that, after the assignment, the bank had been ousted of its franchises. The Act of 1840 gave the bank's debtors on bills a right to pay in bank issues. Decree for complainants. Execution issued as at law, and the sheriff returned it satisfied by a payment to him in notes of the bank. The complainants moved to set aside the entry and award a new execution for specie. On hearing of the motion, it was proved that the judgment was recovered upon a note for \$1,000; that the judgment was rendered for \$250, because the notes of the P Bank were shown to be worth at that time 25 cents on the dollar. Motion for execution for specie denied. Appeal.

Fisher, J. 1. Under the Act of 1840, the defendants had the right to pay the judgment in the issues of the bank, and this right is in no manner impaired by the assignment to the complainants. 2. Rendering judgment for one-fourth the amount of the note, on account of the depreciation in the value of the bank's notes, was a gross error, but the complainants' only remedy was by appeal or writ of error from such judgment. Decree affirmed.

STATE v COMMERCIAL BANK OF MANCHESTER (1857) 33 Miss. 474.

Quo warranto. The defendant pleaded its charter. Demurrer. Overruled. Replication: 1, That the defendant was not a body politic and corporate; 2, that it had refused to loan money for periods of 12 months at 7 per cent, but had continually made loans at less than 12 months, at a greater rate; 3, that it had surrendered its charter, and suspended its operations, and sold and transferred so much of its property that it could not resume business; 4, that its circulation had exceeded double its amount of stock paid in; 5 and 6, similar to 3, with more detail; 7, that the defendant had put into circulation a large amount of notes to circulate as money; 8, that for five years the defendant, by design, had neglected to hold the annual election of directors. The defendant took issue on the fourth replication, and demurred to the others. Demurrers sustained. The plaintiff refused to plead over. The charter provided for an annual election, but if "by any casualty, any election should not take place as prescribed, it shall not amount to a forfeiture;" that loans could be made of "at least half the capital at period of not less than 12 months, at 8 per cent," and that the circulation should not exceed double the amount of the capital. Judgment for plaintiff. Appeal.

Fisher, J. 1. By proceeding against the corporation, the state has admitted its existence. 2. Whenever a corporation has confessed that an act was done under the color of authority conferred by its charter, it will not, in a proceeding of this kind, be permitted to deny its authority to act. 3. The third, fifth, and sixth replication are bad for duplicity, since two of the facts, if well pleaded, would each constitute a ground of forfeiture. The seventh replication is defective for failing to allege that the bank had put in circulation its issue to more than double the amount of paid in stock. 4. The failure to hold an election may not, of itself, be a forfeiture; ut it may be a cause of forfeiture. Not having held an election for five years, the presumption is that the omission arose from design not to hold one. Judgment reversed.

Cited: 34 Miss. 697.

McINTYRE v INGRAHAM (1858) 35 Miss. 25.

Bill against makers of a promissory note. The note was transferred by assignment by the G Bank to the plaintiff, in a deed of trust conveying all its property. The bank's charter was forfeited. Plea: That the note was assigned in violation of a statute. Overruled. The statute made it unlawful for any bank to transfer any note or other evidence of debt, and that in such event the action should abate on plea. Sec. 1 of the bank's charter gave it the right to purchase and possess personal estate of any kind, and to sell and dispose of the same. There was no provision for assigning promissory notes. Plea in abatement. Overruled. Error.

Handy, J. 1. The charter gave the bank, neither expressly nor by implication, power to assign its promissory notes. 2. The judgment of the Supreme Court of the United States, pronouncing a state statute unconstitutional, as impairing the obligation of a particular contract, will be limited to and conclusive on the sole

question of the effect and character of the statute presented for consideration. Decree reversed.

Cited: 41 Miss. 511; 51 id. 342; 59 id. 52.

GREEN v SIZER (1866) 40 Miss. 530.

Indebitatus assumpsit. In 1861, the plaintiff deposited confederate treasury, Mississippi cotton, and Mississippi treasury notes with the defendants, as bankers. The Mississippi treasury notes were given to the defendants under an agreement that the defendants would accept them in payment of the plaintiff's notes. The defendants then refused to credit them on the note, or return them, claiming to hold them as security. All these funds at the time had a value. The defendants set up counterclaims, and contended that no money could be recovered upon the funds deposited, as they were illegal, the Mississippi treasury notes especially, being bills of credit in violation of sec. 10 of art. 1 of the Constitution of the United States. Those notes were not issued as money, but for a state loan. The court charged that any one appropriating any of these funds unlawfully was liable to the owner for the value at the time of the appropriation, and that the confederate and state notes might be considered as money. On the counterclaims the jury found for the defendants. Appeal.

Handy, C. J. 1. Bank notes are not the less the circulating medium and substitute for value, because they are depreciated when compared with gold and silver. 2. The plaintiff had a right to treat the Mississippi treasury notes as received under the agreement, or converted to the use of the defendants, and these notes were not within the prohibition of the constitution. 3. The confederate and state notes represented property and stood in the place of it in the dealings of men; and that is the principal office of circulating medium. Judgment affirmed.

Cited: 40 Miss. 574, 581, 709; 41 id. 460, 569; 42 id. 120, 131, 715.

BANK OF NEWBERRY v STEGALL (1866) 41 Miss. 142.

On penal bond, against principal and sureties. The plaintiff was a South Carolina banking corporation. The bond was given by B, as its agent in this state, and was conditioned for faithful performance in carrying on a general banking business. Four breaches were assigned. The defense was that the bond was void because the business in which B was engaged was illegal, and prohibited by the Act of 1840. Plaintiff contended: 1, That, inasmuch as the Act of 1857 imposed a tax of 2 per cent on bank paper of any other state sent into this state, the Act of 1840, prohibiting foreign bankers from doing business in this state, was not intended to prohibit the establishment of such agencies as that disclosed in this case; 2, that that part of the bond which required B to account for moneys received, could be separated from the rest and was valid. Judgment for defendant. Error.

Ellett, J. 1. Under the Act of 1840, it was not lawful for a foreign banking corporation to create such an agency in this state, and the Act of 1857 does not repeal the Act of 1840. 2. To say that the plaintiff can now recover at law the fruits of the illicit venture, would be to cover the whole proceeding with a legal sanction. Judgment affirmed.

Cited: 43 Miss. 214, 338; 47 id. 313.

CAPITOL STATE BANK v LANE (1876) 52 Miss. 677.

To recover damages for failure to protest a draft. The defendant, a bank, had a draft for collection for the plaintiff, and accepted in payment part cash and a draft on B. This draft was not paid, and the defendant failed to protest it, thereby releasing the drawers. Defendant contended that the draft on B was accepted by it conditionally, and that the original debtor was still liable to the plaintiff for the amount of the same. Judgment for plaintiff. Error.

Campbell, J. If the defendant's contention be true, it is still liable to the plaintiff for its failure to use its opportunity to charge the drawers, when dishonored by B. Judgment affirmed.

CASE v HAWKINS (1876) 53 Miss. 702.

Assumpsit on a draft. The defendant drew the draft, and indorsed it for the accommodation of A. A accepted it, and negotiated it with C Bank. Subsequently, the bank sued A and recovered judgment on the draft. While an appeal was pend-

ing, the bank's president agreed verbally with A, that if he would pay the costs, the bank would release him from any liability for the acceptance or non-payment of the draft. The bank's attorney entered a remittur in full of the judgment, except costs, and A paid the costs and dismissed the appeal. The plaintiff became the receiver of the bank. He moved to suppress all the testimony except the written remittur, on the ground that a contract could not rest partly in parol and partly in writing. Overruled. Judgment for defendant. Error.

Campbell, J. 1. As between the parties, the bill was merged in the judgment against A. 2. The dismissal of the appeal by A and the payment of costs were a sufficient consideration for the agreement to discharge him. 3. A release of the principal by the act of the creditor will discharge the surety. Judgment affirmed.

BANK OF MISSISSIPPI v DUNCAN (1878) 56 Miss. 166.

Scire facias against sureties of the receiver of the plaintiff bank. The receiver was appointed and the bond given in 1844. In 1856, being ordered to pay into court all moneys in his hands as receiver, he left the state. This action was then brought to recover the amount found due from him. The defense was that, by the Act of 1840, amending the charter of the plaintiff, it was made to expire in 10 years from the passage of that act, and that, by its dissolution, all of its rights, powers, and privileges became extinct, except the right to prosecute suits then pending. The Act of 1860 granted to the plaintiff the right to collect the debts due it. *Scire facias* dismissed. Appeal.

Campbell, J. When the plaintiff ceased to exist, the rights of creditors and stockholders expired, and it was not within the power of the legislature to revive rights which had been extinguished. Decree affirmed.

MITCHELL v SAVINGS INSTITUTION (1879) 56 Miss. 444.

On inland bill of exchange to recover a balance against the administrator of an acceptor. T, the president of the plaintiff, was permitted, over objections, to testify to conversations and transactions had with the intestate. The defendant contended that the taking of the bill was *ultra vires*. The statute permitted the plaintiff to "invest" its capital and profits in bills of exchange, and to deal in exchange. The code excluded the testimony of a person who had a claim against the decedent's estate, whereby he might establish that claim. Judgment for plaintiff. Error.

Simrall, C. J. 1. The corporation had express power to "invest" in the bill. 2. The testimony of T was admissible both at common law and under the statute. Judgment affirmed.

Cited: 63 Miss. 66.

BANK OF HOLLY SPRINGS v PINSON (1880) 58 Miss. 421.

Assumpsit for damages for refusal of the defendant, a bank, to transfer on its books certificates of stock which had been assigned to the plaintiff. Defense: That the plaintiff's assignors were indebted to the defendant in amounts exceeding the value of the assigned stock; and that, under its by-laws, it had a lien thereon. The by-laws did contain such provision, with the direction that "certificates of stock shall contain upon them notice of this provision." The certificates were in the usual form, signed by the proper officers, and contained no reference to that clause in the by-laws. The plaintiff had no notice of the provisions of the by-laws. Judgment for plaintiff for full value of the stock. Error.

George, J. The lien in this case having been created by the by-laws of the defendant, the plaintiff could not be affected thereby except upon notice. Furthermore, the issuance of the certificates, without notice thereon of the by-law creating the lien, was a waiver thereof. The uniform practice of issuing the certificates without that notice must operate as a repeal of the by-law. Judgment modified.

Cited: 60 Miss. 224; 72 id. 327.

TISHIMINGO SAV. INSTITUTION v BUCHANAN (1882) 60 Miss. 496.

Bill to restrain sale of realty. N obtained a loan from the defendant, a bank, on a note, and, as collateral security, gave a trust deed to realty, with interest at 2 per cent per month. The plaintiff in good faith subsequently bought the property, and tendered the amount due under the trust deed, which was refused. Plain-

tiff claimed that the note was barred by the Statute of Limitations. This was true, unless an injunction, to prevent the sale by defendant to plaintiff, stopped the running of the statute. Plaintiff also claimed that the defendant had no power to accept this trust deed. The defendant claimed the interest unpaid at 2 per cent per month. The defendant's charter authorized it "to pay and receive such rate of interest as may be mutually agreed upon," and to invest its funds in various evidences of debt, and to hold and possess any real estate taken in payment of debt. Decree for plaintiff. Appeal.

Campbell, C. J. 1. The note was not barred by the Statute of Limitations. 2. The bank was authorized by its charter to loan money, and to secure it by making a deed of trust on land. 3. A tender of the sum due does not discharge the lien of a mortgage or a deed of trust. 4. The tender in this case did not stop interest, because the debtor has since assailed the validity of the claim. 5. A doubt whether the legislature intended to confer upon a corporation power to bargain for interest not allowable to others, must always be resolved against the power. Decree reversed.

THIRD NAT. BANK v VICKSBURG BANK (1883) 61 Miss. 112.

Negligence for failure to protest a draft. The draft was indorsed to the plaintiff, a bank, and was by it forwarded to the defendant, a bank, for collection. The acceptor lived at a distance from the defendant, which necessitated the employment of a third person to make the collection. The person, so employed by the defendant, failed to have the draft protested for non-payment, thereby releasing the indorsers. Judgment for defendant. Appeal.

Cooper, J. A bank, in undertaking to collect, becomes the agent of the owner, with authority to employ such sub-agents as are usual in the business, and is discharged from liability if due care and prudence are used in the selection of the sub-agent. Judgment affirmed.

POLLOCK v OKOLONA SAV. INST. (1883) 61 Miss. 293.

Bill to restrain attachments at law. M, being insolvent, assigned to B, making preferences to some of his creditors. Plaintiff, a bank, was a preferred creditor, and B paid its claim on a preferred debt, and made a deposit as assignee with the plaintiff. Numerous creditors attacked the deed of assignment to B, and issued attachments at law on funds deposited with the plaintiff. The plaintiff made only the attaching creditors and B parties. Defendants claimed: 1, That all those necessary were not made parties; 2, that equity had no jurisdiction; 3, that there was no right in the plaintiff to apply the funds deposited by the assignee to its own claims. Decree for plaintiff. Appeal.

Chalmers, J. 1. All those necessary were made parties. 2. To prevent a multiplicity of suits, equity may draw to itself the ultimate decisions of many actions at law. 3. If the depositor is already the debtor of the bank, the right of offset springs up on a new deposit. But this right does not exist if the deposit is made for a special purpose or trust, and the bank knew or had good reason to suspect this. Decree affirmed.

Cited: 74 Miss. 8; 76 id. 897.

HUGHES v LAKE (1886) 63 Miss. 552.

Attachment on the ground of fraud. The plaintiff had a deposit with the defendant, a banker. A run commenced on the defendant's bank, and when the plaintiff inquired about his deposit the defendant told him the bank was perfectly solvent; that, if the worst came, he would treat the plaintiff's deposit as a special deposit. Thereafter he failed, and the plaintiff was not made a preferred creditor. The defendant was insolvent at the time the deposit was made. The court refused the plaintiff's charge that "if the defendant was insolvent or had good reason so to believe, then the debt was fraudulently contracted," but charged that such facts might be considered in determining whether there was fraud. Judgment for defendant. Appeal.

Campbell, J. In order to sustain an attachment on the ground that the debt was fraudulently contracted, an intent to defraud must be shown. The instruction was correctly given. Judgment affirmed.

PARKER v REDDICK (1887) 65 Miss. 242.

On a draft. Defendant bought from S a draft for \$200 on A, indorsed it, and forwarded to L. By several subsequent indorsements, it reached the R Bank, which presented it to A. Payment was refused, S having no funds to his credit. Plaintiff, an indorser, paid the amount of draft to his indorsee. Thirty days elapsed between the date the draft was drawn and the time it was presented for payment. The court instructed that the presentment was made within a reasonable time. Judgment for plaintiff. Appeal.

Arnold, J. 1. A bill or check payable on demand must be presented for payment within a reasonable time. 2. What constitutes a reasonable time, is a question of law to be determined by the court, when the facts are ascertained. 3. The court erred in its instruction. Judgment reversed.

FIRST NAT. BANK OF MERIDIAN v STRAUSS (1889) 66 Miss. 479.

On bill of exchange. S deposited with G & Co., bankers, his draft on M, and received credit for the amount. G & Co. were insolvent, but S had no knowledge of that fact. G & Co. indorsed the draft to the plaintiff "for collection for account." The next day G & Co. failed. S telegraphed M not to pay the draft, and he permitted it to be protested. This suit was commenced by plaintiff against M, and S intervened. Judgment for defendant. Appeal.

Cooper, J. 1. The fact that the bank was hopelessly insolvent when the deposit was received, is sufficient grounds to warrant a rescission of the transfer for fraud. 2. The plaintiff was not a holder for value. Judgment affirmed.

RYAN v PAINE (1889) 66 Miss. 678.

Bill to establish a trust. The complainants sent to G & Co., bankers, their draft on H, for collection. H gave in payment of the draft his check on G & Co., payable to complainants or bearer. G & Co. forwarded to the complainants their check on another bank. This check was dishonored, and on the same day G & Co. made an assignment, and the defendant was made receiver. When H gave his check in payment of the draft, he had no funds to his credit with G & Co. H was solvent, and was permitted by G & Co. to overdraw for large amounts. Bill dismissed. Appeal.

Campbell, J. The complainants are entitled to impress a trust on so much of the bank's assets as consists of the debt due from H to the bank on his check. Decree reversed.

Cited: 67 Miss. 683; 69 id. 761.

VICKSBURG BANK v WORRELL (1889) 67 Miss. 47.

Bill to restrain a tax sale. The Revenue Act of 1888 provided for a privilege tax on banks and declared that "such privilege tax shall be in lieu of all other taxes upon the shares and assets of said banks." Complainant, a bank, paid to the state the privilege tax, and notified the supervisors of the payment, and claim of exemption from county and municipal taxes on its real estate. The supervisors refused to strike the land from the assessment roll, and the defendant, the tax collector, was proceeding to sell the land. The answer averred that the Act of 1888 was in violation of the constitution. Injunction dissolved. Decree for defendant. Appeal.

Campbell, J. 1. The legislature may exempt property from taxation, whether the owners be corporations or natural persons, and the subjects may be classified at the discretion of the legislature, and if all of the same class are taxed alike, there is no violation of the equality required by the constitution. 2. The law is valid, and the privilege tax paid by a bank is made a substitute for all other taxes. 3. Real estate, bought with funds of a bank and constituting part of its assets, is exempt as real estate, but is a factor in determining the amount of privilege tax. 4. The purpose of the act is to accept in full of all other taxes a sum determinable by the entire wealth of the bank. Decree reversed.

Cited: 68 Mass. 44; 70 id. 511; 75 id. 718; 77 id. 280; 78 id. 112, 536.

EYRICK v CAPITAL STATE BANK (1889) 67 Miss. 60.

Bill to enforce payment of a promissory note, made by R as principal and B as surety. The suit was against R and the administrator of B. R and B were

partners and kept a partnership account with the plaintiff, a bank. B had a private account also. Some of the checks drawn by R on the firm account were to pay his individual debts, which fact was apparent from memoranda on the face thereof. A firm note, which came due before the death of B, was, upon his refusal to pay the same, charged to his private account, there being no funds to the credit of the firm. R did not answer. The administrator's defense was: 1, That twelve months had not elapsed since the grant of administration; 2, setoff to the amount of the firm note which was charged to B's private account; 3, setoff to the amount of checks drawn against the firm account by R to pay his private bills. The note which was charged to B's account was given to the plaintiff for a loan to the firm, but included \$100 which was used by R to pay the interest on the note in suit, which was not a partnership obligation, all of which was known to the plaintiff. The note provided for the payment of an attorney's fee, which defendant contended could not be determined in this proceeding. Decree for plaintiff. Appeal.

Cooper, J. 1. The 12 months permitted to an administrator, before distribution, refers not to payment of debts, but to parcelling to distributees. 2. If B had sued the plaintiff for his deposit, it might have set off any demand it had against the firm, and therefore it could apply his deposit to the payment of the firm note. 3. That part of the note which the plaintiff knew was not for firm purposes, it could not be charged to B's account. 4. Banks are not trustees of depositors in the sense that they must see to the application of funds drawn by those entitled to check against them. 5. The contract was for the principal, interest, and attorney's fee, and there is no difficulty in fixing the latter. Judgment modified.

Cited: 69 Miss. 705; 72 id. 268; 79 id. 68.

LOUISVILLE BANKING CO. v PAINE (1890) 67 Miss. 678.

Bill to impress a trust. M, having a deposit with G & Co., bankers, directed them to pay specified debts coming due, and gave to G & Co. his check, covering the amount necessary to pay same. M's debt to the complainant, a bank, was included, and on maturity it received in payment the draft of G & Co. on New York, which was duly forwarded and dishonored. Meanwhile G & Co. failed. This suit was against the receiver of G & Co. Demurrer. Sustained. Decree for defendant. Appeal.

Campbell, J. It was a mere direction to pay, which M had a legal right to revoke, and this is destructive of all idea of a trust in favor of the complainant. Decree affirmed.

SUPERVISORS OF ATTALA COUNTY v KELLY (1890) 68 Miss. 40.

Petition to have a tax assessment stricken from the rolls. Petitioner was a banker. On February 1, 1890, he paid the privilege tax required under the Act of 1888, which provided that such tax should be in lieu of all other taxes. On February 24, 1890, an act was passed, repealing that provision of the Act of 1888, and providing for an ad valorem tax upon the property of banks, and the petitioner's property was accordingly assessed. The supervisors refused to strike off the assessment. Appeal to the circuit court. Petition granted. Appeal.

Cooper, J. The Act of 1888, exempting from ad valorem tax on payment of the privilege tax, was ex gratia, and void of any element of contract. It was competent for the legislature to impose both the privilege tax and an ad valorem tax. Judgment reversed.

Cited: 77 Miss. 280.

KINNEY v PAINE (1890) 68 Miss. 258.

Bill to impress a trust. The plaintiff sent to G & Co., bankers, for collection, a draft on C, a depositor of G & Co., who gave them in payment of the draft his check on them. C's account was then overdrawn, but the check was accepted and charged to his account. G & Co. forwarded to the plaintiff their draft on New York, which was dishonored. This bill was against the receiver of G & Co., to enforce a trust on the debt due by C. Before the commencement of this suit, other creditors of G & Co., by an arrangement between the parties, took over the assets on payment of an amount in cash. The receiver commenced suit against C for the debt due by him. The draft of G & Co. was received by the plaintiff in Nashville, Tenn., March 19, and presented in New York for payment March 22. Sec. 1300 of the code provided that where a person carried on business with the word "Co."

affixed to his name, without disclosing the name of the other party interested, all the assets of the concern should be liable for the debts of the person conducting the business. Bill dismissed. Appeal.

Campbell, J. 1. Undue delay in presenting the draft is not proved. 2. Sec. 1300 of the code has no application as between creditors. 3. The claim of bona fide purchaser is not predicable on a mere book account due to the bank. Decree reversed.

Cited: 69 Miss. 761.

STATE v VICKSBURG BANK (1891) 69 Miss. 99.

For taxes. The declaration alleged that the capital stock of the defendant, a bank, wholly escaped taxation for the years 1884 to 1889, by reason of the failure of its officers to render a statement to the assessor of the amount and value of the stock, and demanded taxes for those years upon the entire authorized capital, under sec. 498 of the Code of 1880, which provided for assessment upon the authorized capital upon failure of a bank to furnish a statement of amount and value of stock paid in. Demurrer. Sustained. Appeal.

Woods, J. If the officers of the defendant failed to furnish a statement as alleged, it was the duty of the tax assessor to have assessed the property as directed in sec. 498 of the code, and no recovery can be had for taxes which have not been regularly assessed. Judgment affirmed.

HUNTLEY v BANK OF WINONA (1892) 69 Miss. 663.

To recover a tax paid. By the Act of 1886, separate school districts were required to levy a tax to maintain the schools therein. Each county was required to levy a school tax of 3 mills or more. The Revenue Act of 1890 provided "that all real estate of banks shall be liable to pay taxes, state, county and municipal, according to its value, as other real estate is taxed. Cities and towns are prohibited from levying any other tax on banks, or on solvent credits owned by individuals or corporations, greater than 75 per cent of the state tax." The town of Winona levied on the assets of the plaintiff, a bank, a tax equal to 75 per cent of the state tax, and in addition thereto, as a school district it levied a tax of 3 mills for school purposes. This action was to recover from the tax collector the school district tax, paid under protest. Judgment for plaintiff. Appeal.

Cooper, J. The tax in controversy was levied by the municipal authorities of the town, and as such was forbidden by the Act of 1890, regardless of the purpose for which it was levied. Judgment affirmed.

Cited: 75 Miss. 719; 78 id. 536.

ARMOUR-CUDAHY PACKING CO. v FIRST NAT. BANK (1892) 69 Miss. 700.

To recover a deposit. The plaintiff shipped to L a car load of meat, which he refused to receive for his own account, but sold as agent of the plaintiff. He deposited the proceeds with the defendant, a bank, in his own name. The money was paid out on checks drawn by L. L notified the bank officials of the source from which the money in question arose, and directed them to remit the money to the plaintiff. When the deposit was made, the word "meat" was written opposite the entry on his passbook. The money was used by the defendant to make good L's overdrafts. Verdict directed. Judgment for defendant. Appeal.

Woods, J. 1. If a bank has notice that money deposited belongs to another person, payment of checks of the depositor, after such notice, will be at the peril of the bank. 2. Ordinarily a bank is not required to obey verbal instructions as to a deposit, but if it accepts such instruction, and by fair implication consents to follow them, it waives written instructions. Judgment reversed.

BILLINGSLEY v POLLOCK (1892) 69 Miss. 759.

Bill to impress a trust. The complainant sent to the bank, of which defendant was receiver, a note for collection. The maker, who had ample funds on deposit in the same bank, gave the bank his check for the amount of the note, and the bank forwarded to the complainant its check on New York. On the same day the bank failed and its check was dishonored. The defendant contended that the collection had been commingled with the bank's general assets and could not be separated. Bill dismissed. Appeal.

Campbell, C. J. The note was paid by receiving the maker's check as money, when he had money in the bank, and no trust arose in complainant's favor. Judgment affirmed.

BANK OF OXFORD v TOWN OF OXFORD (1892) 70 Miss. 504.

Bill to restrain an action at law for collection of taxes for two years. The bill alleged that the plaintiff, a bank, had paid for those years the proper privilege tax for a capital of \$75,000; that this figure was its actual capital and surplus, less \$10,000 invested in non-taxable bonds. The answer, in form of cross bill, averred that the assets of the plaintiff were from \$175,000 to \$225,000, and prayed for an accounting as to the value of the assets and capital stock, and for a decree for the amount of an ad valorem tax. The Code of 1880 provided for taxing bank's paid-in capital stock at market value. Decree for payment ad valorem upon the gross assets less the non-taxable securities and the deposits. The defendant appealed from so much of the decree as allowed the deposits to be deducted from the gross assets.

Campbell, C. J. The plaintiff was not entitled to deduct from the value of its capital stock the amount invested in non-taxable bonds, and has, therefore, not paid the privilege tax according to law, and is liable as prescribed in sec. 498 of the Code of 1880; and the basis fixed by the decree is erroneous. Decree reversed.

ALEXANDER v THOMAS (1893) 70 Miss. 517.

Bill to restrain the collection of a tax. The president of the G Bank furnished to the assessor of the city a statement showing the value of the capital stock paid in, less one-third the value thereof. This was the basis upon which the county assessment was made on the bank and other property in the county. The city authorities refused to accept that basis, and assessed the stock at full value. Injunction granted. Appeal.

Campbell, C. J. The city had the right to levy its tax upon the capital stock at its full value, as shown by the statement of the president, and was not bound to follow the error of the county in disregarding the express provision of the law that bank stock shall be rated at its true value. Decree reversed.

Cited: 78 Miss. 536.

SHIELDS v THOMAS (1893) 71 Miss. 260.

Bill to impress a trust. The bill alleged that the sheriff had, without authority, deposited in the bank, of which defendant was receiver, funds belonging to the state and county, which funds had not been drawn out when the bank failed; that said money was in the possession of the defendant. The defendant pleaded that the money deposited had been mingled with the other money on deposit; that only the sum of \$368 came into the defendant's hands, and that it was impossible to trace any of the money deposited by the sheriff, either as constituting a part of the \$368 cash or of any of the assets of the bank. Plea sustained. Petition dismissed. Appeal.

Cooper, J. As to the general assets of the bank, the plaintiff is not entitled to relief upon the facts stated, because it is not shown that the funds deposited now form any part thereof. Decree affirmed.

CITIZENS BANK v BANK OF GREENVILLE (1893) 71 Miss. 271.

Bill to impress a trust. H shipped cotton to P, and attached the bill of lading to his draft on P for the amount and deposited it with the defendant, a bank. He then drew his check on the defendant for the purchase price of the cotton, and the payee deposited it with the plaintiff, a bank. In payment of this check, the defendant gave the plaintiff a draft on New York. The next day, P had a similar transaction with the defendant, and his check also came into the plaintiff's hands. On that day the plaintiff loaned the defendant \$2,000, and, at the close of the day's business, accepted in payment of P's check and the loan, another draft on New York. The defendant failed, and this suit was upon the two drafts which were not paid. Demurrer. Sustained. Appeal.

Woods, J. 1. The plaintiff was entitled to demand and receive cash in payment of the H and P checks, but having consented to receive the defendant's drafts, it is in no better position than other creditors; nor can the doctrine of subrogation apply. Decree affirmed.

COLUMBUS INS. & BANKING CO. v FIRST NAT. BANK (1895) 73 Miss. 96.

Assignment for benefit of creditors. The firm of G & Co., composed of G and H, assigned to the complainant for the benefit of creditors and gave the C Bank a preference. F Bank filed a cross petition, claiming a lien for having discounted a note made by M, on which L & Co. was an indorser. M died, and to pay the note, L drew on G & Co., who accepted. The draft was indorsed and delivered to F Bank, and L gave the check of L & D, the successor of L & Co., for the difference between the note and the drafts. The note was delivered to L. C Bank filed a cross petition denying the validity of F Bank's claim on the ground that it was accommodation paper, accepted by H in his firm's name, without the consent of his partner, and claiming a lien. Interest had been charged at 10 per cent in advance on notes it held against G & Co. The charter of the C Bank, issued in 1867, allowed it to charge 10 per cent interest in discounting paper. The Act of March 13, 1886, repealed provisions of any act authorizing a bank to discount at 10 per cent. The Code of 1857, in force at the time the charter was granted, provided that all charters granted under it could be repealed by the legislature unless otherwise provided in this act. Decree that so much of C Bank's charter, as allowed 10 per cent interest, had been repealed, and such interest was usurious; and F Bank's claim was valid and entitled to priority. Appeal.

Cooper, J. 1. C Bank did not have the right to reserve 10 per cent interest in advance. 2. There is nothing on the face of the paper, or the circumstances attending its negotiations, from which to infer that F Bank had notice of the character of the acceptance, or of facts which put on it the duty of making further inquiry. Decree affirmed.

HEPBURN v KINCANNON (1897) 74 Miss. 691.

On promissory notes, given to a national bank of which the plaintiff was receiver. Plea: That the notes were executed for subscriptions to capital stock of the bank. Demurrer to plea. Overruled. Judgment for defendant. Appeal.

Whitfield, J. A receiver of a national bank can collect from a stockholder of the bank a note given for capital stock. Judgment reversed.

WOLFE v SIMMONS (1897) 75 Miss. 539.

To charge the directors of a bank individually on the ground of fraud. The plaintiff sent to the bank for collection a draft on G with bill of lading attached, with direction to deliver the bill of lading only upon payment of the draft. Both draft and bill of lading were delivered to G by the cashier. The bank failed without having paid the plaintiff the amount of the draft. The plaintiff offered to prove that the bank was insolvent to the knowledge of the defendants; that some of the defendants had misappropriated assets of the bank. Evidence excluded. Judgment for defendants. Appeal.

Terral, J. If directors know of the insolvency of the bank, and yet hold it out as worthy of credit, at the same time appropriating its assets to their own advantage, they are individually liable, and the evidence offered therefore should have been received. Judgment reversed.

MILLSAPS v CHAPMAN (1899) 76 Miss. 942.

Bill for waste. Defendants were the directors of a bank. The principal charge was that M, who had been a director for several years, resigned, bought real estate from the bank for less than its value, giving in part payment worthless stock of the bank. Shortly thereafter, he was re-elected as director. The bank had been insolvent for a long time, and, after this transaction, went into the hands of the plaintiff, as receiver. M and T filed a cross bill for foreclosure of a mortgage on other property of the bank, which had been given to secure a loan made by them. Decree, requiring M to pay the difference between the actual value of the property bought by him and the amount paid by him in money. Decree of foreclosure on the cross bill. Appeal.

Woods, C. J. 1. M must be treated as a director, and held liable as such with respect to the purchase. 2. The mortgage to M & T being for a bona fide loan, they were entitled to foreclose. Decree affirmed.

 ANDREWS v KRAMER (1899) 77 Miss. 151.

On checks. Two checks were drawn by W to H in payment of goods. The checks came into the hands of the defendants H and L. Plaintiff, for accommodation, cashed them for B at the instance of L. B indorsed H's name on the checks and delivered them to plaintiff. Thereafter H, claiming the checks, sued plaintiff and recovered judgment, and plaintiff sued for money paid defendants. Plaintiff proved that the money paid to defendants had been appropriated by them to their use. Judgment for defendants. Appeal.

Terral, J. The indorsement of the checks by one defendant at the instance of the other was an undertaking by them to the plaintiff that they were authorized to indorse the checks, and they thereby guaranteed and warranted to plaintiff their title to them, and plaintiff is merely calling on them to make good their guaranty. Judgment reversed.

MISSOURI

BANK OF MISSOURI v PRICE (1821) 1 Mo. 54.

On promissory note against the immediate indorser. The defendant contended that the plaintiff, a bank, could not take a note as indorsee, because no authority was given it to do so by its charter. Sec. 1 of the charter provides that it may purchase goods, chattels, and effects. Sec. 6, that it shall not take, for discounting, any bill or note, more than 6 per cent. Sec. 14, restricting sec. 1, omits the word "effects." Judgment for plaintiff. Error.

McGirk, C. J. 1. The immediate indorser is liable on failure of payment by the maker. 2. The word "effects" in the first section is large enough to comprehend a promissory note. 3. Sec. 14 does not restrain the bank from dealing in notes. Judgment affirmed.

Cited: 1 Mo. 145; 185.

BANK OF EDWARDSVILLE v SIMPSON (1822) 1 Mo. 184.

On promissory note. Plaintiff was assignee thereof. The defendant contended that the plaintiff, being an Illinois corporation, could not sue in the courts of Missouri, and that its charter did not authorize it to purchase the note. The charter, sec. 3, enabled it to purchase land, chattels, and effects. Sec. 7, restrained it from dealing except in "bills of exchange," etc. Judgment for defendant. Error.

Cook, J. 1. Notes do not come within the exception of the restraining provision, and therefore the plaintiff had no authority to purchase. 2. Corporations of one state may sue in another. Judgment affirmed.

Cited: 1 Mo. 186; 116 id. 72.

BANK OF EDWARDSVILLE v HAMMOND (1822) 1 Mo. 186.

This case follows *The Bank of Edwardsville v Simpson*, 1 Mo. 184.

BANK OF MISSOURI v ANDERSON (1822) 1 Mo. 244.

Summary proceeding by motion on bank notes, which had been presented to the bank for specie payments and refused. This remedy was authorized by sec. 27 of the bank's charter. The defendant bank demanded a trial by jury which the court refused. The constitution provided that trial by jury should be inviolate. Judgment for plaintiff. Error.

McGirk, C. J. The proceeding was a suit. The bank was a party, and it had a constitutional right to have the facts as to the alleged demand and refusal of specie payment tried by a jury. Judgment reversed.

Cited: 30 Mo. 603; 83 id. 251; 121 id. 104; 133 id. 526.

HAMTRAMCK v BANK OF EDWARDSVILLE (1829) 2 Mo. 169.

Debt, to the use of M, on a note made payable to the plaintiff, indorsed by it, and coming again to it by indorsement. The plaintiff, a bank, was organized in Illinois under authority to become a corporation after the performance of certain acts. On the trial all indorsements were stricken out by the plaintiff's attorney.

Defendant claimed that plaintiff must rely on its derivative title; that it must prove performance of the acts required to be performed to show corporate existence; and that it had no authority to purchase notes. Judgment for plaintiff. Appeal.

Tompkins, J. 1. The defense could not require the plaintiff to prove these acts, having dealt with it as a corporation. 2. The power to assign was not given by the charter, nor was it necessary to the business of the plaintiff. The bank properly sued as payee, not as assignee. Judgment affirmed.

BANK OF KENTUCKY v CLARK (1835) 4 Mo. 59.

On promissory note against maker. Plea: illegal consideration. Demurrer. The plaintiff was chartered by the Kentucky Legislature. Its charter provided that the capital stock should belong to the State, and should be raised by the sale of state lands; that plaintiff might issue notes; and that the notes should be received for state and county taxes. The state was to enjoy the net income of plaintiff. The unappropriated revenue of the State was to be part of the capital stock. Plaintiff issued notes. Some of them formed the consideration of the promissory note in suit. The defendant contended that the notes were illegal under the provision of the Federal Constitution prohibiting states from emitting bills of credit. Demurrer overruled. Judgment for defendant. Error.

Tompkins, J. 1. The notes issued by plaintiff were bills of credit within the meaning of the constitution. 2. The consideration for the promissory note being illegal, it was void. Judgment reversed.

Cited: 4 Mo. 256.

GRIFFETH v BANK OF KENTUCKY (1836) 4 Mo. 255.

This case follows Bank of Kentucky v Clark, 4 Mo. 59.

DOWNING v STATE (1837) 4 Mo. 572.

Indictment for putting notes in circulation, contrary to the provisions of an act of the state legislature to suppress private bank notes. The indictment alleged that the note purported to be payable to holder, but was payable "to bearer." The defendant was cashier of a private banking company and signed the notes as such. The notes were delivered by the president, not with the intention of putting them in circulation as money, but as curiosities. Defendant convicted. Motion in arrest of judgment. Overruled. Error.

Tompkins, J. 1. The defendant could not be convicted without proof that the notes were issued to be circulated as money. 2. The indictment does not describe the note proved; the variance is fatal. It is not sufficient to set out the legal effect of the note. Judgment reversed.

Cited: 19 Mo. 217, 220.

LINDELL v BENTON (1840) 6 Mo. 361.

Garnishment proceedings. Plaintiff had a judgment against the M Bank. Execution was returned unsatisfied. He caused an attachment to issue July 18, 1837, which was returned with the notice to B and K, as garnishees, requiring them to answer. Garnishees moved to discharge on the grounds that there was no such corporation as the M Bank then in existence, the charter having expired before they were notified; that the names of garnishees did not appear in the papers; that the officer's return had not shown any property of the defendant in their hands; and that the execution issued was irregular and void. In less than one year from judgment against the bank, an execution issued and was returned unsatisfied. Another issued without scire facias. Motion sustained. Garnishees discharged. Error.

Tompkins, J. 1. The act of incorporation of the M Bank did not expire until February 1, 1838, and this writ was issued July 18, 1837. The expiration of the charter before notice did not terminate the action. The bank had a legal existence for the purpose of holding property. 2. It was not necessary for the original papers to show the names of the garnishees, or for the return to show property of defendant in their hands. 3. When a regularly issued execution is returned unsatisfied, another may issue at any time without scire facias. Judgment reversed.

Cited: 106 Mo. 602.

MOORE v BANK OF MISSOURI (1840) 6 Mo. 379.

Assumpsit on a note against immediate indorser. The note was indorsed by defendant in blank. Plaintiff, a bank, was the holder. The note was payable at the bank. The plaintiff sued on the note as its own property. To prove presentment, plaintiff offered the protest, which stated that the note was presented for payment at the bank. Objection. Overruled. Judgment for plaintiff. Appeal.

Tompkins, J. Where an officer performs any act in pursuance of a duty enjoined on him by law, his act thus performed proves itself. The protest stating that the note was presented for payment is therefore evidence of that fact. Judgment affirmed.

NELSON v BANK OF MISSOURI (1841) 7 Mo. 219.

Debt on promissory note against maker. The note was discounted by the plaintiff bank. Sec. 29 of the charter provided: "All bills and notes, whether under seal or otherwise, at any time discounted, shall be placed upon the same footing as foreign bills of exchange, so that the like remedy shall be had against the drawer or indorser." Demurrer, on the ground that debt would not lie. Overruled. Judgment for plaintiff. Appeal.

Napton, J. The section in question was not intended to fix or limit the remedy on notes discounted by the bank, but to fix the liability of the several parties to the instrument. Judgment affirmed.

BAILEY v BANK OF MISSOURI (1842) 7 Mo. 467.

On promissory note against an indorser. The note was discounted by the bank. After the dishonor, a notary went to an office which he understood to be that of the maker and of the indorser, and finding the maker, a brother of the indorser, gave him notice and inquired for the indorser. The maker told him that it would not be necessary to go after him, that they lived together, and that the office was the place to leave the notice for him, whereupon he left the notice with the maker. Judgment for plaintiff. Error.

Tompkins, J. The notice was insufficient. It should have been served on the defendant, or left at his dwelling house, if he had one, or shop, where he was employed, or facts shown from which it might have been inferred that he had notice. The maker of the note was the last person to whom the notice should have been given. Judgment reversed.

Cited: 14 Mo. App. 156; 42 id. 247.

MARKS v BANK OF MISSOURI (1843) 8 Mo. 316.

Assumpsit on a bill of exchange against an accommodation indorser. The defendant alleged that it was agreed between the plaintiff and R, the acceptor, without the consent of the defendant, that plaintiff would forbear to sue R, in consideration of R's making an assignment for the benefit of creditors, in which he was to provide for the payment of the bill in instalments, 20 per cent at maturity and 20 per cent every four months, until the whole was paid. One payment was made by R and interest on the others paid in advance, according to the agreement. The agreement was oral. Defendant contended that this was a valid agreement to give time to the acceptor, which discharged defendant. Judgment for plaintiff. Appeal.

Scott, J. 1. If the bank had a right to receive interest in advance, then the payment thereof was no consideration for the promise to forbear suing the acceptor. 2. If the contract with the acceptor was usurious, so far as the excess of lawful interest was concerned, it was of no avail to the bank, and the excess might have been recovered back. 3. The contract with the acceptor did not therefore prevent the bank from suing. Judgment affirmed.

Cited: 57 Mo. 507; 69 id. 546; 70 id. 116; 74 id. 553; 26 Mo. App. 246; 55 id. 254; 58 id. 188; 62 id. 452; 64 id. 118; 66 id. 642; 67 id. 172; 74 id. 466; 82 id. 191; 83 id. 582.

ST. JOHN v HOMANS (1844) 8 Mo. 382.

Assumpsit on a check drawn on the Bank of M. It was delivered to C & S on the day it was drawn, and transferred to the I Co., whose cashier is plaintiff, but was not presented for payment until eight days later. Payment was refused. Up to the time of presentment, defendant had bank notes deposited with the drawee

sufficient to meet the check. On that day his deposit, by reason of the depreciation of the notes, became insufficient to satisfy the check. All the parties to the check lived in St. Louis. Judgment for plaintiff. Error.

Scott, J. 1. Had the check been presented the day after it was delivered, the loss might have been avoided. 2. It cannot be maintained that the drawer of a check should have money or cash, rather than bank notes, in the hands of the drawee, in order to exact due diligence from the holder. 3. The drawing of a check was not an assignment of the amount to the plaintiff. Judgment reversed.

Cited: 30 Mo. 189; 79 id. 257; 124 id. 37; 14 Mo. App. 371; 40 id. 335; 51 id. 61.

WALKER v BANK OF MISSOURI (1844) 8 Mo. 704.

Assumpsit on promissory note, against an indorser. The note was produced, indorsed by the defendant to G and by G to plaintiff. The notice of non-payment sent to the defendant was regular in form, but was not signed by the notary. The defendant contended that there was no evidence that the note was discounted by the plaintiff; and that the unsigned notice was insufficient to hold him. Judgment for plaintiff. Error.

Tompkins, J. 1. The indorsement gave the bank, prima facie, the absolute title in the note, and he who seeks to divest the prima facie title must produce evidence for that purpose. 2. The notice was not signed, and was, therefore, given by no person competent to prove it. It was insufficient. Judgment reversed.

Cited: 28 Mo. 333.

COCKRILL v KIRKPATRICK (1846) 9 Mo. 697.

For money collected on a note. D gave N a note payable "in the currency of the state." N assigned the note to the plaintiff, who placed it with the defendant for collection, and D paid it in Illinois bank bills, which shortly afterward depreciated very much. The plaintiff declined to take the bills paid to the defendant. The defendant claimed to have made a tender; but no demand was made by the plaintiff. The note was proved by oral testimony without first showing that it was lost. The maker testified to an oral agreement with N that the note might be paid in "the common currency of the county." Judgment for defendant. Error.

McBride, J. 1. If the note was payable in the currency of the state, the payment in Illinois paper was not a sufficient payment. It was payable in gold or silver coin or in notes of the Bank of Missouri. 2. The agent had no right to accept payment in currency other than that called for by the note. 3. The defendant had no right to prove the contents of the note by secondary evidence without first accounting for its absence. 4. Before a principal can maintain an action against his agent for money collected, he must make a demand. 5. A tender is an offer to perform a contract or to pay money coupled with a present ability to do the act. It need not be in constitutional coin, but is good in bank paper, unless objected to on that account at the time. If made in depreciated bank notes, the refusal to accept may be presumed to arise from the fact of such depreciation. 6. Questions as to demand and tender are for the jury. Judgment reversed.

BANK OF MISSOURI v MERCHANTS BANK (1846) 10 Mo. 123.

Money had and received. The defendant, a bank, agreed to collect the debts of the plaintiff in depreciated paper. Defendant made the collection, but refused to honor plaintiff's draft for the amount except in depreciated paper. Plaintiff demanded specie. Defendant had no right under its charter to deal in depreciated bonds. Objection was made to the introduction of depositions which were admitted, but the record did not show what the specific objections were. Judgment for plaintiff. Appeal.

Napton, J. 1. We cannot tell from the record whether or not the objections made to the depositions were the same in the court below that are made now, and we cannot look into them. 2. The fact that defendant violated its charter in making the contract, cannot be taken advantage of collaterally. 3. Though the contract was illegal, this does not make the defendant responsible, in specie, for the amount collected. Judgment reversed.

Cited: 15 Mo. 247; 54 id. 81; 74 Mo. App. 376; 89 id. 369.

BANK OF MISSOURI v BENOIST (1847) 10 Mo. 519.

Assumpsit for money deposited. The defendant pleaded setoff and payment. Plaintiffs deposited depreciated bank notes called "currency." The accounts between the parties were kept in currency. The bank discounted a bill of exchange, which the plaintiffs, without defendant's knowledge, had agreed with the drawer to protect. The bill was dishonored. Defendant charged it to the account of the plaintiffs on learning of the agreement, and rendered an account accordingly. There was no demand on the bank before suit. The plaintiffs claimed a penalty under the defendant's charter. Judgment for plaintiff. Error.

Scott, J. 1. Although currency was a little below specie in value, it was regarded as money. The action for money had and received will lie in this case. 2. As the defendant claimed the money sued for as its own, no further demand was necessary before bringing suit. 3. But to entitle the plaintiffs to recover the penalty, an express demand was necessary. As the judgment included this penalty, it must be reversed. 4. The plaintiffs' agreement with the drawer of the bill cannot be taken advantage of by the defendant under its plea of setoff. Judgment reversed.

Cited: 10 Mo. 542; 27 id. 420; 31 id. 469; 44 id. 331; 51 id. 469; 119 id. 307; 125 id. 615; 156 id. 266; 18 Mo. App. 371; 68 id. 124; 88 id. 503.

COHEN v ST. LOUIS PERPETUAL INS. CO. (1848) 11 Mo. 374.

Against garnishee, for interest on a deposit. The M Bank deposited funds with defendant and received certificates of deposit, which it assigned to L. Creditors of the M Bank attached the funds. They recovered judgment against defendant, for the full amount. L sued the defendant in another state and recovered the full amount there, which the defendant paid. Plaintiff subsequently sued as a creditor of the M Bank. Defendant replied that it had no funds, unless it was liable for interest in the fund from the time of demand in this suit. At the time the defendant was summoned in this cause, the sum remained in the hands of the defendant, but belonged to the M Bank, and was subject to attachment. Defendant had not put the money in the court's care, or otherwise set it aside. Judgment for defendant. Appeal.

McBride, J. As the defendant has not been guilty of an unreasonable and vexatious delay of payment, he should not be subject to the further burden of paying interest. Judgment affirmed.

BOULEWARE v BANK OF MISSOURI (1849) 12 Mo. 542.

Where a note is canceled by mistake by the cashier of a bank, the maker will not be permitted to take advantage of that fact to relieve himself from liability thereon.

JANNEY v BANK OF MISSOURI (1849) 12 Mo. 583.

A bank is not subject to garnishment on a draft of the United States government, until it is accepted, although there may be sufficient funds on deposit for its payment.

STATE v PRESBURY (1850) 13 Mo. 342.

Indictment for illegal banking. The defendant, banker, was charged with unlawfully passing bank notes, and receiving such notes. The notes were not described in particular, but the offense was charged in the terms of the statute. Not all the members of the firm were indicted and only the defendant was served. Motion to quash based on the want of sufficient venue; insufficient description of the offense; misjoinder of defendants; and general informality. Sustained. Appeal.

Birch, J. 1. The courts of this state will take judicial notice of the names of its counties. 2. Averments in substantial conformity with the terms of the act are all that are necessary in charging the commission of the offense thereby created. 3. It was competent and proper for the grand jury to proceed either against the most prominent offending member of the banking house or to include all the partners in the same indictment. Judgment reversed.

Cited: 60 Mo. 491; 65 id. 592.

BANK OF MISSOURI v PHILLIPS (1852) 17 Mo. 29.

Assumpsit against the first indorser of a promissory note. The first answer of the defendant denied notice of non-payment. An additional answer alleged that he indorsed a note with B, for the accommodation of F, the maker, and B; that this was renewed by the note in suit which was indorsed by the defendant as payee, with the express condition that it should be indorsed by B; and that B had not indorsed it. The additional answer was stricken out. Judgment for plaintiff. Appeal. The only question reserved was whether the additional answer was rightfully stricken out.

Gamble, J. As the answer does not intimate that the plaintiff bank knew anything of the relations of the parties, or for whose accommodation the note was made, or that the plaintiff had any notice of the condition or understanding upon which it was indorsed, it was rightfully stricken out. Judgment affirmed.

Cited: 53 Mo. 518.

PAYNE v CLARK (1853) 19 Mo. 152.

On certificate of deposit. The plaintiff deposited money in defendant's bank, and took a certificate, which stated that "\$1,014 in funds as below," had been deposited. This was in writing. Below the writing were entries as follows: in the margin, "\$1,014;" and over the defendants' names; "Currency \$404, cash, \$1,010, total \$1,414." The plaintiff claimed the amount indicated by the entries of cash and currency, \$1,414, and alleged that the statement in the body of the certificate was an error. The defendants admitted the deposit of \$1,014 and averred that the statement in the body of the certificate was correct. Judgment for plaintiff for \$1,014. Appeal.

Ryland, J. The sum in the margin, and the sum in words in the body of the certificate, being the same, must control. Judgment affirmed.

Cited: 66 Mo. App. 597.

STATE v PAGE (1853) 19 Mo. 213.

Indictment under the act to prevent illegal banking (R. C. 167, 1845), charging the defendants with creating and putting into circulation bills and notes, which declared that money would be paid to "the receiver, bearer, or holder" thereof. The certificate admitted in evidence against defendants' objection, read: "This certifies that T B has deposited in this office one dollar, payable to bearer, at the banking house of F & S. (Signed) P & B." Other certificates stated other amounts. Defendants convicted. Appeal.

Ryland, J. These certificates do not contain on their face what is set out in the indictment, viz.: That money would be paid to "the receiver, bearer, or holder" thereof. The variance is fatal. Judgment reversed.

CITY BANK v PHILLIPS (1855) 22 Mo. 85.

On promissory note given for insurance, and discounted by the bank in the usual course of business. Defense: Fraud in the consideration in that the company, having issued a certificate importing solvency, was insolvent; and in that the directors, or a portion of them who were stockholders and directors in both institutions, knew of the insolvency at the time the note was given. The court instructed the jury, that the representations must have been made to the defendant personally. Judgment for plaintiff. Appeal.

Ryland, J. False and fraudulent representations held out and made to the world for the purpose of deceiving the public generally, by which the defendant was imposed upon, would in law discharge him from the note obtained by such representations. The fact that the same persons, or a portion of them, controlled both the bank and the insolvent insurance company, constituted notice to the bank of the character of the note, or were facts from which notice of the fraud may be presumed. Judgment reversed.

Cited: 84 Mo. 669.

PAYNE v CLARK (1856) 23 Mo. 259.

On certificate of deposit and for interest thereon. The deposit was made in February, 1851. The certificate was presented for payment in July, and demand was made for interest from the date of deposit to the date of demand. Payment was afterward offered of the amount deposited with interest for 60 days, the time

for which the certificates stated the deposit was made. The agreement was to pay the deposit, "on return of certificate, sixty days after date, with interest at the rate of six per cent per annum." Judgment for plaintiff, with interest from date of deposit to the present date. Appeal.

Scott, J. Interest allowed is for the use of the money; the party who holds it had its use, and there is no reason why he should not pay for it. Interest is due on the certificate after maturity as well as before. Judgment affirmed.

Cited: 64 Mo. 601; 81 id. 646.

SAWYER v PAGE (1857) 24 Mo. 595.

A bare certificate of deposit, which is not negotiable, is not within sec. 7, p. 173, R. C. 1845, and does not entitle the holder to damages for dishonor.

STATE v THOMPSON (1858) 27 Mo. 365.

Quo warranto. A bank established a branch under the banking act. (Sess. Acts, 1857, p. 14.) Part of the capital was to be furnished by the mother bank and part by the stockholders, representation on the board of directors being in proportion to the amount of capital furnished by the respective parties to the contract. Regarding the stock subscribed for, but not paid in, as "capital furnished," the stockholders were entitled to five directors; otherwise to three. The mother bank took the former view and authorized the election of three directors by the stockholders. The majority of the stockholders voted for a ticket containing five names; the minority for one containing three. The five are relators herein, and the three defendants. Judgment for relators. Appeal.

Scott, J. 1. Subscribing to stock is not "furnishing capital" within the meaning of sec. 15, ch. 10, of the act. The stockholders of the branch were therefore entitled to but three directors. 2. As the majority of the stockholders voted for five directors instead of for three, it cannot be told which of the five were chosen, and votes cast for them were illegal. Judgment reversed.

CHRISTIAN UNIVERSITY v JORDAN (1859) 29 Mo. 68.

On contract to recover instalments alleged to be due thereon. The defendant admitted the contract, but pleaded in bar that the plaintiff had violated an act of December 8, 1855, "to prevent illegal banking," by passing and receiving, within the limits of the state, bank notes of less than five dollars. The plaintiff's treasurer had customarily so passed and received such notes, without directions or instructions from the plaintiff. The court, without jury, found for plaintiff. Appeal.

Scott, J. 1. A corporation, by the interposition of an agent, cannot place itself in any better situation than a natural person. It can act only through its agents; and a failure on its part to prevent a continued violation of the law by its agent, renders it liable. 2. The plaintiff having been incorporated after the provision in the act concerning illegal banking, on which the defense is based, its charter was taken with the knowledge of the existence of the provision. Its violation is therefore a bar to this action. Judgment reversed.

Cited: 33 Mo. 360, 530; 51 id. 46; 60 id. 510; 75 id. 184; 8 Mo. App. 221; 80 id. 265.

MORRISON v McCARTNEY (1860) 30 Mo. 183.

On check, payable in currency, drawn by the defendant on C & B, bankers, dated October 2, 1857, indorsed to the plaintiff the same day and presented to the drawees January 29, 1858, when payment was refused, currency having meanwhile depreciated. Due protest was made and notice given to the defendant. C & B closed October 3, at three o'clock. On October 6, the defendant compromised suits against them and withdrew his deposits. The jury found that defendant had not been damaged by plaintiff's delay in presenting the check. Judgment for plaintiff. Appeal.

Napton, J. 1. The drawer of a check is liable to pay the same, if the holder show that the drawer has sustained no damage from the omission to demand payment of the drawee at an earlier date. 2. It was of no importance to the defendant whether currency depreciated or not during the time the plaintiff held the check. By the law of this state, the check, although expressed to be payable in

currency, was payable in specie or in notes of specie paying banks of this state. Judgment affirmed.

Cited: 43 Mo. 212; 56 id. 67; 124 id. 40; 13 Mo. App. 205; 26 id. 72, 105; 37 id. 478; 40 id. 335; 51 id. 60; 73 id. 449; 82 id. 434.

CITY OF LEXINGTON v AULL (1860) 30 Mo. 480.

Action to recover a penalty of \$1,000 from the president of the F Bank for his refusal to deliver to the assessor, in pursuance of plaintiff's ordinance, a list of the shares of the bank's stock and their holders. Defense, that a tax on the shares would be illegal. The Act of 1857, p. 34, under which the defendant was organized, provided that the banks should pay to the state a tax of 1 per cent on the capital stock paid in, which would be in full for all taxes to the state. By plaintiff's charter it had authority to levy by ordinance, and to collect taxes on personal property within its limits. Judgment for defendant. Error.

Scott, J. The Act of 1857 applies only to state, and not to city, taxes. The bank is subject to the tax and the president to the penalty. Judgment reversed. Cited: 39 Mo. 480; 53 id. 27; see 43 id. 82.

TOWN OF PARIS v FARMERS BANK OF MISSOURI (1860) 30 Mo. 575.

The plaintiff, under its charter, levied a tax on money and bank notes in possession of a branch of the defendant: Held, that the tax was valid; that money and bank notes would be considered personal property, within the meaning of the charter provision; and that the Act of March 2, 1857, exempting banks from taxation, applied to state taxes only.

BANK OF MISSOURI v BREDOW (1862) 31 Mo. 523.

On bill of exchange drawn by P on the defendant, indorsed by P to the O Co., and by it indorsed to the plaintiff. Defense, that the bill, at its maturity, belonged to the O Co., and was indorsed to the plaintiff for collection; that before the commencement of the suit, the plaintiff had been summoned as garnishee, and answered that it held the bill for the company; and that the bill had been attached as its property. Defendant further averred that the plaintiff had violated the act to prevent illegal banking (R. C. 1855, p. 287) by passing and receiving suspended and non specie paying bank notes, whereby it forfeited its charter. Plaintiff moved to strike out the answer. Motion granted. Judgment for plaintiff. Appeal.

Dryden, J. 1. A garnishee's right to sue on a bill indorsed to him for collection is not suspended by the attachment. 2. The forfeiture of the plaintiff's charter relied on in the defendant's answer, was waived by the subsequent act of November 23, 1857, entitled an "act in relation to certain bank paper." By this and other legislation, life was restored to the plaintiff. The answer contained no defense. Judgment affirmed.

Cited: 34 Mo. 122; 93 id. 241; 144 id. 339; 52 Mo. App. 457; 89 id. 424.

CITIZENS BANK v CARSON (1862) 32 Mo. 191.

On bill of exchange by an indorser against the acceptor. The bill was drawn by O on the defendant, who accepted it, but did not pay at maturity. It was protested. O gave the plaintiff, as holder of the bill, his note for the amount thereof. The plaintiff retained the bill. The note was not paid. The defendant's evidence that the bank had an account with O and that, after the bill was protested, he had a balance on deposit equal to its amount, was excluded. Judgment for plaintiff. Appeal.

Bates, J. 1. Unless plaintiff accepted the note in extinguishment of the bill, the defendant is not discharged from liability. 2. The bank account was properly excluded, for the plaintiff was not bound to apply a balance of a current account to the payment of a liability of the drawer. Judgment affirmed.

Cited: 26 Mo. App. 72, 105; 47 id. 438; 62 id. 183; 75 id. 194.

MERCHANTS BANK OF ST. LOUIS v SASSEE (1863) 33 Mo. 350.

On promissory note discounted by the plaintiff at its branch, in C County, payable at the parent bank in S County. The branch discounting deducted the

interest and a sum for premium on exchange, under Sess. Acts, 1857, p. 22, sec. 28. The defendants set up this fact as a defense. Judgment for the plaintiff for the amount of the note less the premium paid. Appeal by plaintiff.

Bates, J. The court erred in deducting from the amount of the judgment the premium paid the branch for exchange, the branch being located in another county. Judgment reversed.

Cited: 34 Mo. 124.

NORTH MISSOURI R. R. CO. v WINKLER (1863) 33 Mo. 354.

To recover a subscription to the capital stock of the plaintiff. The answer alleged the passing and receiving of bank notes by the agents and officers of the plaintiff, of less than \$5, contrary to the provisions of the Statute of December 8, 1855. Plaintiff did not deny the allegations. Plaintiff contended that, having been incorporated before the passage of the banking act which restrained the circulation of depreciated paper, the act had no application to it. Judgment for defendant. Error.

Bay, J. 1. For the purpose of this defense it is not necessary to show an absolute forfeiture of the plaintiff's charter. The matter set up as a violation of the act is sufficient. 2. To bind a corporation, the acts of its agent must be within the scope of his authority. 3. Where the object of a statute is to punish a corporation for violating its provisions, such violation may be pleaded by a subscriber to the capital stock. 4. The plaintiff is subject to the banking act. Judgment affirmed.

Cited: 34 Mo. 124; 36 id. 152; 60 id. 510; 80 Mo. App. 265.

BANK OF MISSOURI v SMITH (1863) 33 Mo. 364.

Assumpsit on promissory note against the makers. The answer denied that the plaintiff was owner of the note; and set up an alleged agreement made between one of the defendants and the "Branch Bank of the State of Missouri." The answer was stricken out. Judgment for plaintiff. Appeal.

Bates, J. 1. Denial of ownership in plaintiff is insufficient without denial of making and indorsement. 2. There is no such person in law as the Branch Bank of the State of Missouri, and the answer setting up an agreement with such supposed person is frivolous. Judgment affirmed.

BOATMAN'S SAV. INSTITUTION v BANK OF MISSOURI (1863) 33 Mo. 497.

To recover the amount of bank bills issued by the defendant, with 20 per cent interest. The plaintiff presented the bills at the defendant's branch in P and the defendant offered to pay on each bill \$5 silver coin of the United States issued after June 1, 1853, in conformity with the Act of Congress of February 21, 1853, and the balance, if any, in gold coin of the United States. The plaintiff declined to accept, and brought this suit. Some of the notes were for larger amounts than \$5. Judgment for plaintiff for amount of notes, with interest at 20 per cent from the date of demand. Appeal.

Dryden, J. 1. The offer made by defendant to pay the notes sued on was a valid and sufficient tender, in conformity to the provisions of the act of Congress, under which each of the notes was a single and distinct debt. Judgment reversed.

CHRISTIAN UNIVERSITY v JORDAN (1863) 33 Mo. 528.

On contract to recover instalments due thereunder. Defendant's answer alleged that plaintiff was guilty of illegal banking, under R. C. 1855, p. 286, which provided that no corporation within the state should pass or receive within the limits of the state any bills, circulating as money, of less denomination than \$5. It was admitted that the treasurer of the defendant had received and passed such bills. It was also admitted that the defendant was solely an educational corporation. Judgment for plaintiff. Error.

Bay, J. Giving the statute a fair and liberal construction, it does not apply to literary, benevolent, and educational institutions. Judgment reversed.

FARMERS BANK v GARTEN (1863) 34 Mo. 119.

On bill of exchange drawn by the defendant G on S, accepted by him in favor of M, indorsed by M to S and by S to the plaintiff. M answered, averring that

the act chartering the plaintiff, a domestic corporation, was unconstitutional; that the plaintiff had suspended specie payment at times for more than 20 days; that M indorsed while the amount was blank, that it was to have been indorsed by D, and was not, and that it was filled for a larger amount than that agreed upon; that the bill did not belong to the plaintiff, but to a branch; and that the plaintiff received and paid out the bills of banks while they were suspended. The answer was stricken out. Error.

Bates, J. 1. The act creating the bank was constitutional. 2. A forfeiture for suspension of specie payment cannot be enforced against the plaintiff collaterally, but only by direct proceedings by the state. 3. That M indorsed the bill on condition that it was to be indorsed by D, and that it was in blank and afterward filled for a larger amount than the one agreed on, is not a defense against the indorser. 4. It is no defense that the bill belonged to a branch, and that both parent bank and branch had suspended specie payment. The Act of 1856-7, p. 17, against illegal banking, does not apply to domestic banking corporations. It is no defense in this suit that the plaintiff received and paid out bills on banks while they were suspended. 5. Charging a premium for exchange in paying paper payable in another county is not usury. Judgment affirmed.

Cited: 39 Mo. 373; 47 id. 564; 52 Mo. App. 457; 80 id. 265.

MATTOON v McDANIEL (1863) 34 Mo. 138.

On three promissory notes by indorsee against the maker. They were payable to the P & G R. R. Co., a corporation. The defendant contended that before indorsing the notes the company had received and paid out in that state, bank notes under the denomination of \$5 and notes of non-specie-paying banks, contrary to the provisions of the law of 1855 concerning illegal currency. The court struck out the answer. Appeal.

Dryden, J. The defense set up cannot be sustained in an action in the name of the indorsee. The answer was properly stricken out. Judgment affirmed.

Cited: 35 Mo. 103; 77 id. 390; 78 id. 270; 71 Mo. App. 296.

BANK OF MISSOURI v SNELLING (1864) 35 Mo. 190.

On promissory note, discounted by the plaintiff bank. Defense: That the plaintiff, a corporation, had passed and received within the state bills as currency of less denomination than five dollars, whereby its charter was forfeited under the Illegal Banking Act of 1855. Answer stricken out. Judgment for plaintiff. Error.

Bates, J. 1. The Act of the General Assembly of March 23, 1863, p. 5, repealed so much of the Illegal Banking Act as authorized a defendant to plead the forfeiture of defendant's charter. The act when in force vested no right in any person. The act having been repealed before this suit was brought, the defendants have no right under it. The forfeiture may be established in a direct proceeding only. Judgment affirmed.

IVORY v BANK OF MISSOURI (1865) 36 Mo. 475.

Negligence against a bank for failing to make presentment, demand, protest, and notice on an indorsed check, left with it for collection. The check was drawn on the S Bank on October 12, payable to J & Co. or order, October 22, and indorsed to the plaintiff. It was presented on the 22d, and was dishonored. Protest was made and notice given. Judgment for plaintiff. Appeal.

Lovelace, J. The instrument was payable on a day certain, and was entitled to days of grace. It was negligence to present it before grace had expired. It was of no consequence how the bank had been accustomed to present such paper. It was its duty to use proper diligence and present it on the proper day. Judgment affirmed.

Cited: 124 Mo. 37; 51 Mo. App. 61.

MILLIKEN v SHAPLEIGH (1865) 36 Mo. 596.

Money had and received. Defendant was a collecting bank. The plaintiffs indorsed two drafts to their bankers for collection. The bankers sent the drafts to the S Association for collection. The S Association collected them, and credited the bankers. The bankers failed, owing the S Association. The trustees of the

S Association defendants herein, refused to surrender the proceeds of the drafts. There was no mutual arrangement that such remittances were to go to the credit of the previous account. No advance was made or credit given on the basis of these bills. The court charged that the plaintiffs were not entitled to recover. Judgment for defendants. Error.

Holmes, J. Where one bank merely passes the proceeds of paper remitted for collection to the credit of another bank on a subsisting indebtedness, the first bank has no lien or right to claim the money. But the real owner may maintain an action to recover the amount. Judgment reversed.

Cited: 56 Mo. 101; 79 id. 425; 17 Mo. App. 253.

BANK OF LOUISVILLE v YOUNG (1866) 37 Mo. 398.

On promissory note against indorser. The agent of plaintiff, a foreign corporation, loaned the bills of the plaintiff on the state, taking the original note of which the one in suit was a renewal. The judge instructed the jury that if they found the note was given in renewal of the original note to secure the balance due on that note given for bank notes of a foreign corporation, then the note in suit was null and void, under sec. 14 of the Act in R. C. 1855, p. 285. He also instructed them that, if in making the loan the interest contracted for was usurious by the law of the plaintiff's domicile, it could not recover. Plaintiff nonsuited. Judgment for defendant. Error.

Wagner, J. 1. The first instruction was correct. 2. The law of the place, where the contract is made and is to be performed, must govern. We will not attempt to execute the usury laws of Kentucky in respect to contracts made here. Judgment reversed.

Cited: 39 Mo. 182; 62 id. 331; 79 id. 652; 144 id. 586.

GERHARDT v BOATMAN'S SAV. INSTITUTION (1866) 38 Mo. 60.

Negligence in notifying indorser of a note. The plaintiff kept his account with the defendant, and gave it a promissory note for collection. The note was not paid at maturity. Through the negligence of defendant's notary, the indorser was discharged. The notary was employed by the year by defendant, to do all its notarial business, and was under bond to defendant. The statute did not require the note to be protested by a notary. The maker was insolvent. Judgment for defendant. Appeal.

Wagner, J. The notary was not acting in the character of an independent officer, but as the agent of the defendant. And there is an implied undertaking by a bank receiving negotiable paper deposited for collection, to take the necessary measures to charge the proper parties, on default or refusal to pay or accept. Judgment reversed.

Cited: 56 Mo. 102; 14 Mo. App. 368; 59 id. 548; 66 id. 51.

CONNECTICUT MUTUAL LIFE INS. CO. v ALBERT (1866) 39 Mo. 181.

To recover possession of real estate under a deed of trust to secure the payment of notes. The plaintiff was a foreign corporation, and the loan was made in the state by plaintiff's agent. The defendant requested the court sitting as a jury, to declare the law to be, that if the plaintiff had been loaning money to many persons, during a period of 14 months, this loan being one of them, it was doing business in the state, and that the notes and deed in suit were void under R. C. 1855, p. 289, sec. 14. Judgment for plaintiff. Appeal.

Fagg, J. The object of the law is to prevent foreign banking corporations from flooding of the country with worthless bills, through agents. It was not intended to drive out money brought from another state to be loaned in the ordinary way. Judgment affirmed.

Cited: 79 Mo. 652; 110 id. 51; 111 id. 214; 141 id. 505.

MERCHANTS BANK v HARRISON (1867) 39 Mo. 433.

Ejectment for the possession of land. The plaintiff bank alleged title under defendant's grantor, but did not prove his title. The defendant denied that the plaintiff was a corporation; contended that it was not authorized by its charter to purchase real estate; and alleged that this purchase was for speculation only.

He also claimed title under a sheriff's deed. The notary's certificate described the notary as for the County of L. It was signed by him as a notary for H County. The sheriff's sale was not made within the time required by law. There was no evidence that plaintiff bought for speculation. Plaintiff's charter was in evidence. Judgment for plaintiff. Appeal.

Holmes, J. 1. The charter and the acts of user thereunder were prima facie evidence that plaintiff was a corporation. 2. There was no prohibition in Sess. Acts 1856-7, p. 21, sec. 26, against plaintiff purchasing real estate when it was necessary in the transaction of business. 3. The defendant's claim under the sheriff's deed is not valid, as the sale was not made in the manner required by law. 4. The defect in the certificate did not render the deed inadmissible. 5. It was unnecessary to prove the title of the common grantor. 6. The recitals in the sheriff's deed are prima facie evidence of the existence of the judgment without producing a certified transcript of the record thereof. Judgment affirmed.

AMERICAN NAT. BANK v BANGS (1868) 42 Mo. 450.

On promissory note against makers. The defendants averred that there had been a material alteration of the note after its execution. The words "at G. Bros., New York, Jan. 10-13" were added to the foot of the note, to the left of the signature. No place of payment was named in the note other than this. The addition was not known to or authorized by the defendants. Judgment for defendants. Error.

Fagg, J. The memorandum in this case does not increase or vary in any respect the liability of the defendants, and presents no obstacle to the recovery of the plaintiff. Judgment reversed.

LIONBERGER v ROWSE (1868) 43 Mo. 67.

To recover the value of property seized by the defendant, as collector of taxes of D. The plaintiff was owner of stock in a national bank in S, which was assessed to him as an individual stockholder. He claimed that the tax should have been against the capital of the bank itself. The defendant demurred to the declaration, relying upon the Act of Congress of June 3, 1864, and the Act of Missouri of February 4, 1864, "for the assessment and collection of the revenues of Missouri." Demurrer sustained. Judgment for defendant. Error.

Wagner, J. 1. Under the provisions of sec. 41 of the Act of Congress of 1864, which act provides a national currency, the tax on national bank stock must be assessed against the shareholders and not against the capital of the bank. 2. The assessment in this case was made under the provision of the revenue law of Missouri which is in consonance with the act of Congress, so far as the assessment of the capital stock of national banks is concerned. 3. It is no objection to the state law that it does not prohibit a greater tax on national than on state banks, or that two state banking institutions are exempt from the tax by their charters. 4. The argument that, as the state law was enacted before the act of Congress, the state law does not therefore apply, is without force. Judgment affirmed.

Cited: 44 Mo. 503; 47 id. 467; 48 id. 287; 49 id. 499; 50 id. 136; 58 id. 296, 558; 87 id. 445; 11 Mo. App. 377.

NORTON v BULL (1868) 43 Mo. 113.

To enforce collection of bills of exchange, drawn by B & Co. on D, in favor of J. The bills were drawn, accepted, and indorsed for the accommodation of the drawers, and delivered to the S Bank in payment of a debt. The defendant, a member of B & Co., averred payment to have been made by conveying lots in St. Louis to A, in trust for the bank. A gave an obligation to R, one of the acceptors, to convey the lots to him, on payment of the drafts at maturity. Two were paid, but the two sued on were not paid. They were indorsed by the bank to the plaintiff after maturity. A conveyed the lots to the plaintiff after he became the owner of the drafts. Plaintiff brought a suit against R to foreclose R's right to redeem, obtained judgment, sold the lots, and applied the proceeds toward the payment of the drafts sued on. Plaintiff brought this suit to recover from the maker the difference between the face of the draft and the proceeds of the sale, which failed to satisfy the drafts. The nature and extent of A's authority were submitted to the jury. Judgment for defendant. Appeal.

Baker, J. 1. If A had authority to act in the premises, or if his acts were

afterward ratified, they were binding on the plaintiff. 2. The appointment of attorneys by corporations, and the extent of their authority, may be established by circumstances. 3. There was evidence of ratification. The plaintiff could in no case repudiate the ratification, without restoring the defendant to as good a situation as when the lots were conveyed to A. Judgment affirmed.

Cited: 129 Mo. 220; 12 Mo. App. 287; 54 id. 332; 57 id. 77; 60 id. 265; 87 id. 322.

MOODY v MACK (1869) 43 Mo. 210.

On check. The check was drawn by the state treasurer on the S Bank to defendant's order. Defendant indorsed it in blank and delivered it to G, who indorsed it to plaintiffs. The check was dated April 17 and presented for payment July 13, when payment was refused. It was protested, but no notice was given defendant. Plaintiffs sought to excuse their delay by showing that the defendant had no money in the hands of the drawee. Judgment for plaintiffs. Appeal.

Bliss, J. There was such a want of diligence on the part of the holder as, unexplained, releases the defendant. He was entitled to notice of dishonor, if he is to be charged as indorser. Judgment reversed.

Cited: 50 Mo. 333.

MERCHANTS BANK v FARMER (1869) 43 Mo. 214.

No facts are given in this case, and no indication of what the contest was about.

Wagner, J. The point was whether the branches of the banks organized under the constitutional amendment of 1856-7 are to be deemed distinct and independent organizations, or as parts of the parent banks. They were agencies, branches, or stems of the parent banks, and the parent bank must, in this instance, be bound by the acts of the branch.

STEPHENS v ST. LOUIS NAT. BANK (1869) 43 Mo. 385.

On notes issued by K Branch of the defendant bank. The Act of 1864, p. 13, provided for the winding up of the branch banks, and that all claims not presented within two years should be barred. The defendant answered that the K branch had been wound up according to the statute, due notice given, and that the demand of the plaintiff had not been presented within two years. Plaintiff demurred on the ground that the statute was unconstitutional as impairing the obligations of a contract. Sustained. Judgment for plaintiff. Appeal.

Wagner, J. By this statute notice must be given, and the claimants have two years after that to present their demands. This would seem to be ample time for them to protect themselves. Judgment reversed.

Cited: 45 Mo. 139; 46 id. 470; 62 id. 185; 65 id. 362; 75 id. 150; 85 id. 70; 87 id. 400; 93 id. 618; 151 id. 124; 71 Mo. App. 324; 81 id. 153.

FIRST NAT. BANK v MEREDITH (1869) 44 Mo. 500.

Injunction to restrain the collecting of taxes, assessed against plaintiff on its stock. Defendant demurred. Demurrer overruled. Injunction granted. Appeal.

Bliss, J. 1. The tax should have been assessed not against plaintiff, but against the individual shareholders. 2. An injunction to restrain the collection is not the proper remedy. The plaintiff has no equity, for its property is not in jeopardy. The bank, as a corporation, will lose nothing if the shares of its stockholders are sold. The demurrer should have been sustained. Decree reversed.

Cited: 47 Mo. 467; 50 id. 136; 58 id. 296; 77 id. 62; 87 id. 445; 89 id. 147; 118 id. 285; 59 Mo. App. 5.

STATE v BANK OF MISSOURI (1870) 45 Mo. 528.

Interpleader to determine claim to dividends on stock of defendant. Claim was made by the State and by E. The bank interpleaded the State and E. Plaintiff, as trustee of the school and seminary fund, and in its own right, held stock in the bank. An act entitled "An Act to authorize the Bank of Missouri to reorganize as a national bank, to provide for the sale of the stock owned by this State in said bank, and to protect the seminary and common school fund, and provide for its safe investment," was passed in 1865. It gave the governor power to appoint an agent to sell the stock owned by the State and held in trust. It

provided that the stock be advertised; that proposals be received; and that the stock be sold only for money or the bonds of the State, or coupons of such bonds. F was appointed agent. Without notice or advertisement F received from E a proposal to purchase the entire lot of stock. This proposal was accepted and approved by the governor. E paid for the stock with state bonds and coupons. The stock was transferred to him by the governor. Plaintiff claimed that the act authorizing the sale was in conflict with the provision of the state constitution which provided that no part of the school fund be invested in the stock, bonds, or obligations of the State; and that it was in conflict with a provision which says, no law enacted by the legislature shall relate to more than one subject, which shall be expressed in the title. Plaintiff also claimed that the sale was void, because F received bids privately. Judgment for defendant. Error.

Wagner, J. 1. The sale and payment provided for would not be an investment of the school funds in bonds or coupons of the State. The State had a right to sell, and it was responsible for the price received. It had a right to take payment in its own indebtedness, and it could replace the amount in the treasury. 2. The constitution does not design to embarrass legislation by compelling a needless multiplication of bills, but only to prevent the joining of incongruous matter in the same act. The act was not in conflict with the constitution. 3. The act of the agent in receiving the private bid of E long after the time when proposals could be legally received under the published notice and when competition was ended, renders the sale void. 4. The governor had no power to bind the State by a ratification of the sale. Judgment reversed.

Cited: 45 Mo. 498; 46 id. 433; 47 id. 204; 51 id. 392; 52 id. 580; 55 id. 376; 79 id. 273; 87 id. 309; 88 id. 214; 41 Mo. App. 339; 52 id. 147; 62 id. 262; 80 id. 239.

NATIONAL BANK OF THE METROPOLIS v WILLIAMS (1870) 46 Mo. 17.

On bill of exchange against the drawer. Defendant alleged that the instrument was given as a memorandum, to enable the plaintiff to receive the proceeds of shipments made by the defendant as its agent, which were afterward indorsed on the draft. The bill lay in the bank for many months, was not treated as a discounted bill, nor did it pass through the books of the bank. Plaintiff objected to testimony as to the declarations of H, the cashier, since dead, touching the real nature of the instrument. Admitted. The plaintiff contended that it should not be bound by H's acts outside the scope of his authority. Judgment for defendant. Appeal.

Bliss, J. The claim that the cashier acted without the scope of his authority, and could not bind the bank, is met with the fact that this bill was not treated as an ordinary bill of exchange. If the bill was drawn for the use of the cashier personally, it belonged to him. His declarations were admissible. Judgment affirmed.

Cited: 52 Mo. 433; 88 id. 360; 121 id. 447; 122 id. 115; 142 id. 149; 15 Mo. App. 346; 49 id. 605; 57 id. 624; 62 id. 627; 76 id. 470; 92 id. 85.

COFFEY v NATIONAL BANK (1870) 46 Mo. 140.

Trover, for a special deposit, made with the Bank of M, which afterward reorganized under the National Banking Law, and became the defendant bank. The deposit consisted of a package of coin. Defendant refused to deliver it on demand. The court instructed the jury, in case they found for the plaintiff, to assess the currency value of the coin at the date of the conversion, with interest from that time. Judgment for plaintiff. Appeal.

Currier, J. 1. The court laid down the correct rule for damages. The plaintiff was entitled to have back his deposit, or its value in currency. 2. Defendant's refusal was evidence of conversion. 3. The bank neither lost any of its assets nor escaped any of its liabilities by the reorganization. Judgment affirmed.

GRAHAM v UNITED STATES SAV. INSTITUTION (1870) 46 Mo. 186.

On checks to recover the amount thereof. The checks drawn on the defendant by a third party in favor of the plaintiffs were delivered to D, collecting agent of the plaintiffs. D indorsed the plaintiffs' firm name on them, drew the money, appropriated it to his own use, and rendered no account to the plaintiffs. Judgment for plaintiffs. Appeal.

Currier, J. D was not the plaintiffs' agent to indorse negotiable paper given

in settlement of debts due his employer. When he had received the checks his duty as a collector ceased. The indorsement of the check was not a necessary incident of the collection of the accounts. Judgment affirmed.

RITCHIE v KINNEY (1870) 46 Mo. 298.

Bill for the adjustment of partnership accounts. The defendant built a steam-boat. He received money from the plaintiff to use in the construction, and receipted for the money as received for that purpose. The defendant also recognized the plaintiff's part ownership in various ways, after the boat was finished. She was afterward sunk and became a total loss. The defendant, to show his receipts and disbursements on account of the boat, offered a synopsis made up from the books of the S Bank, showing aggregates of his deposit and amounts checked out. Rejected. Decree for plaintiff. Error.

Currier, J. 1. No bill of sale was necessary to establish a joint ownership in plaintiff. 2. The "synopsis" was not the best evidence of the facts proposed to be proved by it, and was properly excluded. The books of the bank should have been produced as furnishing the best evidence of their contents. Decree reversed.

Cited: 97 Mo. 140.

CLARK v NATIONAL BANK (1870) 47 Mo. 17.

On deposits, made in the name of the plaintiff, then a married woman. She checked out all but \$600. This her husband withdrew on his checks. Afterward, plaintiff was divorced. This suit was for the amount paid to her husband. The plaintiff relied on the G. S. 1865, ch. 68, sec. 14, which enables a married woman to deal with a bank without the intervention of her husband, and on G. S. 1865, ch. 115, sec. 14, concerning married women. Judgment for defendant. Appeal.

Currier, J. 1. The husband has a right, during the lifetime of the wife, to reduce her chattels or choses in action to possession, and thus defeat her rights. 2. The latter statute does not restrain him from collecting and reducing to possession her personal chattels and choses in action. Judgment affirmed.

Cited: 72 Mo. 572; 79 id. 104; 84 id. 323; 115 id. 17; 6 Mo. App. 161; 10 id. 468; 13 id. 153; 16 id. 296; 41 id. 345.

THE UNION SAV. ASS'N v EDWARDS (1871) 47 Mo. 445.

On a teller's bond, against principal and sureties. Damaging admissions made by the principal after he was discharged by plaintiff were admitted in evidence over the objections of all the defendants. Judgment for plaintiff. Appeal.

Wagner, J. The evidence was certainly admissible against the principal, and the court should have been asked to instruct the jury that the evidence should be disregarded so far as the sureties were concerned. This was not done, and as the evidence was admissible for one purpose, the court was entirely justified in overruling the broad objection of the defendants. Judgment affirmed.

Cited: 48 Mo. 42; 82 id. 61; 104 id. 86; 133 id. 537; 2 Mo. App. 129, 549; 15 id. 137; 23 id. 674; 26 id. 579; 27 id. 651; 32 id. 97; 38 id. 224; 41 id. 332; 47 id. 252; 56 id. 426; 63 id. 166.

STATE v BOATMAN'S SAV. INSTITUTION (1871) 48 Mo. 189.

Quo warranto for a forfeiture of the defendant's charter. The claim for violation of the charter was in loaning money and discounting paper at usurious rates, exceeding 8 per cent. Three classes of facts were set out: 1, Loaning money in the way of discounts at usurious rates; 2, loaning money at usurious rates without specifying the nature of the loan; 3, buying bills of exchange at rates exceeding the current rates of exchange. Demurrer.

Currier, J. 1. Discount means the interest reserved in advance from the amount lent, and is a loan within the charter. 2. It was competent and lawful for the bank to make purchase of bills of exchange at whatever rates might be agreed upon. There is no ground for usury in such purchases. The difference between a loan and a purchase of a bill of exchange lies in the intention of the parties only. Demurrer overruled.

Cited : 52 Mo. 414; 158 id. 260.

STATE v FIELD (1872) 49 Mo. 270.

Indictment, under Wagner Stat. 247, for acting as money broker and exchange dealer without a license. The defense was that the acts were not those of an individual, but of a corporation known as the K Savings Bank. The bank was duly incorporated. The defendant was its president. The acts had been done by the president and for the bank. Defendant guilty. Appeal.

Adams, J. The provision of the statute concerning money brokers and exchange dealers apply only to individuals and not to corporations. The defendant committed no act himself, but the corporation was the actor. Judgment reversed.

CITY OF ST. LOUIS v SAVINGS BANK (1872) 49 Mo. 574.

Action against a bank for not taking out a license under an ordinance passed by the plaintiff. The defendant was chartered by the state, and the charter provided for the payment of a tax of 1 per cent of the net profits of the bank to the state. There were no negative or restrictive words used indicating the intention of the state to surrender the power of increasing the rate if it saw fit. The plaintiff's charter conferred the right to pass the ordinance requiring banks to buy a license. Judgment for plaintiff. Appeal.

Wagner, J. 1. A corporation is confined to the power granted in its charter, and in all things else the authority which the state may exercise over its affairs is as full and ample as though it were an individual carrying on the same business. 2. It was competent for the state to permit the plaintiff to require the license. Judgment affirmed.

Cited: 69 Mo. 302.

PHILLIPS v FRANCISCUS (1873) 52 Mo. 370.

To recover a depositum. S collected money for the plaintiff, which he deposited with the defendants in a sealed envelope, with his name indorsed thereon. Defendants gave S a certificate of deposit, which specified that it was to be delivered to S or to his order on demand. S made a general assignment for creditors. He subsequently indorsed the certificate, ordering the package to be delivered to the plaintiff. The plaintiff demanded the package and it was refused him. Judgment for the plaintiff. Appeal.

Adams, J. The plaintiff was the real owner of the package, and the special deposit was made as a trust fund for him. Defendants had no right to detain the deposit. Judgment affirmed.

MOORE v BANK OF COMMERCE (1873) 52 Mo. 377.

Action for damages for alleging ownership of stock in the defendant bank and for its conversion by the defendant. M owned shares of stock and applied to the plaintiff for a loan thereon. The plaintiff applied to the officer in charge of the bank, and was told by him that it was free from incumbrances. Thereupon the loan was made. M was, and continued to be, indebted to the defendant. M failed to pay plaintiff, and the stock was sold to the plaintiff under power given at the time the loan was made. The plaintiff offered to pay all assessments and applied to have the stock issued to him, or transferred on the books of the bank. The defendant refused. It asserted a lien for M's debts to it, and contended that its by-laws, providing that stock should be transferred only on the books, rendered the sale void. Judgment for plaintiff. Appeal.

Adams, J. 1. The right of alienation is an incident of property, and a by-law prohibiting or restraining the exercise of this right is void as against public policy. 2. The representations of its agent constitute an estoppel in pais against defendant's right to forfeit the stock for unpaid dues. Judgment affirmed.

Cited: 108 Mo. 610; 112 id. 514; 118 id. 442, 457; 6 Mo. App. 463; 8 id. 252; 13 id. 199; 29 id. 492; 43 id. 102; 57 id. 119.

MECHANICS BANK v WRIGHT (1873) 53 Mo. 153.

Assumpsit on a promissory note. The defendants set up that B was the principal on the note and alone received the benefit, and that they were mere sureties, and that the fact was known to the plaintiff, when the note was made; that B was attorney for the plaintiff bank, and had transacted a large amount of business for it and that on settlement, subsequent to the time the note became due, the plaintiff

owed B and paid him a balance in money. From this fact the inference was sought to be drawn, that the note was paid. The court refused to admit evidence to show that the defendants signed as sureties. Judgment for plaintiff. Appeal.

Wagner, J. 1. Parol evidence is admissible to prove who is principal and who is surety to a note or bond in an action at law. 2. There is no presumption of payment of the note from the fact that plaintiff paid B money. Judgment reversed.

Cited: 132 Mo. 629; 41 Mo. App. 371; 46 id. 465; 78 id. 368; 88 id. 141.

CHOTEAU v ROWSE (1874) 56 Mo. 65.

To recover money paid a tax collector. Plaintiffs delivered to the defendant a check on the banking house of T & Co., where they then had a deposit more than sufficient to pay the check, in part payment of their taxes. A month later the bank failed. The check had not been presented. The defendant returned the tax as delinquent, and, although the plaintiff was compelled to pay the taxes a second time, he refused to pay them the amount of the check or any part of it. The evidence offered, failed to establish the entire case of plaintiffs. Defendant demurred to the evidence. Sustained. Nonsuit. Appeal.

Adams, J. 1. The defendant by not presenting the check in due time, made it his own, and must suffer the consequence of the failure of the bankers. If the defendant returned them delinquent, and the plaintiffs were compelled to pay them again, that would render the defendant liable for the amount of the check. 2. Because the plaintiffs failed to prove that defendant converted the money, by neglecting to give credit, and by returning the whole of the taxes as delinquent, the demurrer must be sustained. Judgment affirmed.

Cited: 67 Mo. 145; 90 id. 194; 13 Mo. App. 205; 26 id. 72, 105.

DALY v BUTCHERS AND DROVERS BANK (1874) 56 Mo. 94.

On drafts, to recover the value thereof. They were deposited by plaintiff with the defendant bank for collection. Defendant had collected them, but refused to account for the proceeds. The defendant answered that the drafts were on parties out of the state and were deposited with it with the understanding that they should be sent to Vicksburg for collection; that pursuant to such agreement, they were sent to a bank at that place for collection; that the bank had not yet collected them or accounted to the defendant. The bank at Vicksburg collected a portion of the drafts, but did not account to the defendant. Thereafter it became insolvent. Defendant had made inquiries about the bank and believed it to be solvent when the drafts were sent. Judgment for defendant. Appeal.

Vories, J. Where the bank with which such paper is left for collection, uses due diligence and transmits the paper to a proper correspondent, with proper instructions, its responsibility is at an end, unless by some after act it makes itself responsible. Judgment affirmed.

Cited: 14 Mo. App. 372; 52 id. 164; 59 id. 548; 71 id. 456; 82 id. 431.

SMITH v BEATTIE (1874) 57 Mo. 281.

Bill to enjoin the sale of real estate. Plaintiff made a deed of trust to R to secure the payment of promissory notes to the defendants. Defendants were bankers, and the plaintiff kept an account with them from 1864 to 1869, during which time he deposited largely, and drew the same as required. To prevent a sale of property, the notes in question were given. The plaintiff alleged that, at the time the notes were given, the defendants were indebted to him in an amount larger than the notes. The defendants proved that their books were accurately kept; that they were written up every day. The books were then admitted in evidence, against objection, to prove the account of plaintiff. Decree for defendants. Appeal.

Wagner, J. The books were admissible for the purpose offered. Judgment affirmed.

Cited: 108 Mo. 279; 24 Mo. App. 309; 37 id. 570; 50 id. 632; 72 id. 541.

FARMERS AND TRADERS BANK v HARRISON (1874) 57 Mo. 503.

On promissory note, against maker and sureties. The sureties answered: 1, That the notes were given for money loaned at a usurious interest; 2, that they were released by reason of an extension given the principal without their consent. They

relied upon a provision in the plaintiff's charter limiting the amount of interest to be taken. Demurrer to the first defense. Sustained. Issue was joined on the second and tried by the court. Judgment for plaintiff for full amount of note and interest. Appeal.

Lewis, J. 1. Where a note given to a banking corporation is found to be tainted with usury, the result is the same as in the case of a note given to a natural person. 2. Banks must act within the authorized powers of their charter. The departure from the authority renders any excess invalid. 3. An illegal consideration creates no legal obligation on the holder to refrain from suit, and hence there can be no release of sureties. Judgment reversed.

Cited: 57 Mo. 502; 69 id. 545; 74 id. 553; 155 id. 154; 77 Mo. App. 647.

CURTIS v WARD, ADM'R (1874) 58 Mo. 295.

To recover from a tax collector the amount of the state and county taxes collected by him. The plaintiff was a resident of Illinois and the owner of capital stock in the F National Bank. The stock was assessed to him in M county. The defendant demurred. Overruled. Judgment for plaintiff. Appeal.

Wagner, J. 1. The shares in a national bank are liable to assessment and taxation in this state. 2. Personal property of a nonresident is taxable here, if it be found situated within the local jurisdiction, regardless of whose hands it may happen to be in. Judgment reversed.

Cited: 58 Mo. 296.

THIRD NAT. BANK v ALLEN (1875) 59 Mo. 310.

To recover the amount of a check drawn upon and paid by the plaintiff. The check was raised from \$20 to \$368.38; and the names of the defendants, as payees, were substituted for that of the original payee. The forgery was discovered the next day after payment. The defendants' witness testified that they received notice the second day after the payment. Judgment for plaintiff. Appeal.

Wagner, J. 1. What will amount to a reasonable time of giving notice of a forgery, depends on the circumstances of each particular case. 2. Whether the defendants were notified on that day or the next succeeding, in either event, it was within a reasonable time. Judgment affirmed.

Cited: 155 Mo. 654; 12 Mo. App. 286; 39 id. 85; 71 id. 162.

FARMERS AND DROVERS BANK v WILLIAMSON (1875) 61 Mo. 259.

On a promissory note against the makers. One defendant asked for a continuance on the ground of the absence of the other defendant, who had not been "within the jurisdiction of this court" within the last week. Refused. The plaintiff's assistant cashier testified that the plaintiff was doing business as a bank in the name in which the suit was brought; had a president and officers; kept a discount register; and was the lawful owner of the note for value. Judgment for plaintiff. Appeal.

Sherwood, J. 1. The continuance of a cause, on the ground of inability to produce a witness, rests almost altogether in the sound discretion of the court. 2. The evidence was sufficient to show the plaintiff had the power to sue, and it was immaterial whether it was an association of persons or a corporation. Judgment affirmed.

Cited: 68 Mo. 95; 82 id. 480; 25 Mo. App. 109.

BUCKNER v JONES (1876) 1 Mo. App. 538.

Debt. Plea: Nil debit. Defendant was a member of the firm of J & S; B gave the firm a certified check, drawn by the plaintiff on a bank in P, payable to B's order; J & S advanced money from time to time on the check, to the amount of \$295, and a few days later paid the balance to B. The plaintiff replied that J & S received the check knowing before they made any advances, that B held it as the agent of the plaintiff, with instructions to use it for the plaintiff's benefit. B was an impecunious man, of drinking habits. The check was received to pay taxes for the plaintiff. B owed J & S borrowed money, and paid them from the check and obtained other advances on it. Judgment for plaintiff. Appeal.

Bakewell, J. 1. If the defendant received the check under circumstances to put him on his guard, and to lead him, as a reasonable man, to suspect that it

could not be honestly pledged or paid away for his own benefit, by the person presenting it to him, he was not safe in advancing money on it. 2. Because a check is negotiable, an absolute title does not necessarily pass by indorsement and delivery. Judgment affirmed.

CLERKS SAVINGS BANK v THOMAS (1876) 2 Mo. App. 367.

On promissory notes. One note was made by M and D, payable to the order of the S D Co. and indorsed, "S D Co. by C D, Jr., fin. agt." This note was also indorsed by C D, Jr. The other note was signed S D Co. "by C D Jr., fin. agt.," payable to the order of M & Co., and by them indorsed to the plaintiff. The defendants were members of a co-partnership called the S D Co., and never authorized the making and indorsing of this paper by C D, Jr. C D, Jr. testified that he informed T, a director of the plaintiff, before the paper was offered for discount, that the proceeds of the notes were to go to the benefit of M & Co. Judgment for defendants. Appeal.

Bakewell, J. T, being a director, and present at the board when the notes were offered for discount, the notice to him, was notice to the bank that the paper was for accommodation of M & Co. and put it on inquiry as to the power of C D, Jr. to indorse for S D Co. Judgment affirmed.

Cited: 49 Mo. App. 606.

MARKET STREET BANK v STUMPE (1876) 2 Mo. App. 545.

On bond, against sureties. Defendant S was appointed cashier and teller of plaintiff bank for one year, and was thereafter reappointed. S, as principal, and the other defendants, as sureties, executed the bond reciting that the obligors bound themselves while S held office then or by re-election. The breach assigned was that, during the second year, S paid to T, on his check, \$6,804.43 over the amount deposited by T, which was wholly lost to the bank; and also that he converted to his own use \$4,700 of the money of the bank. The defendants contended that they were not liable because overdrafts were sanctioned by the board of directors. S was not served with process, but appeared and participated in the action. Judgment for plaintiff. Appeal.

Bakewell, J. 1. The fact that the directors sanctioned or made overdrafts, does not relieve the cashier or his sureties. 2. If a party is present and participates in a trial, it is a waiver of service. Judgment affirmed.

Cited: 12 Mo. App. 109; 15 id. 31; 86 Mo. 273.

KNECHT, ADM'R v UNITED STATES SAV. INST. (1876) 2 Mo. App. 563.

To recover a balance of a deposit made by the plaintiff's intestate with defendant. The defendant had previously presented a claim in the probate court for a draft of \$4,000 on the intestate, which had not matured at the time of his death. The claim was allowed, after deducting credit given for the deposit, toward the payment of the claim. The deposit was \$1,777. Defendant set up *res adjudicata*. Judgment for defendant. Appeal.

Lewis, J. 1. Every creditor of an estate, against whom a cross-demand exists in its favor, may strike a balance and obtain an allowance for the amount so appearing due him. 2. The bank had a right to have credit on the draft of the amount of the deposit, because its relation to its depositor was that of a debtor. 3. The proceedings in the probate court were conclusive, and the plea of *res adjudicata* was properly sustained. Judgment affirmed.

Cited: 4 Mo. App. 337; 5 id. 346; 18 id. 449; 74 id. 288.

MATTHEWS v SKINKER (1876) 62 Mo. 329.

Reversed in 98 U. S. 621.

Cited: 4 Mo. App. 418, 540; 8 id. 220; 31 id. 16.

Overruled: 71 Mo. 228; 72 id. 362; 81 Mo. 26; 117 id. 290; 144 id. 586;

DAVIESS CO. SAV. ASS'N v SAILOR (1876) 63 Mo. 24.

On a note, assignee against makers and surety. B, the only contesting defendant, relied on proof that he was surety, and on further evidence (objected to) that the plaintiff's cashier, in reply to his inquiry at the maturity of the note, informed him

in substance that it had collateral means of collection and would not look to him for payment. Judgment for defendant. Appeal.

Napton, J. 1. A cashier has no general authority to bind his bank by declarations or admissions outside the general line of his duty which is to collect and keep money and deliver up securities when paid, nor has he authority to discharge a debtor or a surety without payment. 2. The evidence was incompetent without proof of special authority conferred on the cashier to bind the bank. Judgment reversed.

Cited: 86 Mo. 272; 62 Mo. App. 582; 76 id. 95.

RINGLING v KOHN (1877) 4 Mo. App. 59.

To recover United States bonds. The bonds were described by numbers, amounts, and dates, and were deposited by the plaintiff in the S Bank. The cashier, pledged them to the defendant as collateral security for the payment of a note. The cashier afterward took his check to the defendant, and assumed to pay the note with it, and took up the bonds. The check was worthless, as the S Bank failed. The defendant recovered the bonds by legal proceedings, and the plaintiff brought this action to recover them back. Judgment for plaintiff. Appeal.

Bakewell, J. 1. Bonds of the description of those in question are negotiable, and pass by delivery, and any one who takes them in good faith, holds a title valid against the world. 2. The return of the bonds to the bank, or to the cashier, did not divest the title of the defendant, because it was effected by a dishonest trick. 3. While the bank had no title to the bonds, it had possession which enabled it to transfer the bonds to an innocent purchaser. Judgment reversed.

Cited: 26 Mo. App. 216.

GORMAN v GUARDIAN SAV. BANK (1877) 4 Mo. App. 180.

Bill to wind up the affairs of a bank, and for the appointment of a receiver. It was alleged that the defendants, directors in the bank, lacked experience and were inefficient; that they had disregarded the provisions of the charter in making loans; that the bank was really insolvent, and could not continue business without loss; that plaintiff had not paid her last assessment, made by the directors on the stock; that if the assessments are not paid the stock would be forfeited. On filing the bill, the court made an order enjoining defendants from forfeiting plaintiff's stock. Demurrer: no cause of action. Sustained. Judgment for defendants. Appeal.

Lewis, P. J. Defendants are not charged with any misappropriation of assets to private or fraudulent purposes; nor does there appear any ground upon which plaintiff can claim equitable relief. Judgment affirmed.

MECHANICS BANK v VALLEY PACKING CO. (1877) 4 Mo. App. 200.

On bill of exchange. The bill was drawn by defendant on A & Co. to the order of X, cashier of St. J Bank, and by the request and authority of defendants delivered to A & Co. for acceptance and discount. X indorsed the bill, "Pay to H or order, for collection for my account," and deliver it to H, the cashier of the V Bank, for the account of the St. J Bank. A & Co. were to pay the proceeds to the V Bank, for the account of the St. J Bank. A & Co. crossed out H's indorsement, with the knowledge of the plaintiff, before it had discounted the bill. The plaintiff credited the proceeds on A & Co.'s account, who drew their check and deposited it at the V Bank to the credit of the St. J Bank. A & Co. failed to pay the draft when due. Judgment for defendant. Appeal.

Hayden, J. 1. The bill on its face carried with it a trust, into whatever hands it went. 2. The act of striking out the restrictive indorsement was an act which it was perfectly competent for A & Co. to do, on the basis that the plaintiff was to look only to them. 3. The effect of the alteration of the bill, without the assent of the defendants, was to destroy the validity of the bill as to the defendants. Judgment affirmed.

Cited: 107 Mo. 410. Aff'd: 70 Mo. 643.

MCGRADE v GERMAN SAV. INSTITUTION (1877) 4 Mo. App. 330.

On contract, drawer against drawee, for refusal to pay check. F gave a check on the defendant to the plaintiff. Defendant refused to pay the same. It con-

tended that the payee had no right to sue, and that F being indebted to it, the right to setoff existed. The debt had not matured. Plaintiff nonsuited. Motion to set aside. Denied. Appeal.

Bakewell, J. 1. The undertaking of the defendant was to pay its depositor's checks, if it had funds of the depositor to meet them when presented. The claim of the defendant against F not having matured, and its having funds of his more than sufficient to pay the check when presented, there was no excuse for refusal to pay. 2. The right to setoff was lost by assignment of the funds in the bank, before the debt matured. Judgment reversed.

Cited: 4 Mo. App. 401; 7 id. 532; 11 id. 296; 13 id. 205; 14 id. 382; 64 id. 328. Overruled on point one, 79 Mo. 252; see 71 Mo. App. 139.

ZELLE v GERMAN SAVINGS INSTITUTION (1877) 4 Mo. App. 401.

On check, given by F to the plaintiff. F had funds in the defendant sufficient to pay the check, but he owed defendant a larger amount on a note not then matured. The day the check was presented, F was declared a bankrupt. Defendant declined to pay the check, claiming a right to set off the note against the deposit of F. Judgment for defendant. Appeal.

Bakewell, J. The undertaking of a bank with its depositors is that it will pay its depositor's check to the holder of it, if it has sufficient funds of the depositor to meet it when presented. This promise and agreement inured to the benefit of the holder of the check, and he may sue and recover on it, if it is presented and payment refused. The rights of the parties in this case were fixed when the check was presented for payment. After that, the defendant had no right to pay other checks against the fund, or satisfy demands which subsequently accrued to the defendant and others. Judgment reversed.

Cited: 7 Mo. App. 532; 14 id. 382; 64 id. 328; but see 71 id. 139.

CUMMINGS v SPAUNHORST (1877) 5 Mo. App. 21.

To enforce individual liability of the officers of the C Bank, for receiving a deposit, knowing that the bank was insolvent. The action was based upon sec. 27, art. 12, of the state constitution, which made it a criminal offense to so receive deposits. The defendant demurred on the grounds: 1, That the section did not create a right of action without further legislation; 2, that it did not apply to the defendant which was created by special charter of 1857, and that to give the section the effect contended for, would impair vested rights. Sustained. Judgment for defendant. Appeal.

Hayden, J. 1. The provisions of the section of the constitution raise, in favor of the depositor, a right of action and afford a remedy even under rules which prevailed at common law, without further legislation. 2. A corporation created by a special charter, and its officers, are subject to the police power of the state, and the provisions of its charter cannot exempt it from regulations made in the exercise of that power, nor do they impair the obligation of a contract. Judgment reversed.

Cited: 5 Mo. App. 583; 9 id. 113; 13 id. 111, 112.

CORDELL, ADM'R v FIRST NAT. BANK (1877) 64 Mo. 600.

A certificate of deposit, payable six months after date, with interest from date at 6 per cent per annum, continues to bear that rate of interest, after maturity, though not presented at maturity.

THE STATE v GATES (1877) 67 Mo. 139.

Mandamus to compel respondent, the state treasurer, to pay to the relator, the treasurer of O County, its proportion of the state school funds. The state treasurer, on a warrant from the county court, payable to L, county treasurer, sent L a check for the amount due, payable at the N Bank, in which he had ample funds to meet it. The check was not presented for payment until after the bank suspended. The respondent had not taken security for deposits in the bank, as required by the constitution.

Sherwood, C. J. 1. Payment by bank check may be made by a public officer, when he has money on deposit. 2. By the non-presentation of the check, the county treasurer made the debt and the loss his own. 3. Judicial notice is taken

of the authority of public officers, whose powers are prescribed by law. 4. A public officer has implied power to do those things necessary to effectuate the powers granted. 5. The fact that the state treasurer did not comply with the conditions as to taking security does not relieve the county treasurer from his duty to present the check within a reasonable time. Writ denied.

Cited: 124 Mo. 649; 83 Mo. App. 574; 87 id. 601.

WALKER v ST. LOUIS NAT. BANK (1878) 5 Mo. App. 214.

On check. The teller of the defendant stated to plaintiff that the signature of the payee and indorser was genuine, whereby the plaintiff was led to take the check for value. The check proved to be not genuine, and the plaintiff lost the amount. There was no evidence that the defendant's teller had authority to state that the indorsement and the signature were genuine. Judgment for plaintiff. Appeal.

Hayden, J. A teller of a bank is an agent acting under a special or express authority, and the plaintiff was bound to know that the teller, as such, had no power to bind the defendant by stating that the indorsement was good. Judgment reversed.

UNION BANK OF QUINCY v TUTT (1878) 5 Mo. App. 342.

On bill of exchange. S drew the bill on the defendants, in favor of the L Co. Savings Bank. Defendants accepted the bill, which was discounted before maturity by the plaintiff, a bank, in which the payee had deposits, and the proceeds credited to the payee on current account. The bill being protested for non-payment and returned, the plaintiff thereupon charged the amount due on the bill against the payee in its current account, and transmitted the bill to the payee with notice of entry. The payee returned the bill to the plaintiff, requesting it to sue on it, and agreeing to hold the plaintiff harmless for the expenses. The defendants offered to prove the failure of consideration between the original parties. Overruled. Judgment for plaintiff. Appeal.

Lewis, P. J. When a discount, or any species of advance, or loan by the bank to a depositor, creates an indebtedness on his part, all the funds which the bank has to his credit may be applied upon such indebtedness. When the plaintiff returned the bill to the payee, the transaction was closed by the party who had an absolute right to close it; and when the bill was returned to the plaintiff, there was a new transaction begun, and consummated after dishonor; and defendants were entitled to an inquiry into the consideration. Judgment reversed.

Cited: 89 Mo. App. 508.

KLEEKAMP v MEYER (1878) 5 Mo. App. 444.

On check drawn by the defendants on the F Bank, presented, dishonored, and protested. The answer averred that when the check was presented, the M Bank, by contract with F Bank, was bound to pay any check drawn on the F Bank and presented through the clearing house; that the defendant had on deposit with the F Bank money to pay the check, but that on the day the check was presented, it became insolvent; that the plaintiff entrusted the check to the N Bank as its agent, to present it to the clearing house; that it was a well-known custom for all of the banks in the city to present the check to the M Bank through the clearing house, but that N Bank failed to do so; that, if presented, it would have been paid. Demurrer to answer. Sustained. Judgment for plaintiff. Appeal.

Lewis, J. 1. The drawer of a check is bound to make it good to the holder, if the drawee fails to pay on timely presentation, and a custom, however well established, can never operate to discharge a liability which the law has created. 2. The plaintiff did what the law required. 3. The demurrer did not admit that it was the duty of the N Bank to present the check through the clearing house to the M Bank, in such a manner as to discharge the defendant. Judgment affirmed.

HOME SAV. BANK v TRAUBE (1878) 6 Mo. App. 221.

On bond. Defendant was a surety on a bond given by R for the faithful performance of his duties, as bookkeeper in plaintiff, a savings bank. Without the knowledge of the sureties, R was appointed teller and performed those duties with those of bookkeeper. R defaulted. Some of his stealing had been done while he was bookkeeper and some while he was teller. Case went to a referee. Judgment for plaintiff. Motion for a rehearing. Appeal.

Bakewell, J. 1. One of several parties, on the same side, may appeal without the concurrence of his co-parties. 2. The motion for rehearing on the report of the referee suspended the judgment. 3. A surety will not be held liable where the risk is increased by the act of the party to whose benefit the suretyship is intended to inure; and it is immaterial whether the bank's loss was caused by the wrongdoing of R as bookkeeper, or as teller. Judgment reversed.

Cited: 62 Mo. App. 337; 82 id. 468; 75 id. 424. Rev'd as to point 3 in 75 Mo. 199.

RINGLING v KOHN (1878) 6 Mo. App. 333.

To recover four United States bonds. The bonds were deposited by the plaintiff in the S Bank, and pledged by the cashier to the defendant as collateral for the payment of a note. Defendant claimed that the S Bank had authority to borrow money, and that W, its cashier, had authority to borrow of the defendant and give the note of the S Bank, with collateral security. The cashier had for a year or more been entrusted with the management of the whole business of the bank. No special authority was shown for him to negotiate the loan in question. Judgment for plaintiff. Appeal.

Lewis, J. 1. The S Bank had by its charter general banking powers. 2. It was not necessary for the cashier to be specially authorized to borrow money, as he was entrusted with the whole management of the bank, the power was delegated to him by implication. Judgment reversed.

Cited: 35 Mo. App. 371; 77 id. 191; 80 Mo. 170; 86 id. 140.

SHULTZ v CHRISTMAN (1878) 6 Mo. App. 338.

To recover money obtained by fraud. The plaintiff was assignee of the W Savings Bank. The defendant, a director, owned 20 shares of the bank's stock, which at that time was greatly depreciated, the bank being insolvent. He sold 10 shares to H, the bank's cashier, and 10 shares to M, its bookkeeper, receiving in payment from the latter his note, which was thereupon offered by the defendant to H for discount. H, having credited the amount to defendant's account, destroyed the note and obtained M's certificate of stock. H had been buying stock for the bank, and the 20 shares were charged up to the bank at the value of \$1,000, the major portion of the same going to the defendant, and the balance being distributed between the cashier and bookkeeper. The defendant set up that he sold the note in good faith to the cashier; did not know it was torn up, or that the bank was insolvent. The court instructed: 1, That if the stock was sold with an understanding between defendant and the employee of the bank that the stock was worthless, the jury must find for plaintiff the amount paid by the bank; 2, if the stock sold to the bank was in fact worthless, the sale was in fraud of creditors. Defendant contended that no right passed to the assignee to annul the sale, and that they could not sue without showing a rejection of the sales and a return of the stock. Plaintiff contended that the insolvency of the bank was an excuse for not rescinding the contract. The petition did not show that a rescission was sought. Judgment for plaintiff. Appeal.

Hayden, J. 1. The right to annul the fraudulent sale passed to the assignee by the assignment. 2. The transfer was bad as between the parties, and an action lies in favor of the bank's representatives. 3. If rescission is sought there must be an offer to return that which was received under the contract; and the petition must show that such remedy is desired. 4. If the suit is to recover damages for fraud, no rescission is necessary. 5. The second instruction is wrong, since the assignee represents the bank, not creditors. 6. The defendant was entitled to know that a rescission of the contract was claimed, but the petition gives no warning to that effect. Judgment reversed.

Cited: 7 Mo. App. 238; 8 id. 247; 19 id. 572; 27 id. 266; 93 Mo. 512.

FUSZ v SPAUNHORST (1878) 67 Mo. 256.

On deposit, to recover from the C Bank, a deposit made by the plaintiff while the bank was in an insolvent condition. The plaintiffs were unaware of the condition of the bank at the time of the deposit, but it was known to the defendants. Sec. 27, art. 12, of the constitution made it a crime, the nature and punishment of which was to be prescribed by law, for a bank officer to assent to the reception of deposits or the creation of debts after knowledge of the bank's insolvency. Any such

officer was made individually responsible for such deposit. Demurrer. Sustained. Appeal.

Sherwood, C. J. 1. Directors and officers of the bank are not individually responsible in an action at law for injuries resulting to a creditor or depositor, unless occasioned by the fraudulent act of the party complained of. 2. The section is not self-executing. Judgment reversed.

Cited: 83 Mo. 493; 85 id. 329; 87 id. 243, 281; 89 id. 56, 630; 90 id. 537; 91 id. 254; 102 id. 211; 107 id. 592; 108 id. 221; 123 id. 32; 125 id. 48; 131 id. 163, 483; 148 id. 397; 155 id. 259, 265, 268, 271; 157 id. 535; 166 id. 303; 6 Mo. App. 579; 7 id. 419; 13 id. 111.

BOYD v MEXICO SOUTHERN BANK (1878) 67 Mo. 537.

To recover the amount of a counterfeit United States treasury note alleged to have been received from the defendant, a bank. The evidence as to when the note was returned or tendered to the defendant was not definite. The question whether the return was made within a reasonable time was left to the jury. Judgment for plaintiff. Appeal.

Napton, J. 1. If a creditor receives a counterfeit bill in payment of a debt, the debtor is not discharged, and the creditor upon offering to return it may demand that which is due him. 2. The return, or offer of return, must be made within a reasonable time, and whether made in a reasonable time is a question for a jury. Judgment affirmed.

HANNAH v MOBERLY BANK (1878) 67 Mo. 678.

Application for an execution. The application was by a judgment creditor of defendant, a state bank, against S, one of its stockholders, for an execution; there being no property of the bank whereon to levy. Defendant confessed judgment in favor of its creditors, including plaintiff, and agreed that W, the sheriff, take charge of all property belonging to it, under executions issued on the judgment, and apply the proceeds ratably on such executions. W took possession and became receiver. All the property was disposed of, plaintiff being a party to the transaction, and receiving his pro rata share. A large amount remained unpaid. S owed defendant a balance on stock, for which no call had been made and which was not due. Application denied. Appeal.

Hough, J. 1. Liability of stockholder to a bank, for unpaid stock which is not due, and which has not been called, cannot be seized and collected under an execution against the bank, and such liability can only be reached by a special execution, against the stockholder himself, in default of assets of the bank. 2. The agreement of the parties could not confer upon the sheriff or receiver, authority to institute suits against stockholders when, but for such agreement, he would have had no such authority. Judgment reversed.

Cited: 71 Mo. 595; 78 id. 491; 90 id. 29; 107 id. 586; 108 id. 600; 130 id. 163; 9 Mo. App. 140; 10 id. 513; 12 id. 140; 17 id. 452; 45 id. 511.

CENTRAL NAT. BANK v LEVIN (1879) 6 Mo. App. 543.

On promissory note against an indorser. The president of the plaintiff, a bank, knew that the defendant was in business at S, when the note was discounted. The plaintiff's cashier, on receipt of notice of non-payment, inclosed a notice to defendant in a letter to J at S, deposited it in the post office with instruction to J to deliver it to the defendant. The president was absent and the cashier did not know the defendant's residence. The notice was remailed by J, and did not reach the defendant until the third day after it was mailed from the bank. Had it been addressed to the defendant at S it would, in due course of mail, have reached him the following day. Judgment for defendant. Appeal.

Hayden, J. The bank must be presumed to have known that the defendant did business at S, when it received notice of non-payment, and the absence of the president was no legal excuse for the non-performance of a legal duty, on which the right of recovery depended. Judgment affirmed.

UNION NAT. BANK v HUNT (1879) 7 Mo. App. 42.

On promissory note. Defendant purchased of A 100 shares of the stock of plaintiff, and gave his note. The note was assigned to plaintiff and was renewed by it, the stock being pledged as collateral. Defense: That plaintiff had purchased

largely of its own stock, in violation of an act of Congress, and, illegally holding the stock, contrived that 100 shares should be regarded as the property of defendant, and that he should borrow from plaintiff, and deposit the shares as collateral; that the note in suit was a renewal of one given in the first transaction, representing a discount made in violation of law; that the note was obtained by fraud. Plaintiff's officers represented that the stock was worth \$82 per share, and that it would be worth \$100, and that the bank was in a flourishing condition. Verdict for plaintiff. Appeal.

Bakewell, J. Defendant's position does not establish a defense. The bank had a right to sell the shares. If taken for the security of a debt, it was bound to sell them within six months of the purchase. To make out fraud, there must be evidence from which to infer that representations were made in a material matter, which were false, and made with the intent to deceive, in regard to particulars peculiarly within the knowledge of the officers of the bank, which must have been relied upon by defendant, and have furnished the motive for the transaction on his part, and that he used ordinary vigilance to ascertain the truth. Judgment affirmed.

Cited: 7 Mo. App. 232; 41 id. 676; 74 id. 376. Reversed in 76 Mo., 439 on question of diligence.

MERCANTILE BANK v MCCARTHY (1879) 7 Mo. App. 318.

On promissory note, against the maker and indorser. The defendant averred that it should have been alleged that the note was presented as well as demanded; that there was no notice to the indorser; that there was no evidence that the cashier of the indorsing bank had authority to pledge the bank's negotiable securities. The indorser was president of the T Bank. Notice was left for him at the bank, where he usually called every day for his mail. It was shown that the cashier did the principal part of the outside business of the defendant, securities being frequently pledged by him. He pledged the one in suit. Judgment for plaintiff. Error.

Bakewell, J. 1. Facts necessarily implied need not be stated. 2. There can be no demand on a note without presentation. 3. The notice of protest was sufficient. 4. Where a cashier frequently pledges securities of the bank, in the transaction of its business, the directors will be held to have conferred the authority. 5. He had authority to pass the title to the note in suit, to the plaintiff. Judgment affirmed.

DUFFY v BRYNE (1879) 7 Mo. App. 417.

To recover deposits. Defendants were the directors of an insolvent bank. The plaintiff alleged that deposits were made by him, by reason of representations that the corporation was solvent; that defendant fraudulently concealed the fact that it was insolvent. Demurred to the declaration. Sustained. Judgment for defendants. Error.

Bakewell, J. The mere fact that a man made a deposit in an open bank which was insolvent, and that he lost his money, does not give him a cause of action at common law against the directors. The provisions of the constitution are not self-enforcing, and no act to enforce them had been passed when the petition was brought, and therefore they have no application in the present case. Judgment affirmed.

Cited: 13 Mo. App. 110; 43 id. 232.

SENDER v CONTINENTAL BANK (1879) 7 Mo. App. 532.

On check. The check was drawn on the defendant, payable to the plaintiff. It was presented to the defendant and payment refused. The defendant had funds of the drawer sufficient to pay the check. Judgment for plaintiff. Appeal.

Hayden, J. The obligation of the bank is to pay upon presentment to such persons, as shall be named, or its bearer, when it has on deposit from the drawer, sufficient funds to meet the demand. Judgment affirmed.

Cited: 11 Mo. App. 296; 13 id. 207; 14 id. 382; 64 id. 328; see 71 Mo. App. 139.

BANK OF NORTH AMERICA v TAMBLYN (1879) 7 Mo. App. 570.

To save itself from loss, a bank may, under its general powers, take an assignment of an account due a debtor of the bank. Where there is any evidence to support the finding of a referee, such finding will not be disturbed by an appellate

court on the suggestion that it was against the evidence. One who contends that error was committed in the exclusion of evidence, must preserve in the record the fact that makes the evidence complete.

MECHANICS BANK v VALLEY PACKING COMPANY (1879) 70 Mo. 643.

On bill of exchange against the drawer. Defendant contended that H's indorsement was restrictive, and that the erasure of the indorsement without defendant's assent destroyed the validity of the draft as to defendant. The defendant drew upon A & Co., requesting payment to the order of H, cashier of the F Bank. H indorsed it "pay to H H, cashier, or order, for collection for account of F Bank." H H was cashier of the V Bank. The bill was offered by A of A & Co. to the plaintiff, discounted, and the proceeds placed to the credit of A, and afterward received by the defendant. Across the restricted indorsement made by H, A drew black lines, and in this condition it was received by the plaintiff. At maturity it was protested for non-payment and notice given. Plaintiff was not permitted to show by parol the alleged contract between A and defendant. Judgment for defendant. Affirmed by court of appeals. Appeal.

Henry, J. 1. The indorsement of A without the assent of the defendant, destroyed the validity of the draft as to that company. Plaintiff was bound to know that such was the effect, when it discounted the bill. 2. The evidence was properly rejected. 3. The restrictive indorsement destroyed the validity of the bill and operated as a mere authority to receive the proceeds for A's use. Judgment affirmed.

Cited: 79 Mo. 425; 107 id. 410.

INTERNATIONAL BANK v GERMAN BANK (1879) 71 Mo. 183.

On certificate of deposit. B deposited \$3,000 with the German Bank, receiving a certificate payable in six months. Across the face was written, "Subject to any claim or fees, etc." (None accrued.) B indorsed it to the P S Institution for keeping and as collateral to loans, aggregating \$450. Plaintiff before maturity, and in good faith, received the certificate from W, cashier of the P S Institution, as collateral to a loan of \$5,000. Later W gave his worthless check to plaintiff and returned the collateral to his bank. Plaintiff replevined the certificate and brought suit on it. The P S Institution voluntarily assigned to one F. The G Bank answered that B and the assignee both claimed the fund, paid the money into court, and asked that they interplead. B assigned his claim. The trial court rendered judgment against the plaintiff, allowed the assignee the amount of the small loan, and gave balance to B's assignee. The appellate court modified the judgment giving plaintiff only the amount of the two small notes. Appeal.

Napton, J. 1. The instrument was non-negotiable under the statute, but it was assignable and suable in assignee's name. 2. The written memorandum was of no importance between the interpleaders. 3. It was subject to equities, but the owner is precluded by his acts from claiming the certificate which his indorsement transferred. 4. The blank indorsement of B and the delivery was such a transfer of the title as to authorize those dealing with the latter to infer an absolute ownership in the P S Institution, and a full authority on their part to sell or pledge the certificate. Judgment reversed.

Cited: 89 Mo. 494; 93 id. 169; 95 id. 346; 97 id. 59; 167 id. 400; 15 Mo. App. 214; 27 id. 666; 54 id. 409; 57 id. 120; 62 id. 633.

HODGSON v CHEEVER (1880) 8 Mo. App. 318.

On deposit, against a stockholder of an insolvent bank, formed under the laws of Illinois. The charter of the bank, (Private Laws of Ill. 1869, p. 194-196,) provided that the stockholders be individually responsible to the amount of their stock, in case the bank did not pay any debt or liability. The defendant was a citizen of Missouri, and had never lived in Illinois. Defendant contended that plaintiff's remedy was in equity; that being a non-resident of Illinois he was not liable. Illinois courts had held a creditor of bank could recover from an individual stockholder. Judgment for plaintiff. Error.

Hayden, J. 1. The defendant's personal obligation is fixed by the terms of the charter, and by his subscription, and the contingency is that default shall be made by the corporation. 2. The action for default of the bank may be brought in this state. 3. When the bank ceased to do business, the plaintiff then had a right to enforce his obligation. 4. The defendant's liability arose out of contract, and plain-

tiff was not compelled to file a bill in equity against all the stockholders. Judgment affirmed.

Cited: 8 Mo. App. 324; 9 id. 567; 13 id. 17, 113; 43 id. 201, 492; 131 Mo. 672.

ROSENBLATT v HABERMANN (1880) 8 Mo. App. 486.

On bank check, drawn by the defendant on the G Bank. The check was given near the close of business hours, and on the next day deposited with the C Bank. The C Bank did business during that day, but suspended after business hours. The day following, the C Bank, according to custom, presented the check at the clearing house for payment. Payment being refused, it was returned to the plaintiff, who notified the defendant. Judgment for defendant. Appeal.

Hayden, J. There is no warrant for the assumption that the time for presenting a check is extended by the custom of banks in the transaction of business among themselves. Judgment affirmed.

Cited: 14 Mo. App. 370.

ALBERS v COMMERCIAL BANK (1880) 9 Mo. App. 59.

Aff'd: 85 Mo. 173. Cited: 9 Mo. App. 127; 30 id. 277.

CITY OF CARTHAGE v FIRST NAT. BANK (1880) 71 Mo. 508.

To collect license provided for by ordinance of plaintiff, on banks and banking associations, organized under the laws of the state or the United States. Demurrer, on the ground that the general assembly had no authority to enact such an ordinance, and because it imposed a tax on defendant. Demurrer overruled. Judgment for plaintiff. Appeal.

Norton, J. A state can only impose such a tax upon national banks as is authorized by act of Congress creating them, and that act only authorized a tax on the shares in the bank and not upon its capital stock. Defendant's right to do business is not dependent on a license from the state or any of its municipalities. Judgment reversed.

SAVINGS BANK v HUNT (1880) 72 Mo. 597.

On cashier's bond. The bond was not required by the act under which the plaintiff bank was incorporated, but was provided for by a by-law. The defendant H was appointed cashier for one year, and until his successor should qualify. The bond was silent as to the time of the obligors' liability. H was re-appointed at the expiration of his first term, and thereafter became a defaulter. Judgment for defendants. Appeal.

Henry, J. 1. The continuance of H, without giving a new bond, exonerated the defendants from liability. 2. The bank had power to adopt a by-law requiring the cashier to give a bond. Judgment affirmed.

Cited: 72 Mo. 649; 87 id. 160; 26 Mo. App. 209.

MONITEAU NAT. BANK v MILLER (1880) 73 Mo. 187.

On promissory notes against the surety. Plea: Usury. The original notes taken by plaintiff, a national bank, had been many times renewed, interest being paid each time. The application of the interest paid on one of the notes would have extinguished it and left a balance. The National Banking Law provided for a forfeiture of the entire interest, if taken at a usurious rate, and that the party paying such interest could recover twice the amount as a penalty if sued for within two years from the usurious transaction. The transaction occurred more than two years before this suit was commenced. The referee reported the first note paid and deducted the full interest due on the other note, and stated the balance as due the plaintiff. Judgment for the defendant on the first note, and for the plaintiff for the balance found due. Appeal.

Henry, J. 1. The report of the referee was properly adopted by the court. 2. Whenever a national bank charges an illegal rate of interest, all payments of interest are illegal; and if the original transaction is usurious, the renewals thereof will be tainted therewith. 3. All payments made are to be applied to the principal.

4. The Statute of Limitations does not apply in this case, which is a suit by a bank to recover usurious interest. Judgment affirmed.

Cited: 41 Mo. App. 430; 44 id. 409; 155 id. 64. Overruled in 155 Mo. 65 on point 2.

MUENCH v VALLEY NAT. BANK (1881) 11 Mo. App. 144.

Conversion of notes and acceptances delivered by J, the plaintiff's assignor, to the defendant, a bank, for collection. Answer: That they were to be collected and credited to J on his indebtedness to the defendant, on a note discounted for him. The note matured before the collections were made, and the proceeds were credited to J. Replication: That the defendant presented its entire claim against the estate of J for allowance, and that it was allowed, with the understanding that the defendant should remain liable for the collections. Judgment for defendant. Appeal.

Bakewell, J. 1. When a discount has been made, and the note has matured, so as to create an indebtedness from the depositor to the bank, all funds of the depositor which the bank has at that date, or which it afterward acquires in the course of business with him, may be applied to the discharge of the indebtedness; and this applies to commercial paper placed with the bank for collection. 2. Proving defendant's entire claim cannot be taken as an intention on the part of the defendant to waive its lien. Judgment affirmed.

Cited: 56 Mo. App. 8; 62 id. 183.

STATE SAV. ASS'N v BOATMEN'S SAV. BANK (1881) 11 Mo. App. 292.

On checks drawn on the defendant, and held by the plaintiff. C & Co., depositors, drew the checks, one to A & Co. and one to bearer. They were indorsed and presented to the plaintiff. The cashier, through a mistake, placed them on the canceling fork. They were charged to C & Co. and credited to the parties presenting them. The defendant held an acceptance of C & Co. not matured. When the plaintiff discovered its mistake in paying the checks. C & Co. were embarrassed. Defendant, while it held funds belonging to them, refused to pay the checks, but held the deposit to apply to the payment of the acceptance. C & Co. were afterward adjudged bankrupts, and the defendant adjusted its claim against them in bankruptcy before the present suit was brought. C & Co. notified the defendant that they were about to suspend. Judgment for plaintiff. Appeal.

Bakewell, J. 1. The accidental defacement of the checks by the plaintiff did not impair its right to recover. 2. The deposit was in the hands of the defendant when the drawers of the check went into bankruptcy, but it was there by its own wrong, in refusing to pay the checks, and claiming to have a lien upon it for a debt then matured. The holder can recover on these checks, the payment of which was wrongfully withheld, notwithstanding the proceedings in bankruptcy. 3. The notice of suspension was not an order countermanding payment of the checks. Judgment affirmed.

Cited: 14 Mo. App. 382; 64 id. 328; 140 Mo. 240; see 71 Mo. App. 139.

MECHANICS BANK v CITY OF KANSAS (1881) 73 Mo. 555.

Injunction, to prevent a sale of plaintiff's real estate for the payment of taxes assessed from 1867 to 1875. The ground of relief claimed was that the taxes of the bank were fixed at 1 per cent on the capital stock paid in, and that this amount was payable to the state under sec. 32, art. 1, Act of 1856, and that the assessment by the defendant was therefore without authority. There was no reservation in the Act of 1856, whereby the legislature could not withdraw the exemption from further taxation. The defendant claimed the right to tax for municipal purposes; also that, if the taxes were illegal, they could not be restrained by injunction as there was an adequate remedy at law. Perpetual injunction was decreed for 1873 and years prior thereto, and dissolved as to taxes of 1874-5. Appeal.

Norton, J. 1. The Act of 1856 constituted and created a binding contract between the state and the plaintiff, in effect exempting the plaintiff from all liability to pay any other tax than one per cent on its capital stock, and prohibiting any county, city, or town from levying or collecting any tax from it. Only partial relief was granted by the trial court. It should have been complete. 2. The plaintiff's remedy was by injunction, as the taxes created a cloud on title to the real estate. Decree reversed.

Cited: 97 Mo. 339; 104 id. 267; 131 id. 76; 155 id. 446; 12 Mo. App. 344; 22 id. 79; 36 id. 28.

AULL SAV. BANK v CITY OF LEXINGTON (1881) 74 Mo. 104.

On city warrants issued by the defendant, a city. Demurrer upon the grounds: 1, That the petition did not show any authority in the plaintiff to purchase or deal in such warrants; 2, that the public law relied upon did not give it such authority; it did not show authority in the defendant to issue the warrants; 3, that it did not allege that there was money in the treasury to pay the warrants; 4, that there was no allegation of the incorporated powers or right of plaintiff to sue, or the right or liability of the defendant to be sued. Demurrer. Sustained. Judgment for defendant. Appeal.

Hough, J. 1. The plaintiff, organized under art. 6, ch. 37, Wagner's Statutes, had the power to sue, and to purchase and hold the warrants sued on. 2. The note was stated in the petition to have been for services rendered; and under its charter the city had power to provide for the payment of its debts. 3. The petition sufficiently alleged the incorporation and corporate powers of both the plaintiff and defendant. Judgment reversed.

Cited: 83 Mo. 512; 86 id. 140, 499; 51 Mo. App. 605; 52 id. 250.

WALTER v FORD (1881) 74 Mo. 195.

Administrator's account. The proceeding was begun in a probate court to compel an administrator to inventory \$4,000 as assets of the estate of W, the intestate, who requested the defendant to fill up four checks on the S Bank for \$1,000 each, payable to four persons named by him. W signed the checks and gave them to the defendant, with directions to deliver them to the parties, if he died, and if he recovered to return the checks to him. W died, and the defendant delivered the checks to the payees, who drew the money from the bank. Judgment for defendant. Appeal.

Henry, J. 1. There must be an actual delivery of the subject of the gift by the donor. The transaction possessed none of the elements of a donatio causa mortis. 2. The probate court has jurisdiction to compel an administrator to inventory property omitted. Judgment reversed.

Cited: 75 Mo. 199; 77 id. 174; 89 id. 100; 141 id. 657; 70 Mo. App. 508.

HOMES SAV. BANK v TRAUBE (1881) 75 Mo. 199.

Where the sureties on a bookkeeper's bond sought to be relieved from their obligation, because the bookkeeper was obliged to perform, the duties of teller, it was held that the wrongful act of the bookkeeper must definitely appear to have been connected with his duties as teller, or the sureties would not be discharged.

Cited: 101 Mo. 580; 52 Mo. App. 261, 262.

PUBLIC SCHOOLS v ESTATE OF SAVINGS BANK (1882) 12 Mo. App. 104.

Insolvency proceedings. Plaintiff, as assignee of a claim, sought to establish a preference against the assignee of an insolvent savings bank. At the time of the suspension of the bank, K was cashier and had a deposit. Six days later he assigned it to the plaintiff. The bank had a claim against K for wrongfully allowing an overdraft, upon which a suit on his bond was pending. The defendant set up its counterclaim against the deposit claim. It had not been presented before the assignee as a setoff. The court refused to receive evidence of the claim and gave judgment for plaintiff. R. S. sec. 372 gave insolvency assignees power to adjust claims. R. S. sec. 3522 provided for counterclaims arising on contract. Claim disallowed. Appeal.

Thompson, J. 1. The fact that a suit is pending on the bond of K, embracing the liability involved in the counterclaim, is no ground for rejecting the counterclaim. 2. It is no objection to the claim that it was not presented to the assignee. 3. The power given to the assignee by statute to adjust claims against estates gives him no greater power in relation to counterclaims than that given by statute on that subject. 4. The claim against K was one arising on contract within the statute. Judgment reversed.

Cited: 44 Mo. App. 343; 53 id. 173; 114 Mo. 672. Aff'd: 84 Mo. 56.

LIENBERGER v KINEALY (1882) 13 Mo. App. 4.

On note, by the assignee of an insolvent bank, against the maker. The defendant delivered the note to Z, who guaranteed the payment to the bank. At the time of the assignment Z had a deposit in the bank, and afterward tendered the assignee his check for the amount of the deposit, and offered him the balance of the note in money. The tender was refused. The defendant pleaded that the guaranty of Z was a waiver of notice and that he was bound as principal debtor, and that the tender was a discharge of the note. Plaintiff contended that there could be no payment without the consent of the party paid. Judgment for plaintiff. Appeal.

Lewis, P. J. An assignee for the benefit of creditors takes the property of his assignor, subject to all equities. The note, as against Z, who had become a principal debtor thereon, was subject to his claim as a depositor with the assignor, when the assignment was made, and he had the right to pay with the deposit as far as it would go. Consent was not necessary, since the payee already had the money in its possession, and the tender of the check was merely a surrender or waiver of the depositor's claim thereto. Judgment reversed.

FISCHER v TAMM (1882) 13 Mo. App. 108.

For receiving deposits. Defendants, the president and directors of an insolvent bank, received deposits knowing the bank to be in an insolvent condition. The plaintiffs claimed the amount of the deposits. Demurrer. Overruled. Judgment for plaintiffs. Appeal.

Bakewell, J. Aside from statutory or constitutional provisions, an officer of an incorporated bank is not individually responsible for an injury resulting to a creditor of the bank from mismanagement, unless by his malicious or fraudulent act. Judgment reversed.

UNION NAT. BANK v HUNT (1882) 76 Mo. 439.

On promissory note. The defendant purchased of A & P, stock of the plaintiff bank, at eighty cents on the dollar; and gave a note to the vendors, indorsed by himself and another, which was assigned to the plaintiff before maturity. The defendant requested an extension, and executed the note in suit. Defense: that the plaintiff purchased stock of its own corporation in violation of the act of Congress; and that the note was obtained by fraudulent representations of P, the president of the plaintiff, as to the value of the stock. The stock sold to the defendant was a part of a lot taken by the bank to prevent loss from a bona fide indebtedness. The court instructed for plaintiff, that the alleged representations constituted no defense to the note, and refused to charge for the defendant, that if defendant did not know that the representations of P were false until after the execution of the renewal note, then the note would be void. Judgment for plaintiff. Appeal.

Henry, J. 1. The bank had a right to sell its stock. What P said with regard to the condition of the bank was the statement of a fact, within his knowledge as an officer of the bank, and under such circumstances the defendant may rely upon such representations. The first charge was therefore error. 2. The defendant's instruction was properly refused. 3. A national bank which has purchased its own stock must sell it within six months, and may in good faith take the purchaser's note. 4. The abuse of corporate power is not a defense to the note. Judgment reversed.

Cited: 79 Mo. 640; 81 id. 26; 53 Mo. App. 546.

WHERRY v HALE (1882) 77 Mo. 20.

To set aside a conveyance of real estate made by R to the defendant in trust for the receiver of the F National Bank, on the ground that it was without consideration and with intent to hinder, delay, and defraud creditors. The land was held by R for the bank, and he had paid nothing personally for it, but the conveyance was made to him to avoid the effects of provisions of the National Banking Act. After the bank became insolvent R made the conveyance for the benefit of the receiver. The plaintiff made a loan to defendant, thinking he was the owner of the land. Judgment for defendant. Appeal.

Henry, J. 1. R paid nothing for the lands, but held them for the bank, and a trust was thus created for the bank. Holding for the bank, the conveyance to the trustee for the receiver was but the execution of the trust reposed in him, which a

court of equity would have compelled, had he refused. 2. There was nothing in the transaction violative of the National Banking Act, and if there were, the plaintiff could not impeach it. 3. There can be no question that the title of the bank was good as against the creditors of R. Judgment affirmed.

LEWIS v INTERNATIONAL BANK (1883) 13 Mo. App. 202.

On checks. V, the plaintiff's intestate gave M & Co. a check on the defendant, a bank, in payment of cattle. Before the check was presented, V committed suicide. The plaintiff, as administrator of V, brought suit against the defendant for V's deposit. The bank deposited the money in court. M & Co. were required to interplead. Judgment for plaintiff. Appeal.

Lewis, P. J. 1. Between the drawer of a check for value, and the payee of holder, the delivery of the check is an appropriation, or assignment of so much of the funds on deposit. 2. The law will enforce the contract, whether against the contracting party, or his legal representative. Judgment reversed.

Cited: 64 Mo. App. 328; see 71 Mo. App. 139.

EYERMAN v SECOND NAT. BANK (1883) 13 Mo. App. 289.

To recover a trust fund. R, as "county treasurer," deposited county funds in the N Bank. The county formally demanded the fund. R refused to pay. A judgment was obtained on R's bond and paid. Then the county assigned its claim to the plaintiff, R's bondsman. During this time, R frequently consulted with the directors of the defendant, also a bank. The receiver on the N Bank gave R a draft payable to "R, county treasurer," for the first dividends on the assets. R indorsed the draft to the defendant, for its face value, and the defendant appropriated the proceeds to its own use. The plaintiff sued for the proceeds of the draft. Verdict directed. Judgment for defendant. Appeal.

Lewis, P. J. 1. Such additions as "county treasurer," impart no notice that the fund is held in a fiduciary capacity, and have no legal significance beyond a description of the person. 2. But the demand for the fund, admittedly not R's, and his refusal to pay, put a stop to his lawful custodianship, and made him a wrongdoer, and the assignee may pursue the fund into the hands of any person having notice of the true ownership. The facts should have gone to the jury to determine whether the defendant had such notice before cashing the draft. Judgment reversed.

Cited: 57 Mo. App. 286; 82 id. 306, 308; 86 id. 113. Aff'd: 84 Mo. 408.

LIONBERGER v KRIEGER (1883) 13 Mo. App. 313.

Affirmed: 88 Mo. 160.

STATE v RUBEY (1883) 77 Mo. 610.

On deposit, against the assignee of an insolvent savings bank. The funds were deposited by the treasurer of M County. The Act of February 11, 1881, provided for a priority for debts due the State. The defendant refused to allow the claim, except as a claim to the county treasurer, payable out of the assets of the bank, pro rata, with other secured creditors. The questions presented were as to the right of the State to maintain the action, and to claim priority. Judgment for defendant. Appeal.

Hough, C. J. 1. The act relied upon was never intended to authorize a proceeding like the present. 2. The State does not sustain the relation of creditor to the depository of the officer. 3. The officer alone can maintain an action to recover the funds deposited by him. 4. The State has no right to pursue the defaulting depositories of state officers except by way of garnishment. Sec. 1327, R. S., inhibiting the loaning of state money, does not forbid its deposit in banks. Judgment affirmed.

Cited: 77 Mo. 634; 101 id. 65; 18 Mo. App. 449; 45 id. 617.

MERCHANTS NAT. BANK v COATS (1883) 79 Mo. 168.

Interpleader. Complainant, a bank, was the depository in St. Louis of the M Bank of Kansas City, and had a large deposit. The latter made an assignment to defendant C for benefit of creditors. Eleven checks had been drawn by the M Bank

on the deposit but had not been accepted. C and the checkholders claimed the money adversely. Decree for distribution to the checkholders. C appealed.

Norton, J. A check drawn by a depositor upon his depository for part of the deposit does not, without acceptance, transfer or assign, to the holder of the check a legal or equitable claim to the amount named in the check, or create a lien on the fund. Judgment reversed.

Cited: 79 Mo. 250; 21 Mo. App. 524; 62 Mo. App. 483.

EANS, ADM'R v EXCHANGE BANK (1883) 79 Mo. 182.

On certificate of deposit. The petition alleged that E died, and that the plaintiff was duly appointed administrator by the county court of C, which court had probate jurisdiction; that plaintiff accepted and qualified as administrator. The deposit was made with the N Bank, which afterward went into liquidation, and the defendant bank was organized, and came into possession of the money deposited. The defendant demurred to the petition, because it did not show the plaintiff's authority to sue, and did not state a cause of action; that it did not allege that the intestate was the owner of the certificate; that it did not allege that a bond of indemnity had been given; that there was no allegation showing a liability in law of defendant for the debts of the N Bank; that, if the N Bank paid the sum of the deposit to the defendant, it held it as a trust fund; and that the trust could not be enforced by a suit in law. Demurrer sustained. Appeal.

Henry, J. 1. There were sufficient facts alleged to show plaintiff's right to sue; and the allegation of the possession of the certificate by the intestate would imply that he was the holder and owner. 2. The plaintiff can execute the bond required before judgment is rendered. 3. As the petition expressly avers that the N Bank went into liquidation, and that the defendant organized as a banking corporation, and came into possession of and received the deposit as the successor of the N Bank; and as the demurrer admits the truth of these allegations, defendant is liable. Judgment reversed.

Cited: 39 Mo. App. 385; 43 id. 83, 107; 48 id. 323; 66 id. 660; 78 id. 573; 85 id. 324; 91 id. 238.

DICKINSON v COATES (1883) 79 Mo. 250.

Money had and received, for the use of plaintiff. The M Bank gave the plaintiff a check upon the N Bank. Before the check was presented, the M Bank assigned generally to the defendant for the benefit of creditors. Thereupon, the N Bank dishonored the check, and paid the balance due the M Bank to the defendant. Judgment for plaintiff. Appeal.

Norton, J. A check, which is not drawn on any particular fund, or for the whole sum due the drawer from the drawee, and does not contain any words of transfer, does not operate, before its presentment and acceptance by the drawee, as an assignment, either in law or equity, of so much of the deposit standing to the credit of the drawer. Judgment reversed.

Cited: 79 Mo. 170; 83 id. 338; 85 id. 177; 18 Mo. App. 448; 19 id. 583; 21 id. 524; 34 id. 390; 58 id. 26; 62 id. 483; 71 id. 139; 73 id. 569, 570, 671.

STATE v ROGERS (1883) 79 Mo. 283.

To recover taxes on capital stock of a private bank assessed by C County. Pleas: the general issue, and special pleas; 1, that defendant resided in D County and had paid all of the taxes assessed against him there; and, 2, that the taxes were assessed on bonds of the United States, in which banking capital was invested, and deposited with another bank, as security for funds with which he carried on his business. Demurrer to the answer as a whole, sustained. Judgment for plaintiff. Appeal.

Philips, C. 1. The proper practice in the case is to demur to the new matter, or move to strike it out. A general demurrer to the whole answer is too broad. 2. The first matter of special defense constitutes no defense. Under the statutes of this State the property of a private bank is taxable in the county where the business is carried on. 3. By act of Congress, sustained by decisions of the Supreme Court of the United States, local authorities have no power to impose a tax upon the capital of a private banker invested in United States bonds. Judgment reversed.

Cited: 88 Mo. 62; 93 id. 583; 34 Mo. App. 341; 35 id. 445; 38 id. 87; 74 id. 279.

AYRES v FARMERS & MERCHANTS BANK (1883) 79 Mo. 421.

On check, by indorsee against drawee. The check was sent by plaintiff for collection and credit to M Bank under an arrangement by which such checks were passed to plaintiff's credit, and he was entitled to draw against them. M Bank credited plaintiff with the amount of the check; charged the check to defendant, and mailed it for credit on its own account. The next day M Bank made an assignment. Defendant received the check and credited it, before it heard of the assignment. Judgment for plaintiff. Appeal.

Henry, J. Where a bank receives paper not only for collection, but to be placed to the depositor's credit as soon as received, with a right to draw immediately for the amount, this is in effect a purchase of the paper, and title passes to the bank. Judgment reversed.

Cited: 79 Mo. 428; 80 id. 446; 158 id. 200; 17 Mo. App. 252; 59 id. 547; 60 id. 588, 589; 67 id. 102.

BULLENE v COATES (1883) 79 Mo. 426.

On deposit, to recover of the assignee of M Bank, the amount of checks, drafts and orders alleged to have been deposited with the bank for collection and collected. The answer denied that they had been deposited for collection only. It was proved that they were deposited for credit and were credited, as soon as received, on the books of the bank and on plaintiff's passbook; and that under his course of dealing with the bank, the plaintiff had a right to draw immediately for the amount. Judgment for plaintiff. Appeal.

Norton, J. 1. The checks became the property of the bank, and the bank the debtor of plaintiff to the amount of the deposit. 2. It cannot be legally claimed that the bank was acting merely as the agent of plaintiff. Judgment reversed.

Cited: 80 Mo. 446; 17 Mo. App. 252; 59 id. 547; 67 id. 102.

DONNELL v LEWIS CO. SAV. BANK (1883) 80 Mo. 165.

On promissory note. The proceeding was commenced before the assignee of defendant, who disallowed the claim. Defendant's cashier signed the note in question, indorsed it in the name of the defendant, and gave it in renewal of a former note, which had been discounted by plaintiffs. Defendant contended: 1, That the bank had no authority to borrow money; 2, that the cashier had no authority to make notes for the bank; and, 3, that notice of dishonor was not sufficiently made by giving it to the bank, after an assignment, without giving the assignee notice also. There was no evidence that plaintiffs had any notice of the assignment, at the time the notice was given. Judgment for defendant. Appeal.

Ray, J. 1. Where general banking powers are conferred upon a bank by its charter, it may borrow money without more specific authority. 2. In order to show a cashier's authority to borrow money, it is not necessary to prove power specially conferred upon him by the board of directors, or a distinct ratification by them after the act is consummated; his acts done in the ordinary course of business actually confided to him as cashier, are prima facie evidence that they fall within the scope of his duty. 3. As, at the time of the protest and notice, plaintiffs neither knew nor had reason to know of the assignment, they are not bound thereby and notice to the bank was sufficient. Judgment reversed.

Cited: 86 Mo. 140; 94 id. 480; 120 id. 559; 77 Mo. App. 191.

FLANNERY v COATES (1883) 80 Mo. 444.

On draft, deposited with the M Bank. The draft was, according to the customary dealings between the parties, passed to the credit of plaintiffs. The same evening the bank closed its doors. This action was brought against the assignee. Judgment for defendant. Appeal.

Ewing, C. This question has been decided in a well considered opinion by this court, in *Ayer v Farmers and Merchants Bank*, 79 Mo. 421. It is unnecessary to do more than refer to that. Judgment affirmed.

Cited: 60 Mo. App. 588.

DONNELLY v HODGSON (1884) 14 Mo. App. 548.

To enforce a claim, against the estate of C, by a judgment creditor of the B Bank of which C was a stockholder. Sec. 745, R. S. provided that upon dissolution

of a corporation having debts unpaid, suits might be brought against those who were stockholders at the time of dissolution. The bank had not been formally dissolved. Plaintiff's offer to prove that it had ceased to receive deposits, did not intend to resume business, and was winding up its affairs, was denied. Its notes, given in settlement with creditors, were overdue and dishonored. Judgment for defendant. Appeal.

Bakewell, J. A creditor cannot sue a stockholder under sec. 745, R. S., until the corporation has been dissolved, leaving debts unpaid. There need not be a judgment of forfeiture against the corporation, but the mere fact that a corporation has closed its doors and does not contemplate resumption of business does not show dissolution. Judgment affirmed.

EHRLERMANN v ST. LOUIS NAT. BANK (1884) 14 Mo. App. 591.

A bank which holds and owns a depositor's past due note, the amount of which exceeds the amount of the deposit, may hold the deposit account against the note, and may refuse to pay checks drawn against the deposit.

SIMMONS v DENT (1884) 16 Mo. App. 288.

Motion by judgment creditor of a bank for execution against a stockholder. Defendant transferred to his wife his stock in B Bank, in return for her money, which he had used. The bank was incorporated under the state laws, and, at the time, was in a prosperous condition. The statute permitted married women to become stockholders in any bank, incorporated under the state laws. The bank transferred the stock on its books to the wife, who paid several assessments and received dividends. At the time of this suit, the stock still stood in the name of the wife. Many years after the transfer, plaintiff became a judgment creditor of the bank, with a nulla bona return on his execution. Motion sustained. Appeal.

Bakewell, J. 1. The wife was capable of assuming the liability of a stockholder under the statutes of this state. 2. As the corporation was prosperous at the time of the transfer, and there was no fraudulent intent to escape liability on the part of the defendant, he was released by the transfer to his wife. Judgment reversed.

JUDY v FARMERS & TRADERS BANK (1884) 81 Mo. 404.

To enforce a trust. Plaintiff was indebted to D on a note for \$2,500 secured by a deed of trust to land. C discounted plaintiff's note for \$5,000 secured by another deed of trust to the same land, giving him authority to draw the money through any bank "upon the express condition that the bank hold \$2,500 of the amount, and place it to D's credit, and hold it for the use of D to pay off his note." Defendant collected the money, but did not pay the \$2,500 note when due; but placed it to the credit of C. Plaintiff prayed that defendant be compelled to pay D's note. Decree for plaintiff. Appeal.

Henry, J. 1. The duty of the bank was either to place the money to its own credit, hold it, and pay the note; or to place it to D's credit and notify him that it was there for him. 2. Where there is abundant evidence to sustain the finding of the trial court, this court will not set the finding aside, unless there is such a preponderance of evidence to the contrary, as makes it manifest that the court should have found otherwise. Judgment affirmed.

Cited: 143 Mo. 25; 24 Mo. App. 617; 79 id. 269.

HARRISON v SMITH (1884) 83 Mo. 210.

Bill to impress assets in the hands of the assignee of M Bank, with a trust. Plaintiff, a resident of New York, sent the M Bank a check, not for deposit, but to invest in a specific loan upon real estate security. The bank collected the check, credited P with the amount "on investment account," and gave plaintiff to understand that it had been invested; but subsequently made an assignment for benefit of creditors, without having invested it. Defendant averred that plaintiff was simply a depositor. The court found that the relation was that of trustee and cestui que trust. Judgment for plaintiff. Appeal.

Norton, J. 1. The relation of plaintiff and the bank was that of cestui que trust and trustee. 2. The bank wrongfully mingled the proceeds of the check with its own assets. 3. When the trustee mixes the trust money with his own so that it cannot be distinguished what particular part is trust money, and what part is pri-

vate money, equity will follow the money by taking out the amount due the cestui que trust. 4. The doctrine that trust money cannot be followed where it cannot be distinguished by an "ear-mark," is subject to the application of the foregoing rule. Judgment affirmed.

Cited: 88 Mo. 521; 100 id. 475; 143 id. 663; 144 id. 155; 148 id. 365; 152 id. 142; 158 id. 199, 201; 30 Mo. App. 239; 32 id. 346; 48 id. 590; 57 id. 378; 62 id. 397; 65 id. 287; 66 id. 373; 67 id. 148; 72 id. 667; 73 id. 569, 570; 76 id. 338; 77 id. 514, 522; 85 id. 674; 86 id. 183, 428; 90 id. 262.

COATES v DORAN (1884) 83 Mo. 337.

Action, by the assignee of an insolvent bank, to determine whether the holders of drafts drawn against a fund, which the bank had in the N Bank at the time of its failure, had a lien on said funds, or should be regarded merely as general creditors. Some of the holders of the drafts claimed that they should be paid in the order of date. The court decreed the fund to be distributed pro rata among the holders of the drafts. Appeal.

Norton, J. The drawing of a check for a part of a deposit does not operate either at law or in equity as an assignment pro tanto of the deposit, or confer any lien upon it. Judgment reversed.

Cited: 34 Mo. App. 390; 62 id. 483.

SCHOOL BOARD v SAVINGS BANK (1884) 84 Mo. 56.

On contract. Defendant's cashier had a claim against the defendant. Plaintiff is his assignee. The cashier had allowed an overdraft to be made by a depositor; and defendant, at the time this action was brought, had an action pending on the cashier's bond, for the overdraft. This overdraft, defendant claimed as a setoff in the present action. Setoff allowed. Judgment for defendant. Appeal.

Norton, J. The pendency of a suit by defendant on the cashier's bond does not affect its right to set off the overdraft as a counterclaim to the demand of the cashier which was assigned to plaintiff, although the claim may not have been pleaded before the assignee. Judgment affirmed.

Cited: 114 Mo. 672; 44 Mo. App. 343; 53 id. 173.

LEE v SMITH (1884) 84 Mo. 304.

On certificate of deposit by holder against assignee of bank, who refused to allow the claim. These certificates were issued by the cashier of the bank to himself, in payment of his private debts, and indorsed to plaintiff. At the time of issue the cashier had no funds in the bank. Judgment for defendant. Appeal.

Martin, C. The cashier of a bank has no authority to issue a certificate of deposit to himself; he could not do this without representing both sides of the transaction. These certificates were, therefore, presumptively void upon their face, and plaintiff cannot maintain that he was a bona fide holder without notice of the cashier's want of authority to bind the bank. Judgment affirmed.

Cited: 146 Mo. 330.

ALBERS v COMMERCIAL BANK (1884) 85 Mo. 173.

On deposit. Plaintiffs made a check upon defendant payable to C, who the same day, deposited it with B. On the next day the check was cleared on defendant in the usual course of business, came to defendant through the clearing house in the forenoon and was charged to plaintiff's account. After this, the same day, defendant's cashier was notified that C had failed, and not to pay the check. The cashier then wrote upon the check "canceled by mistake"; the charge was erased from the books and the check handed to the manager of B, who gave in exchange some money and some checks. B at once notified defendant that he would not receive the check, and filed a complaint with the clearing house. It decided that defendant should pay the check, which it did and charged it to plaintiff. The court instructed that the liability of defendant was fixed on presentation of the check. The evidence in the case of B against plaintiff was offered in evidence. Excluded. Action dismissed. Error.

Black, J. 1. A customer of a bank has a right to countermand the payment of a check, before it is paid, and take upon himself the consequences of the act. He has no right to recall the check after it is paid to one who took it in good faith;

neither can his banker do so for him. 2. When a bank receives a check, pays it and charges it to the maker, such acts may be regarded as payment which cannot be recalled and canceled even by consent, except where the parties had knowledge that it was not canceled by mistake. It was not necessary for defendant to plead payment. 3. The liability of the bank to pay did not become fixed on mere presentment. 4. No part of the record save the petition and affidavit was competent evidence. Judgment affirmed.

Cited: 30 Mo. App. 277; 58 id. 26; 72 id. 444.

BURY v WOODS (1885) 17 Mo. App. 245.

Money had and received. Plaintiffs left notes with M Bank for collection only, indorsed in blank. They were forwarded to defendant, a banker. The notes appeared to be the property of the M Bank, and were credited by defendant to it, in the usual course of their dealings. Defendant paid no present value for the notes, nor was any credit given, risk or responsibility incurred on the faith of the notes. M Bank failed, owing defendant a balance larger than the collection of the notes. Judgment for plaintiff. Appeal.

Hall, J. 1. There is no justice in allowing defendant to retain the money he had collected because he had passed it to the credit of M Bank, which still owed him a balance. 2. Plaintiffs can treat defendant as their sub-agent as to the collection. Judgment affirmed.

Cited: 60 Mo. App. 588.

WINSOR v LAFAYETTE COUNTY BANK (1885) 18 Mo. App. 665.

To recover commissions earned in negotiating a sale of real estate belonging to defendant. The property was placed in plaintiffs' hands for sale by W, cashier of defendant, who agreed to pay the commissions. The answer denied that W placed the property in the hands of plaintiffs, or that they assisted him in selling it. The evidence did not show any authority on the part of W to make the employment alleged, or any ratification of such act. Judgment for plaintiffs. Appeal.

Ellison, J. It is not among the ordinary duties of a cashier to bargain and sell real estate, nor to contract with brokers for that purpose. There being no authority in the cashier, as such, to make the contract, and there being no ratification shown, the plaintiffs' case fails. Judgment reversed.

Cited: 29 Mo. App. 396; 35 id. 370; 40 id. 503; 42 id. 76; 54 id. 334; 67 id. 126; 70 id. 679; 73 id. 356; 75 id. 231; 76 id. 94, 95; 79 id. 321; 101 Mo. 377.

ILGENFRITZ v PETTIS COUNTY BANK (1885) 21 Mo. App. 558.

To recover money deposited. Plaintiff alleged that he deposited \$150 with defendant to send to D F at S; that defendant sent it to J F, and that it was returned to defendant, and that defendant had refused to pay it to plaintiff. Plaintiff and A agreed to enter into a transaction. A had \$150 in the hands of D F, and plaintiff agreed to send a like sum. Plaintiff gave defendant a check for \$150 to pay for a draft for D F; the draft being missent was returned and canceled by defendant. A directed it to send a draft for the same amount to C for the purpose of the transaction. Plaintiff told A he wanted to withdraw and A paid him \$50, and said he would send to C for the rest. Plaintiff demanded his money of defendant, and denied A's authority to order the draft. He admitted the receipt of the \$50 from A, but stated that it was claimed by H, and he was holding it subject to that claim. A testified that H had no interest in it. Judgment for plaintiff for full amount. Appeal.

Ellison, J. The finding of the court was correct, except as to the \$50. There is no reason, under the evidence, why the payment of A should not inure to the benefit of the bank. The bank was liable to plaintiff for an unauthorized disposition of the money, yet A was liable to it, and his payment relieves it to that extent. Judgment reversed.

CHEW v ELLINGWOOD (1885) 86 Mo. 260.

On bookkeeper's bond against sureties. Plaintiffs were assignees of the bank, for the benefit of creditors. Defense: That the money used by the bookkeeper was borrowed of the bank in the usual course of business. He was in the habit of taking money as he desired it; and, at the end of each month, would credit it against his salary. The cashier knew the manner in which he transacted the business, and

did not object to it. The directors did not know of the overdraft until the bank made an assignment. The case was sent to a referee who found the foregoing facts and stated the amount of the overdraft. The report of the referee was accepted. Judgment for plaintiffs. Appeal.

Norton, J. 1. The report of the referee stands as a special verdict, and if there was evidence to establish the facts found, the court will not disturb the finding. 2. The bond was taken for the benefit and protection of the stockholders and creditors of the bank. 3. The fact that there were other unfaithful officers who knew and connived at the bookkeeper's infidelity does not relieve his bond from responsibility. 4. The negligence of the directors in not sooner discovering the defalcation is no defense. 5. Directors of a bank in failing circumstances have the right, in the absence of statute, to assign for the benefit of creditors. Judgment affirmed.

Cited: 91 Mo. 203, 204, 375, 376; 92 id. 90; 144 id. 336; 39 Mo. App. 137; 54 id. 277; 62 id. 583; 68 id. 553; 89 id. 374.

McKEAG v COLLINS (1885) 87 Mo. 164.

Ejectment, by purchaser under sheriff's sale. Defendant claimed under a deed of trust from B Bank. C, the president of the bank, made the deed for the benefit of the creditors of the bank, shortly after the commencement of an action by plaintiff the result of which was a sheriff's sale to plaintiff. There was no express authority given to C to make the deed of trust, but defendant contended that there was an acquiescence by the directors and stockholders, which amounted to a ratification and estopped the bank from denying the validity of the conveyance. There was evidence that the bank filed a motion in the circuit court to set aside the conveyance. Judgment for plaintiff. Appeal.

Henry, C. J. 1. The president of the bank had no authority to execute the deed. 2. There was no ratification of the deed before plaintiff obtained judgment in the first action; and a ratification subsequent thereto cannot affect the lien acquired thereby, or the title under a sale to enforce the lien. Judgment affirmed.

Cited: 145 Mo. 428.

WEAR v LEE (1885) 87 Mo. 352.

Where the payee of a check receives it in the place where the bank is located, he may preserve recourse against the drawer by presenting it for payment at any time before the close of banking hours on the next day, and if, in the meantime, the bank fails, the loss will be the drawer's.

SPRINGFIELD v FIRST NAT. BANK (1885) 87 Mo. 441.

For collection of taxes, assessed upon defendant. The plaintiff alleged that it was unable to assess taxes against the shareholders as required by law because of the refusal of defendant's officers to furnish, as required, a list of the stockholders. Demurrer to petition. Sustained. Judgment for defendant. Appeal.

Norton, J. The refusal of the officers of the bank to furnish a list of its stockholders, neither conferred a right upon the assessor, which the law denied to him, nor justified him in making the assessment in any other mode than is by statute prescribed. Judgment affirmed.

Cited: 118 Mo. 285; 145 id. 378.

LIONBERGER v KRIEGER (1885) 88 Mo. 160.

On cashier's bond. The defalcation of the cashier was not disputed. The sureties contended that they were released, because there was an increase of the capital stock of the bank the first year; that there was no evidence of the appointment; that the cashier was not eligible as he was not a director as required by the statutes of the state; that there was no law requiring a bond; and that a statute was passed subsequent to the giving of the bond which required cashiers to give bond, and that it operated as a discharge of the bond in suit. Judgment for plaintiff. Appeal.

Black, J. 1. It was presumably within the contemplation of the parties, that the bank could increase its stock. 2. A recital in the bond that the cashier had been appointed by the directors is conclusive in an action on the bond. 3. In a suit upon an officer's bond where he is only an officer de facto, neither he nor his

sureties can allege that he was not an officer de jure. 4. The bank had a right to take a bond though the statute did not in terms require it. 5. An act subsequently passed requiring cashiers to give bonds did not make void a bond which was binding at common law. Judgment affirmed.

Cited: 116 Mo. 184; 83 Mo. App. 165.

STOLLER v COATES (1885) 88 Mo. 514.

To recover trust funds. The action was brought to compel the assignee of M Bank to pay plaintiffs money claimed as a trust fund. M Bank took a draft on deposit for plaintiffs and they drew their check for the amount and requested the bank to forward the proceeds to E Bank and have it credited to E Bank. M Bank gave plaintiffs a memorandum stating that it had credited the amount to E Bank, and M Bank sent a copy of it to E Bank. Before it arrived M Bank failed. E Bank refused to charge the amount to M Bank or to give credit for it. Plaintiffs proved a demand growing out of their transaction with E Bank against the assignee of M Bank upon which they received dividends. Decree for plaintiffs. Appeal.

Martin, C. 1. The fund remained in M Bank impressed with a trust. The general assets of M Bank having received the benefit of the unlawful conversion, there is nothing inequitable in charging it with the amount of the converted fund as a preferred demand. 2. But the voluntary proceedings of the plaintiffs before the assignee, in proving a claim founded upon this transaction and receiving dividends thereon bars them from prosecuting this claim, as against a specific trust fund. The bank was not liable on both claims. Bill dismissed.

Cited: 126 Mo. 349; 133 id. 650; 143 id. 664; 144 id. 155; 148 id. 365; 152 id. 142; 158 id. 199; 27 Mo. App. 54; 48 id. 590; 57 id. 378; 62 id. 397; 65 id. 287; 66 id. 373; 67 id. 148; 72 id. 667; 73 id. 569, 570; 76 id. 336; 77 id. 522; 85 id. 674, 675; 86 id. 183, 429; 90 id. 262.

MARBOURG v BRINKMAN (1886) 23 Mo. App. 511.

On draft, by payee against the drawers, bankers. The draft was drawn upon M Bank, correspondent of defendant. Defense: laches in presentment. The draft was not presented for some time after it was due, and the M Bank had suspended. Judgment for plaintiff. Appeal.

Hall, J. 1. A draft drawn by one bank upon a distant bank is issued with the sanction of the drawer that it shall be circulated and not immediately presented for payment. 2. As to the drawers of such draft, only such presentment for payment is required by the payee and the subsequent holders, as is required in the case of a bill of exchange, payable on demand under like circumstances. Judgment affirmed.

CUMMINGS v WINN (1886) 89 Mo. 51.

To recover deposit, under the provisions of sec. 918, R. S., against a director and managing officer of a bank. Deposit was made by plaintiff when the bank was insolvent. The last clause of the statute makes a bank officer personally responsible for a deposit so made, when he has knowledge of the condition of the bank. The petition alleged the organization of the bank; that it was insolvent from the second year of its existence; that defendant was a director and managing officer; that defendant knew of the insolvency; that the bank had no available assets, except the money of its depositors, to carry on its business; that the directors and officers loaned the deposits to themselves, without security, being themselves insolvent; that the bank had but \$50,000 to pay \$275,000 indebtedness at the time of its suspension; that defendant issued a false statement of the financial condition of the bank, showing a large excess of assets over liabilities; that plaintiff was induced by these fraudulent representations to make a deposit, and asked judgment for the same. Demurrer to petition. Sustained. Judgment for defendant. Appeal.

Henry, C. J. 1. Defendant is liable; and the depositor, not the assignee, is the person to bring the suit. 2. The petition filed contains all that is necessary to state a cause of action. 3. The last clause of sec. 918 is self-enforcing; for where the law gives a right, but prescribes no remedy, the common law may be resorted to. Judgment reversed.

Cited: 79 Mo. App. 520.

NEFF v GREENE CO. NAT. BANK (1886) 89 Mo. 581.

On deposit. Defendant contended that plaintiff deposited the amount of money claimed with defendant's cashier, and before it was entered on the books, directed the cashier to change it from his credit to that of S, and that it had been paid out on the checks of S. Plaintiff claimed that even if the jury found the facts as contended by defendant, the money having been deposited by him could not be changed to the account of S, or paid out except on his checks, as it was the custom of banks to pay only on checks. Judgment for defendant. Appeal.

Morton, J. The jury found that the plaintiff deposited the money, and directed it to be changed to the account of S, by whom it was drawn. Under this state of facts plaintiff cannot recover; nor does the fact that the bank custom was to pay only on check and that he gave no check when the amount was credited to another, avail him anything. His directions were carried out. Judgment affirmed.

STATE v KELSEY (1886) 89 Mo. 623.

Indictment, based on sec. 1350, R. S., which declares it to be larceny for any person, director, manager, or other officer of a banking institution doing business in the state to receive deposits after knowledge of the fact that the institution is insolvent. The defendant was the owner and conductor of a private bank. The jury found that he had received deposits and transacted business, knowing the bank to be insolvent. Verdict of guilty. Appeal.

Norton, J. The legislature did not intend to include private bankers, among banking institutions, conducted by directors and officers, to which the provisions of the statute relate. Judgment reversed. Prisoner discharged.

Cited: 108 Mo. 627; 125 id. 49; 131 id. 484; 152 id. 526.

DECSOMBES v WOOD (1886) 91 Mo. 196.

To set aside deed of assignment made by an insolvent bank to defendant, and to restore the title to the bank. Plaintiff was a stockholder and creditor at the time of assignment, and after the assignment became a judgment creditor. A majority of the directors made the assignment, by resolution, and authorized the cashier to execute and deliver the deed of assignment. The petition alleged that the assignment was made without notice to, or authority from, the stockholders of the bank, and against the desire of plaintiff. This action was not begun until four years after the assignee had taken charge. Demurrer to petition. Sustained. Judgment for defendant. Appeal.

Ray, J. 1. The stockholders of an insolvent banking corporation have no interest in the assets. Equitably, they belong to the creditors; and the fiduciary relation of the directors, to the stockholders, ceases. The creditors' equitable rights intervene, and their equitable lien attaches. 2. The directors of such insolvent bank have the right to assign, in good faith, equally for all creditors. 3. The proceeding, after so long a delay, is not meritorious. Judgment affirmed.

Cited: 144 Mo. 336; 68 Mo. App. 553.

IHL v BANK OF ST. JOSEPH (1887) 26 Mo. App. 129.

Money had and received. Plaintiff wished F, W, and P to act as security on his bond. To secure them, he gave F, defendant's teller, two drafts payable to defendant. Defendant was to collect the drafts, but there was conflict as to the account to which the proceeds were to be credited. They were credited to F individually and F drew them out and misappropriated them. F was produced by defendant under an attachment. He testified and was discharged. Defendant then offered F's deposition. Objection. Overruled. Later, by agreement, the deposition and other papers were sent to the jury room. The court charged that if the proceeds of the drafts were credited by plaintiff's direction to F, individually or as trustee, and F then drew them out, or if plaintiff placed the drafts in F's hands, to hold the proceeds, the jury must find for defendant. Judgment for defendant. Appeal.

Hall, J. 1. If the bank properly credited the amount to F individually, F had the right, as against the bank, to draw it out for the purpose of misappropriating it, although the bank knew of such purpose. But the bank would have been still indebted to the plaintiff, if it credited the amount to an account other than that directed by the plaintiff. 2. If plaintiff's directions were to credit to F, trustee, a credit to F individually renders the bank liable; whether the drafts were given to

F as teller, or not, the knowledge had by him as to the proper disposition of the proceeds, was the bank's knowledge. 3. The deposition of a witness present in court, cannot be read as original evidence; and by consenting that the deposition go to the jury room, the plaintiff did not waive his objection thereto. Judgment reversed.

Cited: 31 Mo. App. 613; 73 id. 568; 82 id. 309.

BANK OF COMMERCE v GINOCCHIO (1887) 27 Mo. App. 661.

Damages for negligence. The petition alleged that plaintiff purchased a draft payable to the order of defendants, who had indorsed it "pay to the order of H J," and forwarded it by letter from St. Louis to Kansas City addressed to H J, without any street number or indication of his occupation, residence or place of business; that the draft was received by another H J who indorsed it and sold it to the plaintiff, for value, and that they bought in good faith; that defendants well knew the right address of H J for whom the draft was intended; that the drawer issued a duplicate draft, on information that the right person had not received the first, and that the duplicate had been paid. The petition alleged that by reason of negligence and want of care on the part of defendants, the draft was of no value, and defendants were bound to make it good. Demurrer. Sustained. Appeal.

Thompson, J. 1. The petition states no cause of action. 2. The damages stated must be excluded from the category of damages for which the law gives a right of action. They were not the proximate result of the negligence of defendants. Judgment affirmed.

Cited: 71 Mo. App. 162.

ROAN v WINN (1887) 93 Mo. 503.

To subject property to the payment of a claim. The property was conveyed to the defendant W, by an insolvent bank. Plaintiff had a claim against the bank. The conveyance was made in consideration of the surrender to the bank of some of its stock held by W who was a director. An assignment was thereafter made by the bank for the benefit of creditors. It was admitted that the conveyance was made when the bank was insolvent. The defendant R, assignee of the bank, by way of cross bill set up the assignment; and as representative of the creditors, prayed that W be required to convey the land to him. The court found the deeds to W void, and decreed that the title vest in R, to be administered by him. Cross appeals, by plaintiff and by defendant W.

Norton, C. J. 1. The bank was insolvent when the conveyance was made, and the assets had become a trust fund to be managed by the directors, for the benefit of creditors, and the directors could not secure any advantage to themselves. The conveyances were void. 2. Whatever is sufficient to put a man on inquiry, is notice. The defendant W is presumed to have had notice. 3. The court erred in decreeing the land to R. Neither the grantor in a fraudulent deed nor his heirs, executors, or assigns can sue to set aside such a deed. 4. Plaintiff having proved his claim before the assignee, is in the same position as a judgment creditor and can maintain the suit; and his prayer should have been granted. Judgment reversed.

Cited: 94 Mo. 574; 111 id. 288; 114 id. 671; 117 id. 292; 122 id. 158; 126 id. 401; 135 id. 532; 155 id. 521; 164 id. 335; 38 Mo. App. 233; 39 id. 137; 51 id. 205; 60 id. 26, 27; 62 id. 575; 63 id. 526; 76 id. 335.

BANK OF SPRINGFIELD v FIRST NAT. BANK (1888) 30 Mo. App. 271.

To recover a balance, due on an exchange of checks. Defendant received from a correspondent, a draft drawn on M, and received in payment, M's check on plaintiff. M was not in good financial standing, and, before taking the check, defendant inquired of plaintiff over the telephone, whether it was good. The plaintiff stated that it was "all right." The account of M with plaintiff was good for the check that day and the next day, but it was not presented until the third day, when payment was refused. From that day's exchanges, defendant retained the amount of the check. Judgment for plaintiff. Appeal.

Thompson, J. 1. In view of the confessed knowledge which the defendant had of the standing of M, the exercise of reasonable diligence required it to present the check immediately. Having waited two days, it, and not plaintiff, must bear the

loss. 2. Plaintiff was bound by its representation only in that it was true when made; the representation was not equivalent to certification. Judgment affirmed. Cited: 51 Mo. App. 61; 55 id. 91; 88 id. 602, 604.

SCHIERENBERG v STEPHENS (1888) 32 Mo. App. 314.

Money had and received, against an insolvent national bank and the receiver. Plaintiff alleged that the bank proposed to increase its capital stock when it was insolvent; that plaintiff subscribed to the new stock and paid the amount which he now seeks to recover; and that the contract of subscription was void by reason of the bank's failure to comply with a national bank statute which requires that an increase of the capital stock should be authorized by a two-thirds vote of the holders of the original stock, and that the whole amount of the increased stock should be paid in, and that the approval of the comptroller of the currency should be secured. Defendants averred that plaintiff had voluntarily and with knowledge of the facts, paid for his shares before all were taken; that plaintiff had therefore waived the condition in the statute, and was estopped from denying that he was a stockholder. Demurrer to answer. Sustained. Judgment for plaintiff. Appeal.

Rombauer, P. J. 1. The bank could not issue or make a valid sale of the new stock without at some time complying with the statute. The possibility of complying was terminated when the bank dissolved; the contract then became void. 2. The plaintiff was not a stockholder and is not estopped by the declarations of the officers of the bank. Judgment affirmed.

Cited: 32 Mo. App. 331, 332; 132 Mo. 529.

NICHOLS v STEPHENS (1888) 32 Mo. App. 330.

Rombauer, P. J. The facts in this case are the same as those in Schierenberg v Stephens, 32 Mo. App. 314, supra. The defense was insufficient in law.

FLINT ROAD CART CO. v STEPHENS (1888) 32 Mo. App. 341.

To establish a trust. On receipt of the amount sued for, F Bank agreed to give a bond for plaintiff, the money to be held as security only. F Bank mingled the money with its own funds, and gave the bond. It subsequently failed, and defendant became receiver. There was no outstanding liability under the bond. Plaintiff demanded of defendant the amount deposited, contending that it was a trust fund. Defendant contended that, under the provisions of the National Banking Act, he was compelled to pay all money collected to the treasurer of the United States subject to the order of the comptroller of the currency, and that the proper remedy was by proceedings against the comptroller. Judgment for plaintiff. Appeal.

Peers, J. 1. This was a trust fund, and may therefore be followed. If the specific fund cannot be separated from the general mass in the hands of the trustee, there may be taken from the general funds an amount sufficient to replace the particular fund which has been appropriated. 2. Nothing in the National Banking Act deprives this court of jurisdiction to adjudicate upon this claim. Judgment affirmed.

Cited: 86 Mo. App. 183; 158 Mo. 199.

YOUNG v HUDSON (1889) 99 Mo. 102.

On promissory notes, made by defendant to a bank, and upon a merchant's account, all transferred to plaintiff. The action was commenced by attachment to which defendant pleaded in abatement. This plea overruled. The notes had been indorsed by plaintiff, as cashier of the payee bank and in its name, to himself individually. Defendant contended that plaintiff could not make the indorsements. There was no evidence limiting his power as cashier. Plaintiff was collecting for the bank. Defendant also objected to the sufficiency of the evidence as to the assignment of the account, no consideration for the assignment being shown. Judgment for plaintiff. Error.

Barclay, J. 1. Exceptions at a trial on a plea in abatement are not properly subject to examination upon a writ of error; under the statute, they must be taken advantage of by appeal. 2. In the absence of any showing limiting his power, a bank cashier may collect a note due his bank, and to that end may bring suit upon it. He has implied power to indorse such paper for collection, and a holder

for collection has sufficient title to maintain an action. 3. The fact that the account was assigned to plaintiff to collect for the use of the assignors, does not prevent recovery. Judgment affirmed.

Cited: 105 Mo. 9; 152 id. 333; 48 Mo. App. 641; 50 id. 293; 78 id. 607; 82 id. 334; 84 id. 469; 87 id. 600, 603.

NATIONAL BANK v NICKELL (1889) 34 Mo. App. 295.

On promissory note, against one of the makers, who intrusted it to C, another maker, who took it to the plaintiff. The note was blank as to date and the name of the payee, and as to the rate of interest. The president of the plaintiff filled in these spaces, making the plaintiff payee, and the interest 10 per cent. The defendant answered, that he did not execute or deliver the note; that the signature purporting to be his was a forgery; that the material alterations of the note were made by the plaintiff's officer without his knowledge or consent. The plaintiff objected to evidence to show that changes had been made, as that was a matter that should have been raised by special plea. Judgment for defendant. Appeal.

Biggs, J. 1. The alterations being made before the note was negotiated and delivered, the evidence was admissible under a general denial. 2. The filling of the date and the name of the payee by the president of the plaintiff by the consent of C was right, because a note cannot be said to be complete unless it bears a date, and the same may be said in reference to the name of the payee. 3. But neither the president nor C had any right or authority to add the "10" thereby making the note bear 10 per cent interest after maturity. The note signed by the defendant was perfect, so far as the interest clause was concerned. 4. The note is invalid as against the defendant. Judgment affirmed.

Cited: 50 Mo. App. 193; 59 id. 469.

WIND v FIFTH NAT. BANK (1889) 39 Mo. App. 72.

To recover a deposit. Four checks, drawn by the plaintiff on the defendant, were delivered by the plaintiff to M, to be delivered by M to the payees named in the checks. M forged the names of the payees, collected the money, and appropriated it to his own use. The defense was that the plaintiff's account was balanced by payments on his own checks, including those on which the forgeries were committed; that the checks were returned to the plaintiff; that he failed and neglected to the prejudice of the defendant, to advise it of any objection to the checks, until the lapse of an unreasonable time thereafter. Judgment for plaintiff. Appeal.

Thompson, J. 1. Where a customer of a banker receives his book balanced, with his checks returned, and there are circumstances within his knowledge from which, by the exercise of reasonable care and inquiry, he might ascertain that the checks were forged, but he fails to exercise such care, by reason of which the bank suffers loss, the customer has lost his recourse against the bank. 2. Since there is no evidence tending to show loss to the bank by reason of the failure to discover the forgeries, the plaintiff can recover for the payments on such forgeries. Judgment affirmed.

Cited: 74 Mo. App. 291.

GRAHAM, EX'R v MORSTADT (1890) 40 Mo. App. 333.

On note and check. The defendant gave the plaintiff, in July, a check on the N Bank for the amount of a note. The bank failed in November. The note was not presented until the next February, when the bank was in the hands of a receiver. The court excluded evidence to the effect that, if the check had been presented in a reasonable time, it would have been paid. Judgment for plaintiff. Appeal.

Rombauer, J. 1. The check was given for value; the defendant was a principal promissor, and was not discharged by the laches of the holder in making presentation, unless he suffered loss and injury in consequence, and then only pro tanto. 2. The plaintiff was entitled to interest from date of demand. Judgment affirmed.

Cited: 73 Mo. App. 449.

LOW v TAYLOR (1890) 41 Mo. App. 517.

On promissory note, payable to the D Bank. An indorsement stated that the note was made for the purpose of obtaining credit for R, one of the makers, with other defendants as sureties and that it was held as security for any overdraft he

might make, and payable only to that extent. The overdraft of R and interest amounted to more than the note. Plaintiff claimed that he was entitled to the whole amount. Objection was made to exchange on shipment of goods by R, charged as part of the overdraft by the bank. The plaintiff proved his case by producing books for the correctness of which a certificate of one of the defendants was introduced. Judgment for plaintiff for full amount. Appeal.

Ellison, J. 1. The exchange, charged by the bank on shipments made, was properly included in the overdraft. 2. The evidence was sufficient to sustain the plaintiff's case as to the principal, though not binding on the other defendant. Judgment affirmed.

Cited: 47 Mo. App. 537.

BREMEN BANK v UMRATH (1890) 42 Mo. App. 525.

On promissory note, against indorsers. The plaintiff alleged that the defendants were makers of an overdue note and that they had, in writing, waived demand, notice, and protest on the note. Defendants answered that they were accommodation indorsers, as the plaintiff knew, when it took the note; that no notice of non-payment had been given them; and that the words "demand, protest, and notice of protest waived" were placed over their signatures, by an employee of the plaintiff, after they had indorsed the note. The note itself showed defendants to be indorsers, and not makers. The court, on behalf of the plaintiff, instructed the jury that if the waiver of protest was stamped on the note before the same was signed by the defendants, then they must find for the plaintiff; but refused to instruct for the defendants, that if the bank had notice that they signed as accommodation indorsers and not as makers, then the plaintiff could not recover. Judgment for plaintiff. Appeal.

Rombauer, P. J. 1. If any of the employees of the bank altered the note after defendants had indorsed it without their consent, then the plaintiff, by producing the altered note and claiming by virtue of the alteration, ratified the alteration and avoided the note. 2. The plaintiff could not charge the defendants as makers and recover against them as indorsers. Judgment reversed.

Cited: 55 Mo. App. 185.

THIRD NAT. BANK v OWEN (1890) 101 Mo. 558.

On bond. The defendants were principal and sureties on the bond of the receiving teller of the plaintiff. The plaintiff alleged that the teller had embezzled its funds. The defendants answered: 1, that the plaintiffs had permitted the teller to act as cashier, and to discharge his duties as teller in an irregular and improper manner; 2, that at the time the bond was executed, the teller was in default to plaintiff's knowledge, but that they fraudulently concealed that fact. Both pleas stricken out. The court appointed a referee to determine the times and amounts of the embezzlements. Several witnesses employed in the bank were permitted to refer to the bank books in which they had made entries in the ordinary course of business, to refresh their memories. A deposition read was excepted to. The admission of the deposition was assigned as error, but no reason therefore was given by defendants or disclosed by the record. Exception overruled. Judgment for plaintiff. Appeal.

Brace, J. 1. The first plea failed to show a defense to the breaches assigned; but the plea of fraud should not have been stricken out. 2. The trial court must be presumed to have acted correctly in refusing to sustain the exception to the report on account of the deposition. 3. It was proper to allow the witnesses to refer to the books under the circumstances. Judgment reversed.

KOLLOCK v EMMERT (1891) 43 Mo. App. 566.

Conversion. W shipped hogs to defendants as his own. Plaintiff, president of a bank, claimed to be the real owner. W borrowed money of either the bank or the plaintiff, and attempted to give the plaintiff security, by agreeing to ship the hogs in his own name, so that a draft he drew on defendants, would be paid to plaintiff. W purchased the hogs, and the bank paid W's checks which were given for them. Demurrer to evidence. Sustained. Judgment for defendant. Appeal.

Ellison, J. Paying a customer's check is not paying for property that he purchases. It is merely paying the customer's money on his order. The fact that the

customer may have no money in the bank does not alter the matter, the payment is made by the drawee of the checks. Judgment affirmed.

Cited: 46 Mo. App. 215; 50 id. 97; 78 id. 30.

BURNS v KAHN (1891) 47 Mo. App. 215.

On bank check. The check was drawn in September, and dated October 10. It was made by S & Co., payable to order of K & F, by them indorsed to the N Bank, and by the N Bank to the plaintiff. The bank of which the plaintiff purchased it, bought it before its date. Plea, failure of consideration, and that the plaintiff knew the facts when he took the check. Its negotiability was denied, because it did not contain the words "for value." R. S. 1889, sec. 733, provided that promissory notes should not be negotiable, unless containing the words "for value." Judgment for plaintiff. Appeal.

Ellison, J. 1. A check payable to order or bearer is negotiable. 2. The statute was not intended to cover what is known and designated in commercial circles as a check. 3. The fact that the check was post dated, did not interfere with its validity or negotiability. 4. A check in such cases may be negotiated before the day it bears date. Judgment affirmed.

Cited: 59 Mo. App. 547; 82 id. 402; 124 Mo. 39.

WASHINGTON SAV. BANK v BUTCHERS BANK (1891) 107 Mo. 133.

Creditors' bill, to enforce stockholders' statutory liability. The defendant failed in 1877. Its president issued scrip for the outstanding debts to mature in 1880. The plaintiff, as a creditor, accepted it. When it matured, their debts had not been wholly satisfied. They brought suit for the balance in 1880, and executions upon judgments obtained by them were returned nulla bona, in 1881. The present action was begun in 1884. Several of the defendants were administrators of deceased stockholders and pleaded the two-year Statute of Limitations as provided under sec. 745 of the statutes. The others pleaded the five-year statute. They proved that the directors had acquiesced in the president's acts. No call had ever been made upon them for the balance due upon their stock. Judgment for all defendants. Appeal.

Black, J. 1. A call was unnecessary for the maintenance of the suit. 2. Until the scrip matured, there was no cause of action. 3. The president had authority to issue the scrip; and the directors having ratified his act, it became binding on the bank, and also the stockholders. 4. The action accrued at least when the executions were returned nulla bona, viz., June 6, 1881. 5. The plea of the two-year statute is well taken. Judgment reversed.

Cited: 144 Mo. 338; 166 id. 33; 56 Mo. App. 91; 64 id. 35; 77 id. 85; 84 id. 272.

THOMPSON v GREELEY (1891) 107 Mo. 577.

To enforce statutory liability. Action, by the receiver of an insolvent bank, against the directors, to enforce a statutory liability under sec. 916, R. S. 1879, for making a loan to another bank greater than is allowed by the statute. The statute itself did not specify a penalty. The borrowing bank also became insolvent and the loan was lost. Demurrer to petition upon the ground that plaintiff had no capacity to sue in that he was not legally appointed receiver, as the court appointing had no jurisdiction; and that the petition did not state facts sufficient to constitute a cause of action. It was also objected, in argument, that the action should be in equity and not at law. Demurrer sustained. Judgment for defendants. Appeal.

Macfarlane, J. 1. While the statute gives the receiver no authority, yet as the court of chancery had power under R. S. 1889, sec. 2193, to appoint a receiver, the inherent jurisdiction could confer authority to prosecute the suit as one of its equity powers. 2. Since the statute provides no penalty, the action must be at law for breach of duty. 3. A receiver succeeds to the title and rights of action of the corporation, and he can properly prosecute an action to enforce any statute right. 4. If defendants allowed any person or corporation to become indebted to it in excess of the amount allowed by the statute, they are liable for any loss thereon. Judgment reversed.

Cited: 107 Mo. 594; 148 id. 393; 168 id. 335; 52 Mo. App. 448.

THOMPSON v SWAIN (1891) 107 Mo. 594.

To enforce directors' liability for negligence. The directors of a savings bank permitted a manufacturing company to become indebted to it on unsecured notes in an amount exceeding 25 per cent of the capital stock of the bank. The bank became insolvent. Plaintiff was made receiver. He was unable to collect the debt due from the company. He then brought this suit under sec. 916, R. S. 1879, which provided that no savings bank should allow any company to become indebted to it in a sum exceeding 25 per cent of its paid capital stock, without giving security for the debt. Judgment for defendants. Appeal.

Macfarlane, J. The liability of the directors extends to any actual losses resulting to the bank from their willful disregard of the statute. Judgment reversed.

STATE v BUCH (1891) 108 Mo. 622.

Indictment, under R. S., sec. 1350, as amended by acts of 1879 and 1887, for receiving deposits as private bankers, when the bank of which they were owners and managers, was insolvent or in failing circumstances. Defendants contended that the act did not refer to private bankers, but only to owners of properly organized private banks or banking institutions; that their organization was not complete, and that they had not complied with the law in organizing; and that the indictment should therefore be quashed. The cause was removed from one county to another for trial by agreement of the parties, without an order of court. Verdict of guilty. Appeal.

Macfarlane, J. 1. Private bankers are brought within the provisions of the amended act. The fact that defendants were doing an unauthorized banking business will not assist them in escaping the penalties of the law. The indictment was good. 2. A case cannot be removed from one county to another for trial by the mere stipulation of parties without an order of court. Judgment reversed.

Cited: 125 Mo. 49.

ELLERBE v NATIONAL EXCH. BANK (1891) 109 Mo. 445.

To recover a credit given to an insurance company. The cashier of the defendant discounted the notes of the subscribers to the stock of an insurance company of which he was manager, by placing the amounts to the company's credit. He then certified to the plaintiff, the state superintendent of insurance, that this credit represented actual cash deposited by the company. Relying on this, the superintendent empowered the company to transact insurance business. The bank, with knowledge, ratified the cashier's acts and representations. The company became insolvent. The superintendent took charge of its affairs, and sued the bank for the cash said to have been represented by the credit. The bank then set up the defense that the credit was not really represented by cash, but by notes that had never been paid. Judgment for plaintiff. Appeal.

Brace, J. 1. The act of the cashier being within the powers of the bank, it could ratify the same. 2. The bank is estopped from denying that the credit was not based on an actual cash deposit. Judgment affirmed.

Cited: 129 Mo. 643; 148 id. 142.

HYRE v CENTRAL BANK OF KANSAS CITY (1892) 48 Mo. App. 434.

Conversion, for collateral securities, after the note was paid, for the payment of which they were pledged. R, accompanied by the plaintiff, went to the defendant to negotiate a loan, on plaintiff's collateral and note. E, the teller, made out a note. The collateral was examined, approved, and passed to E, in the presence of the president and cashier, and the money paid over. Before the maturity of the note, R executed to E, his individual note for \$100 more than the original note, took up the first note, and, without the knowledge or consent of the plaintiff, pledged the collateral for the payment of the new note. The plaintiff demanded his collateral. It was refused. E subsequently sold it, and applied a portion of the proceeds to the payment of R's note. The balance was appropriated either by E or the defendant. Demurrer to the evidence. Overruled. Judgment for plaintiff, for full amount. Appeal.

Gill, J. 1. Plaintiff trusted the bank, and not E, who attended to the business. E was, at least, the reputed agent of the defendant, and whatever secret restrictions may have been imposed on his authority, they cannot defeat the plaintiff's claim. 2. After payment of the principal note, plaintiff had the right to have his collateral returned. The defendant is liable for its conversion. Judgment affirmed.

CARROLL EXCH. BANK v FIRST NAT. BANK (1892) 50 Mo. App. 92.

Money had and received. T purchased several lots of hogs, and gave his checks on the plaintiff bank for payment. He had no funds there, but agreed with the bank, that, if it would pay the checks, the hogs would be considered its property, and he would turn over the proceeds to it. The checks were paid. He thereafter placed the proceeds in the defendant, which had knowledge of the plaintiff's claim. Demurrer to the evidence. Sustained. Appeal.

Gill, J. 1. The transaction between T and the plaintiff was in the nature of a parol mortgage. 2. As the case is now presented, the rights of the plaintiff are as great against the defendant, as if this suit was against T. 3. The defendant makes no claim to the fund, and there is no evidence that he had any interest in it. 4. Before defendant can be heard to allege the informality or legal insufficiency of the execution of T's mortgage, it must show some right to question it. Judgment reversed.

Cited: 76 Mo. App. 315; 81 id. 304; 83 id. 120; 93 id. 252.

McDANIEL v HARVEY (1892) 51 Mo. App. 198.

To recover subscription to stock in a savings institution. This banking corporation, as originally organized, did business a while, and then became insolvent, whereupon a new corporation was organized. Defendant had \$1500 in stock in the old concern, and was a director. The directors subscribed for stock in the new corporation, and passed an order that the stock they held in the old one, should be received in payment for their subscriptions in the new one. The exchange was made, and the old stock canceled. The old stock was worthless. The new corporation became insolvent and assigned to the plaintiff. The defense was payment by the surrender of the old stock. Judgment for plaintiff. Appeal.

Gill, J. 1. Subscriptions to capital stock compose a part of the assets of a corporation, and pass by general assignment for the benefit of creditors. 2. The directors were not authorized to issue stock "except for money paid, labor done, or property actually received." 3. The law presumes knowledge of the bank's condition, on the part of the directors. Judgment affirmed.

CRIPPEN v AMERICAN NAT. BANK (1892) 51 Mo. App. 508.

On bill of exchange. An unknown person, assuming the name of P, applied to the plaintiffs' agent for a loan on P's land. The plaintiffs had the land reported on. Then they authorized the loan and sent a check to their agents. Thereupon the agents bought the bill of exchange on the defendant, payable to P, and sent it to the applicant, who was identified at the defendant by B, as the person who executed the mortgage for the loan. Thereupon the defendant cashed the bill on the unknown's indorsement as P. Judgment for defendant. Appeal.

Smith, P. J. The person the plaintiffs dealt with was the person intended by them as the payee of the bill who was designated by the name that he assumed in obtaining it, and his indorsement was the indorsement of the payee of the bill by that name. The loss must fall on the plaintiffs, but for whose negligence the loss would not have happened. Judgment affirmed.

Cited: 71 Mo. App. 161.

NORTH ATCHISON BANK v GAY (1892) 114 Mo. 203.

On promissory note, against principal and sureties. A, one of the sureties denied delivery and alleged that he signed the note under an express agreement with G, the principal, (of which agreement the cashier had knowledge), that W and three solvent sureties would also sign; and that there was a contract with the cashier of plaintiff, that it would not accept any note, indorsed by him, unless there were other solvent sureties. Evidence as to these facts was excluded. Defendant A also claimed that G turned over to plaintiff sufficient collateral to pay the note. W did not sign the note, and there was but one other signer besides A. The amount of the note was indorsed on an overdue note of G, and the time of payment of the latter was extended. The court charged that if the cashier had knowledge of the agreement between A and G, then the verdict should be for the defendant; that the burden of proof was on defendant. But it refused to instruct that the bank promised, not to accept the note, unless there were other sureties. Judgment for plaintiff. Appeal.

Gantt, P. J. 1. When a surety signs a note and leaves it in the hands of the

principal to be delivered on condition that it shall be signed by others, it will bind him if delivered by the principal in violation of the conditions. 2. There was sufficient consideration for the note in suit. 3. The court properly declined to hear the evidence of the agreement made with the cashier, relative to taking notes signed by defendant. The alleged promise was without consideration and void. Judgment affirmed.

Cited: 77 Mo. App. 431.

MERCHANTS NAT. BANK v LOVITT (1893) 114 Mo. 519.

On promissory note. Defendant averred failure of consideration, and that the bank had notice of the transaction on which the note was based. A note was given to D, vice-president of plaintiff. The note in suit was a renewal, and was discounted by plaintiff. D sold defendant stock in a corporation about to be formed, as a consideration for the original note. The corporation was never formed. The other officers of the bank knew nothing of the contract between defendant and D, and plaintiff had nothing to do with the original note. The court refused to charge that the knowledge of the vice-president of the nature of the agreement was the knowledge of the bank. Judgment for plaintiff. Appeal.

Black, P. J. 1. In general, notice of a fact acquired by an agent while transacting the business of his principal is notice to the principal, and this rule applies to banking corporations as well as to individuals. 2. But the reason of the rule ceases when the agent acts for himself and not for his principal. D represented himself and not the bank, in the whole transaction. Judgment affirmed.

Cited: 122 Mo. 339; 123 id. 176; 129 id. 430; 131 id. 192; 162 id. 157, 158; 57 Mo. App. 645; 64 id. 330, 532; 66 id. 12, 14, 273, 595; 67 id. 146; 78 id. 467; 79 id. 489; 85 id. 56.

MOUNT VERNON BANK v PORTER (1893) 52 Mo. App. 244.

On cashier's bond against principal and sureties. Defendant, P, as cashier, at the request of plaintiff, negotiated waterworks bonds. A commission of \$1,000 was paid to P, who refused to account to plaintiff for it. Plaintiff offered to prove that P acted in his official capacity; and that he represented the plaintiff only, which paid all his expenses in the negotiation. This was excluded, on the ground that it was outside of P's duties as cashier. It was also contended that the act of plaintiff in negotiating the bonds, was ultra vires. By the statutory charter of Missouri state banks, they are authorized to negotiate bonds for customers. Plaintiff nonsuited. Appeal.

Ellison, J. 1. The evidence offered should have been admitted. The cashier was estopped to deny his agency. The bank did the business through him, and it does not lie in his mouth to say it was beyond his duties. 2. The contract of the bank, made through its officers, to sell the bonds, was not malum in se, and if it overstepped its powers, it was answerable to the state alone. 3. The act was within the proper powers of the bank, under the broad terms of the statute charter of such institutions. Judgment reversed.

Cited: 74 Mo. App. 376.

KEYES v BANK OF HARDIN (1893) 52 Mo. App. 323.

Damages, for conversion of note. Plaintiff, holding a promissory note out of which she was to pay K \$350, delivered it to defendant for collection. Defendant delivered the note to K, without authority from plaintiff. Defendant contended that the note was a kind of special deposit from K, and not from plaintiff; that K always controlled the paper; that defendant had no authority by its charter to receive the note for collection, and could not be bound for it. It did not appear that defendant was to be compensated for collecting the note. Judgment for plaintiff. Appeal.

Gill, J. 1. A gratuitous bailee is liable for such negligence as this, whether it was a general or special deposit. 2. The receiving on deposit and for collection of commercial paper is, by common understanding, part and parcel of the banking business which defendant was authorized to conduct. Judgment affirmed.

Cited: 63 Mo. App. 555.

STATE v LAUGHLIN (1893) 53 Mo. App. 542.

Mandamus, to procure inspection of corporation books. The relator was a stockholder and private banker, and respondents were directors and officers of the Bank

of R, organized under R. S., art. 7, ch. 42. The relator requested of respondents the privilege of examining the books of the bank. Respondents refused, on the ground that the bank occupied such a confidential trust relation toward its customers and depositors that it would be a breach of duty on their part to do so. R. S., sec. 2503 provided that books containing stockholder's names should be kept open during business hours, the last 20 days before election of directors. R. S., sec. 7448 provided that no one should own stock in a private bank, and be a director in another bank at the same time. Motion denied. Appeal.

Smith, P. J. 1. The stockholder has a common-law right to examine and inspect all the books and records of a corporation at all times. 2. There is no provision of the statute in relation to corporations, that in any way impairs this right. The statute requiring the books of a corporation to be kept open for inspection previous to election of directors, is not a limitation of the stockholder's right to inspect them at all times. 3. The statutory regulation as to a person being a director in more than one bank, or a director in a bank when he owns stock in a private bank, is not an encroachment upon the stockholder's common law right of examination. Judgment reversed.

SELZ v COLLINS (1893) 55 Mo. App. 55.

Negligence for failing to collect a draft. Plaintiffs sent defendants, bankers, a draft on W, payable one day after sight for collection. It was presented to W and accepted. Twelve days later defendants collected one half of it, and remitted to plaintiffs. W became insolvent, and the balance of the draft was never paid. Answer: That defendants received instructions from plaintiffs that if W would make a reasonable payment, to hold the draft 10 days for payment of the balance; that they collected one half and gave 20 days to pay the balance, and they urged payment and were refused; that plaintiffs proved the claim before the assignee of W. Plaintiffs authorized defendants to hold the draft for twenty days after partial payment for W to settle the balance. Judgment for plaintiffs, for amount of draft, less payments. Appeal.

Bombauer, P. J. 1. Defendants were guilty of negligence in not notifying the plaintiffs at the end of the 20 days, or in not returning the draft to plaintiffs. 2. Plaintiffs are not bound to exhaust their remedy against the acceptor, before they can recover damages for the negligence of defendants; nor is the allowance of the claim by W's assignee a bar to this action. 3. In order to justify the recovery of the entire amount of the draft, it was incumbent on plaintiff to show that the entire loss was due to the default of defendants, and that, but for such default, the loss would not have happened. This question should have been left to the jury. Judgment reversed.

NICHOLS v COMMERCIAL BANK (1893) 55 Mo. App. 81.

Damages. Plaintiff was to sell cattle to L, to be paid for by check on defendant. The cattle were to be shipped to P Bros. Before delivery plaintiff met the assistant cashier of defendant, who told him that L had been drawing on P Bros., and his drafts had been honored; that defendant had been paying L's checks drawn against such drafts, and there was no doubt but that L's check accompanied by a draft would be paid by defendant. L made a check and draft, gave the check to plaintiff and put the draft in defendant for collection. Neither draft nor check was ever paid. Judgment for plaintiff, for amount of check. Appeal.

Smith, P. J. 1. This action is *ex contractu*. There was nothing in the language of the cashier beyond the expression of an opinion. 2. No action can be maintained on a promise of a collateral nature unless it is in writing. 3. The action cannot be maintained upon the theory of an estoppel in pais. The parol promise of the defendant's cashier was void in law, and the plaintiff was presumed to know it. Such an act cannot operate as an estoppel. Judgment reversed.

Cited: 162 Mo. 311; 62 Mo. App. 602.

FIRST NAT. BANK v LILLARD (1893) 55 Mo. App. 675.

On promissory note. J F L, with defendants signing as sureties, made a note to plaintiff. It was renewed once, but after that J F L forged the names of defendants to two other renewals. This action was on the second note. Defendants averred negligence on the part of plaintiff in accepting the third and fourth notes, and in not notifying them. Between the time of the maturity of the sec-

ond note and J F L's departure, he had ample property out of which it might have been collected. Judgment for defendants. Appeal.

Ellison, J. We do not see what bearing any question of the plaintiff's negligence can have on the case. The sureties are not shown to have suffered any damage on account of not being notified earlier. It was shown that there was property from which the defendants might have been indemnified, but there is no evidence whatever that they would have indemnified themselves. Judgment reversed.

Cited: 70 Mo. App. 173, 174.

SALMON FALLS BANK v LEYSER (1893) 116 Mo. 51.

On bond against a surety. B bought out S & Co., giving his notes and chattel mortgage as security. Plaintiff discounted the notes and held the mortgage. S repurchased the business, S, and defendant as surety, giving B the bond in suit to secure payment of the notes. The petition did not set forth the re-sale or the execution of the bond to B. Defendant claimed that plaintiff, although organized for banking, had no power to buy notes. The defendant offered T's admissions in another suit, that he was agent of the plaintiff. Excluded. Defendant objected to plaintiff's reading in evidence notes not described in the petition. Overruled. Defendant set up: 1, usury; 2, release, by plaintiff's failure to protest the last note; 3, that any loss from not foreclosing the mortgage promptly, should be charged to plaintiff; 4, that plaintiff should have exhausted his remedies at law. Judgment for plaintiff. Appeal.

Burgess, J. 1. Agency cannot be proved by the admission of the supposed agent. 2. A bank has the right to buy notes, but not at a greater rate than it might lawfully charge for a loan. 3. A petition setting forth a good cause of action defectively, not a defective cause of action, is good. 4. Plaintiff did not have to show that it had exhausted its remedies at law. 5. Mere delay in foreclosing a mortgage does not amount to laches. The bond was not one of indemnity, and this action is amply supported by the authorities. 6. The objection to the admission of the notes could only be made under secs. 2096 and 2097, R. S. 1889. 7. The fact that the bond was not in existence when the plaintiff purchased the notes, does not prevent them from bringing this action thereon, as, when executed it inured to plaintiff's benefit. Judgment affirmed.

Cited: 125 Mo. 350; 127 id. 189; 150 id. 304; 153 id. 14, 16; 159 id. 567; 62 Mo. App. 410; 69 id. 103; 70 id. 82; 74 id. 178; 78 id. 304; 81 id. 556; 85 id. 122; 87 id. 490; 93 id. 27, 28, 29.

STATE v CATRON (1893) 118 Mo. 280.

To collect taxes assessed under R. S., secs. 6692 and 6693, against the N Savings Bank, organized under the laws of Missouri. The president of the bank gave the assessor a list of the stockholders. C, who was by consent substituted for the bank as defendant, pleaded that his stock was not assessed or attempted to be assessed. Plaintiff replied that the statute did not require the assessment of stock. The assessment was upon the property represented by the stock. Judgment for plaintiff. Appeal.

Black, P. J. 1. For purposes of taxation, the statute makes no distinction between state and national banks. 2. The assessment should be against the stock, and not the property which it represents. 3. Assessment must be made against stockholders individually, for the amount of their stock, at its actual cash value. Judgment reversed.

Cited: 145 Mo. 378.

BANK OF ATCHISON COUNTY v DURFEE (1893) 118 Mo. 431.

To establish a lien upon stock, created by a by-law, for the indebtedness of W, deceased, against the administrator and others, who claimed a lien as pledgees upon the stock held by W. Plaintiff was organized under ch. 21, R. S. 1879. It was the successor of a private bank owned by defendants. W was cashier of both banks and was a defaulter when he died. No notice had been given the defendant pledgees that no transfer would be allowed by plaintiff, and that it claimed a lien on the stock. Two of defendants answered that they had paid notes for W upon which they were sureties, and had taken an assignment and delivery of stock therefor; and two, that they had paid notes for W upon which they were sureties, and that

stock had been left for them in the bank as security, and that the amount paid by them was a part of the purchase money for the stock. These facts were substantially proved. Judgment was rendered against the administrator for the full amount; the two defendants to whom the stock had been assigned were adjudged to have first lien thereon; plaintiff was adjudged to have a first lien upon the stock left or agreed to be left in the bank for the other two defendants. Cross appeals.

Burgess, J. 1. Notwithstanding the provision of its by-laws plaintiff cannot, under the laws of this state, refuse, as against a pledgee without notice, to transfer the stock of a person indebted to it. 2. Defendants who held assignments were holders in good faith, and the stock, being personal property, passed to them. 3. The agreement of W with the other defendants to leave the stock in the bank as collateral was not an assignment, equitable or otherwise. There was no manual delivery and it never passed beyond the control of W. There was no lien created upon it in favor of these defendants. 4. The stock is liable for the shortage in W's account, which accrued prior to the plaintiff's incorporation, for by taking over the defendants' business, plaintiff succeeded to all defendants' rights therein. Judgment affirmed.

Cited: 118 Mo. 461; 75 Mo. App. 301; 85 id. 55.

McCLINTOCK v CENTRAL BANK (1893) 120 Mo. 127.

Conversion for 50 shares of the capital stock of defendant. Plaintiff bought the stock under an execution against C, in whose name the stock originally stood on the bank books. C owed defendant and had pledged his stock as security, and it refused to transfer. Later defendant transferred to another person, but the evidence did not show that the proceeds of the sale exceeded the amount secured by the pledge. The court instructed the jury that if they found C owed the bank, to return a verdict for defendant. Plaintiff showed that the capital stock of the bank was \$50,000, and that it had loaned C \$13,062, and claimed that the loan was illegal and void under R. S. 1889, sec. 2758, which declared that no company should permit any one individual to owe it more than 25 per cent of its capital stock, and that the indebtedness gave the bank no lien upon the stock. Judgment for defendant. Appeal.

Barclay, J. 1. The statute does not declare void all contracts of loan to one person in excess of one-fourth of the capital stock. Within the limit, C would be liable upon his agreement to pay, and his collateral pledge would be valid as security for that amount at least. 2. A pledge of stock signed in blank is sufficient. 3. The evidence failed to show that the value of the stock when sold exceeded the amount for which it was pledged. Until the debt is canceled, plaintiff has no right to the stock. 4. Plaintiff acquired the stock by its purchase, subject to the lien upon it. Judgment affirmed.

Cited: 90 Mo. App. 118.

STATE v BANK OF NEOSHO (1893) 120 Mo. 161.

To recover personal taxes assessed against the defendant, a private bank, by name. A tax list was returned by the president of the bank in its behalf. Defendant objected to the tax because it was assessed against the bank, by name; and on the ground that the assessors made a return of the real and personal property in two books; and that they failed to make out and return a copy of the book, but returned the original; that the assessment was excessive. No appeal was made to the county board of equalization by defendant. Judgment for plaintiff. Appeal.

Sherwood, J. 1. Defendant being a private bank, the tax was properly assessed on its property against it. It is presumed that the president of the bank in making his return performed his duty. The assessment in the name under which the bank did business was sufficient. 2. The assessor's return in two books instead of one was warranted by the Laws of 1883, p. 137. The return of the original book instead of a copy did not render the tax invalid. 3. No appeal having been taken by the defendant to the county board of equalization, excessive assessment cannot be pleaded in answer to this suit. Judgment affirmed.

Cited: 125 Mo. 160; 131 id. 174; 137 id. 266; 145 id. 191, 378; 155 id. 57, 94; 157 id. 557; 165 id. 84, 516; 167 id. 71; 77 Mo. App. 261; 91 id. 150.

STATE v BUCK (1893) 120 Mo. 479.

Indictment, under R. S. 1879, sec. 1350, as amended by the Act of 1887, for receiving deposits as a private banker, knowing at the time that the bank was in an insolvent or failing condition. By a stipulation of the parties there was to be a change of venue in several cases pending against defendant. Motion was made for change of venue in this case, and several months later an order was made and the clerk issued a certificate of the fact attached to the record. Defendant claimed that the order related to one of the other actions, and that there were evidences of alteration in the certificate. He moved a postponement of trial upon the ground that he was at that time under conviction and sentence in the same court for a felony, a similar offense to the one for which he was to be tried. Defendant contended that R. S., sec. 1350, Laws of 1879, as to the subsequent failure of a bank being prima facie evidence of the knowledge of its officers as to the insolvency was in conflict with art. 2, sec. 28, of the constitution assuring the right of trial by jury. Motion denied. Conviction. Appeal.

Burgess, J. 1. The record shows an order of the court for the change of venue, and that is sufficient upon that point. 2. Receiving money upon deposit, by a private banker, knowing the bank to be in an insolvent condition, was unlawful, and the law implies a criminal intent. 3. The statute enables the State to make a prima facie case by proof of the deposit and failure of the bank. It violates no constitutional guaranty, for the legislature has the right to declare what shall be presumptive evidence of any fact. 4. From the time of defendant's conviction and sentence in a former case, he was, in legal contemplation, in custody different from that of the circuit court, and could not be put upon his trial in another case until he had served his sentence in the first, or until it had been set aside or reversed. Judgment reversed.

Cited: 125 Mo. 49; 131 id. 492; 136 id. 355; 152 id. 539, 543; 166 id. 619; 79 Mo. App. 524.

JOHNSON v PAYNE & WILLIAMS BANK (1894) 56 Mo. App. 257.

To recover money appropriated by S, who was at that time the guardian of his minor children, and had their funds on deposit with defendant. The fact was known to defendant that the money belonged to the children. S was removed, and plaintiff was appointed in his stead. S borrowed money of defendant, his note matured, and he promised to pay when the probate court made him an allowance. The allowance was made, and defendant charged the amount of the note to his account. S had not enough funds to settle with his successor, and gave him a check on defendant, after withdrawing his balance, for just the amount of the note which had been satisfied out of the funds deposited in his name belonging to his wards. Judgment for plaintiff. Appeal.

Smith, P. J. Defendant could not use a deposit to pay the individual debt of the depositor due it, when it had knowledge that the deposit was held in a fiduciary capacity and did not belong to the depositor personally. The allowance to S could not change his relation to the deposit. The act of the bank was prima facie wrong. Judgment affirmed.

Cited: 57 Mo. App. 287; 86 id. 425, 426.

CLARK v FIRST NAT. BANK (1894) 57 Mo. App. 277.

Bill to charge a trust, on a deposit in the defendant, a bank. Plaintiffs were sureties for W, a receiver in a suit, and as such were compelled to pay a sum of money to cestuis que trust. W had funds on deposit with defendant belonging to the beneficiaries; and defendant understood the nature of the deposit. W was indebted to defendant, and it applied the trust funds to the payment of his individual debt. Defendant averred that plaintiffs could not maintain a suit in equity, without first having recovered a judgment in assumpsit against the principal, and exhausting their legal remedy against him and his property. Decree for plaintiffs. Appeal.

Smith, P. J. 1. As soon as a surety has paid a debt, as such, an equity arises in his favor, to have all the securities, which the creditor held against the person or property of the principal debtor, transferred to him. He is subrogated to all the rights, remedies, and securities of the creditor, substituted in his place, whether he has recovered a judgment or not. 2. The order of the court on the settlement of the receiver, was binding on the receiver and his sureties. 3. The money held

by defendant for W was a trust fund, and could not be used by it to pay W's individual indebtedness to it. Decree affirmed.

Cited: 70 Mo. App. 580; 77 id. 515; 79 id. 269; 81 id. 137, 140; 86 id. 425; 87 id. 77, 315; 93 id. 140; 143 Mo. 664; 150 id. 8, 304.

CARROLL EXCHANGE BANK v FIRST NAT. BANK (1894) 58 Mo. App. 17.

For money claimed, as of a parol mortgage. T gave checks on plaintiff to pay for stock. He had no funds and agreed if plaintiff would pay the checks, he would sell the stock, and deposit the net proceeds with plaintiff, to pay an overdraft. The checks were paid. T sold the stock and deposited the proceeds with defendant. Plaintiff regarded the advance as a loan, charged it to T, and subsequently took his note for it. T's agents deposited checks to the credit of plaintiff, which were later withdrawn by T, before they were paid, and the proceeds deposited with defendant. Plaintiff claimed that the amount of these checks to it was part payment under T's agreement with plaintiff and entitled plaintiff to judgment for that amount. Defendant proved an indebtedness from T, and as a creditor, claimed an interest in the deposit. Judgment for defendant. Appeal.

Bill, J. 1. At most, T's promise to the plaintiff was but a parol mortgage, and not a sale. It was invalid as to the defendant not being recorded. 2. Mere giving a check is not payment. A check drawn for a part of the drawer's deposit, does not operate as an assignment pro tanto, nor confer a lien thereon. It is executory, and may be withdrawn before its payment. The check in this case was a mere order, and T had a right to withdraw it. Judgment affirmed.

Cited: 72 Mo. App. 444.

KAVANAUGH v FARMERS BANK (1894) 59 Mo. App. 540.

For balance of deposit. Plaintiff indorsed and deposited a check with defendant drawn on S Bank. Defendant credited it as such deposit. Plaintiff received his passbook balanced, and afterward drew a check for the balance payable to C Bank. C Bank presented the check to defendant and payment was refused. The check deposited by plaintiff with defendant, was forwarded for payment through correspondents, and was lost before it reached S Bank. Defendant informed plaintiff, and requested him to procure a duplicate from the drawer, but he was unable to do so. It appeared that the drawer had funds in S Bank, and that the check would have been paid if it had been presented within a month. Judgment for plaintiff. Appeal.

Smith, P. J. 1. By receiving the check indorsed by the plaintiff, and giving him credit for the amount as so much money deposited, the defendant became its purchaser. 2. Defendant could not charge the check back to plaintiff without first fixing his liability by regular demand, protest, and notice. 3. Such an instrument is subject to the same principles as govern bills of exchange with reference to the rights of a holder. Judgment affirmed.

Cited: 67 Mo. App. 103.

MIDLAND NAT. BANK v ROLL (1894) 60 Mo. App. 585.

On bank check against indorser. Defendant indorsed it in blank and deposited it with C Trust Co. and received credit. C Trust Co. was insolvent, but defendant did not know it. C Trust Co. deposited it with plaintiff the same day "for collection and credit." Plaintiff gave C Trust Co. credit for it. Payment was refused by drawee. Plaintiff charged the check back to C Trust Co. It was shown that it was the custom and understanding between C Trust Co. and plaintiff, to give the former credit for deposits for collection, and allow them to be checked out as cash. Defendant averred that the property in the check was in him, as he had indorsed it to C Trust Co. not knowing it to be insolvent. Judgment for plaintiff. Appeal.

Ellison, J. When an indorsement "for collection and credit" is made in pursuance of an understanding whereby the paper is taken, credited, and treated as cash, title to the paper passes. Judgment affirmed.

Cited: 67 Mo. App. 102.

SPEER v BURLINGAME (1894) 61 Mo. App. 75.

To enforce directors' liability. The action by a depositor was founded on secs. 2760-1, R. S., relating to the reception of deposits when a bank was insolvent. Complaint alleged three deposits at different dates. The court directed the jury if

it found for plaintiff, to assess his damages in a gross sum. Defendants objected to the reading from a deposition taken by defendants of the by-laws, for the purpose of showing defendant's knowledge of the bank's insolvency. The by-laws provided that it was the duty of defendants to "pass upon the business of the bank" and supervise it. Declarations of defendants made to one another after the failure of the bank and of offers for stock refused by them, were excluded. The court instructed the jury that if the bank was doing a general banking business, soliciting and receiving deposits with the assent of defendants, at the time of the making of plaintiff's deposits, they might infer from such facts an assent by defendants to the reception of the deposits, although they had no actual knowledge of them. The court further charged that in determining the want of knowledge on the part of defendants, they must consider as any other fact the presumption authorized by law that the officer did have such knowledge and did assent. Some of defendants objected to the jurisdiction of the trial court, but nevertheless appeared and contested the case. Judgment for plaintiff. Appeal.

Smith, P. J. 1. The contents of the by-laws were admissible. 2. Defendants cannot object to a manner of proving the by-laws of which they have availed themselves. 3. Defendants were entitled to have the jury pass upon each cause of action alleged against them. 4. The evidence of the offers for stock and of defendants' declarations was not competent. 5. It was improper for the court to direct the jury as to the inference which might be drawn from the fact of the bank doing a general business, and receiving deposits; it was for the jury alone to weigh this evidence and find the fact. 6. The jury, in determining the issue of defendants' knowledge by the weight of evidence, were authorized to give the presumption whatever probative force they deemed it entitled to. 7. If a party wishes to insist on the objection that he is not in court, he must keep out for all purposes except to make the objection. Judgment reversed.

BENTON v GERMAN-AMERICAN NAT. BANK (1894) 122 Mo. 332.

Bill to cancel promissory note, and to recover interest paid on it, alleging that it was without consideration and procured by fraudulent representations of W, cashier of defendant, and that defendant had notice of these facts. K Co., through W, one of its officers and also defendant's cashier, sold plaintiff some of its capital stock for which the note was given, payable to W, as cashier of defendant. The note was discounted by defendant and placed to the credit of K Co. At maturity it was renewed and made payable to S, cashier of the bank. At maturity this note was taken up with a note payable to J, cashier of the bank, which note was again renewed by a like note, which was the subject of the suit. Bill dismissed. Appeal.

Brace, J. 1. Knowledge which comes to an officer of a corporation, through his private transactions, is beyond the range of his official duties, and is not notice to the corporation. 2. As there was no evidence that W communicated his knowledge in this matter to the board, or to any officer of the bank, and as the note was discounted for value, it became the property of the bank as a bona fide purchaser. Judgment affirmed.

Cited: 126 Mo. 87; 129 id. 430; 166 id. 636; 66 Mo. App. 14, 598; 67 id. 103; 76 id. 365; 79 id. 489.

FAMOUS SHOE CO. v CROSSWHITE (1894) 124 Mo. 34.

On check against the maker. Plaintiff took the check by indorsement from W, without making any inquiry as to how he obtained it. He took it in the usual course of business. W had obtained the check by fraudulently representing to defendant that he was H. The check was payable to W, and indorsed by W with H's name. It did not contain the words "value received." The principal question was whether the check was negotiable. The defendant pleaded a custom of the bank to identify the persons presenting checks as a defense to the action, claiming that the check was given on reliance of this custom, and that plaintiff knew of the custom. Judgment for defendant. Appeal.

Black, P. J. 1. A check, even if it does not contain the words "value received," is a negotiable instrument. 2. It being shown that the check was procured by fraud, it devolved upon plaintiff to show that he was a bona fide holder. 3. The custom is no defense to the action, as it cannot limit the negotiability of the paper. Judgment reversed.

Cited: 126 Mo. 87; 149 id. 90; 59 Mo. App. 547; 64 id. 119; 68 id. 238; 82 id. 402; 87 id. 483.

STATE v REID (1894) 125 Mo. 43.

Indictment against the president of a trust company and savings institution, for receiving a deposit when the institution was in a failing condition. The indictment was founded upon sec. 3581, R. S. 1889, referring to "banking institutions." Defendant demurred to the indictment, raising the question whether trust companies and their officers are embraced by the statute. The statute authorizing trust companies was passed subsequent to sec. 3581. It was agreed that the company was organized as a trust company under art. 11, ch. 42, R. S. Demurrer sustained. Judgment for defendant. Appeal.

Gantt, P. J. 1. Criminal statutes should be strictly construed. 2. It is apparent that when sec. 3581 was first enacted in 1877, it was not intended to apply to trust companies, because the act providing for the incorporation of trust companies was not enacted until 1885. The fact that some of the powers usually exercised by banks are conferred by statute upon trust companies, does not make a trust company a bank. Judgment affirmed.

Cited: 144 Mo. 590; 152 id. 537; 74 Mo. App. 287; 89 id. 508.

GATE CITY BUILDING ASS'N v BANK OF COMMERCE (1894) 126 Mo. 82.

To recover the amount on a check, paid by defendant to H, plaintiff's secretary. The check was payable to plaintiff. H was the active manager of plaintiff and custodian of its securities, and the keeper of its accounts. Plaintiff and H both had accounts with defendant, and H deposited the check to his personal account; it was collected by defendant, placed to H's account, and checked out by him, and he afterward absconded. Judgment for defendant. Appeal.

Brace, J. 1. The check was a negotiable instrument. 2. The credit given to H was the same as if the money had been paid him on the check and had been immediately placed back by him on credit. The bank became a purchaser for value, in the ordinary course of business. 3. The secretary acted within the apparent scope of his authority. Judgment affirmed.

Cited: 67 Mo. App. 103; 92 id. 299.

PARK BANK v SCHNEIDERMEYER (1895) 62 Mo. App. 179.

On promissory note. Defendant and his partner made the notes to plaintiff. The partner retired and defendant continued the business, and made deposits from time to time with plaintiff. One note matured and plaintiff passed a portion of the deposits to its payment and informed defendant, and subsequently passed a portion of the deposits toward the payment of the other note which was past due. Defendant knew of the application. The suit was brought for the balance. Defendant pleaded the Statute of Limitations. Judgment for plaintiff. Appeal.

Smith, J. 1. Where a depositor is indebted to the bank, the latter has the right to apply the funds of the depositor to the payment of his indebtedness. 2. As defendant received notice of what plaintiff had done, he must be held as sanctioning it. 3. The application of the deposit to the notes constituted, pro tanto, payment thereof, and was sufficient to arrest the running of the Statute of Limitations. Judgment affirmed.

FIRST NAT. BANK v SANFORD (1895) 62 Mo. App. 394.

Bill to recover as a trust fund, money collected by defendant's assignors. Plaintiff intrusted the Bank of C with the collection of a certificate for \$2,080. Two days later it made a general assignment to respondent, having on hand but \$190 cash, and with nominal assets vastly less than liabilities. Defendant denied liability and made special defense that the claim must be presented to the assignee. Bill dismissed. Appeal.

Rombauer, P. J. 1. The relation between the parties was that of principal and agent. 2. The plaintiff was under no obligation to exhibit its claims to the assignee, but was at liberty to fasten it by proceedings in equity upon the specific or substituted assets in assignee's possession. 3. Under the rule prevailing in this state, it is not essential to show that the fund in original or substituted form came into the assignee's possession; for if the general assets are swelled and increased, they must bear the burden. 4. The wrongful conversion so immediately preceding the assignment is of itself evidence of a corresponding increase in the assets. Judgment reversed.

DOWELL v VANDALIA BANKING ASS'N (1895) 62 Mo. App. 482.

On bank check. D, having \$14.70 on deposit in defendant bank, deposited a check for \$2058; and after drawing out part of it, took a certificate of deposit, showing the transaction, and delivered it with a check for the balance of the check deposited, to the plaintiff. The check was presented for payment, which was refused. The court instructed the jury that the plaintiff could not recover, and he took a nonsuit. Appeal.

Bond, J. The check, not having been drawn on a particular fund, nor for the full sum due the drawer by the drawee, and not containing any words of transfer, did not operate, before acceptance, as an assignment in law or equity, of so much of the fund to the credit of the drawer as it called for. Judgment affirmed.

Cited: 71 Mo. 135; 73 id. 671.

PEOPLE'S SAV. BANK v HUGHES (1895) 62 Mo. App. 576.

On promissory note. The defendant signed a note with other parties for the benefit of F. When the note matured, F renewed it with one purporting to be signed by the same parties as the first note. The defendant, learning of the renewal notified the cashier of plaintiff that he did not sign the renewal. The first note had been surrendered in the belief that the renewal notes had been executed by the same parties. It was arranged that if defendant would assist in getting security from F, he should be relieved from responsibility on the first note. This he did and a note was obtained secured by a deed of trust, which the defendant contends, was accepted by the plaintiff's cashier. The powers of the cashier are not specified in the state statutes. Judgment for defendant. Appeal.

Smith, P. J. 1. The power to discharge a surety on a note without payment, was not comprehended in the ordinary duties of the cashier of plaintiff. 2. The action of the cashier was ineffectual to bind the bank, or to estop it to claim payment. There must be proof of such authority to bind the bank. Judgment reversed.

Cited: 64 Mo. App. 329; 67 id. 126; 73 id. 356; 76 id. 95; 84 id. 272.

AKERS v RAY CO. SAV. BANK (1895) 63 Mo. App. 316.

Breach of warranty. Defendant's president gave plaintiff a deed purporting to convey 68 acres of land, whereas, in fact, there were but 53 acres. The president and cashier of the defendant represented to the plaintiff that the defendant owned the number of acres stated in the deed, and that they were authorized to convey the same. The president made the conveyance by an unsealed unacknowledged deed. The suit was to recover for the excess of price paid on account of land which the defendant did not own. The defendant denied the authority of the president and cashier to make the representation as to the quantity. The defendant received the purchase price of the amount represented. Judgment for plaintiff. Appeal.

Ellison, J. 1. The defendant, having received and retained money for land it did not own and could not convey, should make restitution. 2. Defendant is estopped to deny the authority of its officers to receive the money, or to make the representations by which it was obtained. Judgment affirmed.

Cited: 89 Mo. App. 177.

COLUMBIA LAMP CO. v M'F'G CO. (1895) 64 Mo. App. 115.

On check against the maker. The defendant denied consideration, and showed that a suit had been brought against the plaintiff to restrain him from the use of a patent, which defendant also used in his business, and that plaintiff stated he should fight the suit whether the defendant contributed or not. Plaintiff had expended \$18,000 in defense of the patent. Defendant agreed to give plaintiff \$2,000, of which this check represented an instalment. Verdict directed. Judgment for plaintiff. Appeal.

Bond, J. 1. The question whether there was consideration or not should have been submitted to the jury. It might have found that defendant incurred no obligation on the strength of the defendant's promise. 2. The possibility of advantageous results to defendant, which plaintiff did not obligate itself to produce, did not constitute a legal consideration for the check. Judgment reversed.

Cited: 68 Mo. App. 238; 77 id. 499; 83 id. 582.

RIPLEY NAT. BANK v LATIMER (1895) 64 Mo. App. 321.

Negligence. Defendant was the receiver of the S Bank. The action was on a check sent to the bank by mail, for collection or for protest. The check was drawn by T, cashier of S Bank, on the S Bank. The cashier had something on deposit with the bank at the time the check was sent. The S Bank refused to return the check, and failed to protest it or to give notice to plaintiff. Judgment for plaintiff. Appeal.

Smith, P. J. 1. The depositing in the post office of a letter properly addressed to defendant, with postage prepaid, was prima facie evidence that defendant received it. 2. The receiver cannot avoid liability for negligence of the bank any more than the bank itself could. 3. It was the duty of the bank to have honored the check to the extent of the deposit. 4. It was the bank's duty, in case of non-payment, to notify plaintiff. 5. The action of the bank in holding the check and not notifying plaintiff of its dishonor was gross negligence, for which it may be held liable. Judgment affirmed.

Cited: 81 Mo. App. 36.

STATE v SATTLEY (1895) 131 Mo. 464.

Indictment for larceny, for receiving deposits, or for creating a debt by the receipt of money, knowing the bank to be insolvent. Defendant was cashier and director of the K Bank. V, at the solicitation of defendant, made a deposit with the bank, on July 10, and received from the teller a certificate of deposit signed by defendant, as cashier of the bank, payable in six months. On the evening of July 10, the officers of the bank executed an insolvent assignment for the benefit of its creditors. The bank continued to receive deposits up to the time of assignment. Defendant knew of the bank's condition at the time. C, an owner of real estate in K City, well acquainted with real estate values there, testified as to the value of real estate in that city belonging to the bank. Defendant's offer to prove the value of the bank building, based on its cost, was refused. Defendant offered as witnesses, H, who had sold his stock in 1892, and did not know its value in July, 1893, and others who had demanded back deposits from the bank's employees and had been refused. R. S. 1889, sec. 3581, provides that a bank officer who receives, or assents to the reception of a deposit, or consents to the creation of any indebtedness by such bank, in consideration of which any deposit shall be received into such bank after he has knowledge that it is insolvent, or in a failing condition, shall be deemed guilty of larceny. Defendant contended that this section was unconstitutional. Verdict guilty. Appeal.

Gantt, P. J. 1. The State had the right to define offenses and is not restricted by the common law in this respect. 2. The use of the words "did take, steal, and carry away" is unnecessary in an indictment for embezzlement, but the practice is to insert them, and it seems to be required by the decisions. "Any indebtedness" comprehends a debt created by deposit, and the execution and delivery of the certificate of deposit. 3. The failure of the defendant to prevent further deposits, after he knew the bank was in failing circumstances, must be construed as a continuing authority to receive them. 4. There is a prima facie presumption, from the failure of a bank, that its managing officers had knowledge of its failing condition. The defendant was therefore presumed to know. 5. When the several offenses charged in the different counts of an indictment, though distinct in law, spring out of the same transactions, the defendant will not be prejudiced by the joinder, and the court will not compel an election, but will sustain a general verdict. This section is not in conflict with the constitution. 6. It was not proper to ask the value of the building separate from the ground. 7. H was properly excluded as a witness. 8. The prima facie case against defendant was sufficient and conclusive, when not rebutted. 9. C was competent to express his opinion as to the value of the assets. 10. The evidence as to demand and refusal was admissible, whether defendant personally heard of them or not. Judgment affirmed.

Cited: 134 Mo. 245; 152 id. 533, 534, 539, 541; 167 id. 494; 79 Mo. App. 524.

BRIDGES v STEPHENS (1895) 132 Mo. 524.

To recover a claim against a national bank. The defendant, a receiver, rejected the claim of the plaintiff while the claim belonged to A. A tried at various times to get a settlement, until nearly five years had elapsed after the appointment of the receiver, when A informed him that he, A, must bring the suit before

the expiration of five years or his claim would be barred. The defendant agreed orally that if the plaintiff would not bring the action, he would not plead or allow to be pleaded, the Statute of Limitations. With the hope that a settlement would be reached, A delayed until after the five years expired. A assigned the claim to the plaintiff. The defendant pleaded the Statute of Limitations. Plaintiff had had communication with the comptroller of the currency relative to the settlement of the claim, documentary evidence bearing on this subject was introduced, and it was shown that the comptroller had referred the matter to the defendant. Judgment for defendant. Appeal.

Gantt, J. 1. The promise of the defendant, not to plead nor permit to be pleaded, the Statute of Limitations, was valid although not in writing and not within the purview of the statute. The defendant was estopped by this agreement to resort to this plea. 2. The forbearance of the plaintiff's assignor to sue was a sufficient consideration for the agreement. 3. It was not an agreement against public policy. 4. The presumption is that the documentary evidence satisfied the court that the defendant had the power to make the stipulation, and it cannot be presumed that the promise by the defendant not to plead the statute was beyond his power as receiver. Judgment reversed.

Cited: 81 Mo. App. 108; 84 id. 404, 653; 89 id. 509.

STATE v SPRINGER (1895) 134 Mo. 212.

Certiorari, directed to the board of equalization of H County, on petition of the H Bank. The object of the writ was to quash an assessment of the personal property of the bank, which returned an amount of property and was doubled by the board, without personal notice. It was insisted that the increased assessment was void for want of notice to the plaintiff. The county clerk certified that he gave a published notice. The board held a meeting required by statute after the assessment, at which the assessed could show cause why increase should not be made, but the bank did not appear. It was also urged that the assessment should have been made against the stockholders and not against the bank. Writ quashed. Judgment for defendant. Appeal.

Barclay, J. 1. This court had original jurisdiction over proceedings of this sort. As this case involves construction of revenue laws of the state, it comes within our jurisdiction. 2. **Certiorari** is a proper remedy to quash an increased tax assessment, and, as such, its return may be amended. 3. The notice given by the board was sufficient to enable it to act, as appears from the certificate. 4. The opportunity given was sufficient to constitute due process of law. 5. The bank returned the property assessed as its private property, and it cannot complain that it was dealt with as such and taxed to the bank. 6. That an opportunity for a hearing should precede an assessment was not essential to due process of law. 7. It was not necessary that the record should show that the board heard evidence. It was competent for the board to decide on their own knowledge. Judgment affirmed.

Cited: 164 Mo. 54.

GERMAN FIRE INS. CO. v KIMBLE (1896) 66 Mo. App. 370.

To charge assets of the F Bank, in the hands of an assignee, with money which the bank collected for the plaintiff, and failed to pay over. The plaintiff sent the bank a promissory note for collection and it was mutually agreed that it was not placed there as a deposit. The bank collected it, sent the plaintiff a draft on S, which was presented but not paid. The bank made an assignment to defendant, who refused to pay it to plaintiff on demand. Judgment for defendant. Appeal.

Gill, J. 1. The failure to pay over the money collected was such a tortious conversion, as gave the plaintiff the equitable right to follow and reclaim the fund, whether existing separate and apart or intermingled with other moneys of the bank. 2. The case was that of trustee and cestui que trust. Judgment reversed.

CRAWFORD v AMERICAN NAT. BANK (1896) 67 Mo. App. 39.

Creditor's bill, against B Co., an insolvent corporation. An injunction was issued and a receiver appointed. The S Co. was made defendant, and filed a cross petition, setting up a demand against the original defendant for goods sold to the B Co., on fraudulent representations of the plaintiff's cashier, and praying that

the plaintiff be debarred from any share of the funds in the hands of the receiver. Decree debarring plaintiff from sharing with the other creditors. Appeal.

Bond, J. 1. The duties of the cashier of a bank do not warrant representations on his part as to the solvency or credit of business corporations, who are indebted to the bank. 2. To preclude plaintiff from sharing with the other creditors, the cashier's statements must constitute fraudulent representation or estoppel, and must have been made with the authority of the bank or be subsequently ratified. Decree modified by allowing the plaintiff to participate with other creditors.

DYMOCK v MIDLAND NAT. BANK (1896) 67 Mo. App. 97.

Replevin, to recover a shipment of grain. Plaintiff shipped to C, president of C Co., a cargo of grain with a bill of lading, and received a check therefor on defendant bank. Payment of this check was refused. To meet overdrafts, the C Co., a customer of the defendant bank, deposited with it the bills of lading with drafts attached, which were credited to the C Co. Plaintiff was the shipper. The C Co. failed and the draft, not being paid, was charged back by the bank. Judgment for plaintiff. Appeal.

Smith, J. 1. The exercise by the bank of the right to charge the draft back to the C Co. on its non-payment, did not affect the relation of the banker to the depositor, which was that of debtor to creditor. 2. Giving credit for the draft, for an antecedent debt, defendant became a bona fide holder of the draft and bill of lading, to which it was attached. Judgment reversed.

Cited: 92 Mo. App. 301.

WITHERS v LAFAYETTE CO. BANK (1896) 67 Mo. App. 115.

Conversion. The plaintiff alleged that she owned 20 shares of the defendant's stock; that she left her certificates with the president of defendant for safe-keeping; that defendant, in collusion with its president, had annulled them; that she had demanded other certificates to be issued to her; and that the defendant had failed to comply. Demurrer. Overruled. Judgment for plaintiff. Appeal.

Smith, P. J. 1. The petition alleged facts constituting a conversion, or at least facts from which conversion might be inferred. The plaintiff had two remedies—one for damages for conversion, and the other by a suit in equity to compel the issue of new certificates. Judgment affirmed.

Cited: 78 Mo. App. 467; 89 id. 269.

LEONARD v LATIMER (1896) 67 Mo. App. 138.

Bill for a preference, against the estate of the S Bank. The plaintiff, through T, cashier of the S Bank, loaned money to G and took a deed of trust. T reported to G that he could change the loan and place it with M. G made a new note. Without the knowledge of G or the plaintiff, T placed the note with his private papers, and requested the plaintiff to assign his note to him, and he would collect and remit the money to him. Plaintiff did so, and T had the note marked paid and canceled, and the record of the trust deed marked "satisfied." He then forwarded G's note and a new trust deed to M, and directed him to place the amount with the A Bank of New York, to the credit of the S Bank. M deposited half the sum, and retained the balance for a debt of T. The amount deposited to the credit of the S Bank was mingled with the assets of the S Bank. This sum was claimed as a preference by the plaintiff, who did not know of the transaction until the S Bank closed. Decree for defendant. Appeal.

Gill, J. 1. T's knowledge in this transaction is to be imputed to the S Bank. 2. The general assets of the bank having secured the benefit of the unlawful conversion, there is nothing inequitable in charging them with the amount of the converted fund as a preferred demand. Judgment reversed.

Cited: 67 Mo. App. 125; 86 id. 183, 429; 89 id. 514; 90 id. 262; 143 Mo. 664; 152 id. 142.

ADAMS CO. BANK v HAINLINE (1896) 67 Mo. App. 483.

On promissory note, by the indorsee against drawers. Defenses: failure of consideration and fraud by payee. The plaintiff showed that it was a bona fide indorsee and holder for value without notice. There was no contradiction of these facts by defendant who proved the fraud. Verdict directed for plaintiff. Appeal.

Ellison, J. 1. Fraud and failure of consideration are no defenses as against a bona fide holder for value. 2. Where, on the undisputed facts, one party should or should not recover, the court may declare. Judgment affirmed.

ILER v MIDLAND NAT. BANK (1896) 69 Mo. App. 64.

Garnishment proceedings. R & Co., the principal defendants, had been depositors with the bank, and at the time of the service there was a credit in their favor. The bank held unmatured notes of R & Co., for a greater amount than this deposit, and claimed the right to hold the deposit to meet the notes when due. The defendants R & Co. were insolvent. Judgment, charging the garnishee. Appeal.

Gill, J. 1. A demand cannot be set off because of the insolvency of the defendant, unless it existed against the plaintiff in favor of the defendant at the commencement of the suit and had then become due. 2. The right of the setoff existed neither at law nor in equity. Judgment affirmed.

Cited: 75 Mo. App. 573.

STATE v WELLS (1896) 134 Mo. 238.

Indictment against the cashier, for receiving a deposit knowing the bank to be insolvent. Defense, that the loans which rendered the bank insolvent, had been made prior to the time defendant became cashier, and that he did not know the bank was insolvent, until the night after the deposit in question was made. The indictment charged only that the defendant received the deposit. It did not allege that he assented to the reception of the deposit. It appeared that the deposit was received by the bookkeeper, and the evidence went to show that the defendant assented to its receipt by him. Judgment for plaintiff. Appeal.

Gantt, P. J. 1. This is criminal prosecution and the State must establish the crime charged in the indictment and not another, though kindred crime. 2. As the evidence did not tend to prove reception of the deposit, it presents a case of total failure of proof, and the court should have directed an acquittal. Judgment reversed.

BURRIS v BANK OF BUFFALO (1897) 70 Mo. App. 675.

On certificate of deposit. Defense, payment. Plaintiff deposited money with the defendant. She intrusted with M, its cashier, the consummation of a contract with B, for the purchase of land which he claimed to own by deed from A and authorized M to draw and pay the money on presentation of deeds from A to B and from B to herself. M drew the money and paid it to C, on his presenting the deeds with an order from B. One of the deeds was a forgery. Judgment for defendant. Appeal.

Ellison, J. 1. To sell real estate or to contract with brokers was not in the line of the cashier's duty. 2. The cashier was plaintiff's agent in drawing the money, and what he did with it, does not affect the defendant. Affirmed.

Cited: 79 Mo. App. 321.

HOUSTON GROCER CO. v FARMERS BANK (1897) 71 Mo. App. 132.

On bank checks. S gave H, a salesman of plaintiff, several checks payable to plaintiff's order. H, without authority from plaintiff, indorsed them and deposited them to his own account in another bank. They were forwarded to defendant, paid, and surrendered to the drawer. At the time of payment, the deposit of S exceeded their amount. Plaintiff discovered the unauthorized indorsement, obtained the checks from S, and presented them to defendant. Payment was refused. Judgment for defendant. Appeal.

Bond, J. 1. The payment of a check on an unauthorized indorsement of the payee's name, followed by a surrender of the checks to the drawer, did not constitute such an acceptance of the checks and assignment of their proceeds, as will establish privity, and enable the payee to maintain suit against the bank. Judgment affirmed.

ROSSI v NATIONAL BANK OF COMMERCE (1897) 71 Mo. App. 150.

To recover money applied by the defendant bank to the payment of a draft. The M Bank forwarded a draft to E, at S. There were two women of the same name in S, one of whom had a deposit in the M Bank. The other one obtained

the draft by fraud, and by forging the name of the depositor, collected the money. The plaintiff, a depositor in defendant, not knowing the facts, had indorsed the draft to identify E. After paying the draft, defendant indorsed it "for collection account." When the fraud was discovered, defendant paid the draft, and applied the plaintiff's deposit to the payment of it, and gave plaintiff notice of the forgery. Judgment for defendant. Appeal.

Bond, J. 1. The transaction established the status of plaintiff as the accommodation indorser of the forger. 2. Plaintiff's indorsement was a warranty that the woman presenting the draft was entitled to the proceeds. 3. There being no default either in acceptance or payment, plaintiff was not entitled to the notice which indorsers are ordinarily entitled to receive. Plaintiff was entitled to reasonable notice of the forgery. 4. The indorsement for collection by defendant did not relieve it from its liability as a warrantor of prior indorsements. There was no negligence on the part of the defendant or the remitting bank. Judgment affirmed.

AMERICAN EXCH. NAT. BANK v METROPOLITAN NAT. BANK (1897)
71 Mo. App. 451.

Damages for negligence. The plaintiff placed in the hands of the defendant for collection, a check drawn on the B Bank, located at a distant city. Defendant sent it direct to the B Bank for collection, that being the only bank at that place. The B Bank received the check and the same day sent in payment its own check on the Bank of S, which was never paid, the B Bank having failed before the check reached the S Bank. Judgment for plaintiff. Appeal.

Ellison, J. 1. The debtor was not a proper, competent, and reliable agent to make collection, and defendant was therefore guilty of negligence. 2. A custom to send collections to a correspondent even though it be the debtor, is unreasonable and will not be recognized by the courts. Judgment affirmed.

HUME v EAGON (1897) 73 Mo. App. 271.

Replevin. The K Bank held a note drawn by S. Its president assigned the note to the plaintiff, cashier of the bank. S gave plaintiff a chattel mortgage on the goods, as collateral. After the note was overdue, the plaintiff took possession of the goods. The assignment to the plaintiff was made with the knowledge and consent of the directors; and subsequently was ratified at a meeting of the board. The defendant, the sheriff, took possession of the goods under a writ of attachment against S. The statute declared that all acts of indorsing, selling, pledging, and hypothecating, done by any officer of the bank without the authority from the board of directors, should be null and void. Verdict directed for the defendant. Appeal.

Biggs, J. The purpose of the legislature was to restrict and not to take away an existing power. The act of assignment, therefore, was voidable, not void, and so capable of ratification. Judgment reversed.

SANTA FE EXCH. BANK v DICK (1897) 73 Mo. App. 354.

On promissory note against maker. Plea: payment. Defendant executed the note with O as surety. O owed the defendant a sum equal to the note. The cashier of the plaintiff agreed to take, and did take, a transfer of the account against O, in payment of the note, and the cashier stamped the note as paid, but did not deliver it to the defendant. The plaintiff contended that the cashier had no authority to take the account and discharge the note. Judgment for defendant. Appeal.

Ellison, J. 1. The cashier of a bank is considered the executive officer through whom the moneyed operations of the bank in paying or receiving debts, or disposing or transferring securities, are conducted. 2. The transaction was within the line of duty and authority of a cashier. Judgment affirmed.

LONG v ECKERT (1897) 73 Mo. App. 445.

On an account. The defendant gave the plaintiff a check on the W Bank for the amount of the bill. Defense: that the check was not presented within a reasonable time and that the W Bank had failed when it was presented. The check was given on Thursday, a holiday, and the bank continued to do business until the following Tuesday. The check was presented some time on Saturday. Defendant suf-

ferred no loss from the plaintiff's failure to present the check in time or to give notice of its dishonor. The agreed statement set up that the defendant would suffer loss if compelled to pay the sum sued for. Judgment for plaintiff. Appeal.

Gill, J. 1. The drawer of a check is not discharged by any laches of a holder in making presentment or giving notice, unless he shows that he has suffered some loss or injury thereby, and then only to the extent of that loss or injury. 2. The allegation as to loss was a mere conclusion, and not facts from which the court would be justified in finding that defendant had suffered damage. Judgment affirmed.

HOMER v NATIONAL BANK OF COMMERCE (1897) 140 Mo. 225.

On deposit, made by the plaintiff's assignors in the defendant bank upon the day the assignment was made. The defendant claimed a lien on the deposit to apply it to the payment of notes discounted for the assignors, which they averred had been discounted on the faith of the general balance which the assignors kept in the defendant bank. At the time of the assignment these notes had not matured. Previous to the assignment the assignors were required to increase their deposit, in order to continue receiving accommodation from the bank. Judgment for plaintiff. Appeal.

Burgess, J. 1. In order that a debt against an insolvent may be set off against his assignee, it must be due at the time the assignment is made, or at any rate at the time the suit is brought by the assignee. 2. A banker has no lien upon his customer's deposits for advances made which are not yet due, and equity will not permit a setoff of unmatured demands against such deposits in the absence of an express agreement to that effect. 3. Requiring the assignors to increase their deposits, in order to continue to receive accommodations, created no lien upon the deposits. Judgment affirmed.

Cited: 150 Mo. 9, 12.

BUTLER COUNTY v BOATMEN'S BANK (1897) 143 Mo. 13.

On special deposit, to recover from a savings bank. The plaintiff deposited \$30,000 of new funding bonds with written instructions to the defendant to deliver them to W & D for their face value in cash, and to apply the cash so received to the payment of a former series of bonds. The bonds were delivered and the money received, and the amount placed to the credit of F, the county treasurer. During the year, the defendant paid some money for bonds, without check, from F, and \$4,000 on checks of F, which sum was applied to the payment of personal defalcations. When the defendant learned that F was behind in his accounts, it refused to pay except to his successor in office. The sum of the payment constituted the whole amount of the deposit. The court declared the law to be that under the pleading and evidence, verdict should be for defendant. Verdict directed for defendant. Appeal.

MacFarlane, P. J. 1. The court's charge was a declaration of law, and not a finding of fact by the judge sitting as a jury. 2. The defendant received and held the money for the county, and it was his duty to apply it according to the written directions he received. It occupied to the county the relation of trustee, and held the money as a trust fund which could only be applied to the payment of the old bonds. This conclusion is not affected by the fact that F had kept an account with the defendant as county treasurer. Judgment reversed.

Cited: 82 Mo. App. 356; 92 id. 334.

PAUL v DRAPER (1898) 73 Mo. App. 566.

To impress a trust upon funds in the hands of a bank's assignee. The N Bank gave the plaintiff a duplicate deposit slip, showing the deposit of a pension check by him as guardian. The bank credited the plaintiff individually and collected the amount of the check. Subsequently the plaintiff drew out a part of the deposit on his personal checks. The defendant was the bank's assignee. The plaintiff, as guardian, claimed the balance of the deposit as a trust fund. Judgment for defendant. Appeal.

Bond, J. The plaintiff, as the representative of the cestui que trust, has a right to impress the assets of the bank, which were increased to that extent, with a trust for the payment of the unpaid amount on the pension check. Judgment reversed.

Cited: 76 Mo. App. 338; 77 id. 514; 82 id. 309.

McKEEN v BOATMEN'S BANK (1898) 74 Mo. App. 281.

On deposit for a balance. Plea: Payment. The plaintiff replied that the payment was made on a forged check. The defendant averred that on the day of the payment, the plaintiffs left their passbook with the defendant, and that the same was balanced and returned on the next business day with the check in question canceled; that the defendant had a written agreement of plaintiffs that all claims for reclamation by them should be made within 10 days after canceled checks were returned, and that the request in this case was not made within that time. Settlement of account was not pleaded. The court charged that plaintiff could not recover. Judgment for defendant. Motion for a new trial. Granted. Appeal.

Bland, P. J. 1. The writing up of the passbook and its return with vouchers is in effect a statement of the plaintiff's claims upon the bank. All objection must be made by the depositor, within a reasonable time. 2. The 10 days agreed upon between the parties was a reasonable time within which to require reclamation; and not complying with it raises a prima facie presumption that the plaintiff acquiesced in it. Plaintiff is not estopped by this negligence to deny the genuineness of the check. 3. The nonaction on plaintiff's part was negligence, for which plaintiff must answer, if the defendant thereby suffered actual loss. 4. When defendant paid the forged check, it was at fault, and must bear the loss, unless there was some cogent reason for shifting it upon the customer. Order affirmed.

Cited: 89 Mo. App. 508; 91 id. 169.

CITY OF GOODLAND v BANK OF DARLINGTON (1898) 74 Mo. App. 365.

To enforce liability of stockholder in the insolvent S Bank. The defendant demurred, on the ground that defendant could not invest in the stock of another bank. Sustained. There was no question as to subscription or the insolvency of the S Bank. The plaintiff contended that the defendant had implied powers to make the subscription under secs. 2751-2, art. 7, ch. 42, R. S.; that the S Bank had fully executed the contract on its part, and that the defendant could not plead ultra vires. Judgment for defendant. Appeal.

Smith, P. J. 1. The subscription was unauthorized. 2. The defense of ultra vires is not open to a corporation in this state, when the other contracting party has fully executed his part, and the act is not prohibited by law, and where the act is not wrong in itself. Judgment reversed.

Cited: 77 Mo. App. 432; 93 id. 196, 198.

GRAY'S HARBOR COM. CO. v NAT. BANK (1898) 74 Mo. App. 633.

Negligence of bank as collection agent. Defendant received, on October 27, a draft, held it four days, and returned it to the drawers without collection. There was a request by plaintiff not to protest. Defendant claimed that it notified the drawee by telephone the next day after the draft was received, and that such notice was a usage among the banks of the city, when no protest was required. The court instructed the jury that the defendant was liable, if it failed to present the draft for four days if the draft would have been paid on presentation any time before November 9, when the drawee failed; that the burden was on defendant to show that it presented the draft by telephone, and the usage in such cases; and that, if the verdict was for plaintiff, it was entitled to 6 per cent. Judgment for plaintiff. Appeal.

Bland, P. J. 1. The burden was on the plaintiff to prove that the draft was not presented. 2. The burden was on the defendant to prove the custom. 3. Where no pecuniary benefit has or could have occurred to defendant, interest cannot be allowed. 4. The face value of the draft, less the percentage paid by the drawee, was the measure of damages. Judgment affirmed on plaintiff's remitting the excessive interest.

FIRST NAT. BANK v GREGG (1898) 74 Mo. App. 639.

On note. Defense: illegality of consideration. V forged the name of the defendant to a note. He informed the defendant of his act and that he had made a mortgage to defendant to secure him on the forged note. Plaintiff's cashier told defendant that the property included in the mortgage would more than pay the

note, and the note in suit was given by defendant to save V from being prosecuted, and the forged note assigned to defendant, who proved the same against the insolvent estate of V and collected dividends thereon. Verdict directed for plaintiff. Appeal.

Biggs, J. 1. The contract was illegal, and cannot be enforced. 2. It was incapable of ratification. Judgment reversed.

CITIZENS BANK v BOOZE (1898) 75 Mo. App. 189.

On note, against surety. The note stated that it was without interest, if paid when due, and in case of default in payment, it should draw 10 per cent from date. Payment was not demanded at maturity at the place where the note was payable. The plaintiff, a bank, held a deposit of the principal at the time the note matured, which it did not apply to its payment. Defendant contended that the note should bear interest from the date of suit only, and that he was discharged as surety because the principal's deposit was not applied to the note. Judgment for plaintiff. Appeal.

Ellison, J. 1. In order to stop the running of the interest on an obligation payable at a particular place, the payor should have the fund at that place with which to pay it, without demand. 2. The mere failure of the plaintiff to apply in payment of its depositor's note the amount of the deposit at its maturity, did not affect the liability of the surety. Judgment affirmed.

MARSHALL v BANK OF ARCHIE (1898) 76 Mo. App. 92.

To enforce mechanic's lien. The property was a hotel belonging to defendant, and the contract for repairs, for which the lien was founded, was made by defendant's cashier. The property had been owned by the defendant for about two years, and the cashier had had the entire control of renting and managing it. There was evidence tending to show a continued acquiescence by the bank in the authority so exercised. Plaintiff was the lienor. A part of the claim sought to be enforced was for a fence and sidewalk on the premises, which were not included in the contract for repairs upon the building. Judgment for plaintiff. Appeal.

Ellison, J. 1. If a bank for a long time permits its cashier to engage in certain dealings which are without the ordinary scope of his authority, it will be bound by his acts even though it has not given him express authority. 2. It should have been alleged that the contract for the improvement on the building included the fence and the sidewalk, in order to enforce a lien for them. Judgment reversed.

NATIONAL BANK OF COMMERCE v FITZE (1898) 76 Mo. App. 356.

On note against indorsers. Defendants showed that the consideration for the note had failed, and that plaintiff's cashier had knowledge of this fact, when he discounted the note. The cashier's knowledge of the transaction was not acquired in connection with his duties as cashier, but through outside circumstances. The court refused to admit evidence on the question of notice, or to submit the question of notice to the jury. Verdict for plaintiff. Motion for new trial. Granted. Appeal.

Bland, J. 1. Knowledge obtained by a cashier not in the performance of his duty to the bank is not notice to the bank. 2. No error was committed by the court in refusing to submit the question of notice to the jury, nor did it err in rejecting evidence of notice to the cashier obtained in his private capacity. Order reversed.

MILLISACK v MOORE (1898) 76 Mo. App. 528.

To enforce stockholder's liability for a deposit in an insolvent bank. The plaintiff sued the C Bank, located in Kansas, obtained a judgment there, and then brought the present suit against a resident of Missouri. The defendant pleaded: 1, That the suit could only be brought by the receiver; 2, that the court in Kansas had no jurisdiction to render judgment; and, 3, that the court could not allow interest. Judgment for plaintiff. Appeal.

Ellison, J. 1. The liability of the stockholder is for the benefit of the depositor and may be sued upon by him direct. 2. The court in Kansas had jurisdiction of the suit brought by the plaintiff, no defect in service being shown. 3. If the stock-

holder who is the debtor, fails to pay the claim of the creditor, when suit is brought against him, he becomes liable for interest from the commencement of the suit. Judgment affirmed.

CONTINENTAL NAT. BANK v FARRIS (1898) 77 Mo. App. 186.

Fraud. The defendant, the president of the F Savings Bank, signed a certificate which set forth that the board of directors had passed a resolution specially authorizing the cashier to borrow money of the plaintiff, a bank, to execute notes therefor, and to pledge collateral for the payment. The loan was made by the plaintiff in the regular course of business. The certificate was fabricated, and signed with other papers by the president, at the request of the cashier, in ignorance of what he was doing. Before the maturity of the note the bank failed, the collateral was worthless, and the note was never paid. The money borrowed went into the assets of the bank. Judgment for defendant. Appeal.

Ellison, J. 1. The plaintiff had a right to require the certificate of approval before making the loan, leaving the proposition to be accepted or rejected by the borrowing bank. 2. The officers fabricating the certificate will be liable for fraud. Judgment reversed.

THE STATE v LINCOLN TRUST CO. (1898) 144 Mo. 562.

Quo warranto to oust the defendant trust companies of their franchises, because of the alleged exercise of powers and privileges not conferred by law. The acts complained of were receiving deposits subject to check and draft at sight; opening regular bank accounts, with all who desired to do a banking business; and buying and selling exchange on other banks. Defendants answered that they were duly organized under the statutes of the State relating to trust companies, art. 11, ch. 42, R. S. 1889, and admitted the reception of deposits to be held for a specified time at interest; deposits to be held in trust, to be invested in a particular manner; savings deposits subject to check upon which it paid interest on balance; and justified under their charters, contending that the legislature, having recognized these acts by amendatory statutes, was estopped from denying the use thereof.

Burgess, J. 1. The power to receive money by way of general deposit was not conferred by statute, and cannot be implied from the language used. Trust companies have power to receive money in trust only. 2. The recognition by the legislature of the user of powers by a trust company does not create the powers. 3. The doctrine of estoppel does not apply as the State can only be estopped by legislative enactment. Judgment against defendants of ouster from using franchises not granted.

RIPLEY NAT. BANK v CONN. MUT. LIFE INS. CO. (1898) 145 Mo. 142.

Petition to cancel a release and to postpone a lien. The defendant S gave a note to T and N, cashier and president, respectively, of the K Bank, secured by a deed of trust. T and N indorsed the note to the plaintiff, a bank. When the note became due, S got money from the defendant, insurance company, giving a deed of trust to secure the note and other debts, deposited the money with the K Bank and instructed the cashier to pay the note and debts. T forged a note like the one held by the plaintiff and had the deed of trust released and the recorder certified that the note was canceled. T transferred the amount of the note to his own account, and remitted interest to the plaintiff until the K Bank became insolvent. The plaintiff did not know of the deposit of the money by S to pay the note or of the release. Decree for plaintiff. Appeal.

Brace, P. J. 1. The plaintiff was the real cestui que trust and the only party authorized to release the deed of trust. 2. The cashier of the K Bank did not obey the order of S and apply the money to the payment of the note, but it remained on deposit subject to the order of S, until it was converted by the cashier to his own use. 3. The plaintiff gave no authority to the cashier to receive payment of the note and defendant's deed of trust is subject to the one held by plaintiff. Decree affirmed.

CITY OF STANBERRY v JORDAN (1898) 145 Mo. 371.

For failure to collect taxes. Defendant, as collector of taxes, failed to collect taxes levied upon the S Bank. Defendant contended that the taxes were assessed against the bank, an incorporated company, and not against the owners of the

stock; that the court exceeded its jurisdiction, and that the rate of taxation exceeded its constitutional rights. The rate was 50 cents on the \$100 valuation and 75 cents additional on \$100 for sinking fund and interest. Judgment for plaintiff. Appeal.

Williams, J. 1. The court has appellate jurisdiction where the revenue laws are involved. 2. The law of this state provides for the assessment of the shares of stock in an incorporated bank, and not of the bank itself. 3. An assessment in the name under which a private banker does business is good. 4. Upon the facts we cannot say that the city exceeded its authority in making the levy. 5. Plaintiff must allege and prove that the duty devolved on the collector to make the collection. 6. If on a submission there be any ambiguity or lack of clearness, the judgment cannot stand. Judgment reversed.

Cited: 160 Mo. 648.

HALL v FARMERS AND MERCHANTS BANK (1898) 145 Mo. 418.

To set aside a conveyance of land made to a national bank, and by the bank conveyed to K at K. The petition contained two counts, one in equity, and the other in ejectment. The plaintiff's intestate, A, by agreement, conveyed the land by warranty deed to the bank, to be thereafter conveyed to such person as A might request. The cashier and vice-president of the bank were the only officers that knew of the transaction. The vice-president by quitclaim conveyed the land in the name of the bank to K at K, at the request of A. Judgment for defendants. Appeal.

Burgess, J. 1. Though the bank did not have power to accept a deed for such a purpose, it was not absolutely void and the plaintiff cannot question it. 2. It is not necessary to an acceptance of a deed that the board of directors should act upon it. Its acceptance by the cashier was acceptance by the bank. The title to the lot vested in the bank. 3. As the deed was signed by the vice-president and sealed with the corporate seal, it was prima facie valid; but when it was shown that its execution was without authority of the board of directors, that prima facie validity was overcome. The title to the lot remained in the bank, and it holds it in trust for the grantee in the quitclaim deed. 4. In the absence of an order from the probate court, the administrator has no control over the land of his intestate, and he cannot maintain a suit in ejectment, or to remove a cloud on title. Judgment affirmed.

Cited: 88 Mo. App. 65; 89 id. 224; 90 id. 609.

STATE v BURLINGAME (1898) 146 Mo. 207.

Indictment, for receiving a deposit as president of the Bank of Commerce, and assenting thereto, knowing the bank to be insolvent. The defendant pleaded that he had on two prior occasions been tried and acquitted upon a similar charge, as to other persons, and that this was a continuing charge, and could not be prosecuted. Demurrer to plea. Sustained. The evidence showed that the deposit was received when the bank was insolvent. The certificate of incorporation of the "Bank of Commerce, of Springfield, Mo." was admitted in evidence. The statement made by the wife of the defendant, in his presence, that P obtained one-half the money, and was equally liable, was admitted; also copies of deeds, showing conveyances made by a stockholder the day the bank suspended, were admitted. All of the foregoing was objected to by defendant. The court instructed the jury that the crime must be proved beyond a reasonable doubt; this same charge was, in effect subsequently repeated. Defendant convicted. Appeal.

Burgess, J. 1. The offense was not a continuing one, but each receipt of moneys on deposit under the circumstances was a separate offense. 2. The demurrer was properly sustained. 3. There was no error in the admission of the certificate of incorporation. 4. There was no variance between the name of the bank as set forth in the indictment and in the certificate. The words "Springfield, Mo." were no part of the name of the bank, but merely its place of location. 5. The statement as to the declaration of the wife of the defendant was prejudicial to the defendant and was not admissible. 6. The copies of the deeds were not admissible, as they had no tendency to establish any issue involved in this case. They were not in any event the best evidence, and should not have been read without first showing to the court, by proper evidence, that the original deeds were lost, or not within the power of the State to produce. 7. Where the question presented

in a former instruction is presented by another, there is no error in refusing the latter. Judgment reversed.

Cited: 152 Mo. 539, 543; 79 Mo. App. 524.

STATE v SHAPLEIGH HARDWARE CO. (1898) 147 Mo. 366.

On sheriff's bond of indemnity, against judgment creditors of the P Co. A deed of trust had been made by the P Co. to secure a note given to the S Savings Bank. The relator, as trustee, claimed stock levied upon. Defendants alleged that the trust was made to defraud the defendants, and to secure an individual debt of P, the president of the P Co. P did his banking business with Q & Co., private bankers; he gave a note to them before the P Co. was organized. Thereafter, it was renewed by P with an addition of \$500 in the name of the P Co., and the deed of trust was executed to secure it. P had no knowledge of corporation transactions, and Q & Co had persuaded him that the note had become the indebtedness of the P Co. Judgment for defendants. Appeal.

Brace, P. J. 1. As against the defendants, creditors of the P Co., the trust deed was fraudulent, and passed no title to the trustees in the goods levied upon by the defendants. 2. The fact that \$500 of the renewal note was for an actual indebtedness of the P Co. does not make it a company note. 3. Since, upon the undisputed facts in the case, the court might have directed the jury to return a verdict for the defendants, there is no error. Judgment affirmed.

MT. VERNON BANK v PORTER (1898) 148 Mo. 176.

On cashier's bond, for converting commissions on sale of bonds which belonged to the bank. The defendant P, cashier, denied generally, and the sureties averred that the bank had no authority to negotiate the sale of bonds. Verdict directed for the defendants. Reversed by the court of appeals. Appeal.

Burgess, J. 1. As the cashier negotiated the bonds while in the discharge of his duties as cashier, whatever profits he derived from the sale, belonged to the bank. 2. But it devolved upon the plaintiff to show by substantial evidence that he received some compensation or profit therefor while its agent, or for services rendered while such. There was no tangible evidence that he did. Judgment reversed.

Cited: 163 Mo. 491; 88 Mo. App. 70.

MIDLAND NAT. BANK v BRIGHTWELL (1898) 148 Mo. 358.

To establish a preference. Action against the assignee of an insolvent bank to establish a preference for collections made for the plaintiff bank. Agreed case. The plaintiff sent various items to the S Bank for collection, all of which were collected. The defendant sent a draft on the C Bank, together with its own draft, to the plaintiff. Neither of these drafts was paid, both of the drawing banks having failed. The collections were made in the defendant bank by charging the amounts to depositors, and by clearing the day's business with the C Bank. There was but \$449 in cash in the defendant bank when it failed, but the amount of its collections from depositors, for which it gave drafts, was \$2,600. The circuit court decreed that the \$2,600 collected was received as a trust fund, and held as such by the assignee, and that there were funds in his bank from which to satisfy it. Appeal.

Gantt, P. J. 1. When a note or draft is sent by one bank to another for collection, the relation of principal and agent is created and not that of creditor and debtor. 2. Having received the note or draft for collection, the bank does not owe the sender until collected, although it may credit the same in its books. 3. In this case the collection did not augment the assets of the defendant, and there were only \$449 on hand, not a dollar of which is shown to have been received from the depositors owing the several collections. Justice and equity will only be conserved by distributing the assets *pari passu* and by denying the plaintiff the preference it seeks. Judgment reversed.

Cited: 86 Mo. App. 184, 428; 90 id. 263.

UNION NAT. BANK v HILL (1898) 148 Mo. 380.

To recover damages for mismanagement. The action was against the C Bank, its assignee, the administrator of the cashier, and the directors. The assignee refused to institute a suit. The plaintiffs sued for themselves and others, as credi-

tors. The principal management of the bank was turned over to F, the cashier. Loans were made to insolvent persons, and loans in excess of 25 per cent of the capital stock were made to single firms and corporations contrary to statute. The books were carelessly kept. Judgment for defendants. Appeal.

Burgess, J. 1. The directors were guilty of negligence, and are liable to the stockholders for any loss occasioned thereby. 2. But plaintiffs are creditors and the defendants' liability for their failure to exercise due diligence, does not extend to creditors. Judgment affirmed.

Cited: 155 Mo. 259, 266, 279.

BANK OF MONETT v HOWELL (1899) 79 Mo. App. 318.

On promissory note against maker. The defendant counterclaimed a deposit with the plaintiff bank, of a sum of money which the cashier agreed, for compensation, to remit to the C Bank, to be applied to an overdue note. The plaintiff delayed the transmission of money, on which account the defendant was compelled to pay the C Bank additional interest, and this interest was claimed as an offset. It exceeded the amount sued for. Plaintiff contended that an agreement, on the part of the cashier, to transmit the money to another bank, was not within the scope of his agency, and that the undertaking was outside of the legitimate business of the bank. Judgment for defendant. Appeal.

Biggs, J. Such a transaction is an every day occurrence, and is within the legitimate business of a bank. Judgment affirmed.

BACON v FARMERS BANK (1899) 79 Mo. App. 406.

On promissory note, given by C to the plaintiffs, and guaranteed by the defendant bank, by its cashier, who indorsed for it upon the back of the note. The only question raised was the authority of the cashier to bind the bank by a guaranty indorsement. The court held that the defendant was not bound. Judgment for defendant. Appeal.

Gill, J. 1. It was not within the scope of the bank's business to guarantee the payment of notes or commercial paper, unless expressly created for that purpose. 2. The bank not having been organized for such purpose, the cashier could not loan the credit of the bank and it makes no difference that the accommodated party uses the money in payment of a debt due the guarantor. Judgment affirmed.

EADS v ORCUTT (1899) 79 Mo. App. 511.

Action, under sec. 2760, R. S. of 1889, by a depositor against the defendants as officers of the C Bank. The complaint alleged the receipt of deposits by the defendants, knowing that the bank was insolvent or in a failing condition. The act provides that officers of an insolvent bank, who receive deposits, knowing of the insolvency, shall be responsible to the depositors therefor. The plaintiff's assignors had proved their claims before the bank's assignee and had it allowed. The defendants contended that the statute was not penal and that the remedy was in equity; that, as the plaintiff's assignors had elected to pursue a legal remedy, the plaintiff cannot now elect to pursue their remedy under the statute; that if the statute is penal it must be strictly construed; and that only officers, who were at the time in active control and management, are liable, and in fact only those who were present at the time the deposits were received and assented to, could be holden. Judgment for plaintiff. Appeal.

Ellison, J. 1. The statute is penal and an action at law is the proper remedy. 2. Although the plaintiff proved his claim against the assignee, he is not estopped to prosecute this action. It is an additional consistent remedy. 3. Though he has different remedies, he cannot have more than one satisfaction. 4. The fact of insolvency is prima facie evidence not only that the officers know of the insolvency, but that they assented to the reception of deposits made thereafter. Judgment affirmed.

SWOFFORD BROS. DRY GOODS CO. v BANK (1899) 81 Mo. App. 46.

On guaranty. The defendant, a creditor of C Co., by its cashier, indorsed a written guaranty on certain notes for the C Co.'s accommodation. The C Co. was insolvent, and, as a consideration for an agreement by the defendant to pay the notes held by the plaintiff, another creditor, it turned over property to the defend-

ant. The defendant, having sold the property and received the entire proceeds, repudiated the agreement with the plaintiff and claimed the property on a subsequent and independent contract. Judgment for plaintiff. Appeal.

Gill, J. 1. It is not within the scope of a cashier's authority to bind the bank by an accommodation indorsement. 2. One who accepts the proceeds of an act done by one assuming to act as his agent ratifies the act and takes it as his own, with all its burdens as well as its benefits. Judgment affirmed.

Cited: 87 Mo. App. 606.

DALZELL v COMMERCIAL BANK (1899) 82 Mo. App. 264.

Conversion. R pledged stock in the defendant bank, to secure the payment of a note given for the stock. An execution against R was levied upon the stock and it was sold subject to the interest of the defendant. The plaintiff was the purchaser, and a demand was made for the surrender of the stock. The plaintiff claimed that the transaction amounted to a purchase of the stock by the bank; and, that the bank could not purchase its own stock or receive it as a pledge to secure the payment of a note. Judgment for defendant. Appeal.

Bond, J. The transaction between R and the bank was not a purchase, directly or indirectly, on the part of the bank of its own stock; and it does not fall within the rule depriving such corporations of the right in general to buy their own capital stock. Judgment affirmed.

LINDSAY v CONTINENTAL NAT. BANK (1899) 82 Mo. App. 301.

Garnishment proceedings, in which the defendant was summoned as garnishee. Plaintiff was a judgment creditor of B, who was engaged in selling goods on commission. At the time B opened an account with the defendant, he informed it that he had no money of his own; that the deposit account was opened by him as agent of various parties, and in the name of B, agent. None of the alleged principals had made claim to the money prior to the garnishment. Judgment against plaintiff. Appeal.

Bland, P. J. 1. The bank had notice that B's deposit account represented trust funds. 2. The burden of proof was upon plaintiff to establish its claim, and the bank had the right to hold the funds, until the issue of the true character of the funds could be settled. Judgment affirmed.

HERIDER v PHOENIX LOAN ASS'N (1899) 82 Mo. App. 427.

For money due on account. Defendant claimed an offset, in that the plaintiff gave the defendant a check on a bank in S, on December 13. Defendant deposited it in the G Bank for collection. On the same day the G Bank mailed it to the K Bank. It was received by the K Bank on December 14, and mailed to the M Bank about 12 miles from S. The following day the M Bank received it, and mailed it back to the K Bank where it was received on December 17, and on that day forwarded for collection to S. It was presented on December 18 to the assignee of the drawee bank, which had suspended on December 15. Judgment for defendant. Appeal.

Ellison, J. 1. There was negligence in not sending the check direct to S. 2. The defendant, having committed this negligent act, will not be permitted to speculate on the possibility of the check not being presented, if it had been sent to the proper place. 3. Before there can be a discharge of the drawee of a check, there must be an injury resulting to him by reason of delay in presenting. 4. A collecting agent, if it knows of the impending insolvency of a bank upon which it holds a check for collection, must proceed at once to present the check. Judgment reversed.

NATIONAL BANK v AMERICAN EXCH. BANK (1899) 151 Mo. 320.

Money paid, on mistake of fact. The defendant forwarded a draft to the plaintiff for collection. The plaintiff received a check from T, the drawee, in payment, and forwarded its draft to defendant for the same amount. The check proving worthless, plaintiff sought to recover the money paid, contending that even if he had been negligent, the defendant had suffered no damage by reason of his having accepted the check. He requested a submission to the jury. Denied. Judgment ordered for defendant. Appeal.

Burgess, J. 1. If from all the facts disclosed there was any substantial evidence

in favor of the plaintiff, the case should have been submitted. 2. If a bank takes a check of a party who is bound to pay a draft, and surrenders the draft, it assumes the responsibility for the check. If it is not paid the bank is still obliged to pay the amount to the person from whom it received the draft. The defense of "usual and customary business transactions" is not good. A mistake in supposing that T was solvent will not support a recovery. 3. It does not sufficiently appear that the defendant was not injured. If the check had not been taken and notice of non-payment had been sent earlier, the defendant might have found redress. Judgment affirmed.

NATIONAL BANK v STAATS (1899) 155 Mo. 55.

Injunction to restrain the collection of taxes, assessed at a rate alleged to be higher than on other kinds of property in the same county. The plaintiff appeared before the county board of equalization, and obtained a small reduction. It paid 60 per cent of the assessment, and then obtained a temporary injunction as to payment of the balance, which it sought to make perpetual. Decree for perpetual injunction. Appeal.

Sherwood, J. 1. One who regards his assessment as excessive, may appeal from the assessor to the county board of equalization. This is the only remedy the party has. He may not come into equity, for an adequate remedy is provided by the law. 2. The federal statutes forbid discrimination only between a tax on national bank shares and a "tax on moneyed capital in the hands of individual citizens." 3. This does not authorize a court of equity to interfere in cases of taxation of national banks. Decree reversed.

CENTRAL NAT. BANK v HASELTINE (1899) 155 Mo. 58.

On promissory note. Defense: payment of usurious interest which sum defendants asked to have deducted from the principal. Sec. 5198, U. S. R. S. provided, that knowingly taking usurious interest should work a forfeiture of the entire interest, and the person paying such interest could recover, twice the amount paid. Judgment for plaintiff. Appeal.

Marshall, J. 1. The defendants cannot set off usurious interest paid. The remedy afforded by the United States Statute, of instituting an independent action for double interest, is exclusive, and alone available. 2. The decision of the Supreme Court of the United States on that point is binding on this court. Judgment affirmed.

Cited: 155 Mo. 66.

HASELTINE v CENTRAL NAT. BANK (1899) 155 Mo. 66.

Statutory action against a national bank to recover twice the amount of usurious interest paid on a note. The defense was that the plaintiff had not paid or tendered, the principal due, and that he could not maintain his action until he had paid or tendered it. The action was brought under sec. 5198, U. S. R. S., 1878. Judgment for plaintiff. Appeal.

Marshall, J. 1. The Supreme Court of the United States has interpreted this statute, in *Barnet v Bank*, 98 U. S. 555, and this is binding upon the courts of this state. 2. Courts will neither aid the lender to collect usurious interest, nor assist the borrower to recover usurious interest, actually paid, unless he has paid or offers to pay the principal debt. Judgment reversed.

BANK v HUGHLETT (1900) 84 Mo. App. 268.

On promissory notes. The notes were signed by S and the defendants, and recite that the parties executed them as principals. The defendants averred they were accommodation makers; that the president promised to release them if they would induce S to execute to the plaintiff a chattel mortgage of property he held, to secure these notes and other indebtedness to the plaintiff; and that they did so. There was evidence that the president had authority to make such an agreement and also that the plaintiff accepted its benefits. The court charged the jury that if they found the testimony to be true it would release the sureties on the notes. Judgment for sureties. Appeal.

Biggs, J. 1. The power of an officer or agent of a bank to release a surety without payment is not within his implied powers, but may be conferred upon him. 2. His authority may be inferred from evidence of a general course of dealing

or from proof that he has been intrusted with the entire management of the business of the bank. 3. The jury was not misled by the instructions. The error complained of, must materially affect the merits of the action. Judgment affirmed.

VANSANDT v HOBBS (1900) 84 Mo. App. 628.

Trover, for the conversion of a note. The plaintiff was the receiver of an insolvent bank. The note was given to the bank by T and H for money borrowed. The defendant, who was president of the bank, afterward gave his check on the bank, for the amount of the note, and turned it over to the cashier. The bank was then insolvent; a receiver was appointed three days later. There is a statute which declares that no bank cashier shall have power to sell or hypothecate any of the bank's notes without authority from the directors. This law was not in force when the note was executed. Judgment for plaintiff. Appeal.

Ellison, J. 1. When a stranger to a note takes it up from the holder, the transaction will be deemed a purchase and not a payment. 2. The transfer of the note to the defendant was void, and defendant's act in holding it against the bank was a conversion. 3. There was nothing to be returned to the defendant, since he can be placed in statu quo by having his account stand with the bank just as though he had not given the check. 4. The law was a regulation of the power of banking officers and it affected their power and not the contract represented by the note. Judgment affirmed.

CLAY CO. BANK v KEITH (1900) 85 Mo. App. 409.

On promissory note, in the possession of the defendant. The defendant and four others were directors of the bank of which plaintiff was receiver. The capital of the bank being impaired, the directors executed a note for the amount of impairment. The secretary of state required an assessment on the stockholders for the shortage. The directors reported to him that they had paid the note. Instead of paying the note, they canceled it, and substituted separate individual notes of their own. Afterward they made an order that these notes be canceled. They were so marked, and returned. The note in suit was one of them. Plaintiff contended that the cashier had no authority to agree that the notes should not be collected. Judgment for defendant. Appeal.

Ellison, J. The notes having been executed for the purpose of avoiding the law and deceiving the secretary of state, are void. Where a note is given for an illegal purpose, the fraud may be shown by the maker, though he be in *pari delicto*. Judgment affirmed.

UTLEY v HILL (1900) 155 Mo. 232.

Deceit, to recover from directors of a bank the amount deposited and lost through their false representations. The directors of the G Bank, relying on the cashier, signed a statement of the condition of the bank required by statute to be furnished by them to the secretary of state. The plaintiff thereafter made a deposit in the bank, after which the bank failed. The statute declared that the directors assenting to a deposit when they knew the bank was insolvent, were individually responsible, and made the subsequent failure *prima facie* evidence of such knowledge. The case, under a statutory provision, was referred to a referee, who found for the plaintiff. The court set the findings aside. Judgment for defendant. Appeal.

Marshall, J. 1. The defendants are not estopped from showing want of knowledge merely, because it is their duty under the law to know. 2. The knowledge which the law requires that the directors shall have had, is guilty knowledge. 3. The statement required by the statute to be furnished to the secretary of state is not one made with intent to induce persons to deposit, and deceit cannot be predicated upon it. 4. The directors are not liable to the creditors, for no relation either of trust or of contract exists between them. Judgment affirmed.

Cited: 155 Mo. 278, 279, 543, 568, 569, 570; 157 id. 250; 166 id. 405, 406.

MAYER v CITIZENS BANK (1900) 86 Mo. App. 422.

Conversion, for trust funds deposited with defendant. P, a curator, received a check payable to his individual order, in payment of a check due his ward. The check was deposited with the defendant, which knew it represented trust funds. It was credited to P's individual account. Thereafter P made deposits which

were credited to his accounts. He drew a number of checks against it, and among them a check to the defendant, in payment of his individual indebtedness. Subsequently P was removed, and plaintiff was substituted as curator. At this time, there was only a small balance to his credit with defendant. Judgment for plaintiff. Appeal.

Smith, P. J. 1. A bank cannot use a deposit to pay the individual debt of the depositor due to it, where it has knowledge that the deposit is held by the depositor, in a fiduciary capacity. 2. But it is a fundamental condition of recovery, that the subject of conversion be susceptible of identification. The fund cannot here be identified. Judgment reversed.

COX v SLOAN (1900) 158 Mo. 411.

On promissory notes, given by the president of a bank to plaintiff as collateral security for notes held by the K Bank, and secured by a deed of trust. The defendant pleaded want of consideration in that the consideration of the notes, for which these were given as collateral, had passed before they were made. The notes in suit were given and the other notes renewed. The renewed notes were signed by the defendant as maker. The answer also asked for an accounting. The court found for the plaintiff, and gave judgment for a portion of the notes only, directing its application in payment of amounts due on certain of the renewed notes. Appeal by plaintiff.

Marshall, J. 1. The notes are negotiable, and therefore prima facie import a valuable consideration. 2. The extension of the former notes was also a valuable consideration sufficient to support the notes in suit. 3. Giving the notes of defendant, was not a novation for the former notes, for the liability of the original debtor was preserved. 4. The notes in suit were executed as collateral for all of the indebtedness of the bank, and not simply on a part of its notes. 5. The answer, which prayed for an accounting, changed the suit from one in law to one in equity. Judgment should have been for the full amount. Judgment reversed.

Cited: 158 Mo. 430, 438, 439, 440.

STATE v MERCHANTS BANK (1900) 160 Mo. 640.

To recover taxes assessed on stock, against a bank. The defendant appeared before the board of appeals to object to the assessment, but did not appeal from its adverse decision. Plaintiff offered a tax bill merely showing the amount due from the "Merchants Bank," without the addition of the words of "Jefferson City, Missouri." Objection. Overruled. Demurrer to the evidence. Overruled. The defendant offered to show that his assessment was on bank stock, and that it had paid all taxes lawfully assessed. Excluded. The statute declared that stock should be treated as so much money, subject to the rights of the parties in interest to show impairment in value. Judgment for plaintiff. Appeal.

Burgess, J. 1. The words "of Jefferson City, Missouri" are merely descriptive. 2. The tax bill was only prima facie evidence. 3. An appeal from the board of appeals is not the only remedy for a tax payer. 4. Proof that it was bank stock assessed, or that all taxes assessed against the bank were paid, was, in either case, a good defense. 5. By pleading and going to trial, a party waives objection to a petition as indefinite. Judgment reversed.

Cited: 90 Mo. App. 340.

HILL v BANK OF SENECA (1901) 87 Mo. App. 590.

On contract. Defendant held chattel mortgages on growing wheat, belonging to R. Defendant's cashier, B, became alarmed about the security, before the maturity of a larger mortgage, and secured possession of the wheat from R, by indorsements on the mortgages, giving defendant possession until its claims and the expenses of threshing were paid. Plaintiffs had physical possession of the wheat at that time, under contract with R, for threshing. R authorized plaintiffs to continue the threshing at the agreed rate, which he said defendant would pay. B stated that R and D would act as defendant's agents in the matter. Plaintiffs drew checks against defendant to pay for the threshing. Upon the dishonor of the first check, plaintiffs refused to go on with the work. R & D, however, assured them that defendant would pay, and they continued the work. Directors of defendant in no way repudiated B's acts, until the checks were dishonored. Verdict for defendant. Appeal.

Goode, J. 1. The acts of a bank cashier in the collection of debts of the bank are within the apparent scope of his authority. 2. Where the directors of a bank, knowing that work is being done under contract with the cashier that the bank shall pay for the same, allow the work to continue, this is a sufficient ratification of the contract, and no formal action is necessary. Judgment reversed.

BANK OF LADDONIA v FRIAR (1901) 88 Mo. App. 39.

On promissory note against maker. Plea: offset. Defendant offered to prove that G executed a note, exceeding in amount, the one in suit, to F and R; that R assigned to F, and F transferred the note to defendant. Plaintiff replied alleging that the note was deposited by F, and not by defendant, for collection. The bank paid out the proceeds of the note on checks of F. Judgment for plaintiff. Appeal.

Bland, P. J. 1. The naked fact that the note had been assigned to the defendant was not notice to the plaintiff that defendant was entitled to its proceeds. 2. Possession of the note is prima facie evidence of authority to collect it. 3. It is the duty of an agent for collection, in the absence of actual notice that the proceeds of the note belong to a third party, and are demanded by him, to pay the proceeds to the principal. Judgment affirmed.

MUTH v ST. LOUIS TRUST CO. (1901) 88 Mo. App. 596.

On check. The plaintiff drew a check on the defendant and presented it to the paying teller with a request for New York exchange. In lieu, the teller wrote on the check, "Good, S. Trust Co. by J, Tell." The check was deposited with the U Co., presented to the defendant and payment refused, it having omitted to retain the amount out of the funds of the plaintiff. The check was protested. The answer averred that the act of J in certifying the check was without authority real or ostensible. T had certified checks before and the company was acquainted with his acts in so doing. Nonsuit. Motion for a new trial. Granted. Appeal.

Bond, J. 1. Having entered on the field of banking enterprise, the defendant was not in a position to plead incapacity to certify checks, on the ground that it was not chartered as a bank. 2. The paying teller acted within the scope of his authority in certifying the check in suit. 3. In certifying a check "good," a bank makes a simple and unconditional obligation on its part to pay the same to the holder on demand. Judgment affirmed.

FARMERS & MERCHANTS BANK v LOYD (1901) 89 Mo. App. 262.

On promissory note. Pleas: Setoff and counterclaim. D, one of the defendants, was the owner of a certificate of stock in the B Association, for which he paid in monthly instalments, and the withdrawal value of which was \$131.65; he assigned it to the plaintiff, and directed the cashier to apply \$125 of the proceeds, when collected, to the payment of the note. The certificate was forwarded, and it was found that the last nine payments had not been made, for which reason the withdrawal value was reduced to \$65.14. These assessments had all been paid to the cashier of the plaintiff to whom D was directed to pay. The certificate was not returned or tendered to D. The sale to the bank was made through the cashier. The defendant requested the court to instruct the jury that under the circumstances the plaintiff had notice of all the facts, and cannot avoid paying the full contract price; and that no offer to return being made, the defendant was entitled to judgment. Refused. Judgment for plaintiff. Appeal.

Bland, P. J. 1. In making the purchase of the certificate, the cashier acted within the scope of his authority and his knowledge of the condition of the stock must be imputed to the bank. The bank, having purchased the certificate with the secret knowledge that the assessments had not been forwarded to the association, took it at its own risk to make good the delayed assessments and to realize its full withdrawal value. 2. It was the duty of the bank to either force full payment or restore the certificate to D unimpaired. Judgment reversed.

QUATTROCHI v FARMERS AND MERCHANTS BANK (1901) 89 Mo. App. 500.

On deposit, claimed to have been made by plaintiffs in December, 1891. The deposit was credited as \$525. On the last of the month the deposit book was

left with the defendant for settlement. It was alleged that the defendant erased the first figure "5" and wrote the figure "4" in its place; the plaintiffs made the discovery in about a month and demanded credit for the \$100, but the defendant refused. The defendant demurred to the petition upon the ground, that the cause of action, if any, did not accrue within five years next before the petition. Sec. 4293, R. S. 1899, provided a ten-year limitation for suits brought to enforce the payment of bills, notes, or other evidence of debt issued by moneyed corporations. Demurrer sustained. Judgment for defendant. Appeal.

Bland, P. J. 1. The action is not on the passbook. 2. No liability is created by the entry of credits therein to pay the sums acknowledged to have been received. 3. It is not evidence in writing for the payment of money; and is not protected by the ten-year Statute of Limitation, sec. 4293, R. S. 1899. Judgment affirmed.

RHINEHART v PEOPLE'S BANK (1901) 89 Mo. App. 511.

Conversion. The money was the proceeds of an undivided one-half interest in land owned by the plaintiff, a married woman, which she and her husband by joint deed conveyed to C. The deed was placed in the hands of the cashier and general manager of the defendant, to deliver upon payment of the money and to deposit the proceeds in her name. The cashier collected the money and placed it to the credit of the plaintiff's husband. Judgment for plaintiff. Appeal.

Bond, J. 1. The reception of deposits is within the duties of the cashier and general manager, and the information acquired by him in so acting is imputable to its principal. 2. The subsequent use of the money by the bank, and its refusal to account to the plaintiff therefor, amounted to a conversion. Judgment affirmed.

DRUM-FLATO COM. CO. v BANK (1901) 92 Mo. App. 326.

Money had and received. The agent of R deposited money in the C Bank, to be forwarded to the defendant, in O, for deposit to the credit of R. The plaintiff claimed the money as proceeds of a sale of cattle upon which it held a chattel mortgage. The agent of R telegraphed to the defendant that the money was so claimed and to hold it. The defendant received the money October 21, deposited it to the credit of R, and paid it out on R's check November 1. It was paid with the consent of the depositor. It was claimed, by the defendant, that plaintiff did not protect his rights within a reasonable time, if he owned the fund. The title to the money was also in issue. The court instructed the jury, that if the agent of R instructed the defendant to pay on R's check, then plaintiff cannot recover. Under other instructions the questions of reasonable time and ownership of the money were not submitted to the jury. Judgment for defendant. Appeal.

Broaddus, J. 1. The telegram was notice of the plaintiff's claim. If the defendant paid out the money after the notice, without allowing the plaintiff a reasonable length of time to protect its rights, it was liable for the amount in its hands if shown to belong to the plaintiff. 2. The question of a reasonable time was for the jury. 3. The consent of the person making the deposit, that the money might be paid, did not relieve the defendant. The rights of the plaintiff were involved, not those of the depositor. 4. The question of the ownership of the money should have been submitted to the jury. Judgment reversed.

CHICAGO TITLE & TRUST CO. v BRADY (1901) 165 Mo. 197.

On promissory notes, by the receiver of the S Bank. The notes were found among the assets of the bank. The defendant answered that the notes were without consideration, and were given as an accommodation to the S Bank to swell its assets. The plaintiff objected to instructions to the jury because they omitted to state that, if given for accommodation, they must be also without consideration in order not to be binding upon the maker. The notes had never been out of the possession of the bank. Judgment for defendant. Appeal.

Brace, P. J. 1. The defense would have been good against the bank, and must also be good against the receiver. 2. Accommodation paper is simply a loan of credit by the person making it, and its necessary effect is to swell the apparent assets of the latter; but unless it is negotiated, the receiver can acquire no right of action thereon, nor does it supply a consideration for the paper. 3. The instructions complained of were not misleading or improper in connection with all the other instructions. 4. Accommodation paper is not fraudulent or unlawful. Judgment affirmed.

ROE v BANK OF VERSAILLES (1901) 167 Mo. 406.

Tort, for consequential damages, for refusing to pay plaintiff's checks. Plea: no funds. The plaintiff deposited money in the defendant bank, in compliance with an alleged agreement with the president to allow overdrafts. The deposit was applied to the payment of a note, not due, given by him to cover such overdrafts. Plaintiff denied the president's authority to make the agreement. The various objections to the exclusion of evidence and to instructions sufficiently appear in the opinion. Verdict for defendant. Motion for new trial. Granted. Appeal.

Sherwood, P. J. 1. The president is the executive of the bank; he had power to make the contract without consulting the directors. The plaintiff having accepted the loan is estopped to deny the validity of the transaction. The bank is estopped by assumed agency and ratification. 2. Evidence of a contemporaneous parol collateral agreement to apply the deposits to the note was admissible. 3. Plaintiff having directed how the deposits should be applied is estopped to take a course inconsistent with his agreement. 4. The exclusion of evidence subsequently admitted is not prejudicial error. 5. An objection to be available must be specific and followed by an exception. "Incompetent, irrelevant and immaterial" is not sufficient. 6. Testimony, as to what the plaintiff said when the check was not paid, was hearsay. 7. Admissions, in a motion for security for costs, were properly excluded because they did not relate to insolvency at the time of making the note. 8. Parol evidence of payment will be admitted even though a receipt was given at the time. 9. Testimony admitted without objection, cannot thereafter be stricken out on motion. 10. It is discretionary with a trial court whether a witness may be called after the evidence is closed. Reversed. Judgment ordered on verdict.

MONTANA

FULTZ v WALTERS (1874) 2 Mont. 165.

Bill to compel the indorsement of a certificate of deposit, and to compel the bank to pay the same. The complaint alleged, that defendant W, as agent of the plaintiff, deposited money in the F Bank, party defendant, and took a certificate in his own name; that the certificate was in possession of the plaintiff, but that the defendant refused to make an indorsement thereon, and that the F Bank refused to pay the certificate without such indorsement. The certificate was payable three months after date. Demurrer. Sustained. Judgment for defendant. Appeal.

Knowles, J. 1. A certificate of deposit payable at a future date, is in effect a promissory note, and therefore negotiable and may be assigned by delivery without any writing. 2. The bank, therefore, had no interest in the relief asked against the defendant W. 3. A note may be transferred by assignment as well as by indorsement. Such assignment need not be evidenced in writing. The plaintiff, then, had a speedy and adequate remedy at law against the bank without the indorsement prayed for. 4. The plaintiff can maintain a bill in equity to compel the defendant W to indorse the certificate to him. Judgment modified; bill dismissed as to bank; relief granted against defendant W.

Cited: 15 Mont. 552; 18 id. 278.

POWER v FIRST NAT. BANK (1887) 6 Mont. 251.

Where a bank accepts a draft for collection, and transmits it to an agent who collects it, and fails to account for the proceeds, in the absence of a special contract, the bank is absolutely liable for any laches, negligence or default of its correspondent.

CRYSTAL GLASS CO. v FIRST NAT. BANK (1887) 6 Mont. 303.

Where a bank ordered goods for a third party, and the cashier accepted its notes in payment, and issued to the seller a certificate of deposit signed in his name individually and not as cashier, the court held, that the certificate was issued by the cashier in his official capacity; that the cashier did not exceed his authority; and that the bank was consequently liable.

COMM'RS OF SILVER BOW CO. v DAVIS (1887) 6 Mont. 306.

To recover taxes levied on shares of bank stock. The defendant set up that, under the General Banking Act, shares of stock in national banks in the territories were exempt from taxation; that there was an unjust discrimination in the taxation of defendant's shares of national bank stock. By a state statute shares in any company, the capital stock of which was invested in assessable property in Montana, were exempt from taxation. Mining companies having property invested in mining claims were assessed without regard to the market value. Judgment for plaintiff. Appeal.

Wade, C. J. 1. The banking system created by the U. S. R. S. extends alike to the states and territories; and the locality in which the banking association is situated, may levy and assess taxes on its capital stock. 2. There is no discrimination against a bank where its capital stock is taxed in the form of shares, and in favor of other corporations whose shares are exempt, but whose capital stock is taxed. Judgment affirmed.

GARDNER v FIRST NAT. BANK (1890) 10 Mont. 149.

Money had and received. Agreed case. S made certain notes to the defendant, a bank, and stated that he would send, from time to time, deposits to meet the notes. He instructed defendant to apply such deposits toward the payment of the notes before their maturity, but defendant did not do so until after the death of S. The plaintiff, as administrator of the estate of S, then demanded the said money of defendant, but it refused to pay it over. Judgment for defendant. Appeal.

DeWitt, J. The authority of the bank was a naked power to apply the money to the notes, and the power perished with the death of its creator. The action of the bank in applying these deposits, was therefore without authority. The money belongs to the estate of S. Judgment reversed.

MERCER v DYER (1894) 15 Mont. 317.

Mandamus, to compel the defendant, the county treasurer of Park County, to pay a county warrant held by the plaintiff as receiver of an insolvent national bank. The defendant claimed a setoff on the ground that he had, prior to the insolvency of the bank, deposited county funds in the bank. It was contended, that by allowing this setoff, an unauthorized preference was given to the defendant which was prohibited by sec. 5242 of the National Bank Law, which required the assets of an insolvent national bank to be ratably distributed among the creditors, and prohibited any preferences to be given or suffered. Judgment for defendant. Appeal.

Pemberton, C. J. 1. The setoff claimed is not a preference. The defendant had an equitable right to set off his deposit in the bank. 2. Whether or not his indebtedness to the bank had actually matured at the time of his insolvency is immaterial. Judgment affirmed.

Cited: 22 Mont. 215.

OPPENHEIMER v FIRST NAT. BANK OF BUTTE (1897) 20 Mont. 192.

Garnishment. F, an insolvent who lived in P, owed H of the same place \$2,200. He was also indebted to the plaintiff. He had on deposit in defendant bank at B, \$1,900 and he and H supposed it sufficient to cover H's claim. F sent a telegram to defendant directing it to transfer the deposit to the amount of the claim to H. The telegram was received, but owing to an ambiguity therein the bank did not then make the transfer. H gave F credit for the claim. Thereafter plaintiff garnished the defendant on his claim against F. Thereafter, the ambiguity in the telegram being explained, the bank made return to the garnishment that it owed F nothing. This action was brought to compel it to pay the amount of plaintiff's claim against F. Judgment for plaintiff. Appeal.

Buck, J. 1. There was an assignment and the telegram was simply a notice thereof. 2. It was not essential that the assignment should be in writing or that defendant should have consented thereto. The manifest intention was to turn over all the money on deposit. 3. When plaintiff served notice of garnishment, he acquired no better title than his debtor possessed to the bank account at the date of service. Judgment reversed.

FIRST NAT. BANK v PROVINCE (1898) 20 Mont. 374.

Injunction, against collection of tax. Plaintiff was a national bank, and the tax in question was levied by the defendant, as the assessor of Carbon County, upon sheep and other personal property belonging to the bank in that county. The sole question in the case was whether such property could be taxed by the state. Judgment for defendant. Appeal.

Pigott, J. The only interests which the law of Congress, in regard to national banks, allowed to be taxed, were the shares of stock and the real estate owned by the bank. The property in question was not subject to taxation. Judgment reversed.

Cited: 20 Mont. 420.

STATE v CRUSE SAV. BANK (1898) 21 Mont. 50.

To recover license fee. A statute imposed a license fee on banks and banking institutions for carrying on business in the state. The defendant was a state bank. The constitution of the state provided that no foreign corporation could exercise or enjoy any greater rights or privileges than those possessed by state corporations in the same business. It was alleged in the answer that national banks were not subject to the license fee mentioned; that they were in the same line of business with plaintiff, and in competition with it. Judgment for plaintiff. Appeal.

Pemberton, C. J. The license law of the state is not unconstitutional and void, as imposing upon state institutions restrictions, or burdens not imposed upon national banks. Such a law is within the taxing power of the state. Judgment affirmed.

AMERICAN EXCHANGE NAT. BANK v ULM (1898) 21 Mont. 440.

On promissory note. Defendants, signers of the note, were directors of the M Bank at Great Falls. The note was made by them in Chicago, payable to the order of plaintiff, a bank, without anything on its face to indicate the purpose for which it was made. The defendant contended that it was made to enable the president of the M Bank to borrow money for the bank; and that instead, he used it for his own purposes, as collateral for his own note to the plaintiff, a bona fide purchaser of the note. Judgment for defendants. Appeal.

Hunt, J. Plaintiff was a bona fide holder of ordinary commercial paper, and can recover thereon. One who signs negotiable paper for the accommodation of another, confers authority on the person accommodated to bind the accommodation party in favor of third persons by the issue of the note. Judgment reversed.

GUIGNON v FIRST NAT. BANK (1899) 22 Mont. 140.

Money had and received. The plaintiff deposited with defendant bank a draft on a bank in London, a correspondent there of defendant bank, with specific directions to collect it and notify him. The defendant bank forwarded the draft, and charged its correspondent with the amount. The draft was collected, and the amount was placed to the defendant bank's credit, but the proceeds were not forwarded to it. The defendant bank failed; receivers were appointed who were made defendants herein. The amount of the draft subsequently came into their hands. The plaintiff maintained that the receivers held the fund in trust, and sought to recover. Judgment for plaintiff but without interest. Appeal.

Brantly, C. J. 1. The fund was a specific thing belonging to plaintiff, and was held in trust for him by the receivers. The relation between plaintiff and defendant bank was that of principal and agent. 2. It was not proper to allow interest. 3. The title to the draft did not pass to defendant bank. Judgment affirmed.

STADLER v FIRST NAT. BANK OF HELENA (1899) 22 Mont. 190.

To have deposits declared a setoff to a note. The plaintiffs, as a firm, gave the note to the H Bank, one defendant, for value, negotiable and payable there by its terms; and providing for the payment of an attorney's fee in case of suit. On the same day the H Bank, indorsed and transferred the note to the B Bank, also defendant. The H Bank failed. The plaintiffs seek to offset against the note, both firm and individual deposits in the bank, and certificates of deposit not yet due. The court allowed the offset as to the deposit due the firm only, holding that the note was not negotiable. Cross appeal.

Pigott, J. 1. The agreement for the payment of attorney's fees in case of suit, rendered the note not negotiable; and it could not be made negotiable by any stipulation contained thereon. 2. The right to set off exists only as to debts due at the time of the transfer of the note. 3. The certificates of deposit not being due when the note was transferred, cannot be set off against it. The right to set off as to the deposit by the firm did not exist when the notes were transferred, the bank then being solvent and doing business. Judgment modified.

Cited: 24 Mont. 157; 25 id. 73.

BANK v OPERA HOUSE CO. (1899) 23 Mont. 2.

Where a surety who has paid a judgment obtained on a debt, seeks to enforce contribution or repayment from his principal under sec. 1242 of the code of civil procedure, it is not an ordinary action within the meaning of sec. 559, and is not barred by the Statute of Limitations, until the judgment itself "would be so barred." An agreement to release the cashier of a bank from a personal liability due the promiser, in exchange for a loan of the bank's money, is void, for want of consideration, and as being against public policy.

MCDONALD v AMERICAN NAT. BANK (Two cases) (1901) 25 Mont. 456.

Money had and received. Plaintiffs owned a mine, which they sold to M, taking his notes therefor in part payment. An agreement was then made between M and persons in Scotland whereby the latter organized a company, took over the mine and sent money to the defendant, with instructions to pay the notes given by M to plaintiffs. This was not known to plaintiffs, and they accepted part cash, and gave M credit for the balance due. On discovering that such an agreement had been made, they brought actions against the bank to recover the amount unpaid, on the ground that the bank held it in trust for them. It had all been paid out, however, on M's checks, and such payments were sanctioned by the Scotch owners of the mine. Judgment for plaintiffs. Appeal.

Pigott, J. There was no privity between plaintiffs and the depositors of the money; and the transaction did not create a trust in plaintiffs' favor which would render defendant liable for the funds. Judgment reversed.

NEBRASKA

PLATTE VALLEY BANK v HARDING (1871) 1 Neb. 461.

In a suit on a note, payable in terms to a bank, the maker is estopped to deny the incorporation of the bank.

Cited: 22 Neb. 524; 52 id. 659.

LACEY v CENTRAL NAT. BANK OF OMAHA (1875) 4 Neb. 179.

On promissory note. The note was signed by defendant, and payable to plaintiff's cashier. Pleas: 1, want of consideration in that the note was given as an accommodation to the plaintiff to cover an overdraft during an examination by a bank examiner, and not for security; 2, that other persons were to sign the note. Defendant offered oral testimony of an understanding between the maker and the cashier that the note was not to be enforced; and that there should be other makers. Excluded. The note was not indorsed by the cashier to plaintiff. Judgment for plaintiff. Error.

Gantt, J. 1. A witness must state facts and not deductions or conclusions. The evidence was properly excluded. 2. The note, being executed for the benefit of the bank, under our practice act which requires actions to be prosecuted in the name of the real party in interest, the right to sue vested in the bank, without the cashier's indorsement. Judgment affirmed.

Cited: 5 Neb. 329; 6 id. 155.

RICHARDS v KOUNTZE (1876) 4 Neb. 200.

Foreclosure of mortgage. The notes secured bore the legal rate of 10 per cent interest. After maturity, and while the bank still held the notes, defendant agreed to pay 12 per cent interest, and indorsed such agreement on the notes. Subsequently the notes and mortgages were assigned by the bank to plaintiff, a bona fide holder. Defendant contended: 1, that the indorsed agreement affected the original agreement with usury; and 2, that by the National Banking Act the bank was incompetent to hold real estate except as security for a pre-existing debt and the mortgages were therefore extinguished by the assignment to the bank. Decree for plaintiff for the principal of the notes with 10 per cent interest, and a sale of the mortgaged premises. Error.

Gantt, J. 1. Where the original contract is not tainted with usury, the obligation cannot be impaired by a subsequent void usurious agreement. 2. It cannot be presumed in the absence of evidence of the nature of the transfer to the bank, that the transfer was made for other than a pre-existing debt, and in violation of the law; and therefore the assignment of the notes to the bank did not extinguish the mortgages. 3. All interest paid above the legal rate, should have been applied toward the payment of the principal. Decree modified.

Cited: 6 Neb. 154; 7 id. 4, 179; 8 id. 51, 271; 9 id. 232, 455; 10 id. 543; 16 id. 13; 41 id. 47; 50 id. 787; 57 id. 98.

McCANN v THE STATE (1876) 4 Neb. 324.

On certificates of deposit. The governor of the State transferred to defendant bank drafts payable to him as governor, and received the certificates of deposit in exchange, signed by defendant M, president of the bank. The money was paid out on the governor's checks, and was not received by the State. The governor believed he was dealing with the bank. M knew the money was the State's. Defendants contended that the transaction was between M as an individual, and the governor, but this claim was not supported by the evidence. The drafts were indorsed by M individually. Judgment for plaintiff. Error.

Maxwell, J. 1. Notice to the president of a national bank is notice to the bank. The note itself was notice that it did not belong to the governor, but to the state. 2. The drafts were given to M by the governor with the intention of dealing with the bank, and subsequent indorsement by M cannot make it a personal transaction. 3. The bank having purchased the drafts with notice that they belonged to the State, and having collected the same, is liable for the full amount. Judgment affirmed.

STEELE v RUSSELL (1876) 5 Neb. 211.

Negligence, in failing to collect a note or to give notice of non-payment. Defendant, a banker, received the note for collection. He denied negligence, and denied damage to plaintiff because of maker's insolvency, but did not allege plaintiff's negligence. Testimony tending to prove maker insolvent was admitted over plaintiff's objection. Testimony was also admitted, over objection, that the maker could not meet his obligations when the note matured. The court refused to charge that allegations in the complaint, not denied in the answer were admitted, but charged that plaintiff must have used due diligence to collect from the maker before he could hold defendant. Judgment for defendant. Appeal.

Lake, Ch. J. 1. Testimony of the insolvency of the maker was admissible to show lack of damages. 2. Testimony that the maker could not meet his financial obligations was not equivalent to testimony of insolvency; it was misleading and therefore inadmissible. 3. Allegations not denied are admitted. 4. Under the pleadings in this case, plaintiff's lack of diligence was not open to proof as bearing on any issue raised. Judgment reversed.

Cited: 6 Neb. 360; 18 id. 643; 21 id. 615; 32 id. 665; 36 id. 749.

MERCHANTS BANK OF LINCOLN v RUDOLF (1877) 5 Neb. 527.

On a promissory note by payee against makers. Defendants R & Co., as plaintiffs knew, signed only as sureties for defendants L & M. Plaintiff's cashier, to induce R & Co. to indorse other paper for L & M, told R that the note was all paid except \$700 and that plaintiff would look to other securities to cover the amount still due. Relying on these statements, R & Co. failed to protect themselves against

loss on account of the paper. No payment had been made. R was a director of plaintiff. Judgment for defendants R & Co. and against defendants L & M. Error.

Lake, C. J. 1. A cashier of a bank has no authority, by virtue of his office, to release a surety on a note or bill without payment. 2. Ordinarily plaintiffs would be estopped to deny payment by the cashier's representation of payment, but a director of a bank is bound to know the condition of its business, and is charged with notice thereof. 3. Notice to one partner is notice to all. Judgment reversed.

Cited: 7 Neb. 65; 8 id. 208; 16 id. 527; 31 id. 551; 37 id. 201; 38 id. 262.

KENNEDY v OTOE COUNTY NAT. BANK (1878) 7 Neb. 59.

On a promissory note. Defendant alleged that the note was made on the representations of the president of plaintiff bank, while away from the bank, transacting outside business; that the plaintiff took the note understanding that it was made to enable J to purchase stock in plaintiff and to elect himself president; that J gave him, as security, shares of stock, which the bank fraudulently induced him to place with it, and that the bank sold the stock and did not account for the proceeds. These allegations were not proved. Judgment for plaintiff. Error.

Maxwell, J. The representations of the president of the bank, made in transacting its business, are admissible in evidence against the bank; but statements made by him away from the bank, in reference to matters in which the bank has no interest, are not admissible. The bank is entitled to recover. Judgment affirmed.

Cited: 7 Neb. 208; 38 id. 262.

RICH v STATE NAT. BANK (1878) 7 Neb. 201.

To recover value of stock. The president of defendant, on its reorganization, promised that if plaintiff would act as director and give the bank his business, the bank would give him 10 shares of stock. Plaintiff accepted, and fulfilled all the conditions of the contract. Plaintiff gave in evidence a copy of a list of defendant's stockholders, showing that plaintiff was credited with 10 shares. United States Statutes required every director to own 10 shares in his own right. The transfer was made on the books but no certificates were issued. Defendant refused to give certificates. Judgment for defendant. Error.

Maxwell, J. 1. The agreement was a sufficient consideration to sustain the contract in question. 2. The bank ratified the action of the president, who professed to act for it, by receiving the benefits derived from the contract. Judgment reversed.

Cited: 8 Neb. 307; 38 id. 141; 40 id. 241, 504; 59 id. 16.

SCHOOL DISTRICT v STATE BANK (1879) 8 Neb. 168.

To recover school bonds. Plaintiff placed its school bonds with K & Co. for sale. K & Co. were indebted to defendant and were accustomed to send bonds as collateral from time to time. K's clerk sent the bonds in question to defendant for sale and not for collateral and defendant so understood it; but claimed to hold them as collateral. Decree for plaintiff. Appeal.

Cobb, J. Defendant acquired no property in the bonds, inasmuch as they were given as collateral only. Decree affirmed.

GRANT v CROPSEY (1879) 8 Neb. 205.

On promissory note. S & P made a note to a bank, with defendant and A as accommodation makers. A was the cashier and acted for the bank. In this action on the note, defendant alone was served, and pleaded that, after maturity of the note, relying upon the representations of the bank that the note had been paid, he parted with collaterals of S & P. It appeared that A informed defendant that the note was paid; and that defendant thereupon paid S & P funds which he held as trustee to pay over to them when they completed certain work. Plaintiff contended that A, as co-maker with defendant, had an interest adverse to the bank, and could not bind the bank by his statements; and that defendant could not reimburse himself out of the trust funds held by him for the benefit of S & P. Judgment for plaintiff. Error.

Lake, J. 1. Where one willfully causes another to believe in, and act on a certain state of things, one is estopped to deny the existence of that state of things. 2. As A's liability on the note was not diminished by the release of defendant, his

interests were not in conflict with those of the bank and the latter is bound by A's statements. 3. Defendant, by legal proceedings, could have availed himself of the fund he held as an indemnity. 4. The bank directors were bound to know that A and defendant were comakers, and, by keeping A as cashier, are bound by his statements. Judgment reversed.

Cited: 16 Neb. 527, 528; 30 id. 116; 31 id. 551; 34 id. 785; 41 id. 291; 46 id. 143; 48 id. 542.

MERCHANTS BANK v McCONIGA (1879) 8 Neb. 245.

On promissory notes held by a bank. Defense by C was that he was surety, and not principal. Defense by M was that he and L agreed after the notes were given, that L would pay them. Both C and M defended on the ground that L conveyed to plaintiff's cashier in fee, real estate as security, which the bank accepted. Statutes forbade the creation of a trust, unless in writing. Defendant gave in evidence a deed in fee to the cashier, as an individual. There was no written evidence of a trust, but the cashier had made oral statements after he had sold the land tending to establish a trust. Judgment for defendant. Error.

Lake, J. 1. The deed was improperly received in evidence. 2. No trust was created. A trust must be evidenced by a writing. 3. The oral statements of the cashier after the sale, cannot bind the bank. Judgment reversed.

Cited: 38 Neb. 186.

SHAFFER v MADDOX (1879) 9 Neb. 205.

On check, against makers. Two of defendants were partners in a mercantile business, and the other defendant was the owner of the bank. The partners bought goods of plaintiff, and gave him a check on the owner of the bank, although they had no funds on deposit. The check was promptly presented for payment and payment refused; but thereupon the owner of the bank accepted the check solely as security for the partners. Plaintiff did not give notice of non-payment to the firm until the defendants' bank suspended payment. Defendants' evidence of damage resulting therefrom was excluded. Judgment for plaintiff. Error.

Cobb, J. 1. Errors must be specifically pointed out to entitle a party to a review of the evidence admitted or rejected. 2. The partners having no funds in the bank were not entitled to notice of dishonor. The evidence was therefore properly excluded. Judgment affirmed.

Cited: 33 Neb. 591; 40 id. 188; 44 id. 632.

SCOFIELD v STATE NAT. BANK (1879) 9 Neb. 316.

To enjoin a sale of mortgaged premises, and set aside a decree of foreclosure. Plaintiff alleged that he gave a note secured by mortgage to S Bank; that thereafter S Bank was reorganized as S National Bank, defendant, under the National Banking Act; that at the time of the assignment S Bank was indebted to plaintiff in an amount greater than the amount of the note; that under the National Banking Act, defendant was prohibited from dealing in mortgages except to secure a debt contracted by the bank, or to prevent loss on a loan made by it after its organization; that defendant had foreclosed the mortgage and was about to sell the property. Defendant's answer set up the decree of foreclosure, and alleged that plaintiff appeared in the foreclosure suit and pleaded setoff, which was fully adjudicated. Plaintiff did not reply, but moved to strike out the allegations of the answer except as to the decree, as "irrelevant, false and untrue, as appears from the records of this court," and further moved for judgment on the pleadings. Motion overruled and case dismissed. Appeal.

Maxwell, C. J. 1. Matter, which if true, is a defense to the action, is not irrelevant. 2. Where an answer raises an issue of fact, the truth of its allegations cannot be tried on motion to strike out. 3. Failure to file a reply, under sec. 134 of the code, resulted in the admission of the truth of all allegations of new matter in the answer. 4. The decree of foreclosure was valid until modified or reversed. 5. By providing that a state bank may reorganize as a national bank, the National Banking Act impliedly authorized a transfer of assets to the national bank, and a mortgage so transferred may be foreclosed by the latter. 6. As nothing in the petition shows that plaintiff was prevented by accident, mistake, surprise or fraud

of defendant, from making defenses in the foreclosure action, it alleges no ground for interference by a court of equity. Judgment affirmed.

Cited: 33 Neb. 759; 36 id. 69; 38 id. 56; 47 id. 196; 49 id. 418; 52 id. 172; 53 id. 55.

WARD v SCHOOL DISTRICT (1880) 10 Neb. 293.

On bond, against principal and sureties. Defendant was treasurer of plaintiff. Answer, that plaintiff and defendant had a settlement; and that defendant had paid his successor, as shown by his statement. By statute, school money could only be drawn by an order signed by the director and moderator, and the treasurer was required to take a receipt for the same. No such order was given in this case. Defendant deposited the money to his own credit, but with directions to pay it out for school purposes. The bank failed, and the money was lost. Judgment for plaintiff. Error.

Lake, J. 1. The bank was the agent of defendant and not of plaintiff and the loss fell on defendant. 2. A school district cannot release its treasurer for his losses. 3. School money can only be drawn in the way expressly provided by statute. Judgment affirmed.

Cited: 48 Neb. 10; 51 id. 765.

BOARD OF COUNTY COMMISSIONERS v CATTLE (1883) 14 Neb. 144.

Petition, to correct assessment. Petitioners were private bankers. The original statement given to the assessor was in accordance with the statute providing for the listing of bankers' property. They sought to have stricken out the amount of funds deposited with other bankers subject to drafts; property on hand or in transit; checks; and deposits. Ordered in accordance with petition. Error.

Cobb, J. 1. When the owner of money makes a general deposit of it in a bank, it ceases to be his money, and instantly becomes the money of the bank, and he becomes the creditor of the bank, to that amount. 2. The general deposits in a bank are assessable to the bank. 3. The only distinction between the taxation of private bankers and other individuals is that bankers are taxed also on their funds deposited with correspondent banks, for the purposes of exchange. They may deduct all accounts payable, except current deposit funds, from the amount of bills receivable, but not from money on hand, in transit, or in the hands of correspondents. Judgment reversed.

Cited: 38 Neb. 716.

COLLINGWOOD v MERCHANTS BANK (1883) 15 Neb. 118.

On contract. Plaintiff surrendered a certificate of deposit, issued by defendant, for a like amount in sight drafts. Defendant agreed that if plaintiff did not present the drafts for acceptance, he could return them and defendant would pay interest at the rate of that paid on the certificate. Plaintiff was in no case to negotiate the drafts without 30 days' notice to defendants. The drafts were never negotiated and several months after their issue, the drawee failed. Six months later plaintiff demanded payment of defendant, but it refused to pay. Demurrer on the ground that there was no allegation of the amount due on the drafts; that the oral agreement contradicts the written one. Sustained. Judgment for defendant. Error.

Maxwell, J. 1. The method of pleading set out by the code providing for a statement of the amount due is merely permissive, and the party may state his facts in a different form. 2. The parol agreement was valid and did not contradict the written agreement, as it merely showed the purpose for which the drafts were drawn and delivered. 2. Plaintiff not having presented the drafts to the drawee or returned them to defendant within a reasonable time, must bear the loss. Judgment affirmed.

Cited: 30 Neb. 146; 36 id. 594; 58 id. 512.

FIRST NAT. BANK v LUCAS (1887) 21 Neb. 280.

Money had and received. Plaintiff while president of defendant, without authority of the directors, paid out of his own funds money for improving the bank building; expenses in a law suit; and those incurred in discounting some notes. Plaintiff sold the notes for less than their value and gave defendant his note for the difference. On a subsequent sale of his stock to P he represented to P that he had no claims against defendant. Plaintiff was the owner of the bank building and

made the repairs before defendant moved in. There was no agreement that defendant should pay for the repairs. The court instructed the jury that plaintiff, as president of defendant, had authority to dispose of notes of the bank when necessary to protect the bank's credit. Judgment for plaintiff. Error.

Reese, J. 1. Plaintiff was not entitled to recover for the amount paid out for repairs. 2. A bank president cannot dispose of notes held by a bank without authority. Therefore plaintiff must bear the loss which resulted from his unauthorized sale, and is not entitled to compensation. 3. Plaintiff was estopped by his representations to P from setting up any claim against the bank. Judgment reversed.

FIRST NAT. BANK v OVERMAN (1887) 22 Neb. 116.

To recover a penalty. U. S. R. S., sec. 5198, provided that suits or proceedings against national banks might be had in any state, county, municipal or federal court of the district in which the association was located, having jurisdiction in similar matters. Defendants contended that the court did not have jurisdiction, as jurisdiction could not be imposed upon a state court by federal statute. Judgment for plaintiff. Error.

Maxwell, C. J. 1. A penalty may be enforced against a national banking association in any court of the district in which the association is located. 2. The state courts exercise their ordinary jurisdiction derived from their constitution under the state laws; sec. 5198 is permissive, not compulsory. Judgment affirmed.

Cited: 24 Neb. 824, 826; 26 id. 285; 28 id. 691; 37 id. 621.

FIRST NAT. BANK v STATE BANK (1888) 22 Neb. 769.

On forged check. Agreed case. C was a customer of both plaintiff and defendant. A stranger presented to plaintiff a check purporting to be drawn by C on defendant. Plaintiff's cashier compared the signature of the check with a genuine signature of C, and paid the check. He required no proof of the stranger's identity. At the time of payment, C had on deposit with plaintiff sufficient funds to meet the check. Plaintiff forwarded the check, through a correspondent bank, to defendant, which paid the check by giving credit for the amount. On discovery of the fraud, defendant withdrew the credit given. Judgment for defendant. Error.

Maxwell, C. J. 1. A party who pays a forged check, does so at his peril. 2. If by means of his indorsement and use of the same, he obtains money from another, he is liable for the amount thus received. 3. A bank receiving a check from one who had paid it may rightfully assume that the paying bank required proof that the instrument was genuine. Judgment affirmed.

SCHUYLER NAT. BANK v BOLLONG (1888) 24 Neb. 821.

Statutory action in a state court, to recover double the amount of interest on a usurious contract, under U. S. R. S., sec. 5198. Defendant, a national bank, took interest at a higher rate than allowed by state law. Defendant contended that the court had no jurisdiction. The U. S. statutes provided that a person knowingly taking interest at a usurious rate should forfeit the note and twice the amount of interest taken, and that the state courts of the district in which the bank is located, have jurisdiction. There was no allegation that defendant knew the rate was usurious. Judgment for plaintiff. Error.

Maxwell, J. 1. The petition is bad for failing to contain an allegation as to the bank's knowingly contracting for and receiving the usurious rate of interest. 2. State courts have jurisdiction. Judgment reversed.

Cited: 24 Neb. 825; 28 id. 691; 32 id. 76; 48 id. 126.

SCHUYLER NAT. BANK v BOLLONG (1888) 24 Neb. 825.

To recover a statutory penalty, for receiving usurious interest. U. S. R. S., sec. 5197 and 5198, provided that twice the amount of usurious interest paid, could be recovered, and gave state, county, district and municipal courts jurisdiction over banking associations within their territory. Defendant, a national bank, was paid interest at a greater rate than that allowed by the state. Plaintiff refreshed his memory from a memorandum prepared by his attorney several months after the facts occurred, and from other evidence in his possession. Judgment for plaintiff. Error.

Maxwell, J. 1. The state courts have jurisdiction to collect a penalty imposed by Congress for taking usurious interest. 2. The interest having been paid in advance, plaintiff was entitled to recover twice the full sum paid. 3. The memorandum not having been made by the witness immediately after the happening of the event, should not be used to enable him to refresh his recollection; but as the witness testified almost entirely from his own memory there was no prejudicial error. Judgment affirmed.

Cited: 28 Neb. 693; 30 id. 612; 32 id. 76; 40 id. 371.

BAIR v PEOPLE'S BANK (1889) 27 Neb. 577.

On promissory note. There was no allegation or proof that plaintiff bank was a corporation or a partnership. No copy of the note was in the record, though the note was introduced in evidence. The code allowed any association though not incorporated to sue by the name it had assumed. Judgment for plaintiff. Error.

Maxwell, J. 1. All presumptions are in favor of a judgment and error must be affirmatively shown to warrant a reversal. 2. In the absence of proof the note is presumed to have been given to the bank, by defendants, and they are therefore estopped to deny the bank's legal existence. Judgment affirmed.

Cited: 45 Neb. 710; 54 id. 454; 57 id. 614.

STATE v COMMERCIAL STATE BANK (1890) 28 Neb. 677.

Petition for the appointment of a receiver. Defendant M, the president of defendant bank, becoming insolvent, made an assignment for the benefit of creditors. The assignee, claiming the bank was owned by M, took possession. By statute, the business of any individual, firm or corporation engaged in banking, who became insolvent, could be liquidated by the State. The constitution gave the supreme court original jurisdiction in civil actions. The bank was incorporated under the state law. Demurrer to petition.

Norval, J. 1. The supreme court has original jurisdiction to appoint a receiver to take charge and settle the affairs of a state banking corporation. 2. The property and assets of a state banking concern, after ceasing to do business, are a trust fund for the payment of debts, and the creditors' rights are superior to those of the stockholders, or of the assignee of an insolvent stockholder. Demurrer overruled.

Cited: 34 Neb. 200; 37 id. 181; 40 id. 193, 219; 59 id. 455.

SCHUYLER NAT. BANK v BOLLONG (1890) 28 Neb. 684.

Statutory action to recover double the amount of usurious interest charged by defendant for a loan. The action was brought in a state court, under Sec. 5198 U. S. R. S., relating to national banks. The original petition was defective in its mode of stating several causes of action. It was amended to accord with the requirements of the code, but no new causes of action were set forth in the amended petition. Defendant objected to the jurisdiction, and took various exceptions to rulings. Judgment for plaintiff. Error.

Cobb, C. J. 1. It was not error for the court to refuse to strike out the words "so as aforesaid paid by plaintiff to the defendant and by the defendant knowingly contracted for and received," as irrelevant, redundant, and scandalous matter. 2. A state court has jurisdiction of this class of action. 3. The original pleading was not a nullity, but was capable of amendment. As the amended pleading sets up no new cause of action, it is consubstantial with the original in inception and filing; and the action being commenced with the service of summons, no alias summons was necessary. 5. The recovery allowed by sec. 5198, is for twice the full amount of interest paid and not merely for twice the sum taken in excess of the legal rate. Judgment affirmed.

Cited: 37 Neb. 621; 45 id. 719.

NEBRASKA NAT. BANK v LOGAN (1890) 29 Neb. 278.

On check. The petition set forth: that plaintiff was a national bank in O; that two of defendants were partners doing business in O and the other defendants were partners in business in V; that the V partners, knowing of the failing condition of the V Bank, sent a check on that bank to the O partners with directions to collect immediately; that the O partners on the next day indorsed the check to plaintiff

which sent it on the same day to the drawee; that the drawee sent in payment a worthless check which plaintiff refused; that plaintiff immediately notified all the defendants of the dishonor of the check. Demurrer, on the ground that plaintiff made payee its agent by sending the check direct, and must bear the loss. Sustained. Judgment for defendant. Error.

Maxwell, J. 1. The petition stated a cause of action, as the V Bank was in a failing condition. 2. There is no presumption that the check would have been paid if presented by a third party. 3. If such be the fact it should be set up by answer. Judgment reversed.

S. c.: 35 Neb. 182.

STATE BANK v SMITH (1890) 29 Neb. 434.

To recover a deposit. Defendant claimed that its cashier erroneously gave plaintiff credit, for a sum he had not deposited. The entry was erased in the bank's books when the mistake was discovered. Plaintiff claimed he had made such a deposit but failed to show from what source the money came, it being an unusual deposit for him. Judgment for plaintiff. Error.

Maxwell, J. 1. The testimony, if true, shows a mistake in the bank book entry. It was therefore necessary for the plaintiff to show from what source he received the money. 2. Though the evidence be conflicting, the court will review it where it is plain that the jury made a mistake in the findings. Judgment reversed.

HALL v FIRST NAT. BANK OF FAIRFIELD (1890) 30 Neb. 99.

To recover a statutory penalty for usury, under U. S. R. S., sec. 5198. Defendant held plaintiff's notes and applied drafts and general payments in satisfaction thereof. Plaintiff claimed that the amount paid was greatly in excess of that due. There was no evidence of a contract to pay usurious interest, or that defendant knowingly took it, the whole controversy being as to disputed payments. Plaintiff gave a note as last payment in settlement of the account and contended that the usurious interest was included in this note, and that if the notes were not wholly paid by the drafts, and cash payments, these payments should be applied to extinguish the usurious interest and that double the amount thereof should be recovered. Verdict directed for defendant. Judgment for defendant. Error.

Norval, J. 1. Where illegal interest has been actually paid to a national bank double the amount may be recovered under sec. 5198, but where it has been added into a note but not actually paid, it cannot be recovered in an action brought for that purpose. 2. As there was no evidence on which the jury could have found for the plaintiff, the court properly took the case from the jury. 3. Unlawful interest paid, will be applied to the principal. Judgment affirmed.

Cited: 40 Neb. 94; 46 id. 385; 51 id. 399; 53 id. 95.

STATE, EX REL v BENTON (1890) 31 Neb. 44.

Mandamus, to compel the board of bank supervisors to revise and rescind the rate of compensation of bank examiners. Sec. 8 of the Act of March 29, 1889, in providing for the examination of banking institutions, declared that every person appointed to examine the affairs of any bank should receive compensation at the rate of \$10 for each day employed in examination, to be paid by the bank whose affairs were examined, provided that fees paid by any such bank for a single examination, should not be less than \$10, nor more than \$20. Relator alleged that he was a stockholder in the T Bank; that respondents made an order requiring bank examiners to charge \$20, without reference to the time employed; and that an examiner had examined the T Bank and another bank on the same day and required each to pay a fee of \$20.

Cobb, C. J. 1. A writ of mandamus will not issue to compel the board to rescind its resolution and order, even where they are without the authority of law. 2. The relief will not be granted where the relator has no direct legal interest in the ministerial act which he seeks to enforce. A stockholder of a bank has no such interest in this case. Writ denied.

FONNER v SMITH (1890) 31 Neb. 107.

On check, by holder against the owners of the drawee bank. The drawer had sufficient funds in the bank when the check was drawn and presented, but drawee failed to pay it. Judgment for plaintiff. Error.

Maxwell, J. The holder of a check, where the check was drawn upon funds and presented before the funds were withdrawn, may sue the bank for refusing to pay such check. Judgment affirmed.

Cited: 50 Neb. 461, 520; 56 id. 807; 59 id. 282; 60 id. 318.

COMMERCIAL STATE BANK v ROWLAND (1891) 31 Neb. 483.

On promissory note. R sent a note to defendant for collection. Defendant voluntarily paid a note by a third party drawn against R's firm. There was evidence that R had previously assigned the note to plaintiff, and that defendant had notice thereof. Defendant contended it should be allowed to set off the amount paid on the firm note. The court gave instructions not based on the evidence. Judgment for plaintiff. Error.

Norval, J. 1. A bank cannot set off the amount paid on a firm note against the amount of a collection for one of the partners. 2. A banker has no right to use the money of a depositor to discharge a note not payable at the bank where the deposit is made, without instructions from the customer to do so. 3. Instructions not based on the evidence are erroneous. Judgment reversed.

SCHUYLER NAT. BANK v BOLLONG (1891) 32 Neb. 70.

To recover penalties, for receiving usurious interest. Defendant was a national bank which had knowingly received usurious interest on loans made to plaintiff. By U. S. R. S., secs. 5197 and 5198, a national bank was liable for twice the amount of usurious interest received. The courts of states and counties in which national banks were located were given jurisdiction in suits against them. Defendant contended that the district court did not have jurisdiction. Judgment for plaintiff. Error.

Maxwell, J. 1. The state courts have jurisdiction, as well as the federal courts. 2. The findings of facts were sustained by the evidence and the questions of law are settled by the decision in Schuyler National Bank v Bollong, 24 Neb. 821, and 825. Judgment affirmed.

CENTRAL NEBRASKA NAT. BANK v WILDER (1891) 32 Neb. 454.

To recover a dividend declared on bank stock. G, while cashier of defendant, gave plaintiff a certificate of stock as security for a loan. Subsequently, G endorsed on a new certificate of stock, a power of attorney, authorizing X, defendant's new cashier, to transfer the stock on the bank's books. No transfer was registered on the books as required by the by-laws of the bank. The dividend was paid to G, though several of defendant's officers had notice of the pledge to plaintiff. Judgment for plaintiff. Error.

Maxwell, J. Where stock is assigned as security and the assignee is entitled to the dividends, the bank must pay to the assignee, if it has notice. Judgment affirmed.

FARMERS & MERCHANTS BANK v DUNBIER (1891) 32 Neb. 487.

On check, against acceptor. N drew his check on defendant whose cashier verbally agreed to pay it in two days. On the strength of this promise plaintiff delivered certain cattle to N. Defendant paid the check only in part, alleging want of funds. Judgment for plaintiff. Error.

Norval, J. 1. The agreement of the bank to pay the check was not a promise to pay the debt of another, but was an original promise and in the absence of statute to the contrary, was valid although not in writing. Acceptance of a check need not be in writing. 2. The delivery of the cattle was sufficient consideration for the promise. Judgment affirmed.

BRESSLER v COUNTY OF WAYNE (1891) 32 Neb. 834.

To reduce an assessment. Plaintiff was a stockholder in a national bank. Defendant, the county assessor, refused to deduct plaintiff's bona fide indebtedness from the value of his shares of stock. U. S. R. S., sec. 5219, provided for taxation of national bank stock at the same rate as other moneyed capital. Judgment for defendant in the district court. Error. Judgment reversed. On rehearing.

Norval, J. The former decision, reported in 25 Neb. 834, was erroneous. Defendant properly refused to deduct plaintiff's bona fide debts from the value of his

shares of bank stock. This cannot be said to destroy the uniformity established by Congress, even though some moneyed capital which does not come into competition with bank stock, is untaxed or reduced by deducting debts. Judgment of district court affirmed.

FIRST NAT. BANK v MILTONBERGER (1892) 33 Neb. 847.

Statutory action, to recover double the amount of usurious interest paid, and for the conversion of notes given as collateral. Plaintiff gave defendant a note secured by deposit of other notes. Defendants assigned it and sent it to S Bank a few days before it was due. It was returned by S Bank when due and defendant applied the collateral in payment. Defendant claimed that it acted merely as agent for S Bank in collecting the notes. The court refused to charge that the law presumes the transfer of a note in the usual course of business to be lawful, and charged that the burden was on defendant to prove that the sale and transfer were made in good faith and that S Bank was the owner at the time of payment, and that payments made generally upon a usurious loan, are not payments of usury on the loan. Judgment for plaintiff. Error.

Post, J. 1. By selling the note, defendant could evade the penalty for usury; but the bare indorsement of a note in the usual course of business by a national bank in its own favor, raises no presumption as against the maker, from whom it had collected usurious interest. Ownership in a third party at the time of payment is matter of defense and must be proved by the bank. 2. There being no special agreement, the payments on the note are to be applied to the principal and not on the usury. Judgment affirmed.

Cited: 41 Neb. 42; 50 id. 778.

FIRST NAT. BANK v SECURITY NAT. BANK (1892) 34 Neb. 71.

On certificates of deposit. Defenses: failure of consideration; and that plaintiff took the certificates after maturity and with notice. In exchange for certificates held by R, defendant issued the certificates sued on, and wrote across their face, "payable in three months." There was no other consideration. The original certificates proved worthless when presented. R refused to return the certificates to defendant and indorsed them, without recourse, to plaintiff after they were due. Judgment for the plaintiff. Error.

Norval, J. 1. Plaintiff was not a bona fide purchaser for value before maturity, and any defense against R in favor of defendant, is available against plaintiff. 2. The consideration for the issue of the certificates had failed. Judgment reversed.

Cited: 40 Neb. 491; 41 id. 51.

STATE v BANK OF WESTERN (1892) 34 Neb. 175.

Insolvency proceedings. Defendant was an insolvent bank, of which W was receiver. A creditor of the bank filed an intervening petition. Before the bank became insolvent the intervener's assignor bought and paid for a \$500 draft on a New York bank. By mistake, five dollars instead of five hundred was written in the body of the check. The figures \$500 were cut into the check. The New York bank refused to honor the check for more than the sum written in, though defendant had remitted the full amount. Case submitted.

Maxwell, C. J. The intervener was entitled to the amount intended to be paid on the draft. Judgment for the intervener.

STATE v EXCHANGE BANK (1892) 34 Neb. 198.

Insolvency proceedings. Defendant was an insolvent state bank. Plaintiff applied to the supreme court for the appointment of a receiver. The constitution provided that the supreme court should have jurisdiction in civil cases in which the State was a party. By sec. 14, ch. 8, Compiled Stat., the State could apply to the supreme or district court for the appointment of a receiver. Defendant contended that the court did not have jurisdiction, as sec. 14, ch. 8 Compiled Stat. was unconstitutional in that the appointment of a receiver did not come within the constitution.

Post, J. 1. The supreme court had jurisdiction to appoint a receiver of the

insolvent bank. 2. The appointment of a receiver in the name of the State is a civil suit to which the State is a party, within the meaning of the constitution. Objection to jurisdiction, overruled.

Cited: 40 Neb. 193.

FIRST NAT. BANK v SPRAGUE (1892) 34 Neb. 318.

On draft. Plaintiff drew a sight draft, payable to defendant, a bank, and left it with defendant for collection. Defendant, without fraud or negligence, sent the draft to E Bank for collection. E Bank failed, without remitting. Judgment for plaintiff. Error.

Post, J. A bank, acting without fraud or negligence, and without any express agreement, is not liable for the loss of a draft by its correspondent, to which the draft was sent for collection at a distant point. Judgment reversed.

Cited: 55 Neb. 308.

NEBRASKA NAT. BANK v LOGAN (1892) 35 Neb. 182.

On check. The facts in this case are identical with those of 29 Neb. 278, except that the plaintiff here contended that the defendant was negligent in not sooner presenting the check to the drawee. Judgment for defendant. Appeal.

Maxwell, C. J. Plaintiff exercised due diligence in attempting to collect the check. Judgment reversed.

WILSON v COBURN (1892) 35 Neb. 530.

Petition in the county court to establish a preference. Defendant was the assignee of an insolvent bank. Plaintiff alleged that the bank, knowing its insolvency, took his deposit with the intent to defraud him; and he asked to be declared a preferred creditor. Demurrer, on the ground that the county court did not have jurisdiction and that a cause of action was not stated. Sustained. The constitution prohibited the conferring upon county courts, of equity jurisdiction in cases of title to land or mortgages. The county court by statute had jurisdiction of insolvent estates. The specific deposit could not be traced. Judgment for defendant. Error.

Post, J. 1. The county court may allow whatever relief is necessary whether legal or equitable. 2. The fact that defendant became a creditor of the insolvent bank through the fraud of its officers, and the fact that the bank became a trustee ex maleficio, gave the plaintiff no right to a preference over other creditors, unless his portion of the assets is capable of being definitely traced and distinguished. Judgment affirmed.

Cited: 36 Neb. 33; 42 id. 339, 903; 45 id. 433; 49 id. 788; 51 id. 854; 53 id. 65; 54 id. 730.

ANHEUSER-BUSCH BREWING ASS'N v MORRIS (1893) 36 Neb. 31.

Petition, to have a claim preferred. Claimant sent a check to a bank for collection. After collecting it the bank failed, and defendant, as its assignee, took possession of its assets. The claim was filed and allowed, and dividends were received before a preference was asked. Claimant contended that the time of determining whether a preference is to be allowed, is when the order of distribution is made. Judgment for defendant. Appeal.

Norval, J. 1. The transaction did not create the relation of debtor and creditor, and the money collected by the bank constituted a trust fund and did not pass to the assignee as a part of the assets of the bank. 2. But the beneficiary waived his right to the trust fund, by having his claim allowed as an ordinary claim, and by accepting dividends. 3. A preference must be fixed and determined by the county judge at the time the claim is passed on and allowed, and his decision is final unless appealed from. Judgment affirmed.

Cited: 36 Neb. 333; 42 id. 902; 49 id. 788; 52 id. 3; 54 id. 727; 61 id. 184.

FIRST NAT. BANK v SMITH (1893) 36 Neb. 199.

To recover a statutory penalty for receiving usurious interest on a loan to plaintiff. There was no objection on the trial that the pleadings were indefinite. The code provided for the inspection of books on a written demand, and for an order of the court or judge to compel such inspection. Defendant, a national bank, refused to obey the demand and order, which were made in vacation. Plaintiff

proved by his own affidavit, the contents of the books. U. S. R. S., sec. 5198, gave a penalty for taking or receiving usurious interest, provided such action was commenced within two years from the occurrence of the usurious transaction. Plaintiff contended that the statute did not run until the payment of the notes, and that he should recover on another transaction for money paid more than two years before action brought. Judgment for plaintiff, on the first transaction only. Error.

Norval, J. 1. The right accrues as soon as any unlawful interest is paid, and the statute begins to run from the time such payment is made. 2. Where the averments in a pleading are indefinite, the remedy is by a motion to have the same made more definite. 3. It was proper for the judge to make the order in vacation. 4. Defendant failing to obey the order, the affidavit of plaintiff was properly received in evidence. Judgment affirmed.

Cited: 39 Neb. 91; 42 id. 693, 758; 43 id. 582.

MORSE v RICE (1893) 36 Neb. 212.

On certificates of deposit. Defendant was a banker, who issued to plaintiff certificates of deposit, payable on demand and bearing interest after maturity. Subsequently, defendant gave notes which he held against third parties, to plaintiff and urged the makers to pay them. The amount of the notes was not indorsed on the certificates and defendant made no claim for a credit until suit was brought. Plaintiff gave a receipt for the notes and added "for which I hereby credit on account." Plaintiff proved that the notes were taken by him as collateral security for the payment of the certificates. Defendant contended that plaintiff's evidence varied the terms of a written contract. Judgment for plaintiff. Error.

Norval, J. 1. A mere receipt may be explained by parol testimony; the evidence that the notes were given as collateral security was therefore proper. 2. The certificates would draw 7 per cent interest from the time payment was demanded, and if no demand were made, from the institution of the suit. Judgment affirmed.

Cited: 49 Neb. 711; 50 id. 555; 55 id. 593, 625.

PORTER v SHERMAN COUNTY BANKING CO. (1893) 36 Neb. 271.

On deposit against a bank and those who were stockholders when the deposit was made. Most of the stock of the bank was not paid for in cash, but by worthless securities. W & T held most of the stock and were the only stockholders guilty of fraud. The bank practically fulfilled all the provisions of the incorporation law. By the constitution, stockholders were liable to creditors in an amount equal to their stock, in addition to the amount unpaid on the stock held by them. The verdict was for less than the sum admitted to be due. The banking law was changed after the bank failed. There was no demurrer to the misjoinder of causes apparent in the petition. Judgment for defendant. Error.

Maxwell, C. J. 1. A verdict for a sum greatly less than that admitted to be due cannot be sustained. 2. There being a substantial compliance with the incorporating act, mere defects will not render stockholders liable for failure to incorporate. 3. A misjoinder of causes of action appearing on the face of the petition is waived by failure to demur. 4. The banking law in force at the time the action accrued was applicable. 5. Officers of a bank falsely representing capital as paid up, to induce persons to deposit, are liable personally. 6. The stockholders were liable for the unpaid stock held by each, and for a sum equal to the shares so held, for all liabilities accruing while they were stockholders. Judgment reversed.

Cited: 40 Neb. 275.

GRIFFIN v CHASE (1893) 36 Neb. 328.

Foreclosure of mortgages. Plaintiff sent notes to a bank for collection. C, the president of the bank, used some of the money, and he and his wife executed the mortgages in suit to secure payment. The bank was insolvent at the time it collected the notes. A receiver was appointed and took possession. He intervened and answered that plaintiff was a general depositor and was not entitled to a preference; and that he held the mortgages for the benefit of the bank. C's wife alleged failure of consideration, in that one lot was her own and another the home-stead. Judgment for defendant. Error.

Maxwell, C. J. 1. The bank was plaintiff's agent for collection of the notes, and a trustee of the proceeds; and the receiver was not entitled to them as assets

of the bank. 2. C, being personally liable for the money used by him, there was a consideration for the mortgages in suit. Judgment modified.

Cited: 49 Neb. 788; 52 id. 3.

STATE *v* FARMERS AND DROVERS BANK (1893) 36 Neb. 675.

Insolvency proceedings. Plaintiff, the State, obtained the appointment of a receiver, to settle the affairs of defendant, an insolvent state bank. T filed a claim on certificate of deposit, which the receiver refused to allow. The bank was originally a private bank, owned and operated by M. It was later incorporated, with M as president, and the certificates were issued by them in the name of the bank. Claimant surrendered valuable securities in exchange for the certificates; and he testified that he dealt with the bank and not with M as an individual. The certificates were on the usual blanks used by the bank. The receiver contended that they represented the personal obligation of M, and, as to the bank, were without consideration. The referee found for the claimant. Motion to confirm the referee's report. Exceptions.

Post, J. 1. The certificates were *prima facie* the obligation of the bank. 2. The burden was upon the receiver to show that they were issued without authority. Report confirmed.

WOOD RIVER BANK *v* FIRST NAT. BANK (1893) 36 Neb. 744.

Damages, for failure to give notice of dishonor of checks. Plaintiff and defendant were banks in different cities. H drew checks on defendant, which, after several indorsements, were taken by plaintiff, and sent to defendant for collection. Defendant received the checks on Thursday and, knowing then that the drawer did not have funds, failed to protest and give notice of protest until the following Monday. The president of defendant was the notary who made the protest and withheld the checks in order to give the drawer time to provide funds. Defendant contended that the plaintiff had not been damaged, because the solvency of the indorsers was not shown. The indorsers were financially embarrassed. Judgment for plaintiff. Error.

Post, J. 1. Checks are to be regarded as inland bills, and therefore no protest is necessary. But notice of non-payment should have been given as promptly as in cases of formal protest. 2. As the notary was the bank president, the rule that placing a note in a notary's hand is sufficient diligence, cannot avail. 3. The fact that the indorsers were unable to meet all obligations at maturity does not conclusively establish such insolvency as will constitute a defense. Judgment affirmed.

Cited: 50 Neb. 109.

STATE *v* COMMERCIAL & SAV. BANK (1893) 37 Neb. 174.

To recover property belonging to an insolvent bank. Defendant, president of a state bank, was also secretary of a loan company. The president acting for himself and for the loan company, made an agreement with the bank by its cashier, whereby his property and that of the loan company, of little value, was surrendered in exchange for property of the bank of great value consisting of notes and stock. The president then resigned from the bank and it failed. A receiver was then appointed and filed this petition to compel the president and the loan company to surrender the property. Defendant contended that the receiver had no power to institute these proceedings, and that no order could be made in regard to stock held by persons not parties to the proceedings. Referee found for receiver.

Ryan, C. 1. The misconduct of the president of the bank in becoming a party to the misappropriation of the assets of the bank subjected him to a personal liability for the full value of those assets to the bank's creditors. 2. The receiver had the power to institute proceedings to collect the assets of the bank or the value thereof, under order of court. 3. Under the facts it is not necessary to make the other stockholders parties to the proceeding. Judgment, that the president and the loan company return the notes, and the value of the stock.

Cited: 40 Neb. 194.

BANK OF COMMERCE *v* HART (1893) 37 Neb. 197.

On promissory note. Plea: part payment by the sale of certain insurance stock to J, plaintiff's cashier, who agreed to credit the same on the note. Plaintiff, a

national bank, contended that the sale was to J, individually. The court charged that the bank was liable if it authorized the purchase, or ratified it after it was made. Judgment allowing defendant the value of the stock as part payment. Error.

Ragan, C. 1. A national bank has no power to purchase stock in an insurance company. 2. The cashier of a national bank has no authority, by virtue of his office, to accept stock in a corporation, in payment of a debt due the bank. 3. The directors in investing and dealing with the funds of a bank must, in order to bind the bank, be confined to the express purposes for which the bank is incorporated and to the purposes necessarily incident thereto. 4. The directors had no authority to ratify the purchase of the stock if it were made by J for the bank. Judgment reversed.

FIRST NAT. BANK v MILLER (1893) 37 Neb. 500.

Money had and received. Plaintiff indorsed in blank and deposited to his credit with defendant on May 31, checks drawn by B on a bank at C, twenty-seven miles distant, from which there were two daily mails. Defendant accepted the checks as cash and mailed them to A Bank in St. J, for collection. A Bank sent them to S Bank at C for collection, where they arrived on June 5. B was then insolvent and the checks were not paid. Had the checks been presented immediately, they would have been honored. Plaintiff sued for the balance not checked against. There was no evidence of actual damage to him. Defendant contended that the custom was to send checks indirectly to the drawee. Judgment for plaintiff. Error.

Ragan, C. 1. The checks were not presented within a reasonable time. 2. A check, to charge an indorser, must be presented within a reasonable time. 3. Evidence as to whether the indorser was actually damaged, is immaterial. 4. No custom or usage among bankers as to the manner of presenting ordinary checks for payment, relieves them from presenting them within a reasonable time. Judgment affirmed.

Cited: 43 Neb. 792; 50 id. 109.

SCHUYLER NAT. BANK v BOLLONG (1893) 37 Neb. 620.

To recover a statutory penalty for taking usurious interest. Defendant was a national bank which had charged and received usurious interest on loans to plaintiff. Defendant contended that a state court, namely, the district court of the county, in which the bank was located, did not have jurisdiction. By an act of Congress, suits against banks could be tried by the court, of any state or county, in which the bank was located. Judgment for plaintiff. Error.

Ragan, C. The district court had jurisdiction. Judgment affirmed.

Cited: 41 Neb. 501.

COMMERCIAL NAT. BANK v BRILL (1893) 37 Neb. 626.

On promissory note. Plaintiff bought a note made by defendants, payable to M & Co. The note bore an indorsement by the payee's president, made in the regular course of business, and was brought to plaintiff by M & Co.'s secretary. Plaintiff proved that it had been a custom to transact such business with M & Co.'s secretary. Defendant contended that M & Co. had obtained the note by fraud, and had given the secretary no authority to discount it. Defendant was improperly allowed to prove admissions made by the officers of M & Co. after the note had been transferred to the bank. Plaintiff did not specifically assign as error the admission of such evidence. Judgment for defendant. Error.

Irvine, C. 1. The plaintiff made out a case; it was justified in assuming the secretary's authority from the previous course of dealing. 2. Though the admission of incompetent evidence is not assigned as error, the court will disregard the evidence in determining whether the verdict is supported by the evidence. Judgment reversed.

Cited: 44 Neb. 147; 54 id. 611.

HURLBURT v PALMER (1894) 39 Neb. 158.

Deceit. Plaintiffs, stock commission merchants, agreed to advance money to V, one of defendants, on stock shipped by him to them. The other defendants were bankers, who had a claim against V, and knew of his arrangement with plain-

tiffs. The bank, acting honestly, induced V to pay its claim by drawing on plaintiffs. To get service of process on defendants, plaintiffs fraudulently induced V to come within the jurisdiction of the court and thereupon served him. This was separately pleaded in the same answer with the general denial. Plaintiffs contended that the defendants waived the objection to the jurisdiction of the court by suing out a writ of error. Judgment for plaintiffs. Error.

Ryan, C. 1. There being no fraud, the bank is not liable for having secured payment by inducing V to draw on plaintiffs. 2. The facts in regard to the jurisdiction constituted a separate defense and were properly included in the answer with the general denial. 3. The question of jurisdiction is not waived by suing out a writ of error. Judgment reversed.

Cited: 45 Neb. 33; 49 id. 126, 185; 51 id. 402, 422; 52 id. 726; 54 id. 437; 59 id. 173.

STATE v BARTLEY (1894) 39 Neb. 353.

Mandamus. Respondent was the state treasurer. Relator was a national bank which had fulfilled all the conditions of the statute to entitle it to become a depository of state funds. The statute gave respondent power to deposit "the several current funds" in accepted depositories. Respondent contended that the various school funds and others, under ch. 50, Laws of 1891, were not "several current funds" within the meaning of the statute. The constitution provided that permanent educational funds could not be loaned, except on United States, state or county securities. Respondent further contended that depositing the permanent educational funds in the depositories, which were required to pay three per cent interest on the deposit, would be a loan and unconstitutional. Relator contended that respondent should be compelled to deposit some of the funds with it.

Norval, C. J. 1. The "several current funds" applied to all moneys of the state in possession or under respondent's control. 2. But placing funds in the depositories amounts to a loan; and the statute is therefore unconstitutional, in so far as it refers to permanent educational funds. Writ allowed.

Cited: 46 Neb. 719; 51 id. 131; 53 id. 337.

BANK OF COMMERCE v GOOS (1894) 39 Neb. 437.

Damages for failure to honor check. Plaintiff gave a check on defendant, in payment of taxes. The check was dishonored, plaintiff was arrested and imprisoned for fraudulently obtaining a tax receipt, and the newspapers gave the matter great publicity. At the time of drawing check, plaintiff had more than enough on deposit, to cover it, if defendant had not applied the deposit toward the payment of a note. Plaintiff alleged the above facts as special damage. Judgment for plaintiff. Error.

Ryan, C. The bank was not liable for the special damage alleged. It was only liable for such special damage as was directly and solely traceable to its wrongful act. Judgment reversed.

Cited: 43 Neb. 71; 51 id. 494; 54 id. 28; 58 id. 251, 335.

EXETER NAT. BANK v ORCHARD (1894) 39 Neb. 485.

Foreclosure of mortgage. Pleas: usury and payment. Defendant and his wife executed a deed absolute in form to secure the payment of a note given to W. Plaintiff, a national bank, organized and took over W's assets with notice of all the facts, and received a quitclaim deed of W's interest. The note was renewed from time to time both by W and by plaintiff, usurious interest being paid on each renewal, which amounted to more than the original debt. Defendant had sued the bank to recover the penalty provided for, by the United States Statutes on the usurious loans. Plaintiff contended this estopped defendant from pleading usury. The state statute provided that usurious interest should be applied to the principal. Judgment for defendant. Appeal.

Irvine, C. 1. The bank took the assets of W with notice, and subject to all equities. 2. The notes being usurious, the payments made by defendant should be applied to the principal. 3. Defendant was not estopped from pleading usury in the transactions with W. 4. The defense of usury applies to all renewals as well as to the original loan, and payments of interest will be applied on the principal. 5. While the remedies of the federal statutes for penalties for usury are exclu-

sive, a debtor may avail himself under the state law of any defense which accrued before he knew the bank owned the note. Judgment affirmed.

Cited: 46 Neb. 387; 58 id. 338.

McGHEE v FIRST NAT. BANK (1894) 40 Neb. 92.

Where a note has been given to a national bank, to cover interest shown to be usurious, the bank will not be permitted to foreclose a mortgage given to secure the note, and the interest will be declared forfeited.

Cited: 46 Neb. 386; 53 id. 95.

BUFFALO CO. NAT. BANK v SHARPE (1894) 40 Neb. 123.

Foreclosure of mortgage. Defendant S gave G his note, a real estate mortgage executed by himself and wife, and a chattel mortgage on four horses to secure it. Plaintiff bought the note and mortgages of G. Pleas by S's wife: no consideration and fraud. Pleas by S: that the note was given as a renewal; usury; and that plaintiff had knowledge of the equities. G, a director of plaintiff, took the note individually and the bank had no notice. The wife voluntarily executed the mortgage. The horses were sold contrary to the terms of the mortgage. There was no evidence that the horses were sold for less than their true value. Decree for plaintiff. Appeal.

Harrison, J. 1. The bank was not bound with the knowledge or by the acts of G, because he acted in behalf of his own interests, dealing with the bank as an individual, and in no way representing it. 2. The wife had power to make the mortgage, and is bound thereby. 3. There was no evidence of damage from the sale of the horses. Decree affirmed.

Cited: 42 Neb. 877; 46 id. 918; 47 id. 640; 50 id. 659; 53 id. 411, 581, 595; 59 id. 318.

STATE v STATE BANK OF WAHOO (1894) 40 Neb. 192.

Insolvency proceedings in the supreme court. A receiver was appointed by the state to wind up the affairs of defendant, an insolvent state bank. The receiver filed a petition to compel parties, who had received an interest in an electric light plant by a conveyance from a former owner of the bank, to show cause why that interest should not be declared an asset of the bank. The matter was sent to a referee that the state was not a proper party and that the court did not have jurisdiction. Petition dismissed. Exceptions.

Ryan, C. 1. The state is not a proper party to bring an action in the nature of a creditor's bill to determine the good faith of a transfer of property. 2. The receiver should bring the action in his own name, and the supreme court does not have original jurisdiction of such an action. Exceptions overruled.

ARNOLD v WEIMER (1894) 40 Neb. 216.

Attachment. Defendant owned a bank, organized under the state law. Plaintiff, a depositor, commenced a suit in the district court, to recover his deposit, and attached the bank's real estate. On the same day the bank suspended payment, and subsequently a receiver was appointed. By statute, there was nothing to prevent the district courts from exercising jurisdiction. There was nothing to show how the receiver became a party to the suit. The receiver contended that the assets of a state bank, like those of a national bank, cannot be attached, from the moment of insolvency. The court at the receiver's instance, enjoined the sale of the property. Judgment for plaintiff. Error.

Ragan, C. 1. The property of an insolvent bank organized under the state law is not exempt from attachment, and a lien of attachment already vested, is not dissolved by the subsequent appointment of a receiver. 2. The receiver took the assets of the bank subject to all existing equities. 3. The district court had jurisdiction to issue attachments against the assets of a bank. 4. The receiver should have petitioned to be made a party to the suit. 5. The injunctions should not have been granted. Judgment affirmed.

Cited: 40 Neb. 225; 57 id. 175, 176.

ARNOLD v GLOBE INVESTMENT CO. (1894) 40 Neb. 225.

Judgment affirmed, on the authority of *Arnold v Weimer*, 40 Neb. 216, in which the facts are substantially the same.

ROBERTSON v BUFFALO CO. NAT. BANK (1894) 40 Neb. 235.

To recover a subscription. Defendant, a national bank, by its president, signed a subscription paper to donate money for a factory. The directors and stockholders did not authorize or ratify the subscriptions. The bank did not receive any benefit from the contract, and it had no power to make donations. Judgment for defendant. Error.

Ragan, C. 1. Making donations of its funds is not part of the business for which a national bank is incorporated. 2. The president having acted beyond the scope of his authority, the bank is not bound in the absence of authorization or ratification of his act. Judgment affirmed.

Cited: 52 Neb. 539.

STATE v NEBRASKA SAV. BANK (1894) 40 Neb. 342.

Original proceedings to wind up the affairs of a bank. Defendant was an insolvent state bank. Other banks, which were creditors, petitioned to file claims against defendant. The petitioners had taken defendant's notes partly secured by collaterals, and, contending they should share in the general assets of the bank, offered to surrender the collateral to be collected and disposed of by the receiver. Demurrer.

Harrison, J. 1. The petitioners should be entitled to prove their claims against the general assets. 2. All sums arising from the collaterals should be deducted from the amount of the claim. The balance of the claim should be allowed and, before each payment of a dividend from the general assets, any sums derived from collaterals between that time and the payment of the preceding dividend, should be deducted. 3. The collateral should be surrendered to the receiver before allowing the claim. Overruled. Judgment for petitioners.

Cited: 61 Neb. 694.

KIRKWOOD v FIRST NAT. BANK (1894) 40 Neb. 484.

On lost certificate of deposit, by payee. The certificate was payable "on return" and "in current funds." It contained a statement that it should bear interest if left six months, but no interest after six months. The petition asked for a money judgment. The answer alleged that plaintiff had not produced the certificate, nor given an indemnity bond, and prayed the execution of such bond. The case was tried by the court, a jury having been expressly waived. The code abolished formal distinctions between actions at law and suits in equity. Plaintiff claimed that the certificate was lost after six months, and that it was never indorsed. The court found that plaintiff recover only the amount of the certificate. Judgment that defendant pay the amount into court to be delivered to plaintiff on execution of an indemnity bond. Error, by plaintiff.

Irvine, C. 1. If the petition states a cause of action either at law or in equity, the court may administer appropriate relief, regardless of the form of action. 2. Stipulations in a certificate that is payable "on return" or "in current funds" do not destroy its negotiability. 3. A stipulation in a certificate that it shall bear interest only if left for a certain time, and shall not bear interest after a certain date, does not render it non-negotiable; reasonable time for presentment would be before the end of the interest-bearing period, and a purchaser within that time would be a purchaser before maturity. 4. In actions tried by the court there must be a general finding, and if the finding be vague, it will not sustain a judgment. 5. Plaintiff is entitled to absolute judgment if the certificate was non-negotiable or past due, otherwise a bond of indemnity must be given. Judgment as to bond reversed.

Cited: 40 Neb. 497; 53 id. 396.

KIRKWOOD v EXCHANGE NAT. BANK (1894) 40 Neb. 497.

The questions in this case were the same as those decided in the case of *Kirkwood v First National Bank of Hastings*, *supra*.

THOMAS v CITY NAT. BANK (1894) 40 Neb. 501.

On promissory note and guaranty. E indorsed notes and delivered them to the president of the defendant, and defendant sold them to plaintiff giving a written guaranty of payment. Defendant contended that the bank never owned the notes, and that the president's act was not within his authority. Plaintiff contended that the bank received the benefit and ratified the president's act by retaining the proceeds of the sale. The court refused to instruct that plaintiff had the right to rely on the president's apparent authority, but did instruct that the guaranty was not within the line of the banker's business. Judgment for defendant. Error.

Irvine, C. 1. Defendant had power to guaranty the payment of a note as incidental to its sale. 2. The retention by the bank of the proceeds, amounted to a ratification of the president's act. Judgment reversed.

Cited: 52 Neb. 446; 58 id. 713.

HAAS v BANK OF COMMERCE (1894) 41 Neb. 754.

On promissory note. Pleas: fraud in the inception of the note, failure of consideration, payment and other securities sufficient to pay the debt. The answer also denied plaintiff's legal incorporation. Defendant, through the fraudulent representations of the Bank of O, gave his note for stock which never was issued. To secure a loan from plaintiff, the Bank of O pledged this note among others. It offered in evidence its articles of incorporation, and proved that it acted under such articles for some time. Defendant contended that the other collateral should be exhausted, before action against him. Plaintiff received a note payable to itself, in exchange for a note of A, which had been given for one of the other notes held as collateral for the debt of the Bank of O. Judgment for plaintiff. Error.

Irvine, C. 1. The articles of incorporation, and the fact of acting thereunder, were proper evidence. 2. The articles of incorporation and the acts thereunder show a de facto bank. 3. A bank may enforce any or all collaterals held by it, and does not have to proceed in any particular order. 4. Fraud being shown, plaintiff can only recover for the unpaid portion of the debt for which the note was pledged. 5. In determining the balance due on the debt of the Bank of O, plaintiff was bound to treat the note of A as paid in full. Judgment reversed unless modified by agreement.

Cited: 44 Neb. 79; 49 id. 732; 50 id. 245; 58 id. 408; 60 id. 712; 61 id. 666.

SMITH v FIRST NAT. BANK OF CRETE (1894) 42 Neb. 687.

To recover a penalty for taking usurious interest. Sec. 5198, U. S. R. S., relating to national banks, allows the recovery of twice the amount of usurious interest paid, provided the action be brought within two years from the time the usurious transaction occurred. Defendant discounted plaintiff's note dated August 10, 1886, at a usurious rate of interest which was reserved. The first actual payment on the note was made March 11, 1887, and the balance due on the principal and interest of the note was paid the following June. This action was begun February 16, 1889. Judgment for plaintiff on causes of action other than the above. Error by plaintiff on the ground that judgment awarded was too small.

Ryan, C. The limitation of two years dates from the payment in fact, and not from constructive payment by way of discount. Judgment reversed.

Cited: 42 Neb. 759.

INGWERSEN BROS. v EDGECOMBE (1894) 42 Neb. 740.

To foreclose mortgage. Defendant was receiver of a bank. T, an officer of the bank executed the mortgage with the cashier, to secure pre-existing indebtedness of the bank to T, evidenced by a certificate of deposit for \$5,000. T knew the bank was insolvent when the mortgage was made. The bank suspended business upon the following day. The certificate and the mortgage were transferred to plaintiff, who knew the facts. The mortgage was intended as a preference, if the bank failed. Judgment for plaintiff. Appeal.

Post, J. Officers of an insolvent bank, having claims against it, cannot obtain a preference over the general creditors. Judgment reversed.

Cited: 45 Neb. 552; 50 id. 289, 417; 51 id. 640; 52 id. 840; 53 id. 672; 54 id. 503; 55 id. 91; 57 id. 216; 58 id. 187; 60 id. 199.

LANHAM v FIRST NAT. BANK OF CRETE (1894) 42 Neb. 757.

To recover penalty for taking usurious interest. Sec. 5198, U. S. R. S., relating to national banks, provided for the recovery of twice the amount of usury paid, if the action be commenced within two years from the time of the usurious transaction. Plaintiff alleged that he borrowed from defendant the sum of \$2,500, at a usurious rate of interest, amounting to \$75, which was deducted from this amount; that the note was thereafter renewed every three months at the same usurious rate which he paid; that the last interest payment was made April 24, 1889, and that on July 24, 1889, he paid defendant \$2,500 in full of the amount due on the loan. The date of the petition was July 22, 1891. Demurrer. Sustained. Action dismissed. Error.

Harrison, J. The statute of limitations began to run from the time of the actual payment of the interest, on July 24, 1889, and not from its reservation by way of discount. Judgment reversed.

SALLADIN v MITCHELL (1894) 42 Neb. 859.

To foreclose mortgage. Plaintiffs were assignees of an insolvent bank. Defendants, M and wife, had given the bank the mortgage to secure a loan. Subsequently, defendant B bought the mortgaged premises, and deposited with the bank a part of the purchase price for M's benefit. The bank used some of it properly for the payment of taxes on the land and gave M a certificate for the balance. Later, B made a deposit evidenced by certificate to his own account; he also received an oral assignment of a certificate of deposit issued to his son. There was no estoppel pleaded. Plaintiff contended that B was estopped to set off his son's certificate as he had induced his son to prove it against the estate of the bank and he had received a dividend thereon. Defendants contended that the amounts represented by the certificates of deposit should be set off. They exceeded the amount secured by the mortgage. Judgment for defendants. Appeal.

Post, J. 1. The amount paid by the defendants M and wife, was properly allowed as a setoff. 2. The claim of B, for the amount of his deposit was properly set off. 3. The claim for the amount of the deposit made by B's son was properly set off as B is the real party in interest. 4. The question of estoppel cannot be raised. The assignee succeeded to the company's rights as they existed when the assignment was made. Judgment affirmed.

Cited: 49 Neb. 179, 734; 55 id. 193.

STATE v STATE BANK OF WAHOO (1894) 42 Neb. 896.

Insolvency proceedings brought in this court to wind up the affairs of a bank. The president and owner of defendant collected money for L, and sent him a certificate of deposit therefor. The bank became insolvent and plaintiff brought the action to procure appointment of a receiver. L filed a claim as a preferred creditor. L did not consent to become a depositor.

Ragan, C. 1. The relation of banker and depositor can be created only by consent of the parties. It was not shown here. 2. The certificate of deposit was a written acknowledgment that the bank held the funds for L. 3. The money being in trust, did not pass to the receiver of the bank; hence L's claim is that of a preferred creditor. Judgment for claimant.

Cited: 45 Neb. 432; 49 id. 788; 53 id. 468; 54 id. 732.

EXETER NAT. BANK v ORCHARD (1895) 43 Neb. 579.

To recover a penalty, for usury. The suit was to recover double the amount of certain payments of usurious interest, made by plaintiff, on money loaned him by defendant. Plaintiff had not repaid the loan to defendant. The National Banking Act provided that in case a national bank should charge a higher rate of interest, than that allowed by the state of its domicile, the person paying it, might recover twice the amount so paid. Judgment for plaintiff. Error.

Ragan, C. The payment of a usurious loan made by a national bank to a person is not a condition precedent to the right of such person to maintain an action against such bank, to recover double the amount of usurious interest paid to the bank by him, on such loan. Judgment affirmed.

Cited: 43 Neb. 584.

FIRST NAT. BANK v ORCHARD (1895) 43 Neb. 583.

Judgment affirmed on the authority of *Exeter National Bank v Orchard*, 43 Neb. 579, in which the same question appears.

SMITH v FIRST NAT. BANK (1895) 45 Neb. 445.

Replevin. In March, plaintiff sold Y & Co. certain goods. In June, defendant accepted a chattel mortgage on the goods, as security for cash advanced to Y & Co. Plaintiff claimed Y & Co. obtained the goods by fraud and that defendant knew of it, and contended that the loan on such security was ultra vires. There was no attempt to rescind the sale. The loan was for more than 10 per cent of the bank's capital. The government had not proceeded against the bank. A witness, who was not shown to know anything about the goods, testified generally as to the value. To prove Y was not the owner of land, a deposition of the county clerk was offered stating that the index of the county records did not show any land conveyed by Y. The court refused plaintiff's evidence of a statement furnished by Bradstreet's Agency in regard to Y's condition, such statement not being derived from information furnished by Y. The jury returned a verdict blank as to the amount of damages to defendant by reason of plaintiff's detention of the goods. The court then instructed the jury to assess the damages at 7 per cent of the value of the goods from the time they were taken under the writ. Judgment for defendant. Error.

Irvine, C. 1. The question in regard to the value of the stock of goods was improper. 2. It was immaterial what the county records showed in the way of conveyances by Y, and the contents of the records, not the index, should have been given if material. 3. The statement furnished by Bradstreet's Agency was properly excluded. 4. It was proper for the court to direct the jury how to assess the damages, and to instruct the jury how to correct an incomplete verdict. 5. Defendant was a bona fide purchaser. 6. Whether there was any attempt to rescind the sale within a reasonable time was properly left to the jury. 7. That the note was ultra vires cannot be raised here. Judgment affirmed.

NORFOLK NAT. BANK v SCHWENK (1895) 46 Neb. 381.

To recover a penalty for taking usurious interest. Plaintiff paid usurious interest to defendant, a national bank. The United States statutes provided that the receiving of interest at a rate greater than that allowed by the state law forfeited the entire interest, and twice the amount of interest could be recovered if action were brought within two years. A state statute provided that the usurious interest should be applied to reduce the principal. Plaintiff was allowed to set off the amount paid as interest against defendant's counterclaim on renewal notes. Some of the transactions were more than two years previous to the suit. Judgment for plaintiff. Error.

Norval, C. J. 1. The federal statute applies, and under its provisions the usurious interest cannot be set off and deducted from the principal of the loan made by a national bank. 2. An action to recover a penalty for a national bank taking usurious interest must be commenced within two years from the occurrence of the transaction. Judgment reversed.

Cited: 46 Neb. 664; 50 id. 653; 53 id. 95; 58 id. 335, 344, 345.

LANHAM v FIRST NAT. BANK OF CRETE (1896) 46 Neb. 663.

Replevin. Defendant, a national bank, received usurious interest for a loan to plaintiff. The note was renewed from time to time, and usurious interest paid thereon. On the last renewal, plaintiff gave a chattel mortgage on the property in question. On default, defendant seized the property under the mortgage. By a state statute, usurious interest was to be deducted from the principal of the loan. The amounts paid by plaintiff were greater than the principal of the loan. Plaintiff contended that the act of Congress, giving state courts jurisdiction over suits against banks, made the state law in regard to usury apply. Judgment for defendant. Error.

Norval, J. 1. Usurious interest charged and received by a national bank, cannot be deducted from the principal. The federal, not the state, statute governs. 2. The act of Congress giving state courts jurisdiction in suits by and against national banks, did not make the state usury laws applicable. Judgment affirmed.

Cited: 46 Neb. 668; 50 id. 653.

NICHOLS v STATE (1896) 46 Neb. 715.

Indictment, for receiving deposits knowing the bank was insolvent. Defendant was the cashier of a state bank and received a deposit. He offered to prove that a customer of the bank had overdrawn his account, and that the deposit, made by the customer after defendant knew of the bank's insolvency, was a payment of such overdraft and immaterial. Refused. Conviction. Error.

Ragan, C. 1. The receipt of money in payment of a debt did not violate the statute. 2. The relation of debtor and creditor is presumed to arise between a bank and its customers; and a deposit is presumed to be general. 3. The relation being that of debtor and creditor, the presumption is that the deposit was in payment of the overdraft, and the evidence should have been received. Judgment reversed.

CADY v SOUTH OMAHA NAT. BANK (1896) 46 Neb. 756.

For an accounting. On September 23, plaintiff shipped stock to F, in the name of F & Co. On September 26, the checks for the proceeds of the stock were collected by defendant, and the proceeds credited to F's open account which was overdrawn. On September 28, plaintiff sent defendant for collection, a draft on F & Co. for the proceeds of the shipment and the draft was dishonored. At that time, defendant knew that the credit it had given F was the proceeds of the stock sold for plaintiff. Decree for defendant. Appeal.

Post, C. J. 1. Plaintiff's right to the money is not affected by the deposit in F's name, and he can recover the same. 2. Regardless of the question of notice, the money belonged to plaintiff, and the bank could not apply it to F's indebtedness. Decree reversed.

Cited: 47 Neb. 148, 283, 528; 48 id. 430; 52 id. 100; 53 id. 235; 61 id. 365.

BURKE v UTAH NAT. BANK (1896) 47 Neb. 247.

On contract. Defendant agreed to accept drafts, drawn by plaintiff on H & M, to the value of stock shipped to defendants. A draft drawn on October 23 was accepted on October 29. On October 29, a shipment was made. On November 8, another draft was drawn, not covered unless by the shipment of October 29. Defendants refused to accept the draft of November 8, H & M having failed. Defendants contended that they could show that the draft of October 23 was covered by the shipment of October 29, and that the draft of November 8 was therefore covered by no shipment. Plaintiff contended that defendants, having accepted the draft of October 23, were estopped to deny that it was covered by a shipment. The court instructed that if defendants accepted the draft of October 23, plaintiff had the right to presume that it was covered by prior shipments and was warranted in making advances on stock thereafter shipped, and that defendant had no right to apply the proceeds of future shipments to payment of the draft of October 23. Judgment for plaintiff. Error.

Irvine, C. 1. Defendants were estopped to deny that a draft accepted by them was drawn in accordance with their contract with plaintiff, and properly covered by shipments. But in accepting a draft, defendants did not give plaintiff to understand anything more than that stock of that value had been shipped prior to the time of acceptance. 2. The instructions were misleading. Judgment reversed.

Cited: 61 Neb. 27.

STATE v HILL (1896) 47 Neb. 456.

On bond. Defendants were principal and sureties on a bond given by the state treasurer, on his second term of office. The principal had written the bond which included his name, acknowledged it, and signed the oath, but failed to sign the bond at its end. While in office, the principal had deposited money and evidences of value belonging to the state, in a bank, and received certificates of deposit not subject to check. The certificates covered deposits made during both terms, and were taken for their face value. At the expiration of his terms, and after the approval of his accounts by the state auditor, the certificates and a small amount in cash were turned over to his successor. By statute, the treasurer was required to account for and turn over, all moneys received by him. His successor indorsed the certificates, which he had accepted at their face value, made the account an open one and drew checks against it. The bank failed. The successor filed his claim against the receiver and commenced suit to enforce it. The state contended

that certificates of deposit of a bank were not moneys, within the meaning of the statute, and that payment could only be made in cash. Verdict for defendants. Motion for new trial.

Ryan, C. 1. The bond was signed by the principal. 2. Certificates of deposit are moneys within the meaning of the statute. 3. The State had power to ratify and did ratify the successor's act of accepting the certificates. 4. Indorsing and turning over the bank's certificates of deposit, was a payment by the principal which relieved the sureties on the bond. Motion overruled.

Cited: 48 Neb. 9; 50 id. 185, 903; 52 id. 4; 53 id. 139, 301, 411; 57 id. 303; 59 id. 352, 476, 481; 61 id. 579.

NEITZEL v LYONS (1896) 48 Neb. 892.

To appoint a receiver. On the petition of plaintiff, a director of a savings bank, and on the voluntary appearance of the bank, entered by its president, also one of the directors, a receiver was appointed. N, the cashier, moved to vacate the appointment. There was no evidence of insolvency or misconduct. The appointment was not at the instance of a creditor of the bank, nor of the state banking board. There was no objection to the competency of the cashier to make the motion, and the motion was resisted only on the merits. Motion overruled. Error.

Ryan, C. 1. No objection having been taken that the cashier was not a party to the action, and the motion being resisted solely on its merits, all rights of objection were waived. 2. No equitable ground for the appointment of a receiver at the instance of a stockholder was shown. Reversed.

NEBRASKA NAT. BANK v FERGUSON (1896) 49 Neb. 109.

On promissory notes. Defendants were members of a corporation which gave the notes to plaintiff. The notes purported to be signed by the corporation by its proper officer. Plaintiff had dealt with the corporation as such, and sued the corporation and recovered judgment against it on the notes. Plaintiff contended that the articles of incorporation were defective, and that defendants were liable as partners. The corporation ratified the transaction. Judgment for defendants. Error.

Norval, J. 1. The bank was estopped by the judgment from denying that it dealt with a corporation, instead of with defendants as partners. 2. The notes were made by the corporation and not by its members. Judgment affirmed.

CADY v SOUTH OMAHA NAT. BANK (1896) 49 Neb. 125.

Rehearing. The original opinion reported in 46 Neb. 756 is approved.

CAMPBELL v FARMERS AND MERCHANTS BANK (1896) 49 Neb. 143.

On certificate of deposit. Bank of E issued a certificate to plaintiff's assignor C. Thereafter Bank of E sold part of its assets to defendant, which agreed to pay liabilities of Bank of E up to a certain amount. C's certificate was not presented, until after that amount was paid by defendant. Plaintiff claimed that defendant was the successor of Bank of E, and having taken the assets, assumed its liabilities; and that the arrangement between defendant and Bank of E amounted to an unlawful preference to certain creditors. The incorporators of defendant were depositors and members of the partnership of Bank of E. Judgment for defendant on this cause of action. Error.

Ragan, C. 1. The purchase of part of the assets of a co-partnership or corporation by a new corporation organized by the members of the old corporation or co-partnership does not raise a conclusive presumption that the new corporation assumed the liabilities of the old. 2. A co-partnership has the right to prefer creditors, if the preference is made for an honest purpose. Judgment affirmed.

Cited: 51 Neb. 225; 54 id. 516, 797; 55 id. 209; 57 id. 260, 350.

FARMERS LOAN AND TRUST CO. v FUNK (1896) 49 Neb. 353.

To enforce stockholder's liability. Plaintiff, a creditor, sued defendant, a stockholder of an insolvent bank. Plaintiff filed his claim with the receiver but did not reduce it to judgment. The constitution provided that a stockholder was liable to a creditor of the bank for twice the amount of his stock, and that before the

individual liability of a stockholder could be enforced, the amount of the debt must be judicially ascertained and the assets of the corporation exhausted. Judgment for defendant. Error.

Ryan, C. 1. The creditors of a bank have no right of action against the stockholders thereof, until they have reduced their claims to judgment, and executions issued thereon are returned. 2. The liability of a bank stockholder, individually, under the constitution requires no supplementary statutory legislation to render it effective. 3. The individual liability of a stockholder is for the purpose of creating a trust fund for the benefit of all the creditors, and such liability must be enforced by a creditor for the benefit of all, or by the receiver of the bank, if there is one. Judgment affirmed.

Cited: 50 Neb. 742; 52 id. 836; 54 id. 595; 55 id. 97; 56 id. 203, 204, 783; 57 id. 607; 59 id. 65; 60 id. 171; 61 id. 827.

AUSTIN v TECUMSEH NAT. BANK (1896) 49 Neb. 412.

On certificate of deposit. Plaintiff held the certificate made by R and H, private bankers. The Bank of R and H was organized under state laws, and took over the assets of R and H. The Bank of R and H liquidated and thereafter defendant, a national bank, was organized with the same officers and stockholders, and conducted business in the place formerly used by the Bank of R and H. Plaintiff contended that defendant was merely a continuation of the Bank of R and H, under the National Banking Act. There was nothing in the pleadings to show that the transaction was fraudulent. Judgment for defendant. Error.

Post, C. J. 1. The Bank of R and H, having liquidated before defendant was organized, the latter cannot be considered a continuation of the former under the National Banking Act. 2. Under the common law newly organized corporations are liable for the debts of established firms to whose business they have succeeded, only in cases where the transfer of property amounts to a fraud upon creditors of the old concern. Judgment affirmed.

Cited: 50 Neb. 522; 51 id. 801, 806; 57 id. 506.

BERNSTEIN v COBURN (1896) 49 Neb. 734.

On promissory notes. Plaintiff was the assignee of an insolvent bank holding notes made by defendants. Defendants separately pleaded that they should be allowed to set off the amount of their deposits in the bank at the time of its failure. Demurrers. Sustained. Judgment for plaintiff. Error.

Irvine, C. The deposits should be set off. Judgment reversed.

CAPITAL NAT. BANK v COLDWATER NAT. BANK (1896) 49 Neb. 786.

To enforce a trust. Plaintiff, a national bank, received a note indorsed to it by defendant, also a national bank. Plaintiff then returned the note to defendant for collection. H, the maker of the note, had sent defendant funds to meet it. Defendant neglected to remit to plaintiff and failed. Defendant contended that no trust arose, because the identical money could not be traced; and that if this was a trust fund, interest could not be charged. A statute gave interest on money, received to the use of another, and retained without the owner's consent. Judgment for plaintiff. Error.

Ryan, C. 1. This fund coming to a bank for a particular purpose was a trust fund. It must be paid in full though the actual funds are not traceable. 2. Interest is allowed on trust funds misappropriated. Judgment affirmed.

Cited: 49 Neb. 794, 795, 796; 52 id. 3, 67; 54 id. 731; 61 id. 184.

CAPITAL NAT. BANK v GENESEE FRUIT CO. (1896) 49 Neb. 793.

Ryan, C. The decision contained in Capital National Bank v Coldwater National Bank, 49 Neb. 786, governs this case. Judgment affirmed.

CAPITAL NAT. BANK v CUPPLES WOODENWARE CO. (1896) 49 Neb. 794.

Ryan, C. The decision contained in Capital National Bank v Coldwater National Bank, 49 Neb. 786, governs this case. Judgment affirmed.

COLDWATER NAT. BANK v MAGOON (1896) 49 Neb. 795.

Ryan, C. The decision contained in Capital National Bank v Coldwater National Bank, 49 Neb. 786, governs this case. Judgment affirmed.

WESTERN WHEELED SCRAPER CO. v SADILEK (1897) 50 Neb. 105.

On check. Defendant, the county treasurer, gave his check, drawn on the Bank of W, to plaintiff on August 12. The check was forwarded by plaintiff's banker to the Bank of W, for collection, on August 15. The Bank of W failed on August 19, but never paid the check which was received on August 17. Defendant had on deposit in the Bank of W, ample funds to meet the check, from August 12 to August 19. Judgment for defendant. Error.

Post, C. J. 1. A bank which undertakes the collection of a customer's check is guilty of inexcusable negligence, in sending it direct to the drawee bank, instead of through the agency of some third person. 2. A customer's check is not designed for circulation as a medium of exchange, and should be presented for payment with dispatch and diligence. It was the duty of the drawee bank as agent for plaintiff to pay the check immediately, or to give notice of its dishonor, in order to charge the indorser and drawer. 3. The presumption is that the drawee knew that defendant had ample funds to meet the check in its hands from August 12 to August 19. Judgment affirmed.

TECUMSEH NAT. BANK v RUSSELL (1897) 50 Neb. 277.

To recover a certificate of stock. The defendant, F Bank, issued to defendant R, a certificate of its stock. R was a private banker, and plaintiff succeeded to part of his business, R remaining in existence to close out his business. R obtained a loan from the S Bank, pledging the certificate of stock as collateral. The certificate was transferred to the S Bank, and by them sold to the defendant B, cashier of plaintiff, who, upon R's request, took up the note held by the S Bank, by payment out of the funds of plaintiff without directors' consent. B sold the certificate to D, who intervened claiming ownership. The F Bank asked that the certificate be canceled, as it had been obtained by falsely representing the value of certain stock pledged for its payment. Decree for plaintiff. Appeal.

Irvine, C. 1. The legal title of the stock passed to B, who purchased as a trustee with funds unlawfully used for that purpose, which funds the cestui que trust may follow. 2. The fact that D derived title through B was sufficient to arouse suspicion, and he cannot claim to be a purchaser without notice as to the dispute of ownership. 3. The F Bank waived its right to rescission by transferring the certificate to the S Bank. Decree affirmed.

Cited: 51 Neb. 553.

BRANCH v UNITED STATES NAT. BANK (1897) 50 Neb. 470.

On bank check. Plaintiff indorsed the check in blank, delivered it to defendant C, a national bank, for collection, and it was so entered on C's books. It was indorsed "collect for account of C," and sent to defendant collecting agent for C, with a letter of directions, showing that it was sent for collection only. C failed, and was indebted to defendant. Defendant, contending that plaintiff's unrestricted indorsement authorized it to treat C as the owner, refused to pay. The money collected was never remitted to C, nor to its receiver. Decree for plaintiff. Appeal.

Post, C. J. 1. Paper indorsed for collection gives the holder only such title as will enable him to demand payment and enforce collection. The owner may control the collection and may intercept the proceeds thereof in the hands of an intermediate agent. 2. The mere crediting of the remitting bank by a correspondent employed by it to make collections, cannot be held to create a defense to an action by the owner for the proceeds. Decree affirmed.

Cited: 55 Neb. 468.

TECUMSEH NAT. BANK v BEST (1897) 50 Neb. 518.

To recover deposit. The petition alleged that defendant was a national bank properly organized; that it was the successor of the banking firm of R & H, and did business in the same building, took over the property, and assumed the liabilities of that firm; and that its officers had all been members of the firm; that each member of the firm took a large amount of stock in defendant in exchange for the firm property; that the deposit, which was still unpaid, was made with

the firm, and assumed by defendant. Defendant contended that the petition did not state a cause of action. Judgment for plaintiff. Error.

Ryan, C. The petition stated a cause of action, as it disclosed an assumption by defendant of the firm's debts. Judgment affirmed.

Cited: 51 Neb. 808.

TECUMSEH NAT. BANK v SAUNDERS (1897) 50 Neb. 521.

On certificates of deposit. The certificates were issued by the firm of R & H, to plaintiff. Defendant was a bank organized by the members of that firm, which then transferred part of its assets, deposits, and the bank building to defendant. The firm continued to use the same room with the bank for winding up its business, and from time to time made payments on the certificates. Occasionally the bank made the payment, but was immediately reimbursed by the firm. The stockholders of the bank changed. Plaintiff had no knowledge that defendant had taken over any of the assets of the firm. There was no evidence of an agreement that the bank should assume all the indebtedness of the firm. Judgment for plaintiff. Error.

Ryan, C. The bank was not liable, as there was no proof of an undertaking to pay the firm's debts. Judgment reversed.

MONTGOMERY v ALBION NAT. BANK (1897) 50 Neb. 652.

On promissory note by payee against maker. Defenses: usury, and setoff of usurious interest paid. Plaintiff was a national bank and was liable to a penalty of double the usurious interest taken, if action were brought within two years. Demurrer to the answer. Overruled, as to three payments made within two years prior to the commencement of the action, and sustained as to the other payments. An attachment issued, and the costs thereon were taxed in favor of the bank. By a state statute, a person paying usurious interest was allowed costs. Defendant contended that the usurious interest should be deducted from the principal and offset against the note. Judgment for plaintiff. Error.

Norval, J. 1. Usurious interest received by a national bank cannot be deducted from the principal. 2. Defendant was entitled to the costs of the attachments. 3. The usurious interest, paid more than two years before action brought, could not be offset against the note. Judgment reversed, as to awarding the bank costs in the attachment. Otherwise, affirmed.

STATE v GERMAN SAV. BANK (1897) 50 Neb. 734.

Insolvency proceedings to wind up the affairs of a bank. A receiver was appointed of defendant, a state bank. The constitution provided that claims against a corporation should be ascertained, and the assets of the company exhausted before the stockholder's liability on unpaid stock could be enforced. The Banking Act provided that when a receiver reported that the assets were not sufficient to pay the bank's debts, the court might order him to collect from the stockholders. The receiver reported the amount of unpaid capital stock, and that the assets of the bank were not sufficient to pay its debts within a reasonable time. The court ordered the receiver to immediately proceed against the stockholders. Defendant contended that the act was unconstitutional. The receiver had not exhausted the bank's assets, and the amount of the debts had not been judicially ascertained. Defendant moved to discharge the order. Denied. Appeal.

Irvine, C. 1. The liability for unpaid subscriptions can be enforced only after the debts have been judicially ascertained and the assets of the bank exhausted. 2. The statute, so far as it attempts to authorize the collection of unpaid stock subscriptions before a determination of the debts and the exhaustion of the bank's assets, is unconstitutional. Order reversed.

Cited: 53 Neb. 673; 54 id. 595, 706; 55 id. 96; 58 id. 375; 59 id. 65; 60 id. 394.

McINTOSH v JOHNSON (1897) 51 Neb. 33.

On deposit. Defendant was the surviving partner of a firm of private bankers, and the plaintiff was a county treasurer, whose predecessor had deposited county money with the bankers. After the death of the partner and suspension of business, defendant and plaintiff's predecessor settled the indebtedness for about one-third of the amount admitted to be due, and a receipt was given in full for all

claims. By statute, any officer who had made a deposit of public money, or his successor, could maintain an action to recover it. Defendant contended that there was an accord and satisfaction. Judgment for defendant. Error.

Norval, J. 1. The acceptance of part of a liquidated demand past due, in full settlement, is not a bar to an action on such demand. 2. There was no consideration for the agreement to accept a lesser sum than the amount due, and therefore no accord and satisfaction. Judgment reversed.

Cited: 51 Neb. 774.

IN RE STATE TREASURER'S SETTLEMENT (1897) 51 Neb. 116.

Settlement of account. On termination of B's term of office as treasurer of the state, there were public funds on deposit in certain banks. The statute required a bank, in order to become a depository, to give bond approved by the governor, secretary of state, and attorney-general. It also provided that the treasurer could not make deposits for more than half the amount of the bond given. Some of the bonds were approved by all but the governor, who was present at the time. The treasurer deposited more than half the amount of the bonds. He turned over to the succeeding treasurer, accounts instead of physical funds. The law required a treasurer to turn over to his successor all money and books.

Norval, J. 1. A bond approved by two or three persons, whose approval is required, is sufficient if the third person is present. 2. The treasurer having made the deposit contrary to law, the sureties on the bond are not liable. 3. It is not necessary for a treasurer to turn over the actual money to his successor. Judgment accordingly.

Cited: 53 Neb. 337.

HARRINGTON v CONNOR (1897) 51 Neb. 214.

On promissory note, made by defendant, a clerk in a state bank, payable to the cashier, and transferred by him to the bank. Plaintiff, the receiver of the bank, sued on the note. During the trial, by order of court, all the assets of the bank were transferred by the receiver to J. The cashier of the bank practically owned all the stock. Defendant contended that J should have been a party to the suit. Defendant further contended that the note belonged to the cashier, rather than to the bank. Judgment for plaintiff. Error.

Harrison, J. 1. A bank does not cease to exist, because one person owns practically all the stock. 2. In an action by the receiver of a bank to recover the assets, any defense not good as against the rights of creditors of the bank, cannot prevail against the receiver. Judgment affirmed.

Cited: 53 Neb. 21; 58 id. 820.

FIRST NAT. BANK OF TOBIAS v BARNETT (1897) 51 Neb. 397.

To recover penalty, for receiving usurious interest. Defendant received usurious interest on loans to plaintiff. Some of the usurious notes had been entirely paid, some had been renewed, and part of the interest had been taken more than two years before the action was commenced. U. S. R. S. gave a penalty for receiving usurious interest, and fixed two years as the time within which an action to enforce the penalty should be brought. Plaintiff proved all the transactions from the original contract. Defendant contended that a penalty could not be recovered, where the notes had been entirely paid. The court refused to instruct that national banks are not governed by the state usury laws; that the only penalty for taking usurious interest was that imposed by the National Banking Act; that payments made and indorsed upon a note to a national bank are first applied to the principal until that is paid. Judgment for plaintiff. Appeal.

Irvine, C. 1. The evidence of all the transactions was proper. 2. The instructions were properly refused. 3. The penalty could be recovered, though the notes were fully paid. Judgment affirmed.

NEBRASKA NAT. BANK v JOHNSON (1897) 51 Neb. 546.

To establish a trust of real estate. Defendant, while janitor for plaintiff, a bank, stole some of the plaintiff's money and with it bought the real estate in question. The evidence of the theft was circumstantial. Defendant contended that a trust did not arise in the proceeds of property stolen by a servant. There was evidence that defendant had applied a small sum of his own in payment of

the realty. Decree, that defendant held the property in trust for plaintiff, and that plaintiff pay the defendant the amount of the defendant's own money paid on the land. Appeal.

Post, C. J. 1. It was not necessary to produce evidence sufficient to convict the defendant. 2. A trust arose in favor of the plaintiff, which was enforceable by an action in equity. Judgment affirmed.

WYMAN v NAT. BANK OF COMMERCE (1897) 51 Neb. 636.

On deposit. Plaintiff was the receiver of an insolvent insurance company, which had deposited with defendant bank a sum intended as a trust fund for creditors. The codefendants were directors and stockholders of the insurance company. They borrowed the entire sum from the bank, giving their note therefor, and deposited it to the credit of the insurance company. Subsequently, they fraudulently obtained the check of the insurance company for the amount of the deposit, and paid the note with it. The bank had no knowledge of the fraud or that the insurance company was then insolvent, or that the fund was for a special purpose. Judgment for plaintiff against codefendants, and against the plaintiff, in favor of defendant bank. Appeal by plaintiff.

Ryan, C. The bank was not liable. Judgment affirmed.

STATE v MIDLAND STATE BANK (1897) 52 Neb. 1.

Insolvency proceedings. The treasurer of a school district deposited public money in his own name with defendant. Defendant knew it was public money. X was appointed receiver of defendant. The school district filed its claim. Order preferring the claim of the school district. Appeal.

Post, C. J. A custodian of public money having made a deposit thereof in his own name, a trust results in favor of the beneficial owner, which, on the insolvency of the bank receiving such funds with notice, is chargeable on its estate to the prejudice of non-preferred creditors. Affirmed.

Cited: 54 Neb. 732; 61 id. 184.

PENDERSON v SOUTH OMAHA NAT. BANK (1897) 52 Neb. 95.

On deposit. G, after selling goods for plaintiff, and depositing the proceeds in his own name with defendant, failed. Defendant, having no notice of plaintiff's claim, had paid out the deposit on G's checks. Plaintiff contended that G, being insolvent when the goods were sold, and being indebted to defendant, a trust arose in favor of plaintiff. Judgment for defendant. Appeal.

Ryan, C. A trust was not impressed on the deposit. Judgment affirmed.

LEDERER v UNION SAV. BANK (1897) 52 Neb. 133.

To establish a trust. W made a note to plaintiff L, and one to M, who indorsed it to the S Bank, coplaintiff. W died. L sent a copy of his note to M, to prove the claim against W's estate. For the same purpose the S Bank sent its note to M, indorsed for collection. M prosecuted a claim in his own name embracing these and other notes. Attached to the account were copies of the notes. M induced defendant's cashier to advance money to him on the note of M's administrator, claiming that he had presented the claims for allowance and had paid them himself, and agreeing to assign the judgment against the estate to defendant when entered. The cashier examined the records so far as to see that M's claim was allowed, but he did not examine the claim itself. M made no pretense of acting as plaintiff's agent in dealing with defendant.

Irvine, C. 1. The judgment on the claims was an adjudication of M's ownership only, as against the administrator. 2. Defendant was charged with notice of M's relations with plaintiff, as the situation was such as to put it on its inquiry. It is therefore in no better position than M would be, and is to be charged as trustee for plaintiffs. Judgment affirmed.

SHABATA v JOHNSTON (1897) 53 Neb. 12.

On promissory notes, by holder against indorser and makers. One note was made by X and indorsed by F, and the other made by F. The notes were indorsed to a state bank, after its original articles of incorporation had expired, and sold

by its receiver, under order of court, to plaintiff. By oral evidence and a copy of the bank's records, plaintiff gave proof of an extension of the bank's charter beyond the date when suit began. Defendant F claimed to set off against plaintiff, his firm's claim, unmatured at the time of suit. The court refused F's offer to prove that "demand and notice waived" had been inserted before his name without his consent, after his indorsement of X's note. F's note was to cover a transaction with the bank, while F and S were officers. S took the note and indorsed it for the bank. F contended that plaintiff took the note subject to all defenses against the bank; that, as S then or soon thereafter became the owner of all the bank stock, he alone was interested; that the charter having expired, plaintiff acquired no title. The errors were assigned jointly. Defendants voluntarily submitted to the court's jurisdiction before questioning it. Judgment for plaintiff. Error.

Ryan, C. 1. Defendants have waived all right to question the court's jurisdiction. 2. The record of the extension of the charter, the adjudication of insolvency, and the order allowing the sale, proved plaintiff's title. 3. F could not set off a claim due his firm. 4. The assignment of errors being joint, the error in refusing to receive the evidence in regard to the indorsement cannot be considered. 5. Plaintiff took the notes free from equities. 6. It is immaterial how or by whom the stock of the insolvent bank was owned. Judgment affirmed.

HIGGINS v HAYDEN (1897) 53 Neb. 61.

On bill of exchange. Plaintiff, having overdrawn his account in a bank, of which defendant became receiver, deposited the bill for credit. Knowing of the bank's insolvency, its president took the bill and sent it to its correspondent O, which collected and credited the proceeds to the bank. The proceeds were not mingled with other funds of the bank in O's possession. Interest was allowed. Judgment for plaintiff. Appeal.

Irvine, C. 1. The bill was received as a credit for plaintiff, and not for collection. 2. The bank, having accepted the deposit, knowing of its insolvency, was guilty of fraud, and plaintiff may rescind the contract of deposit, and recover the amount of the bill, before its proceeds have been mingled with the general assets. 3. That the bank took the bill for collection, and that the bank was guilty of fraud in the transaction, are not inconsistent allegations. 4. It was proper to allow interest. Judgment affirmed.

UNITED STATES NAT. BANK v GEER (1897) 53 Neb. 67.

Overruled on rehearing, in 55 Neb. 462.

TOMBLIN v HIGGINS (1897) 53 Neb. 92.

On promissory note against maker. Defense: usury. Defendant made a note to cover unpaid principal and usurious interest on a note held by a national bank. The note was made to plaintiff as president, and he sued as agent for the bank. Judgment for defendant. Error.

Post, C. J. 1. The plea of usury is good in an action by a national bank as to unpaid interest where the contract rate exceeds that prescribed by the National Banking Act. 2. Plaintiff is merely the representative of the bank. Judgment affirmed.

STATE v THOMAS (1898) 53 Neb. 464.

Insolvency proceedings. L filed a petition for preference with the receiver of an insolvent state bank. A, as agent for L, and for the bank, collected and deposited money, with the bank, in A's name, as agent. A check given by A to L, for L's share of the money, five days before the bank's failure, was not presented. L knew of the deposit. Decree for receiver. Appeal.

Norval, J. As the money was deposited by A with L's knowledge and consent, the deposit did not create a trust, and the petitioner is not entitled to a preference. Decree affirmed.

BENEDICT v CITIZENS BANK OF PLATTSMOUTH (1898) 54 Neb. 113.

For rent. Defendant leased its banking house from R, from whom plaintiff subsequently acquired the property by mesne conveyances. The lease was for a

term of years, and provided for payment of the rent at the bank, by placing it to the lessor's credit. At the time of making the lease, R was indebted to defendant. Defendant contended that the payment of rent for the entire term should be applied to reduce R's indebtedness. Plaintiff had no notice that the rent was to be applied in such way or that R was indebted to defendant. Judgment for defendant. Error.

Ryan, C. The bank could not apply the rent to reduce the indebtedness of the original lessor. Judgment reversed.

DERN v KELLOG (1898) 54 Neb. 560.

On drafts. Defendants, bankers, received the drafts from plaintiffs for collection. They were accepted and the time of payment was extended by defendants without plaintiffs' consent. Thereafter the acceptor conveyed all his property to defendants in satisfaction of a pre-existing debt, and failed to pay the drafts. The court charged that defendants were not liable if they pursued the usual custom of that place, by extending payment, even without plaintiffs' knowledge. Defendant contended that there was no proof of damage, and that the collection having been sent without special instructions, plaintiffs were presumed to have intended defendants to take the usual course. Judgment for plaintiffs. Error.

Irvine, C. 1. Securing a preference of its own claim and holding the drafts for so long a time showed bad faith, for which the bank was liable. 2. Plaintiffs did not assent to a custom that the bank would be negligent or practice fraud. 3. A prima facie case is made, if it is shown that there was a reasonable probability of collecting the draft, if due care had been used. Judgment affirmed.

Cited: 55 Neb. 428; 60 id. 38.

GERMAN NAT. BANK v FARMERS BANK (1898) 54 Neb. 593.

To enforce stockholders' liability. Plaintiff brought the action for the benefit of all creditors, and made the bank a defendant with the stockholders. The constitution made a stockholder liable, after the claims had been ascertained and the assets exhausted. The petition alleged that the "exact amount justly due has hereinbefore been ascertained, and the corporate property has been wholly and completely exhausted." Defendant's motion to strike out the allegation because indefinite, was overruled. Defendant contended that the action was in fact for the benefit of plaintiff alone, and that the bank should not have been made a party. Judgment for plaintiff for the full amount of each stockholder's statutory liability. Appeal.

Harrison, C. J. 1. The allegations in the petition were sufficient to show that the claims had been ascertained and the assets exhausted. 2. The action was for the benefit of all the creditors. 3. The bank was not improperly made a defendant. 4. The remedy is in equity, and not at law. 5. The court should have determined the amount of the claims, the amount due from each stockholder, and the amount pro rata required to satisfy the indebtedness in the present suit, such amounts to be collected by execution and paid into the hands of the receiver. Judgment accordingly.

Cited: 55 Neb. 97.

ALBION NAT. BANK v MONTGOMERY (1898) 54 Neb. 681.

Statutory penalty to recover double the amount of usurious interest. Defendant was a national bank, which knowingly received the interest from a partnership of which plaintiffs were the members. An act of Congress provided that a person paying usurious interest, could recover double the sum. Defendant contended that this statute was penal; and that only a natural person could sue for the interest. Judgment for plaintiff. Error.

Ryan, C. 1. An artificial as well as a natural person may collect double the usurious interest received by a national bank. 2. The statute is not penal; it does not create a penalty, but merely prescribes the mode of recovery. Judgment affirmed.

STATE v BANK OF COMMERCE (1898) 54 Neb. 725.

On deposit. The county treasurer deposited public money with defendant in his own name. The bank had notice of the facts. It failed, with cash on hand less than plaintiff's claim. It did not appear that the deposit could be traced

into any other assets that came into the hands of the receiver. The county afterward accepted a small dividend, and then asked to be declared a preferred creditor. Defendant contended that the county, by accepting a dividend, was estopped to assert that it was entitled to a preference. Judgment for plaintiff. Appeal.

Ragan, C. 1. The county is not estopped from asserting that its claim is a preferred one. 2. But the county was a preferred creditor only to the extent of the money the bank actually had on hand at the time of its failure; it is not entitled to any preference as to other assets. Judgment reversed.

Cited: 61 Neb. 184.

HASTINGS v BARND (1898) 55 Neb. 93.

To enforce stockholders' liability. Plaintiffs were creditors of a bank of which defendants were the stockholders. The bank failed and a receiver was appointed. The state constitution, art. 11, sec. 4, provided that stockholders were liable to the extent of their unpaid subscription, after the claims of the corporation had been ascertained and its assets exhausted; and that bank stockholders were liable for an amount equal to the stock held by them. There was no allegation that plaintiffs represented all the creditors, or that the debts had been ascertained, or the assets exhausted. Judgment for defendant. Error.

Irvine, C. The liability of stockholders of a bank for double the amount of their stock cannot be enforced unless there has been a judicial ascertainment of the amount of the claims against the bank and an exhaustion of its assets; and the action must be brought by or on behalf of all the creditors or by the receiver for them, and against all the stockholders. Judgment affirmed.

Cited: 61 Neb. 829.

FIRST NAT. BANK OF OMAHA v FIRST NAT. BANK (1898) 55 Neb. 303.

On promissory note. Plaintiff sent the note to defendant for collection. Defendant sent it to H Bank, with instructions to credit defendant with it, when paid. After the collection was made and credited, H Bank failed, with its account with defendant overdrawn. Defendant contended that there was no evidence of a payment to H Bank. Demurrer to the evidence. Sustained. Verdict directed. Judgment for plaintiff. Error.

Harrison, C. J. 1. The note was collected, and the proceeds were credited to defendant according to its instructions. 2. The relation of principal and agent existed between defendant and H Bank, and defendant became liable to plaintiff. Judgment affirmed.

UNITED STATES NAT. BANK v WESTERVELT (1898) 55 Neb. 424.

Foreclosure of mortgage. The defendants were makers of a mortgage given to M Bank, and to S Bank, the latter being a national bank holding a claim on a note against the mortgagors. The mortgage recited that it was given to secure past and future indebtedness of the mortgagors, and to enable them to pay their debts in instalments. Prior to the expiration of the mortgage, the mortgagors' note to S Bank was sent to M Bank for collection, and was in its possession when the mortgage was given. S Bank obtained judgment on the note and levied on the land covered by the mortgage. Plaintiff brought suit to foreclose. There was no evidence of fraud on the part of M Bank in obtaining the mortgage. S Bank contended that the mortgage on its face, and the extrinsic evidence, proved that the transaction was fraudulent; and that the M Bank, having received the note for collection, could not secure its own claims to the exclusion of that of its principal. Judgment for plaintiff. Error.

Irvine, C. 1. The transaction was not fraudulent; a debtor may prefer a creditor unless with intent to delay or defraud other creditors. 2. M Bank was not estopped from obtaining and enforcing its security as long as it duly presented the note for payment in accordance with its duties as collecting agent. Judgment affirmed.

UNITED STATES NAT. BANK v GEER (1898) 55 Neb. 462.

On certificate of deposit. Plaintiff was indorsee of a certificate issued by G, private banker, to defendant C, and indorsed by C to defendant Bank of H. Bank of H indorsed the certificate to the order of the cashier of Bank of L, for account of the Bank of H, and sent it with a letter directing collection and credit. Bank of L indorsed the certificate to plaintiff in the same way, but failed before it was

collected. Bank of H claimed the certificate. Plaintiff contended that parol evidence should be received to show that the Bank of L obtained absolute title, though the indorsement was restricted. Judgment for defendant, H Bank. Error. Judgment reversed. Rehearing.

Norval and Sullivan, JJ. 1. Parol evidence was not admissible to show that the contract was different from that expressed by the indorsement and the letter of instructions. 2. Bank of L had title merely for collection. The former decision reported in 53 Neb. 67 was erroneous. Judgment of reversal vacated.

LEONHARDT v CITIZENS BANK OF ULYSSES (1898) 56 Neb. 38.

On guaranty. Defendants, L and D, private bankers, transferred all their assets to defendant bank, which they organized, and of which they became officers, and guaranteed all bills receivable taken over by the bank. The guaranty covered all doubtful paper until collected, including a note of J, but L and D did not expressly guaranty the renewals. L was president, and D was cashier when the renewals were made. Without the authority or ratification of the stockholders or directors, L, as president of the bank, settled all of its claims against defendants L and D, and gave a receipt in full, which defendants contended covered the guaranty. At the time the receipt was given, L and D were indebted to the bank for overdrafts to an amount exactly equal to that paid for the receipt. Subsequently, at the request of one defendant, when he transferred his stock to the bank, J's note was classified as good, because of the guaranty, and the amount thereof was not deducted, though an assessment for other bad paper was deducted from the sum paid for the stock. Judgment was rendered against J, in a suit by the bank, and the execution was returned unsatisfied. Judgment for plaintiff. New trial denied. Error.

Ragan, C. 1. The renewals did not release L and D from the contract as they could not act as agents for the bank to release themselves. 2. The compromise, not being in full for the guaranty and not authorized or ratified by the stockholders or directors, was not binding. 3. As the renewal of J's note was classified as good, no part of the assessment made on the stock was applicable to its discharge. 4. The guaranty was one of payments, and not of the collectibility of the paper. Judgment affirmed.

FIRST NAT. BANK v FARMERS & MERCHANTS BANK (1898) 56 Neb. 149.

On check. A trust company's agent obtained a loan from the company for a fictitious person, by sending a forged application, a bond, a mortgage, and an abstract of title. All the papers, save the abstract and the notary's certificate, were in the agent's writing. The trust company accepted the loan and sent a check on plaintiff to the agent, with directions to pay it to the borrower, who was made the payee. The agent indorsed the check by making and witnessing the mark of the payee in the manner that all the papers had been signed, and absconded with the money. Defendant paid the check and sent it to plaintiff where it was honored and the amount charged to the trust company. On learning of the fraud, plaintiff credited the amount back to the trust company and sued defendant as indorser. Judgment for defendants. Error.

Irvine, C. 1. The trust company made the check payable to a supposedly real person and the indorsement of the name of a fictitious payee was therefore forgery; and defendants are liable, as the indorsement was not genuine. 2. The apparent authority which will estop a principal to deny an agency must be an authority apparent to the one dealing with the agent, and by him relied on. Judgment reversed.

Cited: 59 Neb. 195.

PICKERING v HASTINGS (1898) 56 Neb. 201.

To enforce a stockholder's liability. Plaintiff was a creditor of a bank in which defendant held stock at the time it failed. Plaintiff had reduced his claim against the bank to judgment and issued an execution, which was returned nulla bona. Plaintiff, then commenced the action against defendant without making the other stockholders parties. Judgment for plaintiff. Error.

Norval, J. An action to enforce a bank stockholder's liability must be on

behalf of all the creditors, and must be against all the stockholders. Judgment reversed.

Cited: 61 Neb. 829.

ESTATE OF DAVIS v WATKINS (1898) 56 Neb. 288.

To enforce a stockholder's liability. The comptroller of currency appointed plaintiff receiver of an insolvent national bank and levied an assessment on the stockholders. U. S. R. S. made certificates, issued by the comptroller under seal, admissible in evidence, and gave him the power to appoint a deputy. The defendant contended that interest should not be allowed upon the assessment of the stockholders; that the certificate of appointment of the receiver, signed by the deputy comptroller, and the certificates of assessment were not admissible in evidence; that the certificate of stock was not admissible in evidence without proof of the authority of the bank's officers to issue the same, and that the corporate existence was not shown. Judgment for plaintiff. Error.

Ragan, C. 1. Interest was payable from the date of the assessment by the comptroller of the currency. 2. The certificate of the receiver's appointment, being under the comptroller's seal, was receivable in evidence without proof of the signature. 3. The certificate of the comptroller, assessing the stockholders, was receivable in evidence. 4. Defendant's intestate being the holder of a certificate of stock, signed and sealed by the officers of the bank, the presumption arises that the officers issuing it had authority to do so. 5. The validity of the incorporation of the bank was a collateral issue, and defendant was estopped from questioning it. Judgment affirmed.

GADSDEN v THRUSH (1898) 56 Neb. 565.

Foreclosure of mortgage. X, codefendant gave a mortgage to plaintiff. He had previously given a note for a loan from codefendant S Bank, and had executed a note and mortgage to T the president of that bank, to secure its usurious loan. At the same time X was also indebted to codefendant F Bank. At its suggestion that N, an officer of the F Bank, would loan the money to pay the indebtedness, X executed a mortgage to N. The transaction was repudiated by N, but the F Bank furnished the money without X's knowledge, and kept the note and mortgage. One of defendants, failed to answer and later sought to take advantage of evidence given by other defendants. The purpose of the mortgage to the president of the S Bank was to evade the usury law applicable to national banks. The S Bank sought to give the true meaning of the contract, in order to overcome the liabilities attaching to individuals on usurious contracts. The F Bank and the S Bank, claiming under prior mortgages, filed liens in the action commenced by plaintiff, and the president of S Bank joined to assist it in evading the usury law. Decree, that the mortgages of the S Bank and the F Bank were prior to plaintiff's. Appeal.

Irvine, C. 1. The mortgage held by the F Bank was inoperative. It could never take effect as it was never delivered to N. 2. The S Bank cannot give the transaction one form in order to evade the usury laws applicable to banks, and then give the true meaning to the transaction in order to evade the liabilities attaching to individuals. 3. A defendant by failing to answer, confesses the facts and cannot take advantage of the proof made by the other parties. Decree reversed.

COLUMBIA NAT. BANK v GERMAN NAT. BANK (1898) 56 Neb. 803.

On bank checks. C sent a check to plaintiff, in payment of a claim. The check was on defendant, in which C then had deposits, and to which C was indebted. C failed and defendant applied the deposits as a part payment of its claim not then due. On the same day, plaintiff presented his checks, and payment was refused. Judgment for defendant. Error.

Harrison, C. J. 1. The drawing of a check, being an appropriation of its amount in favor of the holder, the holder may sue the bank for the recovery of that amount, when the funds have not been drawn out prior to the refusal of the bank to pay. 2. As against the rights of check holders, the bank cannot apply a deposit subject to check, to the part of the depositor's indebtedness, which had not matured or was not due. Judgment reversed.

ANDREWS v STEELE CITY BANK (1898) 57 Neb. 173.

On deposit. Plaintiff made a deposit with defendant, and, after it became insolvent, sued the bank and its owners. While the bank examiner had possession, plaintiff also attached the assets of the bank. A receiver was appointed, and obtained leave to intervene. He then moved to discharge the attachment. Plaintiff contended that the receiver's appointment was invalid, that the property was the bank's, and was attached as required by statute. The code gave a successor in interest the right to intervene. A statute provided that property, in the possession of the bank examiner, could not be attached, until his report had been passed upon by the examining board. Sustained. Error.

Irvine, C. 1. A receiver of a bank, appointed after the commencement of a suit against the bank, may intervene in such suit. 2. The assets of an insolvent bank in the possession of the bank examiner cannot be attached by a creditor. 3. The validity of the receiver's appointment cannot be attacked collaterally. 4. The receiver had a right to resist the attachment in so far as the bank's title was attacked. Judgment affirmed.

SCHMELLING v STATE (1889) 57 Neb. 562.

Insolvency proceedings. S presented a claim for preference to the receiver of an insolvent bank in which S had made a general deposit. Judgment for defendant. Error.

Harrison, C. J. The owner of a general deposit is not entitled to a preference. Judgment affirmed.

STUART v BANK OF STAPLEHURST (1899) 57 Neb. 569.

Damages, for loss of a deposit. The petition alleged that defendants, directors of a national bank, intentionally published false statements regarding the bank's condition, and thereby induced plaintiff to deposit money, which was lost by a failure of the bank. There were no allegations showing it was a case under the National Banking Law. Demurrer to petition. Overruled. A motion to remove the cause to the federal court, made after filing all the proper papers, was overruled. Defendants contended that the state court wrongfully exercised jurisdiction while the hearing pended in the federal court; that in an action for deceit the misrepresentations must have been made directly to the complaining party; and that the defendants were improperly joined. Judgment for plaintiff. Error.

Harrison, C. J. 1. The petition did not disclose a case which could be removed to the federal courts, and the state courts, therefore, retained jurisdiction. 2. An action for deceit arises if the representation of a national bank, in simulated compliance with requirements as to advertisement, made to the whole or any part of the public; is seen and relied upon by any person to his damage. 3. The petition charged joint actions of the defendants, and the acts were such as might be done in combination, hence it was not open to attack by demurrer for an improper joinder of parties. Judgment affirmed.

Cited: 57 Neb. 579.

BROWN v BRINK (1899) 57 Neb. 606.

To enforce stockholders' liability. Plaintiff, receiver of an insolvent bank, in which defendants held stock, sought to charge them individually with debts of the bank. A creditor, whose claim had been allowed against the estate, sought to intervene. In the proceeding appointing the receiver he was ordered to compromise the claim against defendants. There was no allegation or proof of fraud on the part of the receiver in prosecuting the action. Judgment for receiver. Error.

Norval, J. The creditor cannot intervene in such an action. Judgment affirmed.

STATE v BANK OF RUSHVILLE (1899) 57 Neb. 608.

Insolvency proceedings. Application for authority to compromise a claim. The State instituted proceedings by which a receiver was appointed for defendant, an insolvent bank. The receiver collected the assets, distributed the proceeds among the creditors, and instituted suit to enforce the individual liability of the stockholders. While the suit was pending, the receiver applied for authority to compromise the suit. A creditor of the bank intervened to resist the application.

✱

No evidence was introduced by the intervener to show that it was not for the best interest of the bank to make such settlement. Order, granting the receiver the right to compromise the suit. Appeal.

Norval, J. It was proper to allow the receiver to compromise the suit. Order affirmed.

Cited: 61 Neb. 497.

GERNER v MOSHER (1899) 58 Neb. 135.

Deceit. Defendants were officers and directors of a national bank. The cashier and three of the directors attested and published a report to the comptroller of the currency, as to the financial condition of the bank. Plaintiff, relying thereon, bought stock. Plaintiff never examined the bank's books. The president and cashier frequently issued reports not substantiated by the books. The cause, having been removed to the federal court, was remanded to the state court. There was no proof or averment that the false representations were made intentionally or knowingly. Judgment for defendants. Error.

Irvine, C. 1. The state court must treat the decision of the federal court, on the question of removal of a cause of action, as final. 2. A stockholder in a bank cannot be held to have been compelled to examine the bank's books, in order to learn whether the published statements of its condition were true. 3. Issuing the report required by the comptroller of the currency is not a corporate act. It is outside of the official duties of directors, and the directors, not participating, are not liable. 4. Those contemplating purchase of stock in a national bank, as well as depositors and holders of bank notes, are entitled to rely on the truth of the required published statements. 5. The president and cashier of a bank are bound to know its condition, and are liable for making reports not shown by the bank books to be correct. 6. Directors of a bank cannot escape liability for damages resulting from false statements made by them of the condition of the bank, even though they were, at the time, ignorant that such statements were false. It is not necessary in an action for deceit against directors of a bank to aver or prove that false statements were made intentionally or knowingly. Judgment reversed, as to the directors who signed the report, and affirmed, as to those who did not.

Cited: 61 Neb. 101.

FIRST NAT. BANK v RAILSBACK (1899) 58 Neb. 248.

Damages, for refusing to pay check. Plaintiffs were depositors in defendant and drew a check thereon. The payee indorsed the check and presented it, but defendants refused payment, though the deposits to plaintiffs' credit covered the check. Plaintiffs were compelled to pay the holder, and sued the bank for damages. Defendant contended that the court improperly assessed damages for withholding the check. Judgment for plaintiff. Error.

Ryan, C. 1. The bank improperly withheld payment of the check, and is liable therefor. 2. Facts, showing that damage had been sustained, were properly pleaded, and it was shown that the bank unwarrantedly refused to perform a duty which it owed the drawer of the check. Judgment affirmed.

GADSDEN v THRUSH (1899) 58 Neb. 340.

To foreclose mortgage, executed to secure a note, that had been given as collateral for usurious loans. Plaintiff claimed that as the usurious payments were made more than two years prior to this action, they were barred by the Statute of Limitations, as prescribed in the federal statutes. Decree of foreclosure in accordance with federal, not state, usury statutes. Appeal. Rehearing.

Ryan, C. 1. The state usury laws govern, except where they are in conflict with express provisions of federal statutes. The operation of such federal statutes will not be enlarged by construction by the state courts. 2. U. S. R. S., sec. 5198, is inapplicable to this case, because the note sued on was not the note tainted with usury. Reversed. (See 56 Neb. 565, ante p. 801.)

STATE, EX REL. v FAWCET (1899) 58 Neb. 371.

Mandamus, to require a judge to fix the amount of a supersedeas bond. A receiver had been appointed for an insolvent state bank, with the bank's consent,

and had taken possession of its assets. On application of the bank's creditors, respondent, a district judge, ordered the receiver to sell all the bank's realty forthwith. The bank excepted, and respondent refused to fix the amount of the supersedeas bond. Respondent contended that the bank, having consented to the receiver's appointment, could not resist the order. The code provided that where the order directed the sale of real estate, the court or judge should fix the amount of the bond for an appeal.

Irvine, C. 1. The bank was not estopped to resist the order. 2. The amount of the supersedeas bond should have been fixed by the respondent. The right to a supersedeas is absolute, and not within respondent's discretion. Writ allowed.

Cited: 60 Neb. 101, 394. (S. c.: 59 id. 293.)

LONGFELLOW v BARNARD (1899) 58 Neb. 612.

To cancel a mortgage. Counterclaim, praying foreclosure of the mortgage. D was the owner of an unincorporated bank. Plaintiff was its receiver. D was indebted to defendant, and in fraud of all his creditors, mortgaged the land to his sister, and later gave her a deed for the same. Defendant, knowing of the fraud, received an assignment of the mortgage from the sister, as security for the guaranty he had given for the payment of his claim against D, which had been assigned. Plaintiff contended that the bank was a de facto corporation, and the mortgaged property was a bank asset; that the mortgage merged in the deed, and that there was no consideration for the assignment of the mortgage. Decree for plaintiff. Appeal.

Sullivan, J. 1. The bank was not a legal entity. 2. A fraudulent vendee may make a valid mortgage of the property to a creditor of the fraudulent vendor, whether such creditor has notice or not of the prior fraudulent sale. 3. The mortgage did not merge in the deed; merger in such cases is a question of intention. 4. The existence of the debt and the guaranty of its payment, made the assignment valid without other consideration. Decree reversed.

Cited: 59 Neb. 456.

STATE v BANK OF HEMINGFORD (1899) 58 Neb. 818.

Insolvency proceedings. Claimants, knowing the purposes for which defendant, a bank, was organized, sold goods to it while it operated a store. Defendant failed, and the receiver took possession of all the goods. Claimants contended they were entitled to a preference, as to the assets of defendant in the store. Defendant was not authorized to run a store. Decree ordering payment of depositors in full before application of assets to claimants' claim. Appeal.

Harrison, C. J. 1. Depositors and creditors, dealing with the bank, as a bank, are to be preferred over those who dealt with it as a storekeeper. 2. The bank having acted beyond its powers, the receiver can use such fact as a defense to an action to recover the amount of an account arising out of a contract made beyond its powers. Decree affirmed.

HENDERSON v UNITED STATES NAT. BANK (1899) 59 Neb. 280.

On check. Plaintiff sent a check to defendant for collection. Defendant's agent collected it, and sent its own check to defendant. The agent, when it failed, had a small sum to its credit on deposit with defendant but not enough to cover the check; and defendant applied this deposit to a claim which it had against the agent. Plaintiff contended that the check of the agent operated as an assignment of the deposit to plaintiff, and that defendant should apply the amount on deposit toward payment of the check. Judgment for defendant. Error.

Harrison, C. J. A bank deposit is not required to pay a check for a sum larger than that on deposit, or to apply the money on deposit toward its payment. Judgment affirmed.

LONGFELLOW v BARNARD (1899) 59 Neb. 455.

Rehearing of case reported in 58 Neb. 612. Former decision sustained.

OMAHA NAT. BANK v KIPER (1900) 60 Neb. 33.

On draft. Plaintiffs sent defendant a draft for collection. Contrary to instructions, defendant extended the time of payment, and by failure to use due

diligence, its collection was lost. Defendant contended that certain testimony was incompetent. Judgment for plaintiffs. Error.

Sullivan, J. 1. A bank making a collection must keep within the authority conferred upon it, and if the debt is lost through its failure to use due diligence in obtaining payment, the bank is liable for the actual loss arising. 2. Judgment will not be reversed for the admission of incompetent evidence where the cause is tried without a jury, and the evidence in question is not indispensable to recovery. Judgment affirmed.

SCHABERG v McDONALD (1900) 60 Neb. 493.

To enforce stockholder's liability. Defendant was administratrix of a deceased stockholder in an insolvent bank of which plaintiff was receiver. The comptroller of the currency levied an assessment, and the original receiver filed his claim against the decedent's estate within the time fixed by the probate court. Defendant filed objections. The matter was not decided until the time for filing claims was passed. In the district court, plaintiff was substituted as receiver, and entered her appearance and resisted the order without objecting to the informalities. The claim was sold by order of the federal court, while the action was pending in the state courts. Judgment for plaintiff. Error.

Holcomb, J. 1. The claim was not barred. 2. The receiver had power to continue the suit, after the claim had been assigned. 3. A sale made by the receiver of a national bank under order of court, is a judicial sale and cannot be attacked collaterally. 4. A satisfaction of a judgment obtained by the receiver, would obliterate the obligation. Judgment affirmed.

FIRST NAT. BANK v GIBSON (1900) 60 Neb. 767.

To enforce judgment lien. Prior to plaintiff's judgment and execution, B obtained a judgment. The debtor paid B's judgment, and then let the land be sold to satisfy the same judgment. Defendants were purchasers at the sale and implicated in this fraud to defeat plaintiff's judgment. Defendants contended that this action could not be maintained, until all legal remedies had been exhausted. Judgment for plaintiff. Appeal.

Sullivan, J. 1. A judgment at law having been obtained and an execution issued thereon, all the legal remedies had been exhausted. 2. A judgment, once paid by the one primarily liable, cannot be kept alive by an assignment to a third person. Judgment affirmed.

STATE v BANK OF COMMERCE (1900) 61 Neb. 22.

Insolvency proceedings. A receiver had been appointed for defendant. Petitioner, an insurance company, filed its claim to recover a deposit. Petitioner alleged that it was a depositor with defendant; that through fraud of defendant's cashier and of the cashier of O Bank, and without the knowledge of either bank, O's cashier issued a certificate stating that petitioner had a large deposit in O Bank, representing the equivalent of its deposit with defendant; that in fact no transfer of the deposit had been made to O Bank; that a suit was pending to determine whether the petitioner or O Bank owned the deposit. The other creditors contended that the petition did not state a cause of action; that petitioner had lost its right by electing to proceed against O Bank; and that it was estopped by failure to present its claim for more than two years after the bank failed. Order for petitioner. Appeal by other creditors and stockholders.

Sullivan, J. 1. The petitioner was entitled to recover. 2. The petitioner did not lose its rights by trying to enforce a supposed claim against a third party; there can be no election of remedies where there is, in fact, only one remedy. 3. There was no estoppel as it does not appear that the stockholders or creditors were injured in any way by the delay in filing the claim. Order affirmed.

Cited: 61 Neb. 166, 209.

GERNER v YATES (1901) 61 Neb. 100.

Deceit. Defendants, as officers and directors of a national bank, induced plaintiff to buy bank stock, by falsely representing the condition of the bank. The report made by all defendants to the comptroller of the currency, published in local papers, gave the liabilities and resources equally inflated; gave the overdrafts

as loans and discounts; and failed specifically to include interest on re-discounts. The fraud was discovered by plaintiff a short time before instituting suit. Defendants contended that the discharge in bankruptcy of the cashier barred a suit against him, and that the Statute of Limitations had run. Judgment for plaintiff against the president and cashier, but not against one who was director only. Error.

Sullivan, J. 1. The evidence cannot support the judgment in favor of the director. 2. If a published report of a bank gives the resources and liabilities equally inflated, there is not a material misrepresentation on which an action of deceit may be based. 3. It is a false representation of material facts to include overdrafts as loans and discounts in a bank report. 4. It is not necessary to specifically include the item of interest on re-discounts in the comptroller's report. 5. As plaintiff relied upon the reports and the entire directorate of the bank, one director cannot escape liability. 6. The Statute of Limitations had not run, as it did not begin until the fraud was discovered. 7. A discharge in bankruptcy is not a defense to an action for fraud, by the cashier of a bank in his official capacity. Judgment reversed.

STATE v BANK OF COMMERCE (1901) 61 Neb. 181.

Insolvency proceedings. Petition for preference. Defendant, a national bank, failed and a receiver was appointed. Claimant, exhibiting a power of attorney from S, presented a draft to defendant, which took it for collection only and, on a security of the draft, advanced small amounts. The draft was collected, and the proceeds being sent to defendant were commingled with defendant's other funds. When defendant failed there was more cash on hand than enough to pay this claim. Defendant contended that claimant had a general power of attorney, and left the draft for deposit; that the proceeds of the draft were not traced into defendant's hands; and that acceptance of small sums of money showed it to be a deposit. Judgment for plaintiff. Appeal.

Norval, C. J. 1. Claimant is a preferred creditor. 2. The draft being accepted for collection, it is immaterial whether the power of attorney was general or special. 3. The money, equal in amount to that due on the draft, having been sent by defendant's collecting agent, the presumption arises that the bank received the proceeds. 4. Where an insolvent bank has cash on hand greater than the amount of a trust fund held by it as collecting agent, the beneficiary is entitled to a preference as to the cash on hand, but not as to other assets than cash items. Judgment affirmed.

FIRST NAT. BANK v GROSSHANS (1901) 61 Neb. 575.

To foreclose a lien. To guaranty the payment of a note made by defendants and discounted by plaintiff for G, defendants executed a quitclaim deed to land. The land being in several counties, plaintiff commenced an action in each. By stipulation the other cases were to depend upon the decision in the principal case. There was a general statement in the answer that the deed, if any, was procured by fraud, but there were no allegations of fact constituting the fraud. Defendants contended that the decision on sufficiency of evidence used in a former trial was conclusive; that prior suits were pending in other counties, and that a national bank is prohibited by act of Congress from taking real estate security. Decree for plaintiff. Appeal.

Holcomb, J. 1. A decision as to the sufficiency of testimony on a former trial, is not binding in a subsequent trial where the testimony is, or may be presumed to be, materially different. 2. To make available the defense of fraud, facts constituting fraud must be specifically pleaded and proved. 3. Parties, who have given a national bank, real estate as security for a loan, cannot deny the right of the bank to enforce the security. 4. The right to file a plea in abatement was waived by entering into the stipulation regarding the order of proceeding with the trials, and the stipulation was proper. Decree affirmed.

TECUMSEH NAT. BANK v McGEE (1901) 61 Neb. 709.

To recover a deposit. The original plaintiff deposited \$5,000 with defendant. Defendant credited the deposit to H, and claimed that at H's request it subsequently paid the amount to the firm of R & H. Defendant's president was a member of that firm to whose business defendant had practically succeeded, as

R & H continued in business only for the purpose of winding up its affairs. H received a passbook of the kind used by R & H. After the case had been once tried, H died, and his administrator revived and prosecuted the action. Subsequently, the administrator made a settlement with defendant to which plaintiff, one of the heirs, did not consent. Plaintiff moved to set aside the settlement, and to be allowed to prosecute the action. Motion granted. Defendant contended that the action had terminated upon the death of the original plaintiff, and that the Statute of Limitations had run. The court instructed that defendant was liable, unless it proved by a fair preponderance of evidence that the money was paid to the deceased or to R & H, on his authority. Defendant contended that the wording of the instructions evidenced a prejudice against defendant. Judgment for plaintiff. Error.

Holcomb, J. 1. It was proper to allow the heir to be substituted and to prosecute the suit instead of the administrator. 2. The action was but a continuation of the prior proceedings and was therefore not barred by the Statute of Limitations. 3. The instructions were proper. 4. The mere receipt of one of R & H's passbooks by H, an illiterate man, was not conclusive evidence that his account was with that firm. Judgment affirmed.

FOGG v ELLIS (1901) 61 Neb. 829.

On promissory notes. N National Bank, succeeded Bank of B, with the same officers. The receiver of the D Bank, which failed, found some notes made by Bank of B and filed a petition for judgment thereon. The officers of Bank of B filed a written confession of judgment, waiver of issuance, and service of summons, and judgment was entered. The receiver sued defendants as stockholders in Bank of B. Plea: a void judgment. Judgment for plaintiff. Error.

Sedgwick, C. 1. Neither a president nor a cashier of a bank can waive service of summons and enter a confession of judgment which will bind the bank. 2. No jurisdiction having been acquired, the judgment is void, and may be attacked collaterally. Judgment affirmed.

SEVEN VALLEYS BANK v WISE (1901) 61 Neb. 880.

On certificate of deposit. The petition alleged the corporate character of defendant, the issuance of the certificate to plaintiff, presentment and refusal of payment, and that defendant claimed to have a partial defense. General demurrer. Overruled. Judgment for plaintiff. Error.

Sullivan, J. The petition stated a cause of action. Judgment affirmed.

BEDELL v HARBINE BANK OF FAIRBURY (1901) 62 Neb. 339.

On check. Defendant indorsed and deposited with plaintiff for collection a check of B of which he was payee. The testimony was conflicting as to defendant's instructions to plaintiff's cashier. The cashier testified that defendant said that as B did not have funds sufficient to meet the check, he preferred that it be not presently presented, and that the check was sent to plaintiff's correspondent two days later in accordance with defendant's request. There was undue delay in presentment by correspondent bank and collection was not made. Meanwhile plaintiff paid the amount to defendant supposing the check was good. Defendant was never properly notified of the dishonor of the check. The court refused to charge that judgment should be for defendant if plaintiff failed to notify defendant of the dishonor, within a reasonable time; and if there was no agreement between the parties other than the ordinary collection contract. Judgment for plaintiff. Error.

Ames, C. Under the ordinary collection agreement the collecting bank is liable for negligence in sending a check through a distant bank, thus causing unreasonable delay; and also for the negligence of the latter bank in failing to give notice of dishonor. Judgment reversed.

FARMERS & MERCHANTS BANKING CO. v CITY (1901) 62 Neb. 442.

To recover deposit. The petition stated that the treasurer of plaintiff, a city, made a demand deposit, subject to check, with defendant, a bank. Demurrer. Overruled. Defendant contended that the treasurer had no authority to deposit

city funds in a bank, and that the city could not maintain an action for their recovery. Judgment for plaintiff. Error:

Day, C. The city can maintain an action to recover its funds though unlawfully deposited in the name of an officer. Judgment affirmed.

STURDEVANT v FARMERS & MERCHANTS BANK (1901) 62 Neb. 472.

On undertaking in replevin. To accommodate X, a plaintiff in replevin, the cashier of defendant executed an undertaking in the bank's name, for a sum nearly equal to its capital. He had no express authority to do so, and the president, when informed, repudiated the act. X, being unsuccessful, but having taken the property, this suit was brought on the undertaking. Plaintiff contended that it was customary for banks to execute undertakings in judicial proceedings, and that the bank was estopped to assert want of authority. Judgment for defendant. Error.

Pound, C. 1. The cashier had no authority, by virtue of his office, to execute a replevin bond, in the name of the bank, as an accommodation. 2. State banks are not authorized to execute bonds in judicial proceedings. 3. The undertaking being so clearly beyond the bank's powers, no one had cause to be misled thereby, and there was no estoppel. 4. Plaintiff, having allowed the property to be taken upon such insufficient security, cannot estop the bank from setting up that the act was ultra vires. Judgment affirmed.

NEVADA

STATE v FIRST NAT. BANK (1868) 4 Nev. 348.

To recover state and county taxes. The assessment was made from a statement furnished by the defendant to the assessor, and was upon these items: real estate, \$9,000; furniture and assaying apparatus, \$3,000; promissory notes bearing interest, \$75,000; county warrants or scrip, \$3,500. The court below held that the defendant was liable for taxes upon the first two items, but not upon the others. The defendant contended that it was exempt from taxation on the last two items because: 1, The outstanding notes of circulation of the bank were liabilities which should be deducted from the notes and mortgages due to the bank, and only the difference should be taxed; 2, that a tax on these choses in action would be a tax on the business of the bank, and in conflict with the act of Congress granting the charter. Judgment for defendant as to certain items. Appeal by State.

Beatty, C. J. 1. The revenue law providing for the taxation of "money at interest secured by mortgage or otherwise," and of "solvent debts other than those mentioned, where the amount exceeds the same character of indebtedness of the party assessed," does not give the right to set off debts of the party except as to the latter class. Notes and bonds may be taxed regardless of the pecuniary liability of the holder. 2. Though these notes are property and may be treated as having a locality in the state, they are property in which the bank must deal in the ordinary course of its business, and this would be in the nature of a tax on the business of the bank, although ostensibly a tax on local property. 3. The Act of Congress of June 3, 1864, points out the method by which the real estate of a national bank may be taxed, and also the method of taxing the stock of the same bank within the state where it is located. The State should be and is excluded from all other methods of taxation upon national bank property. Judgment affirmed.

Cited: 11 Nev. 79; 15 id. 128; 21 id. 407.

STATE v CARSON CITY SAV. BANK (1882) 17 Nev. 146.

To recover taxes and penalties. The defendant, a state savings bank, was assessed on all its property, including real estate, furniture, cash on hand, and money at interest, secured by mortgage and deposits. The plaintiff refused defendant's tender of part of the tax in payment of all. Judgment for plaintiff. Appeal.

Leonard, C. J. 1. Deposits received in the regular course of business, became the bank's property and are assessable. 2. Bank deposits assessed as money at

interest secured by mortgage, are taxable. 3. The taxation of mortgages or money at interest secured thereby, when the property mortgaged is taxed, is not double taxation and unconstitutional. 4. A bank is liable for penalties for failing to pay a tax. Judgment affirmed.

Cited: 24 Nev. 88; 237.

McKELVEY v CROCKETT (1884) 18 Nev. 238.

Attachment. In an attachment proceeding against a savings bank, plaintiff garnisheed the defendant, as stockholder of the bank. The statute did not make the capital stock payable on organization, but provided for payment by assessment. No assessment was due. The plaintiff recovered on the attachment, and proceeded to enforce the liability of the garnishee. Judgment for defendant. Appeal.

Belknap, J. No assessment being unpaid at the time of the service of the writ of attachment, there was no indebtedness upon which the writ could operate. Judgment affirmed.

THOMPSON v RENO SAV. BANK (1885) 19 Nev. 103.

To enforce stockholder's liability. Bill, to hold defendant L, a stockholder of defendant savings bank, liable for the bank's debts. All the capital stock was not paid in. The defendant L had paid part, claiming it was agreed that it was working capital and not capital stock, and that it was in full of all liability. The statute required a certificate of the amount of the capital stock, and it was given. The bank owed defendant L, who held security for it. Decree for plaintiff. Appeal.

Belknap, C. J. 1. Those who participated in the incorporation of the bank, and by a certificate announced the amount of its capital stock, cannot as against the creditors, contradict their certificates. 2. A stockholder, who is also a creditor, cannot offset his unpaid subscription against the general indebtedness of the bank. 3. A stockholder is liable for the amount of his unpaid subscription. 4. One or more creditors may sue for the benefit of all, and others may join before actual trial. 5. The stockholder must pay his unpaid subscription and surrender his security, before he can share ratably with the other creditors. Decree affirmed.

Cited: 19 Nev. 173, 246, 293, 294.

THOMPSON v RENO SAV. BANK (1885) 19 Nev. 171.

Creditor's bill. Plaintiff obtained judgment against defendant, the R Savings Bank. Execution was returned nulla bona. Defendant H was a stockholder of the bank, but had paid only 30 per cent of the par value of the shares held by him. More than four years had elapsed from the time of making the subscription, to the time of commencing the suit. The defendant H contended that this suit was barred by the Statute of Limitations; and that a suit to enforce a subscription was maintainable only by the bank, or at least not by the plaintiff, until he had exhausted every means to compel the corporation to make the call. Judgment for plaintiff. Appeal.

Belknap, C. J. 1. It was not necessary for the plaintiff, before commencing this action, to attempt to compel the corporation to make a call. 2. The unpaid portion of the subscription was a part of the capital stock of the bank, allowed to remain in reserve in the hands of the stockholders, but subject to call when needed. 3. The Statute of Limitations did not begin to run until a call was made, and therefore it is not available as a defense. Judgment affirmed.

Cited: 19 Nev. 291; 20 id. 255.

THOMPSON v CROCKETT (1885) 19 Nev. 242.

To compel payment of unpaid subscriptions to the capital stock of a savings bank. Two of the defendants were representatives of deceased stockholders. The plaintiff, a creditor of the bank had recovered a judgment at law against the bank, and did not offer to prove his claim against the defendants' estates, according to the probate law. The bill set out that defendants had agreed among themselves, that they should not be liable after having paid in enough for a working capital. The proof showed that this was an implied, rather than an express, agreement. Defendants contended that the plaintiff was limited in recovery to the amount of

his judgment at law, and not to the full amount of the unpaid subscriptions. No demand was made before commencing suit. Decree for plaintiff. Appeal.

Belknap, C. J. 1. The unpaid subscriptions, being a trust fund for the creditors, were no part of the decedents' estates, and the claim need not be proved against them. 2. The variance between the pleading and the proof was immaterial. 3. The money paid under the decree created a trust fund for the creditors, and the amounts received are to be credited upon the indebtedness of the bank to each creditor and the bank discharged to that amount. 4. The deceased stockholders, being trustees and not debtors of the bank's creditors, there was no necessity for presenting a demand before commencing suit. Decree affirmed.

ROSS v BANK OF GOLD HILL (1888) 20 Nev. 191.

Creditor's bill. The plaintiff obtaining judgment against defendant bank, to which execution was returned *nulla bona*, brought this suit to enforce payment of unpaid subscriptions by the stockholders. The bank had continued to do business for seven years, without enforcing payment of subscriptions. The defendants contended that the certificates only amounted to an option to purchase the stock. By G. S., 948-974, sec. 22, it was provided that "no certificate representing shares of stock shall be issued, nor shall such stock be considered as acquired, until the whole sum of money which such certificate purports to represent shall have been paid into the corporation." Judgment for plaintiff. Appeal.

Belknap, J. 1. Sec. 22 was not intended to exempt a subscriber from the payment of his subscription. Its purpose is to protect the public against dealing in certificates representing shares of the capital stock of savings banks, until the money which the certificates represent shall have been paid in, and also, to secure a paid-up capital to such banks. 2. The subscribers, receiving the certificates of stock upon which one instalment had been paid, and which declared that upon the payment of the balance the holder would be entitled to full-paid stock, became, to all appearances, stockholders, and creditors of the bank had the right to assume that its capital was what it purported to be, and that those who appeared to be stockholders during its solvency would be held as such in the event of its failure. Judgment affirmed.

NATIONAL BANK v KREIG (1893) 21 Nev. 404.

A mortgage given to a national bank as security for a loan of money, is not subject to state taxation, as national banks are subject to state taxation only upon their real estate, and upon the shares of stock in the bank owned by the stockholders.

NEW HAMPSHIRE

STRAFFORD BANK v CONNELL (1818) 1 N. H. 192.

Assumpsit, on promissory note. The former cashier of the plaintiff bank was called to prove that the note had been in the bank and was lost while he was cashier. Defendant objected that he was an incompetent witness without a release, because his testimony would tend to discharge himself from being liable for his negligence. Verdict for plaintiff. Motion for new trial.

Richardson, C. J. The cashier of a bank is its agent and servant, and when a paper has been lost by accident, he is often the only person who can explain how it happened; and it would be extremely inconvenient to reject his testimony merely because he may be liable for negligence. Judgment on verdict.

Cited: 2 N. H. 325, 554; 24 id. 79, 299.

GRAFTON BANK v HUNT (1828) 4 N. H. 488.

Assumpsit, on promissory note. Defendant being indebted to plaintiff, a bank, R agreed to let him have \$1,000 to pay plaintiff. K, being indebted to R, delivered a note for \$200 payable to the bank, and purporting to be signed by A. R, having inquired at the bank whether it would discount the \$200 note, and learning that it would, delivered it with \$800 to defendant, who settled with the bank by discounting the note and paying the rest in cash. It was discovered that the note

for \$200 was a forgery, and this action was brought to recover of defendant the amount of that note. Verdict for plaintiff, subject to opinion of court.

Richardson, C. J. The understanding between R and defendant must have been that if the note was discounted at the bank, defendant was to account for the proceeds; if not discounted, that he should return the note to R. It is clear then from the nature of the transaction that the forged note was never the property of defendant, and that the discount must be considered as in fact made on account of R. This view of the case is decisive against plaintiff. New trial granted.

Cited: 5 N. H. 354, 411; 9 id. 367.

ELLIOTT v ABBOTT (1842) 12 N. H. 549.

Assumpsit on promissory note, payable to the A Bank and alleged to have been indorsed to the plaintiff. Defendant was a surety. The note was in fact discounted and taken by the plaintiff, who afterward procured the separate consent of a majority of the directors that the cashier indorse the note. Defendant objected that the evidence was insufficient to show any authority in the cashier to indorse the note. Judgment for plaintiff. Case submitted.

Parker, C. J. 1. The authority not having been conferred at a board meeting was insufficient. 2. Plaintiff should have declared on the note as payable to himself by the name of the president and directors of the bank, or have brought suit in the name of the bank and given it indemnity against costs. Verdict set aside, and leave to amend.

Cited: 16 N. H. 572; 22 id. 85; 23 id. 530; 27 id. 35; 29 id. 298; 38 id. 167; 39 id. 591; 40 id. 26; 41 id. 28; 42 id. 562; 44 id. 358; 50 id. 295; 59 id. 147.

PENNIGEWASSETT BANK v ROGERS (1846) 18 N. H. 255.

Assumpsit, for money had and received. A statute went into effect October 1, 1841, providing that it should be unlawful for any bank director, by reason of any note thereafter made or assumed, to become liable to the bank of which he is director to an amount greater than 50 per cent of his stock. A director being indebted to the bank in excess of this provision, arranged with defendants a few days before the statute went into effect, for them to give a note to the bank as a substitute for this. Defendants now plead the statute as a defense to this action. Declarations and written acts of several directors were admitted to prove the transaction with defendants. Verdict for defendants. Motion for new trial.

Woods, J. 1. All that this section of the statute forbids is the indebtedness or liability of the directors. No director appears to be liable by the terms of this note and the security, therefore, does not come within the prohibition of the statute. 2. The declarations and admissions were inadmissible because the bank was a stranger to them, and they were not made by the directors in a discharge of their duties. New trial granted.

Cited: 51 N. H. 122; 70 id. 134, 135.

THURSTON v WOLFBOROUGH BANK (1847) 18 N. H. 391.

Assumpsit, for money had and received. Plaintiffs sued on several bank bills issued by defendant bank. Defendant relied on the Statute of Limitations, and proved that it had issued no bills for more than six years, during most of which time the bank had been closed. Verdict for plaintiff. Motion for new trial.

Parker, C. J. 1. When defendants shut their bank and had no place of business, they precluded a demand in the usual way; and the holders of their bills were not bound to seek the officers of the bank elsewhere, for the purpose of demanding payment. 2. The bank having issued its promises, payable on demand, it was at the pleasure of the holders when the demand should be made, and their right of action commenced. Judgment on the verdict.

PISCATAQUA EXCHANGE BANK v CARTER (1850) 20 N. H. 246.

Assumpsit on promissory note, against indorser. Defense: That there had been no demand and notice. Plaintiff, a bank, relied on a usage, that indorsers of notes for discount should be required to waive demand and notice. When this note was discounted, however, no such waiver was in fact made. No demand was made on the third day of grace. Case reserved.

Bell, J. 1. If the usage set up, is assumed to be valid and binding, it was a rule established by plaintiff, for its own convenience and security, and might be waived; and in this instance was neglected. Demand and notice were not in fact waived. 2. The contract between the indorser and the indorsees, proved by the signature of the indorser, cannot be varied by evidence of a verbal agreement between the parties at the time of the indorsement. 3. There having been no demand and no notice to the indorser of non-payment, the indorser is discharged. Judgment for defendant.

Cited: 47 N. H. 531.

BOSTON & MAINE R. R. v OLIVER (1855) 32 N. H. 172.

Assumpsit, in which the F Bank was summoned as trustee. Defendant was employed by plaintiff, and had given a bond upon which the F Bank was surety. Defendant closed his account with the bank and then handed the cashier \$600, saying, "Take this and keep it until I call for it." The cashier made an entry of deposit to defendant's credit. Defendant thereafter absconded, being largely indebted to plaintiff. The plaintiff, after enforcing the surety bond against the bank, brought this action to have the \$600 also applied to defendant's deficiency.

Bell, J. 1. The money was paid to the cashier personally, and no deposit in the bank was authorized or intended, and the bank is not chargeable. 2. The bank is not concluded by the entry on its books or the admission in disclosure, to show the true facts. 3. A trustee is entitled to retain or to set off against the debt which he may owe the principal, a demand of which he might avail himself by any of the notes allowed either by common or by statute law, if the action was brought by defendant himself. Trustee discharged.

Cited: 45 N. H. 528.

HILL v ROCKINGHAM BANK (1863) 44 N. H. 567.

To compel delivery of stock certificate. A testator gave to his wife the interest of \$1,000, to be invested in bank stock during his life-time, and after his decease the principal to be divided among his living children. Thirteen shares of stock were accordingly bought in the defendant bank in the name of the heirs of the testator. The wife died, and plaintiff was the only living child of the testator. Demurrer: 1, That title had not been determined by the probate court; and, 2, that there was a remedy at law.

Bellows, J. 1. The bank must be regarded as holding the certificates in trust for the owner, and for the purpose of perfecting the title of the owner. A court of equity may properly decree the delivery of such certificates. 2. It was not necessary that the title to the legacy be determined by the probate court, because that court does not have exclusive jurisdiction. Demurrer overruled.

Cited: 64 N. H. 256.

HEATH v PORTSMOUTH SAVINGS BANK (1865) 46 N. H. 78.

Assumpsit, to recover deposit. At the time of the deposit in defendant bank, there was given plaintiff, as evidence thereof, a book stating the deposit, in which was the following clause: "Depositors are alone responsible for the safe-keeping of the book, and the proper withdrawal of their money. No withdrawal will be allowed without the book, and the book is the order for the withdrawal." Plaintiff having lost his book, defendant refused to refund his deposit unless he gave indemnity. Case reserved.

Bartlett, J. The clause in the deposit book was made a part of the contract between plaintiff and defendant. The bank was as much entitled to the production and offer of the book upon a demand for the deposit, as the maker of a note payable to bearer, is to an offer of the note when payment is demanded. Nonsuit.

Cited: 67 N. H. 551.

PINE RIVER BANK v HODSON (1865) 46 N. H. 114.

Assumpsit, on promissory note. The charter of plaintiff bank required that the \$50,000 of stock should be taken and paid in before the bank went into operation, and a statute required that the stock should be paid in cash. Defendant was allowed to give his note for the shares of stock for which he subscribed. He set up these facts as a defense to his liability on the note. Verdict for plaintiff. Exceptions.

Perley, C. J. The general objects of these provisions would not be advanced, but defeated, if this defense were admitted, for the law is for the protection of the public, to secure the billholders, depositors, and other creditors of the bank against loss. Judgment on verdict.

IN RE WHITE MTS. BANK (1865) 46 N. H. 143.

Application for assignee and injunction. The bank commissioners applied under the statute (Comp. Stat. 325, sec. 26) for the appointment of an assignee to take charge of the bank, and for an injunction prohibiting the bank from issuing bills and transacting business. The order granted included a provision that bills of the bank should not be received by the assignee in payment of debts due to the bank. A motion was made to modify the injunction so that bills of the bank might be received in payment by the assignee.

Perley, C. J. By this assignment under the statute, the corporation is practically dissolved. If debtors to the bank were allowed to pay their debts in the depreciated bills, they would in effect receive pay for their bills in full, and the other holders of bills, in case of a deficiency, would receive less than their proportionate share of the assets. This would be in conflict with the design of the statute, which is to put all holders of the bills of a failing bank upon a footing of equality. Motion denied.

Cited: 60 N. H. 216; 69 id. 623; 70 id. 541.

NASHUA SAV. BANK v CITY OF NASHUA (1866) 46 N. H. 389.

Petition for abatement of taxes, assessed against the plaintiff, a savings bank: 1, On real estate situated in the defendant city, where it was located; and, 2, on stock in another local corporation.

Perley, C. J. 1. Land is taxed in the place where it is situated. 2. As the stock of a corporation goes to make up the taxable property of the corporation, a tax upon it assessed to the holder would result in double taxation. Tax on land in Nashua must stand. Tax on stock in another corporation abated.

Cited: 51 N. H. 469; 52 id. 26, 29; 54 id. 413; 58 id. 553, 563; 59 id. 289, 405; 60 id. 234, 238; 63 id. 142, 168; 64 id. 195, 203; 67 id. 83; 68 id. 385, 387, 402.

PARSONS v TREADWELL (1870) 50 N. H. 356.

Assumpsit, on a written contract. Plaintiffs, who owned the controlling stock in a banking corporation, agreed to sell it to defendants. Subsequently defendants, receiving sums of money due the bank at the date of the agreement and not included in the estimate, placed them to the credit of plaintiffs, but no notice was given to plaintiffs that the collection had been made, and no certificates of deposits were issued to them. Plaintiffs claimed interest on this deposit. It was also agreed that when the defendants finally wound up the bank, if they were not obliged to pay all the sums which the total amount on deposit and bills in circulation called for, they should pay back to plaintiffs the difference between the sums actually paid, and the face amount of such bills and deposits, which was the basis of valuation in the contract of sale. Plaintiffs claimed interest not only on this "difference" (the bank having been wound up), but on the total amount of deposits and bills in circulation. Plaintiffs claimed: 1, the money from the unredeemed bills with interest; 2, interest on the sum left with defendants to redeem; 3, interest on the sum agreed to be due plaintiffs at the time of the sale; 4, their proportion of amounts due depositors whose claims were barred by the Statute of Limitations; 5, their share of the amount unpaid of bills re-issued by defendants; and 6, interest from the date of their demand. Case reserved.

Foster, J. 1. While an ordinary deposit does not draw interest, defendants could not make plaintiffs involuntary depositors and thus escape payment of interest. 2. Defendants should have given plaintiffs notice of the receipt of this money, so that they could have made such use of it as they saw fit. 3. A reasonable interpretation of the contract does not entitle plaintiffs to interest upon the gross amount of all sums remaining in defendants' hands, subject to the call of billholders and depositors, but only to interest on their share, namely, the difference between the amount of deposits and bills in circulation, and the amount which they would ultimately be required to pay in order to discharge the liabilities of the bank on account thereof. 4. The plaintiffs are entitled to their proportion

portion of the sum due depositors, whose claims have been barred by the Statute of Limitations. 5. The reissued bills having been once redeemed by defendants, became their property, to which plaintiffs have no claim. 6. Interest is due from the date of making the demand. Auditor appointed to make the computations.

COCHECHO NAT. BANK v HASKELL (1871) 51 N. H. 116.

Assumpsit, on promissory note. A note for \$800 was made by defendant H, on July 3, 1866, with defendants S and A as sureties. It contained a provision that the sureties should be liable, and the plaintiff could extend the time of payment without discharging them. In September and November, 1866, S signed notes as surety for H. Before signing them, the cashier of the plaintiff told S that the note in question had been paid, or secured, so that he would have no further trouble with it. In 1869, a judgment was recovered by the plaintiff on the September and November notes, and S paid \$800 in settlement taking a discharge in writing. Defendant S proved by parol, that at the time the discharge was given, it was agreed that all of S's liability to the plaintiff as surety for H, including the note in suit, was included and discharged by said release. Verdict for defendant S. Exceptions.

Bellows, C. J. 1. If the representation was intended to induce defendant S to believe that it was true and to act on it accordingly, and he did change his position, relying on the truth of the representation, the bank would be estopped. It does not appear that S was induced to change his position, though he soon after signed another note for H. 2. The acts of a cashier done in the ordinary course of the business may be regarded, *prima facie*, as coming within the scope of his duty, but a cashier has no power to discharge the surety without payment. 3. The release could not be enlarged by parol. 4. Defendant S was entitled to prove that the note in suit was paid, and to prove that, if it were not paid, the plaintiff was estopped to claim that it was not paid. Judgment on the verdict.

Cited: 64 N. H. 463; 69 id. 191.

ROCKINGHAM SAV. BANK v PORTSMOUTH (1872) 52 N. H. 17.

To restrain collection of a tax. The tax was levied on real estate purchased by the plaintiff, a savings bank, with deposits. Plaintiff relied on ch. 4, secs. 1 and 2, of the Laws of 1869, which provided for a tax of 1 per cent on the whole amount of deposits and circulations of savings banks, and that no other tax should be assessed on said deposits and accumulations, or against its depositors, on account thereof. Plaintiff paid the 1 per cent tax. There was nothing to show that the assessors had refused to abate the tax. Case reserved.

Sargent, J. The legislature intended that the tax of 1 per cent should be in full for all taxes upon the same property in whatever form it might exist, and they intended to make this case an exception to the general rule of taxing real estate in the town where situated. The plaintiff has an adequate remedy at law upon the application for the abatement of taxes, and the bill in equity may be considered such an application if the assessors refused to abate the tax. Case discharged.

Cited: 54 N. H. 413; 56 id. 383, 384, 386; 58 id. 100, 563, 584; 59 id. 105, 289; 60 id. 504, 505; 64 id. 203; 68 id. 385, 402; 70 id. 224.

FIRST NAT. BANK v PETERBOROUGH (1875) 56 N. H. 38.

Petition, for abatement of tax. A tax was assessed on the surplus of the petitioner, a national bank, in accordance with G. S. ch. 49, sec. 5, providing that the surplus capital of banks was liable to taxation in the town where located. 13 Stats. at Large, 111, provided that 10 per cent of the profits were to be added to the surplus each year, and that shares in national banks were taxable. Case reserved.

Smith, J. The states have the unquestionable right to tax the surplus earnings of national banks within their limits. The efficiency of banks to discharge their duties is not impaired by the taxation complained of; their property only, and not their operations, is subjected to taxation, and it is just that these institutions should bear their proportion of a common burden. Petition dismissed.

Cited: 58 N. H. 317.

PENACOOK BANK v HUBBARD (1877) 58 N. H. 167.

Assumpsit, for amount of checks paid defendant by mistake. The checks were drawn by M on the plaintiff, in favor of S, who sent them to plaintiff by defendant. Plaintiff paid defendant who paid S. The plaintiff's clerk erroneously supposed that plaintiff had funds of M, when in fact his account was overdrawn. Verdict for plaintiff. Case reserved.

Foster, J. By the plaintiff's delivery of the money to the defendant for the payee, defendant was as fully authorized by plaintiff to carry it to the payee as if he had been the plaintiff's messenger. Without fault on his part, he is not liable for doing what plaintiff authorized him to do. There is no legal reason for transferring from plaintiff to defendant the consequences of plaintiff's error. Verdict set aside.

Cited: 61 N. H. 20.

WOODS v MILFORD SAV. INSTITUTION (1877) 58 N. H. 184.

Assumpsit, for a deposit. The defendant, a savings bank, had been compelled to pay out the money, in satisfaction of judgments rendered in suits for the plaintiff's board, in which the plaintiff's guardian was defendant and the bank was trustee. The guardianship was revoked. The plaintiff contended that he had no notice of the suits, and the bank should not have been charged for his money, as trustee.

Doe, C. J. 1. The plaintiff by his guardian had notice of the trustee's suits. 2. If the defendant should not have been charged as trustee, it is not, on that account, liable for property which the law has taken from it, and appropriated to the payment of the plaintiff's debts in suits against the plaintiff's guardian. Judgment for defendant.

Cited: 60 N. H. 217; 64 id. 310.

STRAFFORD NAT. BANK v DOVER (1878) 58 N. H. 316.

The surplus fund which a national bank is required, by U. S. G. S., sec. 5199, to reserve from its net profits, is not excluded in the valuation of its shares for taxation.

KIMBALL v NORTON (1879) 59 N. H. 1.

Bill for instructions by the assignee of a savings bank. Defendant was a depositor in the bank and had entered into a stipulation with the bank that the deposit might be paid to any one presenting the book. Later the bank took the defendant's book in pledge, with knowledge that the apparent title was in the defendant and not in the pledgor, and without sufficient evidence of the pledgor's authority. Defendant having demanded the deposit book, plaintiff brought this bill for instructions. The court ruled that defendant was entitled to a decree for the book, discharged from all claim of the bank as pledgee. Exceptions.

Doe, C. J. The stipulation that a deposit may be withdrawn by any one presenting the book, does not relieve the bank from the duty of acting in good faith and with reasonable care. The agreement is to be construed according to the authorized business and organic object of the institution. Exceptions overruled.

Cited: 66 N. H. 373; 67 id. 551.

COGSWELL v ROCKINGHAM SAV. BANK (1879) 59 N. H. 43.

Insolvency proceedings, to terminate the defendant. D and F had special deposits with the defendant for safe-keeping, to be checked out on call. The P Savings Bank was the indorsee for value of a check drawn by the defendant on the B Bank, in payment of a deposit. The defendant had no funds in the B Bank when the check was issued or presented, but by an arrangement between the banks the defendant was authorized to draw the check and the B Bank was bound to pay it. This arrangement continued for six days after the check was drawn. The check would have been paid if presented at an earlier day. D, F and P Savings Bank claimed payment in full, as creditors, in preference to the general creditors.

Clark, J. 1. The transaction was in the nature of a loan. 2. The bank must be held to account for the call deposits, and the claims are debts to be paid in full.

3. In an action by the holder of a check against the drawer, delay in demanding payment of the drawee, is not a defense, unless the drawer has suffered loss by reason of the delay. Case discharged.

Cited: 59 N. H. 290; 63 id. 142, 147, 162; 64 id. 596; 68 id. 292, 385.

HALL v PARIS (1879) 59 N. H. 71.

To determine rights of depositor. The plaintiffs were assignees of a savings bank. The charter of the bank made the safe-keeping and investment of deposits for profit the sole business of the bank. The defendants had funds on deposit. They owed the bank on notes for which their bank books were pledged as collateral. Defendant A, prior to the failure, requested one of the bank's officers to apply his deposit on his note. The officer agreed to do so. Defendant B kept a special deposit subject to call. Each of these defendants claims the right to set off his deposits on his notes.

Allen, J. 1. The depositors are virtually stockholders, as they share profits and losses. 2. The bank is the trustee or agent for the depositors. 3. The mere fact that one has funds on deposit, does not entitle him to a setoff, on his liability to the bank. 4. Defendant A is entitled to have his deposit set off against his note, provided nothing more remained to be done when the agreement was made. 5. The defendant B is entitled to have his special deposit in full as it was not part of the bank's business to receive such deposits. Having received the benefits, it is bound to account for such fund. Judgment for defendants.

Cited: 59 N. H. 290; 63 id. 142, 162; 68 id. 385.

FIRST NAT. BANK v CONCORD (1879) 59 N. H. 75.

To abate taxes. The plaintiff bank had a portion of its surplus invested in government bonds. These, the tax assessors assessed as "money on hand at interest or on deposit." The plaintiff contended that this tax should be abated, as it was not taxed as surplus. This appeal is taken from decision of the tax assessors. Judgment for defendant. Appeal.

Doe, C. J. 1. The shares of a national bank as well as its surplus are taxable. This is true whether invested in government bonds or not. 2. A mere misnomer is immaterial, it was the surplus that was intended. 3. All taxation should be equally borne. Judgment affirmed.

Cited: 59 N. H. 594; 60 id. 238; 65 id. 114; 67 id. 82; 69 id. 33; 70 id. 205.

BERRY v WINDHAM (1879) 59 N. H. 288.

To abate a tax. The plaintiff had been taxed in New Hampshire on funds he had deposited in a savings bank in Massachusetts. The bank had paid a tax on its deposits. A statute of New Hampshire forbade double taxation. The selectmen of the defendant town refused to abate plaintiff's tax. Appeal.

Stanley, J. 1. A savings bank is a trustee for its depositors. The depositor has the equitable title, the bank the legal. 2. Only the person holding the legal title is subject to the tax. 3. The funds having been taxed in Massachusetts, were not subject to another tax here. Judgment for plaintiff.

Cited: 59 N. H. 405, 526; 60 id. 238; 65 id. 114; 67 id. 82, 83; 68 id. 385; 70 id. 204, 530.

BARKER v ROCHESTER NAT. BANK (1879) 59 N. H. 310.

Debt, to recover a penalty under G. S., ch. 213, sec. 3, for usury. Defendant, a banking corporation organized under the National Currency Act, contended that the usury law of the state was not binding on it. Verdict for defendant. Motion for new trial.

Stanley, J. The National Currency Act is binding upon the states; and providing, as it does, the penalty to which corporations organized under it, are subject for taking usurious interest, it necessarily renders the state law on the subject inapplicable to such corporations. Judgment on verdict.

DOWD v CITY SAV. BANK (1879) 59 N. H. 391.

Statutory proceedings, to settle affairs of a bank. Plaintiff presented a claim against the bank to the commissioner appointed under G. L., ch. 166, sec. 16. At

the hearing he made no objection to the proceedings, but he now appealed from the commissioners' decision, contending that the decision conflicted with his constitutional right to a jury trial.

Bingham, J. The plaintiff having voluntarily presented his claim to the commissioner, and at the hearing not having objected to the proceeding, he cannot now deny authority. Exceptions overruled.

Cited: 61 N. H. 611; 66 id. 325.

HALL v BRACKETT (1880) 60 N. H. 215.

On indemnity bond. The plaintiffs were assignees of a savings bank. The defendant was treasurer. In an action upon the bond, it was objected: 1, That the action should have been brought in the name of the bank; 2, that one of the plaintiffs' counsel, having been a commissioner in the insolvency proceedings, was disqualified to appear here; 3, that in his official position, he had passed on the claim against the bank; and, 4, that, as such, he obtained information which was privileged.

Smith, J. 1. The assignees being trustees who hold the legal title, are proper parties to the action. 2. The claim involved in this action is on the treasurer's bond. The counsel mentioned, had nothing to do with this. 3. None of the communications to the counsel while acting as commissioner, were privileged. Judgment for plaintiff.

Cited: 69 N. H. 623.

TAY v CONCORD BANK (1880) 60 N. H. 277.

Assumpsit on bank deposit. Money collected at a fair, for the purpose of procuring a hall, was placed in the hands of a committee. The plaintiff was chosen by the committee to be treasurer, and deposited the money with defendant, a bank in his name as treasurer of the committee. Later plaintiff and the committee had a disagreement, and though the hall was finished, plaintiff refused to draw the money. A majority of the committee elected a new treasurer to whom the bank paid the money. Plaintiff contended that the money was paid by defendant without authority.

Allen, J. The disposition of the fund was given to the executive committee, and the appropriation of the fund by that committee was sufficient authority to warrant payment by the bank. Such payment was a discharge. Judgment for defendant.

NORTON v DERRY NAT. BANK (1882) 61 N. H. 589.

Assumpsit on written guaranty. The defendant's cashier, in the name of the bank, guaranteed a contract between plaintiff and a third party for the delivery within a specified time of certain building materials. The cashier also certified to the plaintiff a false record of a note of the directors, authorizing this guaranty.

Allen, J. It is no part of the business of a bank, nor necessarily incidental to it, to guarantee a building contract, and the defendant had no power to make the guaranty which is the subject of this action. Case discharged.

Cited: 68 N. H. 292.

BROWN v FOLSOM (1883) 62 N. H. 527.

Creditors' bill. The plaintiffs were depositors in a savings bank. The defendants were officers and directors of the bank. The bank failed and was placed in hands of assignees. The plaintiffs seek to charge defendants with liability on the ground of fraud and mismanagement. Demurrer.

Carpenter, J. The assignee is an officer of the court and subject to its orders. If he fails to perform his duty, he may be removed. The right which plaintiffs seek to assert, belongs to the assignee to enforce. Demurrer sustained.

Cited: 68 N. H. 558; 69 id. 622; 70 id. 541.

WESTON v MANCHESTER (1883) 62 N. H. 574.

To abate a tax on bank stock. The tax assessors levied a tax on the plaintiff's national bank stock, and refused to deduct the stock from its indebtedness.

The amount of the plaintiff's money on hand, money at interest, and national bank stock was less than the amount on which he paid interest.

Doe, C. J. The plaintiff is entitled to an abatement. Case discharged.
Cited: 64 N. H. 284; 67 id. 442.

FRANCESTOWN SAV. BANK CASE (1884) 63 N. H. 138.

Insolvency proceedings, to settle the affairs of a savings bank. The assets of the bank were not sufficient to pay the depositors in full. An act was passed scaling the deposits 20 per cent. This left the assets slightly in excess of the liabilities. The bank continued to do business, receiving new deposits, which were kept separate from the old. Subsequently an assignee was appointed to wind up the affairs of the bank as to the old deposits. Some of the old depositors had withdrawn all their deposits as reduced. Some had withdrawn part. The remainder had withdrawn none. A surplus remained to be divided. The question was as to the proper distribution of such surplus. Those depositors who had left any portion of their deposits, claimed that those who wholly withdrew were not entitled to share the surplus. Case reserved.

Smith, J. 1. The depositors in savings banks in this state are virtually stockholders. 2. The act scaling the deposits expressly provided that any surplus should be equitably divided among the depositors. 3. The depositors were tenants in common, and a withdrawal by one of all his deposits did not waive his right to share the surplus. Case discharged.

Cited: 68 N. H. 385.

GREELEY v NASHUA SAV. BANK (1884) 63 N. H. 145.

To recover bonds. The plaintiff called at defendant's place of business, and saw the clerk of defendant's treasurer. Plaintiff desired to deposit certain bonds for safe-keeping. The clerk told the plaintiff that the bank received such bonds, collected the interest as it matured, and credited it to the depositor's account. Plaintiff left the bonds, and received a receipt for safe-keeping signed by the clerk of the treasurer of defendant. Defendant never knew of this transaction. Judgment for defendant. Appeal.

Smith, J. 1. The charter of defendant did not authorize it to act as bailee. Nothing has been shown to connect the bank with the transaction. 2. The defendant is not liable for the unauthorized act of the treasurer or his clerk. Judgment affirmed.

LACONIA SAV. BANK v LACONIA (1892) 67 N. H. 324.

To abate a tax. The selectmen of defendant, a town, levied a tax on the guaranty fund of plaintiff, a savings bank. The law required each savings bank to pay a tax on all deposits on which it paid interest, also on its capital. This tax was in lieu of all other taxes. The keeping of a guaranty fund by savings banks was compulsory. Defendants contended that the guaranty fund was to be deemed surplus capital.

Smith, J. 1. The state tax is upon capital and deposits only, and is in lieu of all other taxes. 2. No authority for the assessment of the tax herein is given to the town. Judgment for plaintiff.

BROWN v MERRIMAC RIVER SAV. BANK (1893) 67 N. H. 549.

Money had and received. The plaintiff's intestate had money on deposit with defendant, a savings bank. A rule of the bank required immediate notice of loss of book, in order to hold the bank responsible for payment to the wrong party. The plaintiff's book was stolen. He notified defendant the next day. The defendant, in the meantime, had paid out the deposit to a stranger who presented the book, but had not required him to be identified. The defendant asked the court to charge: that if it acted in good faith and with the care ordinarily used in their business, under all the facts within its knowledge, it was not responsible. The court refused, but charged that if the bank exercised such care as persons of average prudence would, then it was not responsible. To show whether the intestate had acted in collusion with X, evidence as to the amount of money the intestate had when he died, two months later, was admitted. Verdict for plaintiff. Exceptions.

Wallace, J. 1. The request to charge that defendant was relieved of liability, if the degree of care exercised in their business was used, was properly denied. Defendant is bound to show that it exercised all the care that would be required from an ordinarily prudent person. 2. The testimony of the assets of plaintiff's intestate at the time of his death was proper. Judgment affirmed.

ABBOTT v WOLFEBOROUGH SAV. BANK (1895) 68 N. H. 290.

Petition, to recover special deposit. The defendant, a savings bank, received a deposit from plaintiff, which was marked "special." No interest or dividends were paid on such deposit. No vote of directors was necessary to authorize the treasurer to pay out funds on such deposit. The deposits went into the general funds of the bank.

Blodgett, J. This deposit was in the nature of a loan and the defendant, by receiving the money, and using it, is equitably and legally estopped to deny its liability to repay. Petition granted.

PETITION OF WOLFEBOROUGH SAV. BANK (1896) 69 N. H. 84.

Petition, to abate taxes. The bank's deposits were scaled 25 per cent by act of the legislature. The bank had already paid taxes on the deposits in full. The petitioner now sought to have the tax on this 25 per cent refunded. The state opposed, on the ground that no recovery could be had after payment. After the tax had been paid, a statute was passed authorizing an application for the abatement of taxes and the abatement thereof.

Blodgett, J. 1. The fact that the tax had been paid before the passage of the act is immaterial. 2. The bank having been subjected to a payment of a tax of 25 per cent in excess of what it ought to have been, equity requires an abatement to a corresponding extent. Petition granted.

HANSON v HEARD (1897) 69 N. H. 190.

Money had and received. The defendant was receiver of a national bank. The cashier of the bank had received money from plaintiff on a promise to pay plaintiff an illegal rate of interest. He gave plaintiff receipts, one bearing his signature as cashier, the others being signed individually. The plaintiff understood that he was dealing with him as cashier. This money was deposited in cashier's personal account. The cashier afterward absconded. Verdict for plaintiff. Exceptions.

Chase, J. 1. The cashier had prima facie authority to act for the bank in the ordinary course of its business, and in receiving deposits as a part of such business. 2. That some of the receipts bore the cashier's personal signature, did not preclude plaintiff from showing that they were understood as given and taken in his capacity as cashier. 3. The promise of an illegal interest does not authorize the retention of the principal. 4. The cashier's independent fraud did not affect the matter. Exceptions overruled.

STRAFFORD SAV. BANK v CHURCH (1899) 69 N. H. 582.

Assumpsit, to recover deposit paid by mistake. A depositor with the plaintiff bank, died intestate, and the bank paid the amount to her husband. Later her administrator brought suit against the bank and recovered. In the meantime the husband had died and his administrator appeared in the action against the bank. The bank now attempted to recover the amount of the judgment against the husband's administrator. The claim against the husband's estate was barred by the Statute of Limitations, but plaintiff contended that the appearance of the husband's administrator was a new promise that his estate would reimburse plaintiff. Plaintiff had made demand by letter. Judgment for defendant. Exception.

Chase, J. 1. The payment by plaintiff to the husband of the depositor was made voluntarily, and a payment made under such circumstances cannot be recovered by the payor, although he was under no obligation to make it. 2. The demand must be made in such a way that the party upon whom it is made may immediately discharge himself by complying therewith; the demand by letter was therefore not sufficient. 3. The right of action was barred by the Statute of Limitations, and the appearance of the husband's administrator in the suit did not constitute a new promise by his estate to reimburse the bank. Exceptions overruled.

RICKER v HALL (1899) 69 N. H. 592.

To charge directors for fraud of cashier. The defendants were directors of a national bank. The cashier had embezzled a large sum. The defalcations covered a long period of time. The directors and the national bank examiner made examinations from time to time, and discovered nothing wrong. Prior to the discovery of the shortage, some of the directors and the cashier had formed a pool for speculation. The speculation resulted disastrously. The plaintiff, a stockholder, sought to charge the directors personally for the loss occasioned by the cashier, claiming that knowledge of this speculative pool was sufficient to create liability on the part of directors when they afterward continued to employ the cashier. Judgment for defendants. Exceptions.

Peaslee, J. 1. The question of negligence on the part of the directors is one of fact solely for the jury. 2. Knowledge by a director of prior unsuccessful speculations by an officer of a bank does not charge such director with personal liability. Exceptions overruled.

Cited: 79 N. H. 172, 447.

BANK COMMISSIONER v TRUST CO. (1899) 69 N. H. 621.

To determine rights of trustees. The defendant had issued debentures and to secure them, pledged securities with trustees, and agreed to pay the expenses of executing the trust. Subsequently an assignee was appointed for defendant. Thereafter no assets were allowed to be paid out. About 11 per cent had been paid by order of the court prior thereto. The trustees contended that they were preferred creditors.

Chase, J. 1. The contract between the defendant and the trustees was not rescinded by the assignment, but the defendant was prevented from further performance. 2. The trustees are entitled to a reasonable damage for the breach, also all expenses incurred before the assignment. 3. The payment of the 11 per cent was prior to the assignment of the defendant and does not affect the trustees' claim. 4. The trustees' claim for preference should be disallowed. Case discharged.

Cited: 70 N. H. 541, 542.

BANK COMMISSIONERS v SECURITY TRUST CO. (1900) 70 N. H. 536.

Petition for appointment of assignee of the property of defendant, a trust company, doing business as a savings bank, and a trust and banking company. Defendant sold notes secured by mortgage, and guaranteed the payment of the principal and interest. Some of the claimants presented claims on the guaranty. Others held collateral given by the maker of the notes, and also collateral given by defendant to secure payment of certificates of deposit issued by it. Some of the claimants insisted on a preference, because their claims were for collections made by defendant. Part of these collections were made with the claimants' authority, and part were not so made. Mortgages standing in defendant's name, though sold to claimants, were foreclosed and title remained in defendant, and in some cases defendant issued to claimants secured certificates of deposit, for the amount collected. Some of the claimants accepted these certificates. Defendant was authorized to act as a testamentary trustee and acted as such over a fund claimed by B. It did not appear that the fund was deposited in the savings department. Defendant sold land to M, who gave his notes, which were sold to the C and W Bank. The C and W Bank also purchased an outstanding mortgage. The C and W Bank claimed to be paid in full from the money coming from M, who was ready to pay, and that the mortgage be paid from other assets. Defendant sold B a note and mortgage, representing the mortgage as a first lien. Subsequently defendant assigned the same mortgage, and the note it was given to secure, to another party. Defendant sold G a note secured by mortgage, and the interest not being paid, defendant advanced it and inventoried the payments as assets. Defendant failed to pay a mortgage held on the land by V as it had promised G, and discharged her mortgage and gave V a new one, and subsequently acquired the equity in the land. R was hired to go over the books and to investigate affairs in North Dakota, where a preference was given for a claim for wages. In New Hampshire where the contract was made there was no such preference given by statute.

Chase, J. 1. Interest should be allowed on the claims to the date of the appointment of the assignee. 2. The guaranty was an absolute promise to pay the

debt, if the debtor failed to make payment within the specified time, and being unconditional, no demand upon the principal debtor or notice to the defendant of his default was necessary. 3. Claimants holding defendant's certificates of deposit are entitled to prove for the balance of their claims, over and above the proceeds or value of their collaterals. 4. Creditors holding the defendant's guaranties are entitled to prove the full amount due upon them, without regard to the securities which the creditors may hold from the original debtor. 5. The beneficial owner must trace his money or property into some specific property in the possession of the representative of the trustee or fiduciary agent to entitle himself to a preference over general creditors. 6. If the mortgages have been foreclosed by defendant in its own name, with or without authority, and the nominal title is still in it, it holds the property in trust for the owners of the mortgages. 7. Where claimants have accepted certificates of deposit with collaterals, their rights are governed by the new contract thus made, and if they refused to accept them, the tender is immaterial. 8. The money of the C and W Bank having been traced to the bank, it is entitled to have defendant's interest in the land charged for the payment of its notes. 9. B's right to a preference depends on his ability to prove that the money, or its substitute, went into the assignee's possession. 10. G is entitled to be restored to the position she occupied when defendant wrongfully discharged her mortgage. 11. There cannot be a preference for wages for work done in North Dakota. Case discharged.

NEW JERSEY

STATE BANK v VAN HORN (1817) 1 South. 383.

On bank note. The note was not payable at the defendant bank. Plaintiff began suit before a justice's court without demanding payment at the bank. Summons was served on defendant's cashier. The cashier and one of the directors appeared at the trial. The jurisdiction of the court was limited and the manner of serving summons was defined by the act creating it. The summons had not been served in accordance with this act. Judgment for plaintiff. On certiorari.

Kirkpatrick, C. J. 1. Demand at the bank was unnecessary. 2. The court could not, however, proceed to trial without appearance, unless the summons had been served according to the directions of the act. Judgment reversed.

HEVENER v KERR (1818) 4 South. 58.

To recover money taken on execution. S recovered a judgment against plaintiff. Defendant, a constable, levied the execution. He, at the instance of S, demanded and received an additional amount of \$6.99, as a condition of accepting certain bank notes. Plaintiff sued defendant to recover this sum. Plaintiff was nonsuited. Defendant procured a summons to be issued, returnable by himself, to recover damages for the expenses of suit begun against him by plaintiff. Plaintiff did not appear. Defendant returned the summons in his own name and upon his oath. Judgment against plaintiff for the sum demanded and costs. Plaintiff paid the judgment. The present action was brought before a justice of the peace to recover this sum and the additional amount received by defendant in the action begun by S because of accepting bank notes. Defendant did not appear. The justice inspected the receipts. No witnesses were sworn. Judgment, by default, for plaintiff. On certiorari.

Kirkpatrick, C. J. 1. A justice cannot render a final judgment by default. 2. If the creditor receives bank bills, he does it gratuitously by way of accommodation and he himself has the right to prescribe the terms of accommodation. 3. However erroneous may have been the proceeding in the action wherein the plaintiff served his own process, the judgment entered must prevail until it be regularly vacated or reversed. Judgment reversed.

Cited: 18 N. J. 153; 21 id. 51, 479.

GORDON v NEW BRUNSWICK BANK (1822) 1 Halst. 100.

To procure warrant to collect tax. The legislature on November 2, 1810, imposed a tax, definite in amount, on the capital stock, subscribed and paid in, of banks of issue. No commission of appeal was provided for. The defendant, a bank

issuing notes, returned its paid-in capital as \$250,000. The plaintiff, the state treasurer, alleged that during the years 1817-1820, inclusive, defendant had paid less than the specified tax on that amount. On being required to show cause why a warrant should not issue for the deficiencies, defendant admitted plaintiff's allegation, but contended: 1, that the tax was unconstitutional; 2, that it was entitled to pay less than the specified tax on \$250,000, because its capital had diminished. Defendant showed receipts in full from a previous treasurer for the years in question, procured by representations as to the diminution of its capital.

Rossell, J. 1. The clause in our constitution which provides for the appointment of commissioners of appeal in all cases of taxation does not apply to cases like the present. 2. The receipt of the treasurer in full for a sum less than the original tax is not conclusive. 3. Defendant's allegation that its capital had been lessened by losses did not authorize the treasurer in reducing the tax. Application for relief should have been made to the legislature. Judgment against defendant for the deficiencies accruing prior to 1821.

Cited: 31 N. J. 515.

SCOTT v CONOVER (1822) 1 Halst. 222.

Debt. The action was on an agreement to pay in bank notes for the conveyance of land. The agreement stated that the plaintiff "hath granted, bargained and sold, and doth absolutely bargain and sell," the land in question; and contained his promise to give a good and sufficient title on a future day certain. Case stated.

Kirkpatrick, C. J. 1. The article of agreement itself conveyed the land. 2. Bank notes are not money. An action of debt will not, therefore, lie on a contract to pay in bank notes. 3. In covenant plaintiff could recover his real damages, according to the then value of the bank notes, and according to the equities of the case. Judgment for defendant.

STATE BANK v AYERS (1824) 2 Halst. 130.

On promissory note against indorser. The note was discounted by the plaintiff. The defendant pleaded: that notice of protest was not sent to him in due time; that it was not sent to the nearest post office; and that the note was usurious. The makers resided in New York, and the note was protested and notice sent by mail the next day to the plaintiff who transmitted it by the next mail after it was received, to the defendant. There was a post office at R, five miles from the residence of the defendant, and one at W, four miles from his residence. He did not reside in a post town. The proof of the post office to which the notice was sent, rested on the statement of the cashier, that it was his custom to send to the nearest post office, and he could not state positively to which this notice was sent. On a former note given by the same maker to the plaintiff, which was partly paid by the plaintiff in post notes, the plaintiff had received more than legal interest. That note was settled, a new agreement was made, and the present note given with new security, and for legal interest. Judgment for plaintiff. Rule for new trial.

Ford, J. 1. The notice of protest was given in due time. 2. There was sufficient circumstantial evidence in the statement of the cashier for the jury to find that the notice was sent to the nearest post office. 3. The present contract is a lawful one, and no usury appears therein. The new transaction was voluntary on the part of the makers. Rule discharged.

Cited: 8 N. J. 263; 17 id. 503; 20 id. 133; 42 id. 30; 22 N. J. Eq. 443, 609.

STATE BANK AT ELIZABETH v CHETWOOD (1824) 3 Halst. 1.

Debt on a cashier's bond. The defendant, a surety, pleaded several pleas, with subjoined notices, the nature of which sufficiently appears from the opinion. Plaintiff moved to strike out the notices.

Ford, J. 1. Defendant is estopped from denying that D was cashier, after having recited in the bond under hand and seal that he was defendant's cashier. 2. The bond was not avoided by D's failure to be sworn before he entered on his duties. 3. A plea that the bond was delivered to one of defendant's co-obligors to hold as an escrow, is ill. 4. The bond being for the performance of many specific acts and duties at the principal's peril, the allegation that if he erred he did so by mistake and not for want of fidelity is no defense. 5. Where the principal is bound only to deliver plaintiff's funds to his successor and is not bound to resign, his

resigning and handing the funds to a committee is consideration for plaintiff's agreement to accept these acts in satisfaction. 6. Ratification by plaintiff of acts alleged to constitute a breach of the bond would constitute a good defense. 7. But there could be no ratification without knowledge of the cashier's improper acts. 8. The question of ratification is for the jury. 9. Continuing the principal in office after discovery of his misconduct did not heal breaches of an anterior date. Motion overruled as to some, sustained as to others, of the notices.

Cited: 1 N. J. L. 396; 12 id. 18; 15 id. 162; 21 id. 116, 121, 247; 35 id. 441; 41 id. 408; 52 id. 44; 59 id. 125; 51 N. J. Eq. 619.

COXE v STATE BANK (1825) 3 Halst. 172.

Application for a setoff. The plaintiff obtained judgment and execution against the defendant, on certain bank bills. Defendant applied to the court to bring the bills of plaintiff into court and have satisfaction entered. Refused. The plaintiff failed. Defendant brought a number of suits against it on the bills of plaintiff on which he obtained judgment. He applied to the court to have these judgments set off against the judgment of the bank against him. No appeal was taken from these judgments.

Ford, J. 1. The notes of the bank could not be tendered as cash, nor can they be brought into court as such. 2. The judgment against the bank not having been appealed from, may be set off against the judgment against the defendant. So ordered.

Cited: 11 N. J. 399; 39 id. 241; 47 id. 18.

CHANDLER v THE MONMOUTH BANK (1832) 1 Green 255.

Assumpsit for services rendered. The plaintiff was one of the directors of the defendant, which was authorized to build and operate a ferry. The plaintiff secured a loan for the defendant to enable it to accomplish this, pledging his personal security. He also superintended the building of the ferry boat, and made the contracts for her supplies and fuel. The defendant's charter contained a provision that no director should be entitled to any emolument, unless the same should have been allowed by the stockholders at a general meeting. The court charged that plaintiff was not entitled to compensation for the services. Verdict for defendant. Rule to show cause why verdict should not be set aside and a new trial granted.

Drake, J. 1. The directors are not entitled, as directors, to compensation for the performance of their appropriate duties. 2. The individual members of a board are not excluded from just compensation for services of a different character, merely because they were rendered while they were directors. Rule absolute. New trial granted.

Cited: 30 N. J. Eq. 713.

LEGGETT v NEW JERSEY M'F'G CO. (1832) 1 N. J. Eq. 541.

Bill to foreclose a mortgage on a banking house, and for sale of the premises. The receiver of the defendant, a banking corporation, answered that the president and cashier who executed the mortgage were not authorized by the directors or by the act of incorporation to do so, and that complainant had notice of the facts. It was also claimed that the defendant had no authority under its charter, to acquire or convey real estate. The mortgage was executed under the seal of the corporation.

Vroom, Ch. 1. The powers of a corporation are those expressly granted, and those incident. The defendant had authority to hold real estate necessary for its business purposes, and to convey it for the use of the corporation. The property mortgaged was necessary for the defendant. 2. The mortgage, being signed by the president and cashier, and under the corporate seal, was prima facie, only, a due and lawful execution. 3. The president and cashier had no authority, ex officio, to make the mortgage. 4. The burden of proving that they had special authority is on defendants. The instrument is unenforceable. Bill dismissed.

Cited: 23 N. J. Eq. 167; 36 id. 566; 33 N. J. 63; 34 id. 430; 35 id. 443; 43 id. 328; 46 id. 241; 48 id. 523; 49 id. 466.

TRENTON BANKING CO. v WOODRUFF (1838) 2 N. J. Eq. 117.

Bill to foreclose two mortgages. W executed three mortgages on the same premises, the first and third of which were assigned to the plaintiff, a bank, to secure payment of notes. The act of incorporation of the plaintiff provided that it should not "deal or trade in anything except bills of exchange, promissory notes, gold or silver bullion, or in the sale of goods which shall be the product of its lands." Defendant contended that the plaintiff could not take the conveyance. The answer of the defendant's wife alleged that the second mortgage was bequeathed to her and that W, the executor of the will, fraudulently destroyed and canceled it of record; and that it was a claim prior to the third mortgage. The plaintiff disclaimed all knowledge of the improper discharge of the second mortgage. There was evidence that the canceled mortgage had been shown to the cashier by W, and that there was a question raised as to whether the cancellation was legal.

Pennington, Ch. 1. The provision in the plaintiff's charter was to restrain it within the legitimate sphere of banking. But it could secure a debt by accepting the transfer of a mortgage on real estate. 2. The destruction of a bond or other instrument without authority, can never be set up against the right of the one who had the beneficial interest. 3. The cancellation was only prima facie evidence of discharge. 4. Notice to cashier is notice to a bank. 5. The court has power to direct an issue in a case where there are facts both ways, not sufficiently conclusive to found a decree on, without the intervention of a jury. Issue to be made for supreme court, whether W paid the bond or mortgage. So awarded.

Cited: 12 N. J. 113, 494; 13 id. 478; 15 id. 107; 17 id. 288, 384; 18 id. 434; 20 id. 42, 149; 21 id. 590; 23 id. 400; 28 id. 347; 29 id. 416; 31 id. 433, 539; 42 id. 404, 407; 34 N. J. 317.

OAKLEY v PATTERSON BANK (1839) 2 N. J. Eq. 173.

Bill for an injunction, and the appointment of a receiver. The suit was brought under the Act of February 16, 1829, to prevent frauds by incorporated companies. It charged that the principal part of the capital of the defendant, a bank, had been lost by large loans to R; that the late cashier had made a large loan to R, without the knowledge of the board, which was to have been secured, but that the claim of the bank was contested because of usurious interest; that a proper bond had not been required of the cashier; that the circulation of the bank had been refused; and that there were no funds to redeem the bills of the bank. On the filing of the bill an injunction was issued.

Pennington, Ch. 1. The defendant is insolvent within the meaning of the act under which the bill is brought. 2. It does not follow because an injunction has been issued, that a receiver should not be appointed. They are independent questions. Circumstances may call for a suspension of operations of the bank, while the directors in charge may be best calculated to wind up its affairs. 3. The great loans to R were improvident, and brought the bank into embarrassment, but circumstances do not seem to warrant taking the affairs out of the hands of the directors. The bank was not taken out of the general act by the Act of February 1, 1838. Order accordingly.

Cited: 8 N. J. Eq. 77; 9 id. 351; 11 id. 126; 49 id. 405.

MORRIS CANAL & BANKING CO. v VAN VORST (1847) 1 Zab. 100.

On bond of a cashier. A was cashier and clerk of the plaintiff, and gave a bond for the faithful performance of his duties. The defendant's testator was one of his sureties. While A was in the employ of the plaintiff, its charter was amended by the legislature, its powers were enlarged, and it opened a branch office in New York, whereby the cashier's duties and responsibilities were greatly increased. A gave the plaintiff his promissory note, and conveyed lands to it, in satisfaction of his shortages. The alleged shortages were known to the plaintiff, for five years before this action was brought, and in the meantime A had become insolvent. A by-law required the plaintiff's finance committee to hold weekly meetings to audit the accounts, which was not done. Plea, actio non. Demurrer.

Carpenter, J. 1. A promissory note given by the principal on a bond, and accepted by the obligee, in full satisfaction of the bond, is a bar to a subsequent action on the bond. 2. In the absence of fraud, mere delay in bringing suit, until after the principal has become insolvent, is no defense by a surety, though he may have given notice to creditors and requested them to bring suit. 3. An increase

in the business will not discharge the sureties. 4. The by-laws of the corporation form no part of the condition of the bond; they are for the security and protection of the company, not of its officers. 5. The sureties are not responsible for losses occasioned by accident, or mistake of the cashier, where there was no willful neglect or omission, or wrongful act. 6. The neglect of plaintiff's officers to examine the principal's accounts will not justify his wrongful acts or neglect. Demurrer overruled.

Cited: 23 N. J. 107; 38 id. 361; 39 id. 3; 43 id. 76; 44 id. 67; 52 id. 46; 35 N. J. Eq. 332, 602.

OVERMAN v HOBOKEN CITY BANK (1862) 30 N. J. L. 61.

On bank check. The plaintiff alleged that the check was drawn by A on the defendant and deposited on Saturday, October 29, for collection, with the C Bank; that on October 31 it was presented to the O Bank, agent of the defendant, and payment demanded through the clearing house in New York City; that the C and O Banks were both members of that association; that the defendant retained the check without notice of non-payment, until November 2, when it was returned to the C Bank unpaid; and that A failed on the first day of November. This retention, under the clearing house rules, constituted an acceptance. No authority was shown in the association to alter or modify the law merchant in regard to checks or commercial papers. Defendant was not a member of the clearing house. Demurrer.

Whelpley, C. J. 1. The clearing house association has no power to make usages or rules to bind those who are not parties to its organization. 2. Those who are not bound by its usages, and have not contracted with reference to them, have no right to avail themselves of them to create obligation against those who are parties to their adoption, and bound by them inter sese only. 3. A failure on the part of the defendant to return the check sooner was not necessarily an acceptance of it. Judgment for defendant.

Cited: 31 N. J. 563.

OVERMAN v HOBOKEN CITY BANK (1864) 31 N. J. L. 563.

On check. The check was on the defendant, drawn by A to the plaintiff's order, and deposited in the C Bank in New York. It was sent to the O Bank, presented to the defendant October 31, between twelve and one o'clock, retained until the following day at about twelve o'clock, when it was returned to the O Bank marked "not good." The following morning the O Bank returned it to the C Bank and the plaintiff was notified. The court ruled that there was no evidence of acceptance by the defendant. Plaintiff sought to hold defendant under a usage relating to checks drawn on New York City banks and their treatment under the clearing house rules. Defendant was not a New York City bank. Error.

Beasley, C. J. 1. The defendant has a right to insist that its business in this transaction was conducted in accordance with the established rules of law. It does not appear that it ever agreed, either expressly or impliedly, to regulate it by any other standard. The usage, even if valid, did not affect the check in suit. 2. There was no error in the instruction of the court as to the acceptance. Mere retention by the drawee was not equivalent to acceptance. Judgment affirmed. (See 30 N. J. L. 61, ante p. 825).

STATE, EX REL. v HART (1865) 31 N. J. L. 434.

On certiorari to review taxation. The prosecutor resided in the township of H, in the county of M, State of New Jersey. He owned stock in a national bank situated in the same county and State but in a different township. He was assessed for state, county and township taxes thereon. He contended that the tax was illegal: 1, because national banks cannot be taxed by the states, and a tax on the shares of a bank in the hands of an individual is in effect a tax on the bank itself; 2, because most of the bank's capital was invested in United States bonds; 3, because the tax was not assessed in the township where the bank was situated; 4, because the tax was higher than that on the stock of state banks situated in the same county as the national bank. The Act of Congress of February 25, 1863, provided in sec. 41, that national bank stock might be taxed by the state against the person holding it "at the place" where such bank was located, on condition that such tax did not exceed the rate imposed on state banks. The state law imposed the tax on the stock of state banks directly on the banks themselves, while

the national bank was assessed, not only on the paid-in capital, but on its accumulated surplus.

Elmer, J. 1. National banks cannot be directly taxed by the states. 2. But national bank stock owned by individuals may be assessed for taxation against the individuals by the State. 3. The word "place" means the district, larger or smaller which imposes the taxes, including thus the State, if they are state taxes, the county if they are county taxes, and any lesser district as the case may be. It is not implied that there shall be but one assessment or one tax. 4. The proviso of the act of Congress which requires that the tax imposed shall not exceed the rate imposed on the shares of state banks has not been infringed. 5. The taxes assessed for county and state purposes, and so much of the township tax as was assessed on the value of the shares not vested in United States bonds should be affirmed, and the balance of the township tax reversed. Judgment accordingly.

Cited: 32 N. J. 353; 34 id. 130; 43 id. 568.

KINSELA'S ADM'R v CATARACT CITY BANK (1866) 18 N. J. Eq. 158.

Bill, for an injunction and appointment of a receiver. The complainant alleged the insolvency of the defendant bank and its inability to redeem its notes. The injunction was granted and R was appointed receiver. On R's report a creditor filed a petition for his removal and to have charged against him certain payments. The matter was referred to a master. The bank was organized in 1860 under the banking law of 1850 by eight persons, the defendants and S, deceased. They signed the certificate of organization which was filed with the secretary of state and elected S president. They did not elect a board of directors. The defendants subscribed for five shares each on which nothing was paid. S subscribed for the balance of 3,000 shares. S had absolute control over the bank and died insolvent. The par value per share was \$50. Nix. Dig. 151 provided that where the whole capital shall not have been paid in and the capital paid be sufficient to satisfy the claims of creditors, each stockholder shall be bound to pay the sum necessary to complete the amount of such share. Nix. Dig. 371 provided that when an incorporated company shall become insolvent it shall not be lawful for any officer or director of said company to sell, convey, or assign any of the company's property, that in case of a bona fide purchaser for value, who has no notice, such purchase shall not be invalidated. S transferred to R some of the bank's collateral two days before failure as security for money loaned to the bank. R had no knowledge of the bank's insolvent condition although he had heard rumors. R was one of the associates, but S had the sole management of the bank. Shortly before the bank failed an effort was made to raise funds and P delivered to H his subscription of \$376 which he agreed to contribute if the loan was successful. H placed it in the bank as a special deposit. On the failure of the bank R paid this money to H.

The Master reported: 1. The persons who signed the certificate were only associates and not directors. They had no power to choose a president, who, through their instrumentality was enabled to commit a fraud upon the statute. 2. The court cannot relieve the defendants from the well-settled rule relating to stockholders of an insolvent corporation, and they are responsible for the amount due on their stock. 3. The pre-existing debt constituted a bona fide consideration for the collateral and the knowledge of the insolvency of a bank cannot depend on mere construction notice, but must be actual notice. 4. The return of the money to H was legal as the loan was not completed. 5. There appears no substantial reason for the receiver's removal. Petition dismissed.

Cited: 41 N. J. Eq. 641.

STATE, EX REL. v HAIGHT (1866) 31 N. J. L. 399.

On certiorari in the matter of taxation. The prosecutors, residents of New Jersey, owned and were assessed for stock in several national banks there situated. The facts sufficiently appear from the contention. They contended: 1, that the State was powerless to tax national bank stock; 2, that the fact that the capital of these banks was invested in United States bonds exempted their stock from taxation by the State; 3, that the word "place" in the proviso of the National Banking Act, sec. 41, did not denote the township or city where the banking house stood; 4, that debts owed to a resident national bank were not deducted from the valuation of the prosecutor's taxable property. The section provided that national bank stock should be assessed against its holders at the place where the bank was located.

Beasley, C. J. 1. The state tax laws apply to national bank stock. 2. So far, and so far only, as the shares of stock of a national bank represent the value of its capital uninvested in national securities, such taxation is to be regulated by the laws of the state imposing it. 3. The word "place" as used in the act of Congress, bears a relation to the species of tax which is to be levied; thus, with regard to a state tax the word means state; and with regard to a county and township or city tax, it is to be contracted in significance to such localities. 4. The corporation to which the debt was due not being a non-resident, this credit should have been allowed. 5. The assessment on the Hoboken bank, for the municipal government of Jersey City is void, because it could not be assessed at the place where the bank is located. Decree for defendant.

Cited: 32 N. J. 274; 34 id. 130; 63 id. 549.

SKILLMAN v TITUS (1866) 32 N. J. L. 96.

On check. The check was made by the defendant on the T Banking Co., payable to "A B, or bearer." It was delivered to A T and by him transferred for value to the plaintiff two and a half years afterward. On its face were the letters "Mem." written by defendant at the time of delivery. Equities then and thereafter existing between A T and defendant would have made the check unenforceable in A T's hands. Verdict for plaintiff. Rule to show cause why the verdict should not be set aside.

Haines, J. As the abbreviation "Mem." was on the check when the plaintiff took it, the presumption of law is that he saw and read it. These letters indicated that the check was not given in the usual course of trade. The fact that it has been outstanding for two and a half years, together with the letters "mem.," was sufficient to put the plaintiff on inquiry. If he sustained loss by his negligence, he has no ground of complaint against the defendant. Verdict set aside.

STATE v BOYD (1867) 32 N. J. L. 273.

Certiorari to review taxation. The prosecutors were stockholders in a national bank, the whole capital of which consisted of United States bonds. They were taxed for their shares, for state, county, and township purposes. The defendant was collector of taxes. The object of the prosecution was to set aside the taxation, made for the year 1865. The Act of March 28, 1862, in force when the tax was imposed, provided that private corporations of the State should be assessed and taxed to the full amount of their capital stock paid in and surplus, and that persons holding the capital stock, should not be assessed therefor.

Vredenburg, J. 1. When the tax complained of was imposed, no tax could, by force of law, be imposed upon any stock of the state banks, in the hands of their stockholders. 2. The law of Congress requires the stock of national banks to be subject to state taxation, provided that the tax so imposed shall not exceed the rate imposed on shares assessed in any of the state banks. The tax was imposed in violation of the paramount law. Taxes set aside.

Cited: 43 N. J. 568.

STATE, FARMERS NAT. BANK. v COOK (1867) 32 N. J. L. 347.

Certiorari to review taxation. Taxes were assessed against the individual stockholders of the F National Bank, the prosecutor, by the defendant, the collector of the township of M. The defendant claimed that the corporation could not prosecute for the stockholders. Application for an amendment substituting four of the stockholders in the place of the corporation as prosecutors was then made. It was claimed by the prosecutor that taxes on stock were assessed illegally against residents of the township where the bank was located, because on the same duplicate with other personal property and entered separately, and on stock of non-residents.

Elmer, J. 1. The corporation is not the agent of the stockholders to make this prosecution. 2. The substitution of stockholders for the corporation cannot be allowed. 3. It was not necessary to make demand or to include the value of stock with other personal property taxable at the place where the bank was located. 4. Non-resident stockholders are not exempt from the burden of taxation imposed upon other stockholders. 5. The application for amendment of the writ was properly denied. Writ dismissed.

FREEHOLDERS OF MIDDLESEX v THOMAS (1869) 20 N. J. Eq. 39.

To foreclose a mortgage. Complainants held a first mortgage on the defendant's property. Subsequently, the defendant borrowed money on a second mortgage, and delivered to X, the amount of the complainants' mortgage, with instructions to pay it to them. X deposited the money in the bank, and notified the county collector, who had the custody of the complainants' mortgage. The collector receipted the bond, and had the mortgage canceled of record. Before the money was drawn by the collector, the bank suspended payment.

Zabriskie, Ch. 1. Money deposited by a debtor with a third person, or in a bank, for the benefit of his creditor, without the authority of his creditor, is not payment of a debt, nor can the neglect of the creditor in not calling or drawing for it within a reasonable time make it payment. 2. If a mortgage is canceled, without actual payment, or by fraud or mistake, or without authority from the real owner of the mortgage, the cancellation is inoperative, and the mortgage remains a valid security. 3. A receipt is not conclusive, and proof is admissible that the payment, for which it was given, was never actually made. Decree for complainants.

Cited: 30 N. J. Eq. 352; 34 id. 170; 35 id. 331; 59 N. J. 465.

RAFFERTY, REC'R v BANK OF JERSEY CITY (1869) 33 N. J. L. 368.

To recover funds of an insolvent bank fraudulently diverted. In 1856, C S, as owner of 2,965 shares, with seven others as owners of five shares each, filed and recorded a certificate in the office of the secretary of state in accordance with sec. 16 of the Banking Act (Nix. Dig. 59), stating that the association should continue 20 years; that the capital stock was \$50,000; and that C S had been appointed president. In four years, during which it had dealings with defendant, also a bank, the bank became insolvent to the knowledge of defendant. The insolvent was indebted to defendant. The defendant accepted from C S assets of the insolvent equal in value to defendant's claim. Defendant contended that the action to recover these assets could not be maintained by the receiver because the insolvent was not a corporation. No board of directors had ever been elected. The date of the certificate was five days before the actual filing and recording. Verdict for plaintiff. Rule to show cause why verdict should not be set aside.

Bedle, J. 1. The insolvent bank became a corporation on the date of the filing and recording of the certificate. 2. Though its assets were irregularly acquired, yet, as against the receiver, the defendant is estopped by its course of dealing from now appropriating them to secure its own claim to the detriment of others equally entitled to share therein. Judgment for plaintiff.

Cited: 48 N. J. 602.

TITUS v MECHANICS NAT. BANK (1871) 35 N. J. L. 588.

For negligence of defendant's agent in failing to present checks. Plaintiffs deposited checks, drawn to their order by L on a New York firm, with the defendant, a bank, without indorsing them. There was evidence that they were received and credited in plaintiffs' cash account as cash, in part as payment of an overdraft, and in part to be drawn against. Plaintiffs alleged that in consideration of their keeping their deposits with defendant and giving it these checks to collect, defendant promised to present them and, if unpaid, to make protest and to give notice. Defendant sent the checks to a New York bank. The latter failed to present them. Defendant learning that they were unpaid, charged them back to plaintiffs. Plaintiffs demanded credit for the checks. Defendant refused credit. Plaintiffs non-suited. Exceptions.

Zabriskie, Ch. 1. It is not necessary to demand money deposited with a bank by check, or to demand that it be handed over in bills or specie. Plaintiffs' demand was sufficient. 2. There was evidence from which the jury might infer that these checks were received as cash. The cause should have been submitted to them. 3. The consideration for defendant's promise, as alleged, was sufficient. 4. A bank receiving a note for collection, is responsible for the fault or neglect of its corresponding bank or any other agent to whom it may transmit it for collection. Judgment reversed.

Cited: 42 N. J. 30; 46 id. 607; 60 N. J. Eq. 91.

BUCKLEY v SECOND NAT. BANK (1872) 35 N. J. L. 400.

On check. The action was to recover the amount of a check on the United States treasury payable to the plaintiff, or order. It was sent to C, the attorney

of the plaintiff who had prosecuted the claim on which it was issued. C indorsed it forging the plaintiff's name, presented it to the defendant, and had it cashed, before the plaintiff knew it had been issued. The defendant afterward received the amount of the check from the drawer. Certified for decision.

Woodhull, J. 1. The plaintiff was the owner of the check when it came into the defendant's hands. 2. Neither the defendant nor C could obtain any interest through a forgery, although the defendant was not aware of the forgery. The plaintiff's right to the check remained precisely as it was before his name was forged. 3. The defendant must pay the amount due the plaintiff and look to C for its remedy. Let judgment be entered for plaintiff by the court below.

Cited: 58 N. J. 441.

YOUNG v VOUGH (1873) 23 N. J. Eq. 325.

Bill to compel the transfer of stock. Defendant M was the principal stockholder in the bank and had induced defendant, V, to subscribe for thirty shares of the stock, furnishing the money to pay for it. V agreed to pay over the dividends, and, on request, to transfer the stock to M. V became director, M voting for him, and took the oath required by the Banking Act, with M's knowledge that he was a bona fide owner in his own right of at least ten shares of the capital stock of the bank, standing in his name on the books of the association, and that they were not pledged or hypothecated for any loan or debt. A by-law of the bank provided that it should make no transfer of stock while the holder was in debt to the bank whether the debt was due or not. The complainant took V's note in part payment of another note given by M, V and C. The note was discounted by the bank, which held it on June 2. V transferred the thirty shares of the bank stock on June 2 to M, without M's knowledge. The bank disavowed the transfer, and refused it to be allowed to be entered on the stock ledger, as V was indebted to the bank at the time on the note. The complainant obtained a judgment against V, and the sheriff sold the shares in question to him under an execution. The complainant paid the note at the bank.

Zabriskie, Ch. 1. This transfer was illegal. 2. This illegality was not affected by the subsequent payment of the debt to the bank by Young. 3. The object of M was to give V a credit to which he was not entitled. 4. M must have known and foreseen that his acts would have that effect. 5. When the complainant paid the note, he was entitled to all the rights of a surety, one of which is to be subrogated in place of a creditor, and to have all the collateral securities which the creditor had. 6. That, in this case, was the lien on the stock, and the right to prevent its transfer until the debt was paid by the real debtor. Decree for complainant.

Cited: 24 N. J. Eq. 535.

BRAMHALL v ATLANTIC NAT. BANK (1873) 36 N. J. L. 243.

On notes against maker of one and indorser of the other. A New York corporation made a note for \$5,000 payable to defendant and S, by whom it was indorsed for the accommodation of the maker to plaintiff, a national bank. Plaintiff, supposing that it was buying the note from defendant and S, discounted it at a rate greater than 7 per cent. The note was protested for non-payment and the two notes in suit for \$2,954.74 each, one made and one indorsed by defendant were given plaintiff for the note for \$5,000. The three notes were drawn and made payable in New York. Defendant contended that the transaction amounted to a loan by plaintiff to the New York corporation, and that it was usurious. In New York, by Laws of 1850, ch. 172, p. 334, neither a corporation nor its indorsers could plead usury in a suit on the corporation's note. With this exception 7 per cent was the legal rate. The Act of Congress of 1864, p. 108, sec. 30, permitted national banks to charge any rate fixed by the state where located, but in case no rate was fixed, prohibited them from charging interest at a higher rate than 7 per cent, and provided that the knowingly charging "a rate of interest greater than aforesaid" should work a forfeiture of the entire interest or whatever was agreed to be paid. Verdict for plaintiff for full amount of the notes. Rule to show cause why the verdict should not be set aside.

Bedle, J. 1. The transaction amounted to a loan to the New York corporation. 2. The plaintiff, however, is entitled to recover the actual amount paid with

interest at the rate legal in New York. The act of Congress does not prevent that where the excess of proper interest was not knowingly reserved. Plaintiff to reduce verdict; otherwise a new trial to be ordered.

Cited: 47 N. J. 234.

NEWARK SAV. INSTITUTION CASE (1877) 28 N. J. Eq. 552.

For instruction as to management of trusts. The application was made by a savings institution, in accordance with its charter, for judicial intervention and direction. It represented that, owing to the depreciation of property, it would be unable, in case of an impending run on it by depositors of large sums, to convert its securities into cash without great loss.

Runyon, Ch. 1. This court has jurisdiction over all trusts. 2. A savings institution is a mere trustee. 3. The vigilant depositors ought not to be permitted to exhaust such of plaintiff's securities as are immediately convertible into cash, and thus to devolve all the losses of the trust on the less vigilant or the less informed who are as much entitled to payment in full as the vigilant. Decree: That the easily convertible assets be declared a dividend to be shared by all the depositors; that subsequent deposits be kept separate from those already received, and invested as the court directs; and that examiners' report on the petitioner's condition.

Cited: 29 N. J. Eq. 109; 30 id. 6; 32 id. 165; 39 id. 183; 42 id. 497.

STATE, NORTH WARD NAT. BANK v NEWARK (1877) 39 N. J. L. 380.

Certiorari, to review taxation. The plaintiff had its banking house in Newark. The stock was largely held by persons who did not reside in that city. Plaintiff was assessed by defendant on the whole amount of its capital stock and surplus under an act entitled "a supplement to the act entitled 'an act relating to the assessment and revision of taxes in the city of Newark.'" By the Act of Congress of 1864, amended in 1868, the states were empowered to tax national bank shares in the place where the bank was located, by including them in the personal property valuation of the owners, in the assessment of taxes.

Depue, J. 1. A tax on the property of a national bank which does not deprive it of the power to serve the government, may be rightfully laid by the state. The power of the states to tax the stock of national banks in the hands of stockholders is derived exclusively from the authority conferred by Congress. 2. The undivided surplus, not being invested in federal securities, might be lawfully taxed against the bank. It should be taken into consideration in estimating the taxable value of the stock. 3. The stock owned by non-residents was lawfully taxed in the ward where the bank was located. The assessment relating to stockholders who reside in the state, but not in the city of Newark, is set aside. Rule accordingly.

Cited: 40 N. J. 90, 462, 558; 41 id. 60; 42 id. 364; 43 id. 567, 639; 44 id. 574; 46 id. 133; 47 id. 435; 48 id. 320, 336; 50 id. 104; 51 id. 91; 54 id. 140; 55 id. 111; 56 id. 199; 58 id. 48; 61 id. 351; 63 id. 74; 30 N. J. Eq. 620, 676.

DIME SAV. INSTITUTION CASE (1878) 29 N. J. Eq. 109.

For instruction as to management of trusts. The applicant was a savings institution. It had received deposits in small amounts and had invested them on general account. There was danger that its depositors would make a run on it, in which case the forced conversion of its securities into cash would cause a loss to the less vigilant depositors.

Runyon, Ch. 1. It is the duty of the trustee to realize on the assets as fast as may be done, consistently with the interest of the trust, and to divide the available assets, under the direction of this court and with all practical dispatch, among those who are entitled to receive them.

PROVIDENT SAV. INSTITUTION CASE (1878) 30 N. J. Eq. 5.

For instructions as to management of trusts. Petitioner was created for the purpose of receiving and investing the money of depositors. It had no capital stock. Petitioner desired to declare a dividend of six per cent to its depositors, and to retain for a surplus an amount equal to about ten per cent of its deposits. P. L. 1878, p. 393, provide that it shall be the duty of the trustees of every savings institution, to regulate the rate of interest, or dividends, not to exceed five per cent, after reserving such amount as they deem expedient as a surplus.

Runyon, Ch. The petitioner ought not to pay its depositors, interest or dividend at the rate of more than 5 per cent per annum, until it shall have accumulated a proper surplus of 15 per cent of its deposits. The Act of 1878 is to be construed in connection with P. L. 1876, p. 341.

FIRST NAT. BANK *v* CHRISTOPHER (1878) 40 N. J. L. 435.

On note, against maker. Defendant was induced to make the note by the fraud of the attorney of a firm to which P, one of plaintiff's directors, belonged. P knew of the fraud, but did not communicate his knowledge to plaintiff. The plaintiff subsequently discounted the note for the firm. There was no evidence that P acted in the capacity of director in the discount of the note. Defendant contended that P's knowledge constituted notice to the plaintiff. Verdict for plaintiff. Rule to show cause why the verdict should not be set aside.

Depue, J. 1. A bank is not bound by the knowledge of a director who is not present and acting with the board when the discount is made. 2. In negotiating the note with the plaintiff, P was dealing with it in his own interests, and must be regarded as a stranger. Rule discharged.

Cited: 48 N. J. 393; 41 N. J. Eq. 533; 50 id. 484; 57 id. 345.

STATE, NORTH WARD NAT. BANK *v* NEWARK (1878) 40 N. J. L. 558.

On certiorari to review taxation. A tax on all the shares of plaintiff, a national bank situated in the North Ward of Newark, was assessed in 1876, to the plaintiff itself, under secs. 16 and 17 of the Act of 1866, which provided that the tax on bank shares should be assessed to the holders in the wards where the banks were situated, and should be paid by the bank and charged to the shareholders. This act was repealed by the Act of 1869, Rev. Stat. p. 1160, sec. 99, which provided that resident stockholders of national banks should be assessed for their shares in the townships or wards where they themselves resided. Defendant contended that secs. 16 and 17 had been re-enacted as to the City of Newark by a special provision of a supplement to an act relating to the assessment and revision of taxation in that city, by which secs. 16 and 17 were declared to be in full force as to Newark. The state constitution, however, provided that property should be assessed "under general laws and by uniform rules." The supreme court held generally that the tax should not have been assessed under secs. 16 and 17, but under the Act of 1869. They ruled, however, that the assessment was valid as to stockholders residing in Newark when it was made, on the ground that they were taxable for their stock at their places of residence, and it did not appear but that they all resided in the ward in which the bank was situated.

Runyon, Ch. 1. The constitutional provision as to uniformity of taxation was fatal to the special provision of the supplement to the Newark tax law. 2. The assessment on the bank of the tax on the shares of stockholders residing in Newark when it was made, cannot be sustained on the presumption that they all resided in the ward in which the bank was situated. 3. Every stockholder resident here is to be assessed for his shares in the township or ward where he resided. Judgment reversed.

Cited: 42 N. J. 364; 43 id. 639; 46 id. 133; 47 id. 435; 48 id. 101, 320, 336; 49 id. 544; 50 id. 104; 51 id. 91; 54 id. 140; 56 id. 199; 58 id. 48; 30 N. J. Eq. 676; 31 id. 503.

STOCKTON *v* MECHANICS SAV. BANK (1880) 32 N. J. Eq. 163.

Insolvency proceedings. Defendant was an insolvent savings bank for which a receiver had been appointed, and plaintiff was the attorney-general proceeding to wind up the bank's business. The charter authorized the bank to receive and invest deposits, divide the profits among the depositors and repay the principal with interest according to the bank's regulations. The regulations provided that deposits entitled to share in the profits could be withdrawn only on thirty days notice, and that special deposits, which were not to share in the profits, were to be repaid upon demand. Both kinds of deposits were indistinguishably intermingled in the bank's funds. The receiver asked for instructions on facts which appear in the opinion.

Runyon, Ch. 1. The depositor who has borrowed money from the bank and has given his note or mortgage as security cannot set off his deposits against his indebtedness. 2. The special deposits are not entitled to a preference. 3. The indebtedness of the bank incurred in the ordinary course of business should be pre-

ferred. 4. The rent for the unexpired term should not be paid after surrender of the premises by the receiver to the lessor. 5. A claim for money paid for the check of the bank, which was dishonored, should be preferred. 6. The claims for checks given to depositors, on account of deposits, should not be preferred. 7. The bank was a mere trustee for its depositors. Decree accordingly.

Cited: 32 N. J. 640; 34 id. 260, 401; 38 id. 58, 376; 39 id. 183; 53 id. 618.

FREEHOLDERS OF MIDDLESEX v STATE BANK (1880) 32 N. J. Eq. 467.

Petition to establish the rights of parties to the assets of an insolvent bank. The defendant was an insolvent state bank in which the state treasurer had a deposit. Learning of the defendant's insolvency, the treasurer gave a check for the amount of the deposit to T Bank, a creditor of defendant, for \$432.50 for collection. T Bank credited the treasurer with the amount, and immediately sent it to defendant, which charged it to the treasurer and credited it to T Bank. Immediately defendant ceased doing business, and a receiver was appointed. T Bank proved its claim for \$432.50, but made no claim for the amount of the check. The State contended that the loss fell upon T Bank and that the latter should prove the claim.

Runyon, Ch. 1. The transaction was a mere collection for the accommodation of the treasurer, and the credit was given according to the customs of banks in such cases, on the obvious understanding that if the draft should not be collected the credit should be canceled. 2. The loss fell on the State, and should be proved by it. Decree accordingly.

VAIL v NEWARK SAV. INSTITUTION (1880) 32 N. J. Eq. 627.

Bill, to recover a deposit, the balance due on an annuity, and to secure future payments of the annuity. The complainants were beneficiaries of a trust under a will. The trustees and beneficiaries, desiring to secure the annuity, deposited a sum in defendant, a savings bank, having power to execute trusts. The written and oral testimony showed that the fund was a deposit on which interest was to be paid according to the rates paid other depositors; that interest to a certain amount was to be paid to the annuitant; and that the balance was to be paid to the other beneficiaries. The bank being unable to pay claims in full, the court has taken charge of it. Complainants contended that the deposit was a trust, and that they were entitled to a preference over the ordinary creditors.

Runyon, Ch. 1. The fund was a deposit, not a trust. 2. Complainants were not entitled to a preference. Bill dismissed.

IN RE NEWARK SAV. INSTITUTION (1880) 32 N. J. Eq. 644.

Application for directions for investing the new deposits of a savings bank. By statute and court regulations, savings banks were authorized to invest in bonds of municipalities of the state, interest-bearing obligations of the city in which the bank was located, and in first mortgages on real estate in the state.

Runyon, Ch. 1. Investments on mortgage to the amount of 50 per cent can be made on real estate within the state, but the mortgages must be first liens, worth, if the property is improved and productive, double the amount loaned, and if the property is unproductive and unimproved, 70 per cent more than the sum loaned, and must be supported by a certificate of the bank's counsel that title is good, as well as certificates of the managers of the bank, and of the master of the court, approving the investment. The remainder must be invested in bonds of the United States, or of this State, or of the City of Newark. 2. All municipal bonds are not good securities. Directions accordingly.

GRAHAM v NATIONAL BANK (1880) 32 N. J. Eq. 804.

Foreclosure of mortgages. Defendants made, executed, and delivered the mortgages on real estate to secure a note given by them for a loan from complainant, a national bank. By sec. 5137, R. S., a national bank was authorized to hold real estate, mortgaged to it, to secure debts previously contracted, and such real estate as was conveyed in satisfaction of debts previously contracted. The delivery of the money and mortgages, and the making of the note were concurrent acts. Defendants contended that the bank was not authorized to take the mortgages, and that the contracts were void. Decree for complainant. Appeal.

Scudder, J. 1. The mortgages, though without the statute, were only voidable. 2. It was for the government and not the defendants to object. Decree affirmed.

DAVEY v JONES (1880) 42 N. J. L. 28.

On promissory note against indorser. The note was made by D, to the order of defendant, and by him indorsed to plaintiff. It was payable at the J Bank. The plaintiff resided in S County and the defendant in U County. The plaintiff indorsed the note and left it before maturity, for collection, with the J Bank, where he was a depositor. He was well known to the officers of the bank. The notary by mistake read his name Darcy instead of Davey, and made out the notices of protest and inclosed them in an envelope directed to F Darcy. In consequence of this mistake, the notices did not reach plaintiff, and no notice was sent to or received by defendant. Verdict for plaintiff. Rule to show cause why the verdict should not be set aside.

Van Syckel, J. 1. The law imposes on collecting agents the duty of doing all that the owner would be required to do for the protection of his rights, and makes them liable to the owner for default in that duty. 2. The bank knew the plaintiff, and the notary, being the agent of the bank, was chargeable in law with the knowledge which the bank had, and must be presumed to have known who the plaintiff was. 3. The plaintiff has shown no excuse for failure to give the requisite notice of dishonor to the defendant, in order to fix him with the liability as indorser. Rule absolute.

HANNON v WILLIAMS (1881) 34 N. J. Eq. 255.

Bill to set off a deposit against a bond and mortgage. Defendant was the receiver of an insolvent savings bank in which complainant was a depositor. Complainant borrowed money from the bank, and gave her bond and mortgage to secure it. The amount of the loan was, at her request, placed to her credit in the bank and entered in her passbook, subject to her check. The bank was insolvent at the time, but no representations were made to induce complainant to deposit. From time to time complainant drew on and added to the deposit, and at the time of the failure of the bank, a considerable part of the original loan was still on deposit. The complainant contended that the entire amount on deposit at the time the bank failed, should be set off; that the amount of the original loan still on deposit, should be deducted from the mortgage; and that the loan and deposit were fraudulent. Decree for defendant. Appeal.

Green, J. 1. The depositor was not entitled to set off the deposit against the debt. 2. The amount of the original loan still on deposit cannot be deducted from the mortgage. There was, in effect, a payment of the amount of the loan to complainant. 3. There was no fraud. Decree affirmed.

Cited: 34 N. J. Eq. 401; 38 id. 376; 39 id. 183; 42 id. 499; 46 id. 61; 56 N. J. 358.

SMITH v SPEER (1881) 34 N. J. Eq. 336.

Bill to protect deposits in savings banks. Defendant was the guardian, and complainant, the nephew, of a depositor in the banks. The accounts were made in the depositor's name. Subsequently, an entry was made in one passbook, that the account was in trust for complainant, and in the other, that the account was to be drawn on by the depositor, and after her death by the complainant. She kept the passbooks and drew on the accounts. The depositor becoming insane, defendant was appointed guardian, and was about to draw on the deposits. Complainant contended that the deposits were in trust for him. Decree for defendant. Rehearing.

Runyon, Ch. The complainant had no right to the deposits during the lifetime of the depositor. Decree affirmed.

Cited: 42 N. J. Eq. 355; 62 N. J. Eq. 508.

CHESTER v HALLIARD (1881) 34 N. J. Eq. 341.

Bill by depositors of a savings bank against its managers. The defendants, while managers of X Bank, induced some of the plaintiffs to make deposits by false representations as to the bank's financial responsibility. They also culpably mismanaged the bank's funds. The bank became insolvent and a receiver was ap-

pointed. This bill was subsequently filed by some of the depositors, in their joint names. Demurrer for misjoinder and nonjoinder.

Runyon, Ch. 1. Although the misrepresentation was general in character, and addressed to the public, the complainants cannot sue jointly for relief on that ground. 2. As to the charge of mismanagement, complainants can sue jointly in their own names, but the receiver must be made a party defendant. Demurrer allowed.

Cited: 36 N. J. 313, 439; 37 id. 362; 40 id. 44.

TERHUNE v BANK OF BERGEN COUNTY (1881) 34 N. J. Eq. 367.

Petition to recover a deposit. The petitioner deposited cash and checks in defendant, a bank, on the day before it failed. The checks were credited to the petitioner, sent on for collection, and collected by the bank's collecting agent. The officers of the bank knew that the cashier had embezzled the funds but did not know that the bank was insolvent at that time. Petitioner contended that the amount of his deposits made on the day before the bank failed should be preferred.

Runyon, Ch. 1. The officers were not guilty of fraud. 2. The petitioner was not entitled to a preference. Petition dismissed.

Cited: 46 N. J. Eq. 607; 60 id. 103.

WILLIAMS v RILEY (1881) 34 N. J. Eq. 398.

Bill to obtain indemnity for the depositors and creditors of a savings bank. Complainant was the receiver of an insolvent savings bank to which the defendant, while its treasurer and manager, had assigned a bond and mortgage, contrary to the charter, which provided that the bank should not invest in bonds and mortgages except on real estate worth twice the amount of the investment above all encumbrances and contrary to the bank's rules. The other managers did not know of the transaction for six years and had not repudiated it. The property not being worth the amount of the loan, and a loss having occurred, the receiver asked that the defendant make up the loss. Defendant contended that the bank had ratified his act by not repudiating it; and that in the transaction he stood as a stranger to the bank.

Runyon, Ch. 1. The defendant was a trustee, not a stranger, and is liable for the loss. 2. The transaction was not ratified by the bank's failure to repudiate it. Decree for complainant.

Cited: 37 N. J. 414; 42 id. 396.

STRATTON v COLLINS (1881) 43 N. J. L. 562.

Certiorari to review taxation. The defendant assessed a tax in the township where the plaintiff resided, on plaintiff's shares of stock in a national bank at Mount Holly. The constitution directs that property shall be assessed for taxes at uniform rates, according to its true value. The shares of corporate stock are generally exempt (Rev., p. 1152, sec. 64, II.). Shares of stock of the banks, whether national or state, are taxed to the owner in the township or ward where he resides (Rev., p. 1161, sec. 99). Shares of the same bank were taxed by the officers of other townships on a lesser valuation. The valuation of the shares included funds invested in United States securities. The taxation of national bank shares under the state authority is expressly permitted by sec. 5219, U. S. R. S. The state law, though taxing moneyed capital generally in the hands of individuals, allowed a few special exemptions from taxation.

Dixon, J. 1. The "Act concerning the assessment and collection of taxes," approved March 10, 1880, could have relieved personal property in townships from taxation. 2. That the tax on other corporations is assessed on their real and personal property does not render the tax on bank shares in the hands of individuals repugnant to the constitution. 3. Single instances of error in valuation, arising from accident or mistake, or even willful default of the officer, afford no ground for invalidating the tax of one, the valuation of whose property is not itself exorbitant. 4. The shares of national banking associations are subject to state taxation without any reference to the amount of the capital or surplus invested in United States bonds. 5. The act of Congress is not violated though the local laws may for special reasons exempt particular classes of property from taxation. Tax affirmed.

CHESTER v HALLIARD (1882) 36 N. J. Eq. 313.

Against the managers of a savings bank for the loss of deposits. The bill alleged that complainants, severally, relying on the fraudulent representations of defendants, had deposited funds in the bank; and that the misconduct of defendants had caused its insolvency. The bank was not a party to the suit. Defendant contended that the complainants could not sue jointly; that they were not liable unless the bank was a party; and that the bill rested on two distinct matters. Demurrer. Sustained. Decree for defendants. Appeal.

Beasley, C. J. 1. The cause of complaint was not joint. 2. The depositors could not make the defendants liable for the loss without making the bank a party to the action. 3. The fraud of defendants in inducing the complainants to put their money in an insolvent bank, had no connection with the question whether defendants by their misdoings occasioned such insolvency. Decree affirmed.

Cited: 38 N. J. Eq. 376, 379; 40 id. 44, 708; 44 id. 322.

CONWAY v HALSEY (1882) 44 N. J. L. 462.

Negligence. Plaintiff was a stockholder, and defendants were directors, of a national bank. The plaintiff charged defendants with so neglecting to protect the assets of the bank that the cashier was enabled to make away with its entire capital. Defendant demurred.

Beasley, C. J. An action will not lie in behalf of a stockholder in a corporation, against its directors, for their negligence in conducting its affairs. Demurrer sustained. Judgment for defendant.

Cited: 36 N. J. E. 316; 37 id. 362; 38 id. 376, 379; 44 id. 322.

ADAMS v HACKENSACK IMP. CO. (1882) 44 N. J. L. 638.

On bonds. The defendant having issued bonds, deposited funds to its credit in the B Bank before they matured, and instructed the bank to pay them when presented. The plaintiff had no knowledge of this arrangement, aside from the fact that the bank was named in the bonds as their place of payment. They were payable November 1, and were not presented previous to November 11, at which date a receiver was appointed for the bank. Judgment for defendant. Error.

Depue, J. 1. The naming of a bank in the paper as the place of payment does not make the bank the holder's agent for the collection of the paper or the receipt of the money. 2. The debtor cannot make the bank the agent of the holder by simply depositing with it funds with which to pay the paper. Judgment reversed.

Cited: 57 N. J. Eq. 606.

ACKERMAN v HALSEY (1883) 37 N. J. Eq. 356.

Against officers of an insolvent bank for neglect and mismanagement. The defendants were the officers and directors of a bank which became insolvent through their official mismanagement, gross misconduct, and culpable neglect, extending over a period of years. The receiver of the bank, after request, refused to bring this action. Thereupon the plaintiff, who was a creditor and a stockholder, brought it for the benefit of himself and all others in like interest. Some of the defendants had been directors longer than the others. General demurrer.

Runyon, Ch. 1. The plaintiff may properly bring this suit. 2. There is no adequate remedy at law, and the damages may be assessed in equity. 3. The defendants are liable for losses from gross negligence, but they are liable only for losses incurred during their terms in office. Demurrer overruled.

Cited: 38 N. J. Eq. 376, 501; 44 id. 322; 49 id. 85; 62 id. 406.

WILLIAMS v McDONALD (1883) 37 N. J. Eq. 409.

Bill for relief. The defendant was one of the managers, and a member of the finance committee, of the X Savings Bank. M purchased property worth \$16,000, giving two concurrent mortgages thereon for \$11,000. Subsequently the defendant agreed to lend him \$4,000 on a second mortgage. The defendant assigned this mortgage to the bank at the request of its president. The investment was not submitted to the finance committee. The first mortgages were foreclosed and the property was brought in by the mortgagees. Thereafter, the bank failed. Its receiver brought this action, alleging that the defendant had profited by the transac-

tion. This was not proved. The charter of the bank provided that it should invest no money in mortgages, except on real estate worth at least double the amount invested, above all incumbrances. A by-law provided that all applications for loans should be submitted to the finance committee.

Runyon, Ch. 1. Since defendant acted in good faith, and derived no personal benefit from the transaction, the breach of trust of which he was guilty was not a fraudulent one. Bill dismissed.

Cited: 46 N. J. Eq. 52.

BOWNE v MOUNT HOLLY NAT. BANK (1883) 45 N. J. L. 360.

Debt. Defendants and F were joint and several sureties on the bond of K, plaintiff's cashier. Plaintiff covenanted with F not to sue him on the bond. K was a defaulter at the time the bond was executed. Defendants claimed that they were discharged by the negligence of the plaintiff in not discovering the defalcation. Defendants offered the books of the bank in evidence to show that on investigation the default would have been readily ascertained. Excluded. Defendants also set up a plea of release, and under it sought to put the covenant to F, not to sue, in evidence. Excluded. Judgment for plaintiff. Error.

Runyon, Ch. The mere fact that K was a defaulter to the bank when the bond was given, will not discharge the surety; nor will the neglect of the bank to ascertain the existence of that fact discharge him. 2. The books were properly excluded. 3. The covenant not to sue was not a release, and was not admissible under the plea. Judgment affirmed.

TUTTLE v FRELINGHUYSEN (1884) 38 N. J. Eq. 12.

Bill to determine the ownership of the proceeds of bills of exchange. An injunction issued restraining defendant from disposing of the bills or their proceeds. Defendant was the receiver of a national bank of which one of the complainants had been president. The complainants were the executors of T, who at his death had a large deposit in the bank. Knowing that the bank was insolvent, the president, acting in the usual course of business, bought the bills, indorsed in blank, for the estate and paid for them by money of the estate on deposit. The bills were found with the papers of the estate in the cashier's desk on the failure of the bank. The receiver refused to give up the bills or the proceeds and held them, when the bill was filed, in a separate account as a trust fund. Defendant contended that the purchase of bills was contrary to U. S. R. S., sec. 5242, prohibiting the transfer of bills owing to a bank after an act of insolvency, or in contemplation thereof, and that the court did not have jurisdiction.

Runyon, Ch. 1. The purchase of the bills was not in contravention of the statute. Complainant could follow the fund into defendant's hands. 2. The court had jurisdiction. Decree for complainants.

DELAWARE, LACKAWANNA & WESTERN R. R. CO. v OXFORD IRON CO.
(1884) 38 N. J. Eq. 340.

Petition for the allowance of a claim. The petitioner, a national bank organized under the law of 1864, had a claim against defendant, an insolvent corporation, on two notes. Some of the petitioner's stock had been held by S & Co., the indorsers on the notes made by defendant, in the name of S. Petitioner contended that the stock was to be transferred to it as further security for the loan, but no such agreement was proved. There was a provision in petitioner's articles of association and by-laws, by which it could acquire a lien on its stock held by its debtors. Petitioner contended that the statement in the inventory of S's assignee in insolvency, who was also assignee for the firm and the corporation, that the stock was "valued at nothing above incumbrances," was an admission in favor of petitioner's contention. All the assignments were made before the notes became due.

Runyon, Ch. 1. A national bank organized under the law of 1864 cannot, even by provision in its articles of association or by direct by-laws, acquire a lien on its own stock held by its debtors. 2. The statement in the inventory did not establish the contention. Decree, that the bank was not bound to credit anything on the claim against defendant by reason of any lien on the stock.

HOBERT v DOVELL (1884) 38 N. J. Eq. 553.

Bill for an accounting. Complainant was the mother of the teller of a bank, of which defendant became receiver. Prior to the failure of the bank, the teller knowingly assisted the cashier in embezzling its funds and wrongfully took funds himself. He then conveyed his property, and induced complainant to convey hers, to two directors of defendant, in trust, to cover all his deficiency. The bank failed and complainant asked for an accounting. Complainant contended that the conveyance was only to cover the teller's personal abstractions. The receiver contended that the conveyances were absolute and that no account was necessary. Decree for complainant. Appeal.

Dixon, J. 1. The conveyances to the directors were not absolute, but were made to indemnify the bank for the funds taken by the teller personally, and also for the deficiency for which he was civilly liable. 2. The teller was civilly liable to the bank for knowingly assisting the cashier to abstract the funds. 3. The receiver should render an account and return the surplus, if any. Decree reversed.

CREVELING v BLOOMSBURY NAT. BANK (1884) 46 N. J. L. 255.

On check. Plaintiff alleged: that C deposited money with defendant and gave his check to the order of plaintiff for \$500, which defendant refused to pay; and that defendant had fraudulently appropriated the money to its own use. Demurrer.

Scudder, J. The holder or payee of a check cannot sue the bank on which it is drawn for a refusal to pay it, although the check is regularly made, delivered, presented for payment, and the maker has funds in the bank on deposit sufficient to pay it. Judgment for defendant.

IMPORTERS AND TRADERS NAT. BANK v LITTELL (1884) 46 N. J. L. 506.

On note. The note was made in the State of New York. The defendant pleaded that it was discounted by the plaintiff in New York, for the payees, at an usurious rate; that, by virtue of the New York Statute, the entire debt was forfeited; and that by the National Banking Act under which the plaintiff was incorporated, the plaintiff had forfeited the entire interest. Plaintiff moved to strike out the pleas.

Van Syckel, J. 1. The federal act supersedes the state law imposing penalties for usury, in so far as they are applicable to national banks. 2. If the maker of the note is entitled to set off the usurious contract between the plaintiff and the indorser, it is not necessary to plead the federal statute specifically; he may avail himself of it under general issue. Motion granted.

HOFFMAN v FIRST NAT. BANK (1884) 46 N. J. L. 604.

On check. The action was against the maker and indorsers. Defendants made or indorsed two checks on the S Bank. They were deposited in the open account of the indorser in the C Bank. The indorsements were general. The C Bank transferred them to the plaintiff, a national bank, in the regular course of business, and the amount was credited to the C Bank. The next day, the C Bank failed, owing plaintiff more than the amount of the checks. Payment on the checks was stopped. Judgment for plaintiff. Error.

Parker, J. The indorsements being general and the checks having passed to the credit of the depositors on the books of the C Bank, from that moment they became the property of the C Bank and could be legally transferred by the C Bank to the plaintiff or to any other bona fide creditor. Judgment affirmed.

WILKINSON v DODD (1885) 40 N. J. Eq. 123.

To enforce liability of bank managers. The defendants were managers of the N Bank. It became embarrassed, and the chancellor ordered that all of its deposits should be regarded as special deposits, and invested only in city or United States bonds. Subsequently, the defendants obtained permission from the court to invest funds in first bonds and mortgages. The defendants immediately made extensive loans to F & H of bonds and cash on securities represented by F & H to be in a box to which they alone had access. F & H became insolvent. It was found that they had sold the securities. F & H turned over miscellaneous securities in lieu of the bonds, but the bank became insolvent through the loss of this loan. The plaintiff was appointed receiver. He realized on part of the miscella-

neous securities more than they had been appraised at. A judgment against the firm would have been worthless, but the plaintiff obtained a cash settlement from them, and executed a general release. R, one of the managers, died. His executor was made a party. Defendants demurred.

Bird, V. Ch. 1. The release of F & H did not operate to release the managers, nor was it a ratification of the managers' acts. 2. The managers, as trustees, were guilty of misfeasance and fraud, and became personally responsible. 3. The death of the wrongdoer does not abate his liability. 4. It was not necessary to join F & H. 5. The extent of the responsibility of the managers cannot be gone into on demurrer. 6. The fact that the securities sold brought more than their appraised value will not support the presumption that those yet unsold will bring more than their appraised value. Demurrer overruled.

Cited: 41 N. J. Eq. 567; 42 id. 235; 62 id. 445, 450.

WILLIAMS v MCKAY (1885) 40 N. J. Eq. 189.

Bill, to hold the managers of a savings bank liable for losses accruing during their term. The bill alleged that the defendants had been the president, treasurer and managers of a savings bank; that complainant had been appointed its receiver; that during their term, unauthorized loans on insufficient security had been made; that the president had overdrawn his account; and that the managers had not required the president to give a bond. The charter forbid loans on any but real estate or municipal bond security. The executive committee had failed to demand sufficient security for the loans made on real estate. Defendants had terminated their connection with the bank more than six years before this suit. Demurrer. Sustained. Decree for defendants. Appeal.

Beasley, C. J. 1. The Statute of Limitations did not run in favor of these trustees. 2. The defendants were trustees of the bank and were liable for their failure to exercise ordinary diligence in seeing that the committees performed their duties. 3. The bill stated a cause of action. This suit is in the right of depositors and creditors. 4. The lapse of time was no bar, as lapse of time is often a strong circumstance in equity. 5. The intent of the charter was to prohibit loans on personal security only, or on insufficient security. Decree reversed.

Cited: 40 N. J. Eq. 143, 708; 41 id. 139; 42 id. 42, 250, 396; 46 id. 27, 36, 57, 490; 51 id. 35; 53 id. 86; 62 id. 406, 445, 446, 745.

DODD v UNA (1885) 40 N. J. Eq. 672.

Petition to inquire into the conduct of the managers of a savings bank in disobeying an order of court. Petitioners were the depositors in a savings bank. Defendants were its president and its managers. With the written consent of all the defendants, the president had made an ex parte application to the court for permission to invest in property, other than that allowed by law. Permission was granted. Some of the investments depreciated in value. Subsequently petitioners filed this petition, contending that the president had not followed the order of the court, and that defendants were guilty of contempt. Defendants contended the court did not have jurisdiction to enter the order permitting defendants to change the investments, and that such order could not be questioned in this proceeding. Order adjudging the president guilty of contempt. Appeal.

Magie, J. 1. Though defendants were trustees, the court could not grant the order in regard to the investments. 2. The original order could be questioned in the proceedings to punish defendants for contempt in disobeying it. 3. The president's conduct in making the application for the original order does not prevent his questioning the jurisdiction. Consent will not confer jurisdiction. Order reversed.

Cited: 42 N. J. Eq. 498; 48 id. 108; 52 id. 23; 54 id. 614; 62 id. 740.

IMPORTERS AND TRADERS NAT. BANK v LITTELL (1885) 47 N. J. L. 233.

On notes against the maker. The plaintiff discounted the notes in the State of New York for the payees, reserving a greater discount than the legal rate of interest in that state. The defendant set up usury. The National Banking Act, secs. 5197 and 5198, provides for a forfeiture of interest, when a greater amount than the legal rate is taken, to the person by whom it is paid.

Van Syckel, J. 1. Neither under the laws of New York nor of this state is such

a transfer a usurious transaction. 2. Under the federal act, the maker of a valid note cannot avail himself of the defense of usury in the contract of indorsement. Judgment for plaintiff. (See 46 N. J. L. 506, ante p. 837.)

FIFTH WARD SAV. BANK v FIRST NAT. BANK (1885) 47 N. J. L. 357.

Conversion of bonds pledged. B, secretary and treasurer of plaintiff, a savings bank, had authority to carry on its everyday affairs. On one or two occasions of great emergency, he had borrowed money for the plaintiff, pledging its securities. After these unauthorized transactions, the president had required him to obtain a resolution authorizing the borrowing. Thereafter, for his own purpose, B effected a loan in the plaintiff's name, with the defendant, pledging the plaintiff's bonds. B used the money for himself. The court charged that it was for the jury to decide whether the plaintiff had held B out as authorized to make loans. Judgment for plaintiff. Motion for a new trial.

Beasley, C. J. 1. The treasurer and secretary of a savings bank, having general authority to carry on its everyday affairs, has not power, *virtute officii*, to borrow money and pledge the bank's securities as collateral. 2. The charge was a proper one. Rule discharged. Judgment affirmed.

Cited: 48 N. J. 527.

WILLIAMS v REILLY (1886) 41 N. J. Eq. 137.

To enforce a bank manager's liability. The defendant, who was one of the board of managers of a bank, was elected its treasurer. In that capacity he made illegal loans and advances without consulting either the finance committee or the board of managers. He was also negligent in the care of the bank's funds. The bank became insolvent and the complainant was appointed its receiver. He charged defendant with dereliction of duty as a manager holding an office of special trust in the management. Demurrer, based on the Statute of Limitations.

Runyon, Ch. The liability which the complainant seeks to establish and enforce, is one not cognizable at law. The Statute of Limitations does not run in favor of this class of trustees. Demurrer overruled.

Cited: 42 N. J. Eq. 41; 53 id. 86.

WILLIAMS v McDONALD (1886) 42 N. J. Eq. 392.

To charge a manager of a savings bank for loss while in office. Plaintiff was the receiver of a savings bank. Defendant had been a member of its finance committee. Defendant knowing the value of the property, and acting with the president, made a loan on real estate for an amount greater than that allowed by the charter. The security failed and the loan was lost. There was no allegation or evidence of fraud. Decree for defendant. Appeal.

Sudder, J. It was not essential to prove that defendant acted fraudulently or that he derived any benefit from the loan; it is sufficient to show that there was a culpable lack of prudence, or failure to exercise with ordinary care his functions as quasi trustee of the funds of the bank, by which loss was sustained. Decree reversed.

Cited: 46 N. J. Eq. 35, 52.

FISHER v NATIONAL BANK OF NEW JERSEY (1886) 48 N. J. L. 390.

Replevin. V was the owner of nine negotiable bonds which came into the possession of the plaintiff and H, as trustees of V's estate, after V's death. H was the cashier of the defendant. The bonds were deposited in a safe deposit box in defendant, in an envelope, with H's name thereon. H retained the key to the box. The coupons were detached as they became due and placed to the credit of the trustees. H had defaulted in his accounts and made a note to defendant, reciting the pledge of these bonds as collateral, which note he kept in his own custody. The other officers of defendant were not aware of the existence of the note during H's life. The bonds had not been attached to it nor seen until after the death of H. Defendant claimed to be entitled to the bonds as security for the note. Verdict for plaintiff. Rule to show cause why verdict should not be set aside.

Van Syckel, J. 1. H's mark upon the envelope containing the bonds indicated that they were held by him, not as cashier of the bank, but under his own personal control. H having no right to transfer these bonds, the property of the

real owner was not divested by the recital in the note. 2. It required an actual delivery or passing of the property from the hands of H to the possession of the bank, to vest the title in the latter. 3. The burden was on the bank to show the fact of delivery. Rule discharged.

FIFTH WARD SAV. BANK v FIRST NAT. BANK (1886) 48 N. J. L. 513.

Trover for the value of bonds. The plaintiff, a savings bank, owned twenty bonds. B was the plaintiff's treasurer and had the custody of the bonds. He was also president of the C Bank. The cashier of C Bank sent defendant for collection a note of J for \$4,000, and as collateral security, four coupon bonds, payable to bearer, issued by municipalities and belonging to plaintiff. Defendant discounted the note and placed the proceeds to the credit of C Bank. The cashier of C Bank sent to defendant for collection nine notes of B as treasurer of plaintiff, payable at C Bank, and six similar bonds belonging to plaintiff as collateral security. The C Bank sent to defendant a note of P to order of B, president, indorsed by B, with four similar bonds as collateral security. There was a general arrangement between defendant and the C Bank, that all paper sent by the C Bank to defendant should be held by defendant for past and future advances. The C Bank failed, owing defendant \$43,000. The J and P notes were forgeries. Defendant discounted for plaintiff two notes of B, as treasurer of plaintiff, receiving as collateral ten negotiable bonds belonging to plaintiff. Defendant refused to give up the bonds without payment. Judgment for defendant. Error.

Depue, J. 1. Having dealt with an officer of the savings bank, whose duties, as defined in the charter and by common usage, were those of a special agent, the defendant assumed the risk of the authority of the officer to make the notes and pledge the securities. 2. The treasurer of a savings bank cannot simply in virtue of his office as treasurer, create obligations which shall be binding on the bank. 3. If B was held out by the managers of the plaintiff in the general course of dealing, as its agent with such authority, his acts as such agent were binding on the plaintiff. Judgment affirmed.

Cited: 59 N. J. Eq. 421.

MORRISTOWN INST. FOR SAV. v ROBERTS (1887) 42 N. J. Eq. 496.

Bill for instructions. Complainant was a savings bank that had gone into voluntary liquidation. Defendants were depositors of two classes: those who had withdrawn their deposits before the proceedings were instituted; and those who remained depositors. The first class claimed to be entitled to share in the surplus the bank had at the time proceedings were instituted.

Runyon, Ch. The surplus which a savings institution has, when wound up, belongs to those who are the depositors at that time. Decree accordingly.

DODD v WILKINSON (1887) 42 N. J. Eq. 647.

To enforce the liability of managers of an insolvent savings bank. The bill alleged that the defendants were directed by the court of chancery not to make certain loans, but that they disregarded the chancellor's orders; and that they made loans forbidden by the law of the land, and by the statutes regulating savings banks. The complainant also set out conspicuous instances of such illegal loans. Decree for complainant. Exceptions to the allegations of the bill as impertinent.

Van Syckel, J. 1. It is competent to consider whether the conduct and practice of defendants, when present, encouraged and led to the illegal acts of their associates when defendants were absent. 2. The managers may be charged with liability, if they participated in the prohibited acts which led to the loss complained of; or if they in any way promoted them; or if they neglected to bestow in their conduct of the affairs of the bank that measure of care which the law exacted from them, and in consequence thereof their associates were not restrained from doing or were enabled to do, those acts which have proved so disastrous to the creditors of the institution. Exceptions overruled. Decree affirmed.

Cited: 50 N. J. Eq. 157.

CAMDEN NAT. BANK v GREEN (1889) 45 N. J. Eq. 546.

Injunction and setoff. Complainant, a national bank, discounted a note for G, the husband of defendant, and placed the proceeds to his credit. At G's death a part of the proceeds still remained to his credit. Defendant, his sole legatee and

executrix, had the balance transferred to her individual credit, and subsequently made additional deposits in the same account. The amount to her credit had never been reduced below the balance of the proceeds of the note. When the note fell due, there was a sufficient sum to her credit to cover it. She refused to pay the note, and complainant charged her account with it. In an action at law, defendant recovered a judgment against complainant for the full amount to her credit before such charge. Complainant alleged an equitable setoff to the amount of the balance of the proceeds of the note standing to E's credit at his death, and asked that defendant be restrained from collecting more than that sum. G's estate was insolvent.

Bird, V. Ch. 1. In order to sustain an equitable setoff it is important to show that the controversy between the parties grew out of the same pecuniary transaction or pertains to the same matter or thing. 2. It is the ability to trace and identify the subject-matter of the transaction which gives rise to the equitable lien, which is distinguishable from setoffs allowed at law. 3. The fact that the deposit was made in the individual name of the defendant in no wise prevents the application of equitable principles. 4. The existence of this equity makes the bank's claim superior to that of any other creditor. Injunction made perpetual.

Cited: 46 N. J. Eq. 607; 56 N. J. 360.

WILLIAMS v MCKAY (1889) 46 N. J. Eq. 25.

Bill to enforce the liability of bank managers for misfeasance and negligence in office. Plaintiff was the receiver of an insolvent savings bank of which defendants had been managers. Its charter provided that it should invest no money except in the bonds of certain states and cities of the United States, and in real estate worth double the amount of the sum invested, above all encumbrances. The bill set out numerous investments as to which defendants were alleged to have used bad judgment. They had never acquainted themselves with the contents of the bank's books. The less important facts are sufficiently indicated by the opinion. Defendants excused themselves on the ground of mistake as to the meaning of the charter, and concealment by minor officers.

McGill, Ch. 1. The managers' duty was to lend the bank's money not only in the manner indicated and required by the charter, but also prudently; the prudence required being measured by the character and objects of the institution. 2. The managers could define the duties of the officers and appoint small committees from their number to attend to the routine work, but had no right to rely entirely on officers and committees. 3. There are five grades of culpability among defendants: 1, Those managers who were concerned in, and profited by, an unlawful, imprudent, or negligent transaction that resulted in a loss; 2, those who were concerned in, but did not profit by it; 3, those who, ignorant of the transaction, by the improper discharge of their duties made the loss possible; 4, those who, ignorant of the transaction, negligently omitted to discharge special duties, the performance of which would have prevented the loss; 5, those who, though not charged with special duties, failed to exercise reasonable circumspection over the affairs of the bank. 4. The investment of a small sum on the security of a mortgage which is second to a mortgage for a very large sum is imprudent. 5. The investment in a second mortgage on land worth less than twice the previous encumbrances plus twice the entire investment is neither wholly nor partially illegal. 6. Trustees of the character of defendants are not merely required to be honest, but they must also bring ordinary competency to the discharge of the duties they undertake, together with reasonable vigilance and care. 7. An excusable mistake in the meaning of the law is one which occurs after all means of information that suggest themselves to a man of ordinary care and prudence have been exhausted. 8. Defendants were not bound to make such an examination of the books as would be expected of expert accountants, but should have carried it far enough to understand the method of bookkeeping that prevailed. 9. Investment on mere personal security was illegal. Decree for complainant.

CARPENTER v NATIONAL BANK AT RAHWAY (1889) 50 N. J. L. 6.

To recover double the amount of usury paid. Plaintiff's two notes were discounted by defendant, a national bank, plaintiff being credited on his account with the face of the notes less the discount charged. Defendant contended that the action was barred by the limitation of sec. 5198, U. S. R. S., which provided that the taxing of usurious interest knowingly should forfeit the entire interest;

and in the same section, in the sentence immediately following, that the person paying usurious interest might recover double the amount by an action, provided such action was commenced "within two years from the time the usurious transaction occurred." The notes were dated and discounted more than two years before, but were paid within two years of, the commencement of the action. Judgment for defendant. Error.

Beasley, C. J. 1. The statutory provision creates two distinct offenses, the first is the reserving or charging usurious interest; the second is the actually receiving the money. 2. The second offense, which is the foundation of this action, is the one to which the two years' limitation applies. The action, therefore, is not barred. Judgment reversed.

TRENTON SAV. FUND *v* RICHARDS (1889) 52 N. J. L. 156.

Certiorari to review assessment of taxes. The assessment was made by the city of Trenton. The prosecutor, a savings bank, insisted that it should have been taxed only under the supplement to "an act concerning savings banks," approved April 27, 1888, by which "all savings banks shall, in lieu of all other taxes, pay an annual tax on the amount of their deposits of one half per cent, after deducting . . . funds . . . to meet the current . . . expenses and the amount invested in any securities issued by this state, by any county, town, township, or city in this state, or which by the statutes of this state or of the United States are exempt from taxation, and the cost of real estate purchased under foreclosure, which real estate shall be subject to the same tax as other like property." The city contended that the statute was unconstitutional. The constitution required that property should be assessed for tax under the general laws, and by uniform rule, according to its true value. Real estate purchased under foreclosure was one of the 11 sorts of property which savings banks were permitted to hold.

Dixon, J. 1. The tax is a personal tax chargeable on savings banks either because of the franchises they enjoy or because of the business they do. Looking merely at the tax which this statute imposes, we see no reason for doubting its validity. 2. If, however, the enactment is sustained, it will exempt from taxation all the property of savings banks except real estate purchased under foreclosure; but the mass of the bank's property with this exception, does not constitute a class within the constitutional clause as construed, permitting property to be classified for the purposes of taxation, but requiring that all the members of the class selected shall be included in the taxing law, and that the rules applied thereto shall be uniform as to the whole of the class. The exemption is therefore unconstitutional. Judgment accordingly.

Cited: 53 N. J. 213.

NATIONAL BANK OF RAHWAY *v* CARPENTER (1889) 52 N. J. L. 165.

To recover double the amount of usury paid. There were three transactions. 1. H made his note payable to plaintiff, plaintiff indorsed it, and defendant, a national bank, discounted it at an usurious rate, passing the amount less the discount to plaintiff's credit in his account. Plaintiff paid the note December 4, 1882. 2. Plaintiff made a note which defendant discounted at an usurious rate. The amount less the discount was placed to plaintiff's credit. 3. On April 2, 1883, plaintiff paid the last mentioned note, together with additional interest for the time that the note had remained overdue and unpaid. This suit was begun December 4, 1884, more than two years after the discounting of both notes, within two years from the payment of the second note, and exactly two years from the payment of the first note. Defendant contended that the action was barred by sec. 5197, U. S. R. S., which provided in substance as follows: the taking of usurious interest knowingly shall forfeit the interest on the debt. In case the usurious interest has been paid, twice its amount may be recovered back, provided the action is commenced within two years from the time the usurious transaction occurred. Judgment for defendant. Error to supreme court. Judgment reversed. Error.

McGill, Ch. 1. The words, "usurious transaction," as used in the proviso, refer not to the time when the interest is agreed on and reserved or charged, but to the time when it is paid. 2. The transfer to the bank of commercial paper of a third person at the time of its discount is payment of the interest which was reserved when the discount was made. Judgment of supreme court reversed. (See 50 N. J. L. 6, ante p. 841.)

WAGNER v HOWARD SAV. INSTITUTION (1890) 52 N. J. L. 225.

To recover deposit. The defendant, a savings institution, gave plaintiff a deposit book at the time of the deposit, containing its by-laws, one of which required any person demanding any part of his deposit or interest to present the deposit book. There was no evidence that plaintiff's attention was called to this by-law or that she assented to it. Another provided that if the depositor should lose the deposit book, he should give immediate notice of the loss, and in case of any doubt about his identity, the board of directors might require such evidence as they deemed necessary. The plaintiff lost her deposit book, and gave notice of the loss. The defendant contended that she could not recover her deposit without producing the deposit book or giving an indemnity bond. No doubt was raised as to her identity. Case certified.

Beasley, C. J. The two by-laws construed together lead to the conclusion that on the loss of the deposit book by accident, all that the depositor can be required to do is to give notice that his book has passed from his control by casualty, producing testimony and giving security if his identity be in doubt. Judgment advised for plaintiff.

BOARD OF FREEHOLDERS v NEWARK NAT. BANK (1891) 48 N. J. Eq. 51.

Bill to recover a deposit made by a third person. S, while collector of Essex County, deposited the county moneys with the defendant, a national bank, in his own name, as such collector. When S's term of office expired, he refused to check out the balance standing to his credit and pay it over, either to the complainant or to his successor in office. The defendant refused to allow either the complainant or the new collector to check it out. R. S., p. 127, sec. 2; p. 128, sec. 4, provide that the title to all county property shall vest in the board of freeholders, and authorize the board to raise and expend money for public purposes. Demurrer by defendant.

Van Fleet, V. Ch. 1. The contract arising by implication of law, from a deposit of money in a bank, is that the bank will, whenever required, pay out the money in such sums and to such persons as the depositor may designate by his check. 2. No legal relation arising out of contract, express or implied, was established between the complainant and the defendant when the money was deposited. 3. The defendant has become subject to no legal duty to the complainant, since the deposit, that is enforceable by any ordinary or extraordinary remedy known to the law. Plaintiff is therefore entitled to maintain a bill in equity. Demurrer. Overruled.

Cited: 48 N. J. Eq. 627; 50 id. 569.

SMITH v BOARD OF FREEHOLDERS (1891) 48 N. J. Eq. 627.

Bill to recover a deposit. The defendant S was the collector of Essex County. Complainant, the board of freeholders, deposited the county moneys with the defendant bank. The account was kept in the name of S, as collector, and by the direction of complainant checks were honored, only when drawn on it by S, "collector," and countersigned by the county auditor. R was elected to succeed S as collector; the bank refused to honor checks drawn on the county moneys either by R, or by the complainant. S demurred to jurisdiction. Overruled. Decree for plaintiff. Appeal.

Magie, J. 1. By this deposit the bank became the debtor of the complainant. 2. An action at law only will lie for its collection. 3. The line of diversion between legal and equitable remedies is fixed in this state, and even the legislature is forbidden to intermingle these remedies. Decree reversed.

Cited: 50 N. J. Eq. 569.

FIRST PRESBYTERIAN CHURCH v NATIONAL BANK (1894) 57 N. J. L. 27.

Covenant. The action was on an agreement under seal dated June 18, 1872, in which defendant, a national bank, promised to pay a sum to the plaintiff, annually, so long as it refrained from erecting a building on its land or otherwise obstructing the light of defendant's building. The agreement contained no provision for termination by notice. The defendant pleaded that there was no consideration for the promise; that it discontinued its obligation by notice; that the undertaking was ultra vires; that the defendant's liability ceased with its corporate term of life on August 1, 1885, and did not survive with the extension

of its charter by the Act of Congress of July, 1882. The bank was empowered to acquire and hold such real estate, or interest therein, as might be necessary for its accommodation.

Garrison, J. 1. The writing delivered in 1872, under seal, was obligatory, even if gratuitous. 2. The notice was without legal effect. 3. The defense of ultra vires was not open to the defendant after so long an acceptance and acquiescence. 4. In consequence also of its power to hold real estate the defense of ultra vires was not available. 5. The extension of the term of the defendant did not cancel the continuing obligations of the corporation. Demurrer sustained. Judgment on demurrer for plaintiff.

Cited: 56 N. J. Eq. 277.

ORANGE NAT. BANK v ORANGE (1895) 58 N. J. L. 45.

Certiorari to review assessment. The banking house and lot of plaintiff were assessed as other real estate was assessed in the place when plaintiff was located, and was not included in estimating the assessable value of plaintiff's stock. The National Banking Act provided that shares of a national bank could be taxed by the states, but not at a greater rate than other moneyed capital was assessed; and that the real estate of the bank should be taxed as other real estate was taxed.

Van Syckel, J. The Act of 1891 requires the banking house and lot to be assessed to the bank in the township or ward where the bank is located, and that their value shall not be computed in estimating the assessable value of the stock of the bank in the hands of its shareholders. Writ dismissed.

Cited: 65 N. J. 122.

GRAHAM v ORANGE CO. NAT. BANK (1896) 59 N. J. L. 225.

If the president of a bank, who is also a member of its discount committee, participates in the discounting of a note made to him individually for an illegal purpose of which he has knowledge, his knowledge is not imputable to the bank.

TUFTS v PEOPLES BANK AND TRUST CO. (1896) 59 N. J. L. 380.

Money had and received. Defendant sent plaintiff a note indorsed for collection, purporting to have been made in his favor by K, who was a depositor in the plaintiff, an ordinary bank of deposit. Without demanding payment, plaintiff charged the amount against K's account, and sent its draft to defendant for the amount. On discovering what had been done, K declared that the note was signed without his authority and demanded that the charge be canceled. This had not been done. K actually owed defendant the money. Judgment for defendant. **Certiorari.**

Dixon, J. 1. Defendant's accepting payment from the bank of the amount due him from K operated to transfer his claim against K to the bank, whether the instrument was or was not a valid note. 2. The relation between the bank and its depositor being that of debtor and creditor, entitled it to set off the amount so paid against the claim of K against it. Judgment affirmed.

CROSSLEY v TOWNSHIP COMMITTEE (1898) 62 N. J. L. 583.

Where a stockholder, a non-resident, was assessed in the city of East Orange for shares of stock owned by her in a national bank located in the city of Newark: Held, that the shares should have been taxed in the district where the bank was located; and that the court has power to direct a proper assessment to be made in the city of Newark (G. S. p. 3404, sec. 547).

SCUDDER v TRENTON SAV. FUND SOCIETY (1899) 58 N. J. Eq. 154.

Bill to collect a deposit. S, while he was a surrogate, deposited money with defendant in the name of "S, Surrogate." He died leaving a balance undrawn. Complainant was appointed his administrator, but the defendant refused to allow him to draw out this deposit.

Reed, V. Ch. 1. The addendum, "Surrogate," was merely *descriptio personae*, and does not imply that the money deposited was held in trust. 2. Until some

beneficiary asserts a claim on the bank the administrator of the depositor stands in the place of the depositor, and the bank is bound to pay the deposit to him. 3. The claim on the bank is a strictly legal one. Bill dismissed.

POLHEMUS v HOLLAND TRUST CO. (1899) 59 N. J. Eq. 93.

Deceit and negligence of trustee. The G Co. of New York State issued its bonds payable to T, and secured by a mortgage on its entire stock. It subsequently entered into an agreement with the defendant, a trust company, to retire these bonds, and to issue new ones. A new issue was made and secured by a mortgage to the defendant. The bonds were certified by the defendant, and delivered to it, in New York, to be exchanged for old bonds, or sold. Some of the bonds were certified, and surrendered to the G Co., in payment for improvements which its directors falsely certified had been made in its plant. The original bonds were not all surrendered. Complainant purchased several of the new bonds from the defendant in New York, on the representations of its clerk, that they were first mortgage bonds. He also purchased bonds issued to the G Co. to cover its alleged improvements. Default was made in the payment of the outstanding original bonds, and the entire property of the G Co. was sold under foreclosure of T's mortgage. Complainant contends that defendant held the bonds issued for the improvements as trustees for the bondholders, and should have ascertained whether the improvements were actually made before certifying the bonds.

Reed, V. Ch. 1. The recovery of money paid by the inducement of false representations is not within the scope of modern equity jurisdiction. 2. The possession by the trust company of those particular bonds was not as a trustee for the bondholders, but as a pledgee of the bonds. 3. The person who made the false representations was not the agent of the defendant in this transaction, but of the G Co., and the cause of action arose in New York. Bill dismissed.

Cited: 61 N. J. Eq. 501. Reversed: 61 N. J. Eq. 654.

HARTER v MECHANICS NAT. BANK (1899) 63 N. J. L. 578.

To recover a balance. On January 29, 1898, K gave plaintiffs his check for \$1,000, with instructions to pay the amount to Y on delivery to plaintiffs of her bond and mortgage to R. On the same day, a bond and mortgage, purporting to be signed and acknowledged by Y, but in fact forged by A, were presented by the latter to plaintiffs, and their check for \$985 on defendant, a national bank, was given to A, payable to Y's order. A forged Y's name on this check and obtained the money from defendant. K, who had become the owner of the bond and mortgage, thereafter called on Y to collect the interest, and was informed by her that she had executed neither the mortgage nor the bond. Y and K called on A, and at the end of the conversation, Y said that it would be "all right;" and that A would settle it soon. Defendant contended that this was a ratification, and that K's failure to promptly notify plaintiffs of the forgery after his first conversation with Y was a waiver of his right to recover from plaintiffs. Defendant charged plaintiffs' account with the amount of the check, for which plaintiffs now sue. Judgment for plaintiffs. Error.

Dixon, J. 1. The return of the paid check with a forged indorsement, and the passbook, cast on the depositor the duty of exercising reasonable care to examine the vouchers. 2. The manifest import of what Y stated after the interview with A was that the bond and mortgage were not executed by her, and that they placed an obligation on A which she believed he would soon settle. There was no ratification of the forgery. 3. The failure of K to notify plaintiffs of the forgery at once did not affect their right to recover from the bank. Judgment affirmed.

COSGROVE v PROVIDENT INSTITUTION (1899) 64 N. J. L. 39.

Reversed in 64 N. J. L. 653.

MYERS v CAMPBELL (1899) 64 N. J. L. 186.

Certiorari to review taxation. The prosecutor gave H two mortgages on real estate to indemnify him against loss through indorsing of the prosecutor's notes, discounted and held by the M National Bank. The prosecutor was taxed on his real estate on a valuation of \$3,500. The Act of 1869, April 1, provided that the state

should tax all national bank shares to the holders, if residents. The Act of March 28, 1895, forbade deductions from the taxable value of real estate, because of debts to banks. The prosecutor claimed that the notes should be deducted from his assessed property. The claim was rejected by the assessors.

Dixon, J. 1. The property of national banks is taxed through their stockholders. The shares of stock in national banks should be assessed either to the holders, if resident in the state, or to the bank, if the holders are non-resident. 2. Debts due to the national banks, secured by mortgages on real estate, should be deducted from the value of such real estate. The deduction claimed should have been allowed. 3. Mortgages held by national banks are valid *inter partes*. Tax set aside.

COSGROVE v PROVIDENT INSTITUTION (1900) 64 N. J. L. 653.

To recover balance of deposit. A by-law of the defendant, a savings institution, provided that deposits and dividends should be drawn by depositors in person or by written order, or by some person legally authorized, and only on production of the depositor's book; and all payments made to persons presenting the deposit-book should be valid payments. An unknown woman presented the plaintiffs' book and drew \$150 on representations that she was one of the plaintiffs, all without the plaintiffs' knowledge. Plaintiffs had a copy of the by-laws. The payment was made in good faith. Judgment for plaintiffs. Error.

Gummere, J. A payment made by the bank in good faith, and in the exercise of due care, to any person who produced the passbook, operated to discharge the bank, without regard to whether or not such person was entitled to draw the money. Judgment reversed.

PERTH AMBOY GAS LIGHT CO. v MIDDLESEX CO. BANK (1900)
60 N. J. Eq. 84.

To recover deposit. Defendant's cashier had systematically embezzled its funds by drawing on its securities, deposited for safe-keeping with a New York Bank. Defendant's other officers never inspected its account with the New York Bank. They were informed by the latter that their account was overdrawn, about two o'clock in the afternoon, and continued to do business until the regular closing hour. The defendant was found to be hopelessly insolvent, and was placed in the hands of a receiver. The claims for preference were varied. Some were based on actual cash deposits made shortly before the defendant closed. Others were on checks of other banks, similarly deposited. The largest amounts were by banks which sent checks on the insolvent bank, drawn by depositors therein, to the defendant for collection. Checks drawn on other banks and indorsed to defendant for collection, were forwarded by defendant, after it knew itself to be insolvent, to the banks on which they were drawn, and placed to defendant's credit by those banks. Judgment, allowing a preference only on claims based on paper sent for collection. Appeal.

Pitney, V. Ch. 1. The mere deposit of a draft with a bank, for collection, is a bailment. 2. In cases where the contract is lending and borrowing, the creditor of an insolvent bank can reclaim his deposit as against the general creditors, only when the bank accepted his deposit after they knew of its insolvency. 3. If it appears that his deposit was in cash, and actually passed into the hands of the receiver, he may reclaim it, although he may not be able to identify the very coin or bills which formed the deposit. 4. The fraud of bank officers in accepting deposits must be actual, as distinguished from constructive. 5. When a depositor deposits a check of another person on the bank in which he deposits, no money actually passes, and there can be no tracing of the deposit. 6. Claimants are not entitled to preference, except those who cash deposits passed into the hands of the receiver, and those whose claims were based on paper deposited for collection. Decree modified.

FIDELITY TRUST CO. v BAKER (1900) 60 N. J. Eq. 170.

Bill to restrain cancellation of a mortgage, or to compel repayment. M B delivered to B, her attorney, a sum of money to be invested in a first mortgage on the land of T, and to be applied in payment of two prior mortgages on the land. B acted as solicitor for M B and T. He paid off the first mortgage, but only half of the second mortgage, which was held by P. T executed to M B a bond and mortgage on the land, which was left in the custody of B. Both T and M B

believed it to be the only encumbrance on the property. B misappropriated the money received by him for the purpose of satisfying the P mortgage. Subsequently, by means of a forged check, he procured a deposit credit from complainant, against which he was allowed to have checks certified. B had his check certified and mailed to P to cancel the P mortgage. P indorsed a consent to its cancellation on the mortgage and sent it to defendant M B. Complainant joined M B, B, P and T as defendants. Its case depended on its right to follow funds procured by B, M B's agent, and paid over to P for the benefit of the other defendants.

Emery, V. Ch. 1. Money, though procured by fraud or felony, cannot be followed into the hands of a person who has received it in satisfaction of an existing debt. 2. The fact that the discharge of the debt was without the knowledge of the creditors, when made, cannot effect its validity. 3. Certified checks, when used and accepted as money in payment of debts, must be treated as payments of money, and are entitled to the same protection. 4. Where, on the payment of the debt, there is a transfer, satisfaction or release by the creditor of an interest in land, held as security for the debt, he becomes, in addition, a purchaser for valuable consideration. 5. Negligence or carelessness in parting with it cannot affect the equitable right to follow money procured by fraud and crime, or pass the title to the wrongdoer. Bill dismissed.

MECHANICS NAT. BANK v BAKER, REC'R (1900) 65 N. J. L. 113.

Certiorari to review an assessment for taxes on plaintiff's capital stock, held by non-residents of the state. It was urged that the federal law (U. S. R. S. sec. 5219) permits national banks to be taxed only on real estate, and that the taxation of stock was unauthorized. No complaint was made to the commissioners of appeal or state board of taxation. There was no evidence of excessive taxation.

Dixon, J. 1. The assessment is not on the bank; it is on the shares, in form only to the bank. 2. The statutes of the state do not violate that provision of the state constitution which requires property to be assessed for taxes under general laws and by uniform rules, nor are they repugnant to sec. 5219, U. S. R. S. 3. The shares of national banks are to be assessed at their true value. If there was excessive taxation, the prosecutor might have presented its complaint to the commissioners of appeal and to the state board of taxation. The objection of excess in taxation fails for want of such presentation and evidence. Assessment affirmed.

Cited: 65 N. J. 122.

MECHANICS NAT. BANK v BAKER, REC'R (1900) 65 N. J. L. 549.

To set aside tax on shares of the capital stock of the plaintiff, owned by non-residents of the state, and assessed against plaintiff. Defendant was a receiver of taxes. The objection was founded on sec. 5219, U. S. R. S., requiring that taxes of national banks "shall not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of such state." It was alleged that trust companies, organized under the laws of the state, were competitors of national banks; and that the taxation on such companies was at a less rate than on plaintiff's stock. The law was construed below to impose a tax on such companies based on the par value of their capital stock and no more. The act under which trust company stock was assessed read "to the amount of such shares." It was assumed that by our laws, taxation on shares of national banks was required on their real value. The court below found that the stock of trust companies had been assessed at their true value. Judgment for defendant. Error.

Magie, Ch. 1. Under the Trust Company Act, the shares of stock are to be assessed and taxed at their real value, not at their par value. 2. Such assessment is the same as that on national bank stock, and is not prohibited by U. S. R. S., sec. 5219. Judgment affirmed.

CAMPBELL v WATSON (1901) 62 N. J. Eq. 396.

Bill to enforce liability of directors. Defendants were directors of the M Bank. They were also managers under the charter. The entire control of its accounts and investments was left to V, its cashier. The M Bank kept its funds and securities on deposit with the P Bank in New York, and drew them out as needed. At the end of each month the P Bank sent the M Bank an account stated, known as a reconciliation sheet. V embezzled funds systematically by falsifying the reconciliation sheet. A comparison of these sheets with the draft stubs would instantly

have revealed V's defalcations. No examination was ever made by the defendants. The state banking examiner made periodical examinations. Because of V's overdrafts on the P Bank, the M Bank became insolvent. Its charter provided that its affairs should be managed by a board of directors. A by-law provided for the appointment of a committee of the directors every three months, whose duty it should be to examine into the affairs of the bank and ascertain the condition of its cash and ledger accounts. After this by-law was passed the original charter expired, and was renewed by direction that its existence should be extended as fully as if the new term had been named in the original charter. Plaintiff was receiver of the M Bank. The total losses had not been ascertained, or the extent of defendant's liability determined.

Pitney, V. Ch. 1. The action was not premature. 2. The by-law survived the expiration of the original charter. 3. In matters of administration, where a duty to perform certain functions devolves on them, directors are liable either for their non-performance, or for their lack of ordinary diligence in their attempted performance, whereby loss is incurred. 4. The presumption of repeal does not follow the long-continued non-observance of a by-law. 5. The fact that the state banking officials make periodical examinations of a bank's accounts will not justify its directors in not making any examinations. 6. A director of a bank is estopped to deny knowledge of its by-laws. 7. Directors, in looking over the work of the officers of a bank are bound to exercise only such care and diligence as experience has shown is proper and practicable. Decree for plaintiff.

CAMPBELL v MANUFACTURERS NAT. BANK (1901) 67 N. J. L. 301.

Money had and received. The plaintiff's cashier, V, being personally indebted to defendant, drew a draft of the plaintiff on its New York correspondent, signed it with his official signature, and delivered it to defendant. Defendant accepted it with knowledge of the foregoing facts. Defendant contended that the bank was bound by the cashier's act: 1, because V was authorized to issue drafts; 2, because the presumption of ratification obtained on account of the presumptive knowledge of the books and records of the plaintiff, with which its officers were chargeable. Defendant offered no evidence of actual notice, or of ratification. Judgment for plaintiff. Error.

Fort, J. 1. A person cannot deal with a cashier of a bank as an individual in securing a draft, and claim, after the draft is delivered, that it has become the transaction of the bank. 2. The burden was on the plaintiff to prove that the act of the cashier done for the cashier's individual benefit, was authorized or ratified. Judgment affirmed.

NEW MEXICO

ALBUQUERQUE NAT. BANK v PEREA (1891) 5 N. M. 664.

To restrain the collection of taxes. The complainant bank delivered to the assessor, a list of its taxable property, which included the market value of its capital stock. The assessor taxed the property at its full value, according to the complainant's own estimate. The rate of taxation was higher than on similar property, but not higher than its market value. The original bill failed to allege ownership of the stock in the shareholders, and a supplemental bill was made to cure the defect. The amount of the capital stock was not assessable, and would have been deducted on application to the tax adjuster. Demurrer. Sustained. Judgment for defendant. Appeal.

O'Brien, J. 1. It was the complainant's duty to apply to the tribunal established by law to grant the desired relief. 2. The complainant cannot set up as the basis of a bill in equity its own mistake, and its subsequent negligence in failing to ask the proper tribunal to relieve it from the consequences thereof. 3. Such inequality alone does not afford ground for equitable relief. Judgment affirmed.

UNITED STATES v FOLSOM (1894) 7 N. M. 532.

Indictments, for making false entries. The defendant, as president of a bank, was charged with making false entries in the bank's books. The court permitted a consolidation of four indictments into one, and allowed the prosecution to re-

open as to alleged false entries in the books of the bank. The prosecution showed that a report of the bank's business for July 9, 1891, was called for by the comptroller; that after such call the defendant caused the books to be changed by the insertion of transactions occurring subsequent to July 9, 1891. Defendant contended that the two-year Statute of Limitation applied, and that two jurors were improperly accepted, being over sixty years of age. The court instructed that a *prima facie* guilty intent existed if the jury believed beyond a reasonable doubt that the wrongful act had been intentionally committed. The court permitted the jury to consider the report of the bank's condition to show intent. Verdict guilty. Appeal.

Smith, C. J. 1. The offenses charged in all the indictments are of a like nature, and could have been presented in one indictment. 2. The territorial law of the two years limitation would not apply, as the jurisdiction of the district courts in trying offenses of this character is separate and distinct from the jurisdiction in trying territorial causes. 3. If illegal evidence relating to such matters were allowed, it could not, under the instructions of the court, have been considered by the jury. 4. The error in reopening the case is not well taken, as this matter was within the discretion of the court. 5. The finding of the jury is sustained by the testimony of the defendant. 6. Age of itself does not create incompetency for jury service. Judgment affirmed.

BANK OF COMMERCE v HARRISON (1901) 66 Pac. (N. M.) 460.

On certificate of deposit. On December 13, 1890, the plaintiff deposited with the defendant, a bank, \$5,000, and received the certificate of deposit. The money was payable on the return of the certificate indorsed, six months after date. On April 19, 1900, the plaintiff presented the certificate to the defendant for payment, and demanded interest from December 13, 1890, which was refused. It was protested for non-payment. Demurrer: 1, That the cause of action accrued more than six years before, and was barred by the Statute of Limitations; 2, that the agreement was to pay the \$5,000 and interest for six months; and 3, that protest was unnecessary. Overruled. Judgment for plaintiff. Appeal.

McMillan, J. 1. The transaction was a deposit and not a loan. 2. The law of negotiable instruments applies to a certificate of deposit when it has been indorsed and transferred by the original holder. This new relation is governed by the law merchant. 3. The certificate, not having been presented within six months after delivery, it drew interest up to the time of payment. 4. The Statute of Limitations did not run against it, until after demand of payment and refusal. Judgment affirmed.

NEW YORK

PRESIDENT OF UNITED STATES BANK v HASKINS (1799) 1 Johns. Cas. 132.

In an action by the president, directors, and company of the Bank of the United States, it is not necessary to set forth the act of Congress incorporating the bank, whether it be a public or private act.

Cited: 14 John. 246; 5 Wend. 482; 12 Barb. 575; 28 id. 63.

CRUGER v ARMSTRONG (1802) 3 Johns. Cas. 5.

Assumpsit, on check. The plaintiff declared: 1, for money had and received to the use of plaintiff; 2, for money paid. The plaintiff produced and proved a check drawn by the defendants, payable to W & J C or bearer. Objection, as not evidence under the counts; that it was an inland bill and ought to have been declared on as such; that the plaintiff ought to be called on to prove that payment of the check had been demanded of the bank. Overruled. It was proved that on the day of the date of the check, the defendant's checks had been paid to a large amount. At the close of the day, there remained a balance to their credit. The defendant never had any consideration for the check, as it was loaned to P & M who passed it through a broker to the plaintiff. Verdict for plaintiff. Motion for new trial.

Radcliff, J. 1. Considering the check either as a bill of exchange or draft, the plaintiff was entitled to give it in evidence under the money counts. 2. The holder

of a bill must prima facie be deemed to be the rightful owner. 3. Checks are in form and reality, bills of exchange, and it is therefore necessary to present them for payment. 4. It is only after the dishonor of the draft, that the holder can require payment from the drawer. Motion granted.

Cited: 3 Johns. Cas. 264; 12 John. 95; 6 Cow. 491; 6 Wend. 445, 643; 7 id. 175; 13 id. 553; 14 id. 590; 21 id. 373, 505; 2 Hill 427; 11 Hun 485; 6 N. Y. 418; 8 id. 348; 34 App. Div. 362.

CONROY v WARREN (1802) 3 Johns. Cas. 259.

Assumpsit on check. The check was dated March 28 and was payable to bearer. It was presented on October 20 and payment was refused. The check was not stamped. After the date of the check, the defendant drew large sums of money from the bank. The Act of Congress, July 6, 1797, in describing the instruments required to be stamped, specified "any bond, bills, single or penal, foreign or inland bills of exchange, promissory notes or other notes for the security of money." The defendant moved for a nonsuit, on the grounds: 1, That the plaintiff had not shown that he obtained possession of the check bona fide and for a valuable consideration; 2, that the check was not stamped; 3, that the check was not presented for payment in due time. Overruled. Verdict for plaintiff. Motion to set aside verdict and for a new trial.

Thompson, J. 1. Prima facie, the check imported a consideration. 2. A check is not, in mercantile language, a note for the security of money. 3. A mere order to pay money requires no stamp. 4. What is a reasonable time for presenting a check for payment is a question for the determination of the court. Defendant has sustained no damage from the delay. 5. The circumstance of the defendant drawing large sums of money from the bank after the date of the check throws the onus probandi of actual damage on the defendant. Motion denied.

Cited: 10 John. 232; 6 Cow. 455, 491; 7 id. 176; 5 Wend. 602; 6 id. 622; 12 id. 487; 13 id. 553; 14 id. 587, 590; 21 id. 374; 2 Hill 427; 7 id. 384; 24 Hun 289; 36 id. 145.

WINTER v BANK OF NEW YORK (1805) 2 Caines' Term Rep. 337.

Assumpsit, for money had and received. L, having certain money consigned to plaintiff, being about to enter a bank after banking hours to deposit it therein, was accosted by A who informed him that he could easily get into the bank, and effect the deposit. L followed A to the door, where he was requested to remain while A saw the cashier. A represented to the cashier that he wished to deposit the money, and on the strength of these representations, the cashier released him from liability on certain notes and bills which the defendant held. The money was credited to A, and L delivered it, thinking it was properly placed to his own credit. The next day, L deposited the money in his name, on account of plaintiff, to whom the bank refused to pay. The cashier did not ask to whom the money belonged. Verdict for plaintiff. Motion for new trial.

Spencer, J. 1. When one of two innocent persons must suffer by the act of a third, he who enabled such third person to occasion the loss must sustain it. 2. The officer of the bank, having failed to ask A whether or not the money was really his own, rendered the bank liable for any loss occasioned thereby. Motion denied.

MANHATTAN CO. v LYDIG (1809) 4 John. 377.

Assumpsit, for money had and received. B, a bookkeeper in the bank of the plaintiff, was occasionally employed by defendant, a depositor in the bank, to post his books and make deposits. B had no right to receive money. The entries in controversy appeared in the ledger account to the credit of defendant, in B's handwriting, but were not in the cash book. Corresponding entries to those in the ledger were made in defendant's passbook, which had been balanced three times. B became an embezzler. The directors of the bank had pursued the customary method of inspection, but the false entries had not been discovered because of false entries in the balance sheet. The money sent by defendant to B to deposit, had been embezzled by him and the false entries were made to conceal the embezzlement. The court charged the jury that the bank was not chargeable unless the sum was left with the receiving teller, or some person acting in his stead, unless the money came into the custody of the bank, or unless they became chargeable in

consequence of the fraud or improper conduct of the bookkeeper. Verdict for defendant. Motion for new trial.

Spencer, J. 1. The bookkeeper, in making deposits for defendant, acted as his agent, and not for the bank. 2. The entries in the passbook can be shown to be erroneous. If a bank book accompanies the deposit, and an entry is made, it would be conclusive on the bank; but it would not be if the book is sent to be written up afterward. 3. The instruction on the question of negligence was too general. 4. If the bank pursued the usual and customary method to detect the fraud, it is sufficient. New trial granted.

Cited: H. & D. 413; 10 N. Y. 76, 83; 57 id. 602; 5 Sandf. 133.

BRISTOL v BARKER (1816) Anth. N. P. 235.

Qui tam action to recover a penalty for issuing bank notes of less than one dollar. The defendant was the proprietor of a bank in New York City, receiving deposits and making discounts. He was the sole owner of the establishment, and was not associated with any other person or company in the bank. 2. Rev. Laws 234 provided that if any person unauthorized by law shall become a member of any association, institution or company, or proprietor of any bank for the purpose of issuing notes, receiving deposits, making discounts, or transacting any other business which incorporated banks may do, he shall forfeit \$1,000 to be recovered by any person who shall sue.

Thompson, C. J. 1. The statute is penal and was intended to restrain banking associations unincorporated. 2. An individual may by law issue notes, receive deposits and make discounts. Plaintiff nonsuited.

S. c.: 14 John. 205.

ATTORNEY-GENERAL v UTICA INS. CO. (1817) 2 Johns. Ch. 371.

Injunction. The information was filed by the attorney-general, ex officio, setting forth that the defendant was unlawfully and without right, issuing notes and doing a general banking business; and a motion was made for an injunction to restrain its operation.

Kent, C. 1. This court has no jurisdiction to grant the injunction prayed for, in such a case as this. 2. The questions, whether the defendants have banking powers, and are within the purview of the restraining act, are of law. Motion denied.

Cited: 22 Abb. N. C. 230; 63 App. Div. 367, 368; 9 Barb. 91; 23 Barb. 599; 28 id. 68; 36 id. 259; 2 Edm. 404; 1 Edw. 88; Hopk. 360, 598; 5 Hun 519; 15 Johns. 379; 3 Johns. Ch. 287; 5 id. 381; 3 Misc. 333; 8 id. 628; 11 N. Y. 252; 27 id. 628; 57 id. 172; 88 id. 59; 99 id. 241; 101 id. 483; 116 id. 444; 124 id. 337; 134 id. 274; 143 id. 263; 2 Sandf. Ch. 266; 35 Supr. 116.

BRISTOL v BARKER (1817) 14 John. 205.

An individual, carrying on the banking business on his own account and responsibility, cannot be penalized under the act to restrain unincorporated banking associations from receiving and passing bank notes of less than one dollar (2 N. R. L. 234), as the act applies only to associations or companies formed for banking purposes.

Cited: 15 Johns. 379; 116 N. Y. 444. Same case Anth. N. P. 235.

PEOPLE v UTICA INS. CO. (1818) 15 Johns. 358.

Quo warranto. Defendant was incorporated for the purpose of conducting a fire insurance business. The language ordinarily used in bank charters was wholly lacking. Defendant assumed to do a banking business. An act of the legislature expressly prohibited any "person or persons," not having banking powers, from doing a banking business. Plea: that the company was not a "person" within the meaning of the prohibitory act. Demurrer.

Thompson, C. J. 1. The right to do a banking business, has, since the restraining act, become a franchise, which can only be exercised under legislative grant. 2. A thing within the intention of the maker of a statute, is within the statute. Acting within the letter of the statute is not acting within the statute, unless it is also within the intent of the maker. 3. The act incorporating the company contains no authority to do the acts complained of. 4. Although the act

does not expressly include a corporation, yet the term "person" will embrace such companies.

Spencer, J. 1. An information in the nature of a quo warranto need not show title in the people to have the franchise exercised. 2. A corporation has only those powers specifically granted by the act of incorporation, and those necessarily implied for carrying the same into effect. 3. Quo warranto is the proper remedy. Judgment of ouster.

Cited: 20 Abb. N. C. 323; 14 App. Div. 559; 15 id. 246, 249; 4 Barb. 130; 5 id. 476; 8 id. 133, 149; 15 id. 470; 21 id. 438; 24 id. 24, 134; 25 id. 201; 27 id. 239; 28 id. 321; 29 id. 50, 656; 32 id. 253; 40 id. 344; 42 id. 642; 43 id. 200, 268, 419; 45 id. 206, 220; 47 id. 116; 49 id. 16; 50 id. 600; 51 id. 634; 52 id. 146; 56 id. 29, 53; 1 Cow. 300; 1 id. 542; 2 id. 675, 699, 705; 3 id. 96; 4 id. 380; 8 id. 22, 194; 1 Daly 240; 3 Duer 145; 1 Edw. 532; 1 Hall 555; 2 Hill 244; 6 id. 38; 7 id. 282; 1 Hilt. 275; 1 Hun. 59; 12 id. 43; 17 id. 181; 18 id. 248; 27 id. 383; 32 id. 405; 45 id. 365; 50 id. 338; 54 id. 385; 19 Johns. 6; 4 Johns. Ch. 330; 1 Keyes 308; 3 Lans. 357; 12 Misc. 624; 9 N. Y. 71; 13 id. 81; 15 id. 209, 258; 19 id. 163; 22 id. 354; 24 id. 275; 31 id. 290; 54 id. 332; 55 id. 529; 58 id. 314; 60 id. 288; 71 id. 167; 77 id. 70; 79 id. 443; 89 id. 18; 95 id. 121; 96 id. 496; 97 id. 124, 477; 108 id. 529; 120 id. 394; 134 id. 304; 141 id. 244; 162 id. 126; 2 Park 418; 1 Redf. 386; 2 Robt. 263; 1 Sweeny 440; 1 T. & C. 201; 3 id. 163; 1 Wend. 336; 4 id. 654; 5 id. 552; 9 id. 383; 10 id. 193; 17 id. 304; 21 id. 249; 23 id. 238, 564, 582.

THROOP v CHEESEMAN (1819) 16 John. 264.

Assumpsit. The declaration contained only general counts. Plaintiff gave in evidence instruments made by defendant, by which he promised to pay certain sums in "current bank bills," and in "notes current at the banks in Utica and Albany." The Act of April 17, 1816, provided that all bills or notes made payable in "notes or bills of any incorporated company," might be prosecuted by the holder and that possession should be prima facie evidence of value given. It was objected that the instruments were not expressly made payable in the bills of any "incorporated company"; that some of them were dated anterior to the act; also that there could be no recovery on the general counts. Verdict for plaintiff subject to the opinion of the court.

Spencer, C. J. 1. The act, being remedial, is to be construed liberally. 2. The language of the obligations implies that they are to be payable in the notes or bills of "incorporated companies," though none are specifically designated. 3. The act is retrospective as regards the remedy and was intended to afford relief to persons holding such obligations. 3. Since the holder could maintain an action on the notes themselves, he can also recover upon the general counts. 4. That some of the notes were dated anterior to the act is no defense. Judgment on the verdict.

SILVER LAKE BANK v NORTH (1820) 4 Johns. Ch. 370.

To foreclose mortgage. Plaintiff was a banking corporation organized under the laws of Pennsylvania. The bond and mortgage were delivered to it there. A judgment creditor of defendant, in collusion with defendant, combined to procure a sale on execution of the mortgaged premises so as to defeat plaintiff's security. Defenses: 1, That a foreign corporation could not sue in the courts of this state; 2, that the mortgage was unauthorized by the act incorporating plaintiff, because the money was loaned after the bond and mortgage were given; and, 3, that the mortgage was a fraud upon the act of New York, restraining unincorporated banking associations. It was in proof that previous to the date and execution of the mortgage the plaintiff had agreed to loan the money.

The Chancellor. 1. A foreign corporation may sue here in its corporate name, and may prove as matter of fact, if the same were denied, that it was lawfully incorporated. 2. A mortgage taken to secure a loan advanced bona fide as a loan, according to the usage of banking operations, is not within the prohibition which was only meant to prohibit banking companies from investing their capital in real property and engaging in land speculations. 3. The act to restrain unincorporated banking associations does not apply. But the doctrine of substitution does, and plaintiffs stand in the place and partake of the rights of the judgment creditor. Decree accordingly.

Cited: 4 Barb. 130; 29 id. 51; Clarke Ch. 382, 451; 2 Cow. 125; 35 Hun 582; 12 Misc. 232; 12 N. Y. 505, 573; 22 id. 278; 25 id. 327; 42 id. 96; 134 id. 535; 3 Redf. 495; 43 Supr. 484; 5 Wend. 482; 7 id. 553.

BANK OF UTICA v MAGHER (1820) 18 John. 341.

On bank note. A public act gave the defendant, a bank, the right to maintain a branch bank in C, and provided that no notes should be issued by the branch bank without being first countersigned by the cashier, and that the notes shall be payable on demand at the branch bank. The note was issued by the branch bank and was countersigned by its cashier, without adding his official character. There was no allegation or proof of demand of payment at the branch bank. It was proved that the person countersigning the note was the cashier of the branch bank. Judgment for plaintiff. Error.

Spencer, C. J. 1. The notes were payable on demand at the branch bank, and therefore it should have been averred and proved that payment had been demanded at the branch bank where it was issued. Until such demand was made the defendant was not guilty of default in payment. 2. As acts of agents do not derive their validity from professing on their face to have been done in the exercise of their agency, and as the act incorporating the branch was a public act, it was not necessary for the cashier to add his official character to his signature. Judgment reversed.

Cited: 3 Wend. 19.

UTICA INS. CO. v SCOTT (1821) 19 John. 1.

Assumpsit on promissory note by the indorsee against the indorser. Defendant pleaded that plaintiff unlawfully became a member of a banking association, and unlawfully established an office, issued notes, received deposits, made discounts, and unlawfully discounted the note in question. The replication did not confess and avoid, or traverse and deny that plaintiff unlawfully established an office, issued notes, and made discounts. By statute, plaintiff could not become a member of a banking association. Demurrer.

Per curiam. 1. The plaintiff was not authorized to issue notes, make discounts, or transact any business done by an incorporated bank, and the note was void. 2. The replication was bad. Demurrer sustained. Judgment for defendant.

Cited: 2 Cow. 702; 6 id. 606; 8 id. 25, 709; 18 Hun 295; 30 id. 641; 76 id. 170; 14 N. Y. 188; 15 id. 97; 77 id. 69; 79 id. 447; 151 id. 37; 1 Wend. 57; 3 id. 583; 4 id. 654; 5 id. 597; 7 id. 34; 8 id. 458.

Reversed as to point 1 in 8 Cow. 709.

MECHANICS & FARMERS BANK v SMITH (1821) 19 John. 115.

Assumpsit, for money had and received. Plaintiff's clerk made a deposit for plaintiff in defendant. By mistake, the teller entered the wrong sum. Plaintiff immediately notified the bank of the mistake, but defendant refused to make the correction. Plaintiff challenged a juror to the favor and, on his voir dire, asked if he were a drawer or indorser of any notes held by the bank. Plaintiff asked the defendant's teller whether he was accustomed to make mistakes, and proved instances in which he had made them. Defendant proved that the bank's by-laws provided that all payments made or received by the bank, should be examined at the time, and contended that the entry in the passbook was conclusive. The court charged that the only question was one of fact, that the bank was liable if the money was paid to the teller in the usual course of business for the purpose of deposit. Motion for nonsuit. Overruled. Judgment for plaintiff. Error.

Woodworth, J. 1. It is proper to ask a witness, challenged to the favor on his voir dire, any question showing his interest in the suit, or in the parties. 2. The entry in the bank book, being made under a mistake and not being the deliberate act of both parties, was not conclusive. 3. To show the credibility and accuracy of witnesses, it is proper to ask if he is in the habit of making mistakes. 4. The by-law did not relieve the bank from liability, and the charge was proper. Judgment affirmed.

Cited: 1 Denio 306, 309; 26 Barb. 598; 38 id. 540; 67 Hun 467; 59 N. Y. 102; 123 id. 349.

JEFFERSON COUNTY BANK v CHAPMAN (1822) 19 John. 322.

On promissory note. Defense: General issue and setoff of unpaid bank notes issued by the plaintiff. The defendant was maker of a promissory note indorsed to the plaintiff. Defendant did not prove that he held the unpaid bank notes at the commencement of the action. The plaintiff had stopped payment of its notes prior to the commencement of the action, and had not resumed payment. There was no evidence that the plaintiff was insolvent. Judgment for defendant. Error.

Woodworth, J. 1. A debt or demand, to be a setoff, must be an existing debt or demand at the time of the commencement of the plaintiff's suit. 2. It was error to receive evidence in regard to the time of stopping payment of the bank's notes, in the absence of proof of the insolvency of the bank. Judgment reversed.

Cited: 9 Barb. 277; 3 Wend. 18, 594, 614; 82 N. Y. 23.

SMEDES v UTICA BANK (1823) 20 John. 372.

Assumpsit. A note was sent by plaintiff to defendant for collection. The declaration stated that, by the defendant's negligence, the note was not collected and proper notice of dishonor was not given to hold the indorser, who lived in the same place with the maker. The defendant's clerk, who gave the notice, was not able to testify as to what he had done, or how he had given the notice. Defendant contended that there was no consideration to support the promise alleged in the declaration. The plaintiff proved that a person collecting a note, according to the custom of banks, agreed to give notice if the note was dishonored. Verdict for plaintiff, subject to the opinion of the court.

Woodworth, J. 1. The defendant undertook, in default of payment by the makers, to give notice to the indorsers. 2. The delivery of the note for collection with the possibility of profit arising therefrom, is a good consideration to support a declaration for non-feasance. 3. To bind an indorser living in the town with the maker of the note, notice must be given to him personally or left at his place of business or residence. Judgment for plaintiff.

Cited: 7 Barb. 149; 8 id. 399; 41 id. 346, 348, 349, 350; 9 Bosw. 463; 3 Cow. 662; 5 id. 308; 3 Denio 26; 2 Hill 590; 5 Hun 416; 23 id. 631; 3 Lans. 90 (n); 11 Misc. 286; 7 N. Y. 461; 13 id. 551; 15 id. 168; 39 id. 193; 69 id. 387; 87 id. 597; 6 Robt. 350; 9 Wend. 48; 15 id. 487; 22 id. 228. Aff'd: 3 Cow. 662.

BANK OF UTICA v SMALLEY (1824) 2 Cow. 770.

Assumpsit, on a note. The note was indorsed by the defendants, as accommodation indorsers, to the plaintiff. In order to testify, a stockholder in the bank, transferred his stock. The transfer was not recorded on the stock register. The suit was not in the name by which the plaintiff was incorporated, and defendant failed to file a plea in abatement. Plaintiff did not prove that it was a corporation. The interest was received for ninety-one days, upon a forbearance of ninety.

Sutherland, J. 1. The transfer of the stock by the witness passed his interest, and rendered him competent to testify. 2. The bank must, upon the general issue, prove that it is a corporation. 3. A misnomer of the plaintiff can only be taken advantage of by a plea in abatement. 4. The transaction was usurious. Judgment for defendant.

Cited: 16 App. Div. 604; 2 Barb. 299; 5 id. 211; 12 id. 575; 14 id. 183; 28 id. 63; 38 id. 540; 41 id. 574; 8 Cow. 398; 5 Bosw. 716; 3 Daly 220; 1 Denio 452; 1 Duer 708; 4 id. 524; 6 id. 582; 6 Hill 628; 78 Hun 93; 14 N. Y. 560; 20 id. 511; 24 id. 289; 34 id. 80; 46 id. 331; 48 id. 605; 49 id. 222; 52 id. 210; 134 id. 180; 3 Wend. 300; 11 id. 629; 18 id. 474; 20 id. 219.

BANK OF UTICA v HILLARD (1825) 5 Cow. 153.

Assumpsit, on promissory note. Plaintiff, a bank, was the indorsee, and defendant the indorser, of the note. A clerk of the bank was served with a subpoena duces tecum to produce the bank's books. It was not shown that he had control of the books. The court refused to let defendant prove by the clerk, a custom of the bank to make a usurious discount in all cases, and to prove by the maker of the note, the transaction itself. Verdict for the plaintiff. Motion for a new trial.

Savage, C. J. 1. A clerk, not having possession or control over books of a

bank, cannot be compelled to produce them upon a subpoena duces tecum. 2. The maker of a note is a competent witness in a suit by the indorsee against the indorser. 3. It was not proper to show the custom of the bank to discount notes at a usurious rate of interest, without first having given notice to the bank to produce its books. New trial granted.

Cited: 7 Cow. 385; 1 Hall 510; Hoff. 550; 1 Wend. 557; 3 id. 416.

WENDELL v WASHINGTON & WARREN BANK (1825) 5 Cow. 161.

Assumpsit. The plaintiff was the owner of bills of the defendant. He presented them to its cashier within banking hours and demanded payment in specie which was refused. Defendant paid in court, the principal of the bills and 10 per cent damages from date of demand of payment. Sec. 10 of the charter of the bank, provided that the persons whose bills are refused payment in specie may recover the amount due with 7 per cent interest, also 10 per cent damages. Plaintiff contended that it was entitled to receive interest at 7 per cent.

Savage, C. J. The legislature intended the 10 per cent per annum, as an addition to the sum of principal and interest which was already recoverable at law. Judgment for plaintiff.

Cited: 6 Cow. 215.

PEOPLE v BANK OF WASHINGTON & WARREN (1825) 6 Cow. 211.

Information in the nature of a quo warranto, against defendant, a bank for exercising banking privileges without warrant or charter. It was claimed that the charter had become forfeited for insolvency.

Woodworth, J. 1. The legislature did not intend that the refusal to pay on demand should be a ground of forfeiture, but, on the contrary, it intended that the business of the bank might be again commenced at an indefinite period, whenever the defendant should resume the payment of its bills. 2. Insolvency merely, at a particular time, however produced, is not good cause for dissolving the corporation. 3. There must be a total nonuser to work a forfeiture. Judgment for defendant.

Cited: 6 Cow. 219; 21 Wend. 249; 23 id. 237, 569.

ATTORNEY-GENERAL v BANK OF NIAGARA (1825) 1 Hopk. Ch. 354.

Quo warranto to annul a charter. Under the act incorporating the defendant, it was provided that if the bank should refuse to redeem its notes, its charter would be revoked. This proceeding having been brought on the ground that the defendant had, for some time, omitted to redeem its bills and has become wholly insolvent, an injunction was prayed for, on the ground that the defendant was about to resume business during the pendency of the quo warranto proceedings, and was engaged in buying up its paper at a heavy discount.

Per curiam. 1. Questions relative to the defendant's charter rights must be heard in a court of law; injunction is therefore improper. 2. The exercise of banking privileges, though contrary to law, is not a nuisance. 3. The omission of the corporation to exercise its powers, does not of itself work a forfeiture. 4. The suspension of payment was not equivalent to a forfeiture. 5. The fact that the bank was engaged in buying up its own paper at a discount, will not work a forfeiture of its charter; but even if it would, the remedy is in the supreme court. Motion denied.

Cited: 22 Abb. N. C. 230; 63 App. Div. 367, 368; 17 Barb. 601; 23 id. 599; 36 id. 259; 1 Edw. Ch. 88; Hopk. 598; 3 Misc. 334; 18 N. Y. 595; 57 id. 172; 101 id. 483; 143 id. 263; 2 Sandf. Ch. 266.

MEADS v WALKER (1825) 1 Hopk. Ch. 587.

Injunction, to restrain defendants from holding a bank directors' meeting, and disposing of stock. The defendants were appointed commissioners to receive subscriptions to the capital stock of a bank. The complainants became subscribers to the stock of the bank, and paid their requisite deposits. There being a great number of subscribers, the commissioners took it upon themselves to reject some, among whom were the complainants, and apportioned the stock among themselves and others. The defendants contended that they had authority so to do, and that the apportionment was for the best interest of the bank. Injunction granted.

The Chancellor. 1. Every subscriber acquired a right to some portion of the stock by subscription and payment. 2. The appropriation was partial and unjust because it excluded other subscribers having equal rights. 3. The commissioners had no arbitrary power to reject subscriptions; they are trustees charged with a trust for the benefit of all subscribers, and can derive no benefit from their trust. Injunction continued.

Cited: 1 Edw. Ch. 364; 4 Paige 251.

MEAD v ENGS (1826) 5 Cow. 303.

Assumpsit, on an inland bill of exchange by plaintiffs, as indorsers, against defendant, as drawer. The bill was drawn at New York on B, at Bristol, R. I., and left at the T Bank for collection. It was protested for non-payment and returned to R, cashier of the bank. R sent the bill by next mail to S, cashier of the R W Bank, from whom the T Bank had received it for collection. S, on receipt of the bill and protest, forwarded them by first mail to F, the immediate indorser of R W Bank. F received them on the following morning inclosed in a letter post-marked "Providence," two days before, but not posted early enough to catch the first mail for New York. Defendant contended that S was guilty of negligence. The court charged that it was not necessary for S to give direct notice to all parties. Judgment for plaintiff. Motion for new trial.

Sutherland, J. 1. The law does not require the holder of a bill or note to give the earliest possible notice of dishonor. It requires only reasonable diligence. 2. The cashier was not bound, in the exercise of due diligence, to have prepared and forwarded notice by the very first mail. 3. It is not reasonable to demand that he neglect his official duties to forward a notice of protest during banking hours. 4. If the drawer received due notice of the dishonor of a bill of exchange from any person who is a party to it, he becomes directly liable upon it to any subsequent indorser. Motion denied.

Cited: 41 Barb. 345; 6 Daly 564; 4 Duer 208; 1 Hill 265; 2 id. 457; 23 Hun 631; 9 Misc. 87; 20 N. Y. 410; 34 id. 130; 87 id. 597; 3 Wend. 277; 4 id. 567.

BANK OF UTICA v HILLARD (1826) 5 Cow. 419.

Where the cashier of the plaintiff bank had been required by subpoena duces tecum, sued out by the defendant, to produce the books of the bank, it was held that a motion to compel him to produce the books would be, in effect, to compel the bank to produce evidence against itself, and must be denied.

Cited: 6 Cow. 62. Same case, 5 Cow. 153.

PEOPLE v BANK OF NIAGARA (1826) 6 Cow. 196.

Information in nature of quo warranto against a bank for exercising banking privileges without warrant. The question presented was whether the bank, having become insolvent and unable to redeem its paper, and having stopped business from July 2, 1819, to October 4, 1824, when it resumed the redemption of its bills, had thereby forfeited its charter. The legislature anticipated the insolvency of the bank, and provided that, while insolvent, it should cease doing business until it should be able to redeem its paper. At the commencement of this prosecution, it was solvent.

Savage, C. J. It is sufficient that the bank is solvent and now redeeming its bills. The right to prosecute for forfeiture had ceased. Judgment for defendants.

Cited: 6 Cow. 212, 217; 4 Wend. 282; 9 id. 377; 15 id. 126; 21 id. 249; 23 id. 235, 258, 573, 594.

PEOPLE v BANK OF HUDSON (1826) 6 Cow. 217.

Information in nature of quo warranto for exercising banking privileges after forfeiture of bank charter by insolvency. On demurrer.

Woodworth, J. The mere fact of insolvency at a particular time, however produced, is insufficient. If the suspension was the consequence of continued insolvency, or afterward on becoming solvent, if the defendants had still continued to suspend banking operations, the right to dissolve the corporation would be established. Judgment on demurrer, with leave to defendants to withdraw demurrer and rejoin.

Cited: 20 Barb. 526; 12 Hun 266; 9 Wend. 377; 21 id. 249; 23 id. 237.

PEOPLE v BARTOW (1826) 6 Cow. 290.

Debt, for penalty under the Act of April 21, 1818, for carrying on the business of banking, unauthorized by law. It was contended: 1, that defendant had not contravened all provisions of the act; 2, that the offense was not against the form of the statute. On demurrer to declaration.

Woodworth, J. 1. All banking operations are prohibited. 2. To keep an office of deposit for the purpose of discounting notes is a specific violation of the statute, though the office be not for the carrying on of any other banking operation. 3. The declaration should allege it was done against the form of the statute. The defendant may withdraw his demurrer and plead.

Cited: 16 App. Div. 61; 8 Barb. 202; 1 Hall 613; 4 Wend. 501; 17 id. 174.

UTICA INS. CO. v SCOTT (1826) 8 Cow. 709.

On promissory note against indorser. Plea: the plaintiff conducted without authority a banking business; was proprietor of a fund to be used for discounts, and had illegally established a banking office; and that the note was discounted by plaintiff. Replication, that plaintiff by its charter, was empowered to loan its surplus funds, and that the note was given for money so loaned. Special demurrer, on ground that plaintiff had not confessed and avoided, traversed or denied, that it had illegally established a banking house. Judgment for defendant. Error.

Spencer, S. 1. On demurrer, judgment must be given against the party whose pleading was first defective in substance. 2. Failure to allege in the plea that the note was paid out of the fund of which plaintiff was illegally proprietor would be fatal, were it not cured by plaintiff's pleading over, and averring in the replication that the note was paid out of the fund named. 3. A loan is an investment within the meaning of plaintiff's charter, though it has a short credit. Judgment reversed.

Cited: 2 Hall 518; 32 Hun. 448; 77 N. Y. 70; 12 Wend. 66.

HUBBARD v BANK OF CHENANGO (1827) 8 Cow. 88.

Assumpsit, on bank bills presented by plaintiff for payment in specie. Plea: tender. It appeared that when plaintiff demanded payment, the tellers were engaged in counting specie for others, but the cashier promised to pay as soon as the tellers were at liberty. The tellers caused unnecessary delay by counting out small coins. Plaintiff was willing to accept a box of specie, at the bank mark, but his offer was refused. Next day, a box with the amount demanded inclosed, was set aside for plaintiff. This box was brought into court at the commencement of this action. Plaintiff demanded 14 per cent interest. A statute provided that interest on unpaid bank notes should be 10 per cent. The bank's charter provided for 14 per cent interest, unless payment or tender of principal and interest were made at the bank within sixty days. Verdict for plaintiff, by consent, subject to the opinion of the court on a case.

Savage, C. J. 1. The unreasonable delay by the bank in paying plaintiff's demand amounted to a refusal. 2. The provision for the penalty of 14 per cent in the bank's charter did not prevent interest running at 10 per cent until tender was made. 3. If the alleged tender be regarded as sufficient in other respects, it is not effective because interest for one day was not included. Judgment for plaintiff.

Cited: 5 Denio 50; 1 C. C. 343.

NIAGARA BANK v ROSEVELT (1827) 9 Cow. 409.

Bill, to redeem mortgage and for an account. W held a mortgage against C & S to secure \$6,000. He became indebted to them in the sum of \$3,000 on open account. The plaintiff R recovered a judgment against C & S. W assigned the mortgage to the defendant bank without indorsing or crediting the \$3,000. R tendered the amount of the mortgage less \$3,000, and brought this bill. He obtained judgment. Appeal.

Woodworth, J. 1. The plaintiffs took their judgment subject to the mortgage. The advances constituting the sum of \$3,000 were a valid setoff in law and equity which the mortgagee could not resist, if insisted on by the mortgagors. 2. The respondents succeeded to the rights of the mortgagor so far forth as to claim the benefit of the setoff on which the mortgagors might have relied. The plaintiffs

are entitled to an assignment of the mortgage. 3. It is not competent for a creditor who has one existing debt to pay to apply money to a note on which he is indorser. 4. The mortgagee was not a creditor. 5. The bank was bound to accept its own bills in payment. 6. Claims of depositors in an insolvent bank and claims for salaries have no preference over the claims of ordinary creditors. Judgment affirmed.

Cited: 30 Barb. 273; 34 id. 230; 50 id. 345; 10 N. Y. 361; 28 id. 527; 42 id. 99; 3 Sandf. Ch. 311.

WOOD v JEFFERSON CO. BANK (1828) 9 Cow. 194.

Assumpsit on promissory note, by indorsee against indorser. Pleas: Non-assumpsit, and nul tiel corporation. The plaintiff set forth the act of incorporation, and produced its books showing the election of president and directors. The plaintiff agreed to sue the indorser first, and to give the maker time if the indorser were unable to pay. Judgment for plaintiff. Error.

Savage, Ch. J. 1. The plea of nul tiel corporation is bad because the plaintiff is bound to prove its corporate existence. 2. Setting forth the act of incorporation is not sufficient to prove the fact; but production of the books showing the election of president and directors, is prima facie evidence that the terms of the act have been complied with, and is sufficient to establish the corporate existence of the plaintiff. 3. The maker is the principal debtor, and an agreement to extend his time if it prejudice the indorser, discharges the indorser. 4. But here the agreement to give the maker time was conditioned on the non-payment by the indorser, and was therefore not prejudicial to him. He may pay and recover over. Judgment affirmed.

Cited: 5 Barb. 462; 12 id. 577; 24 id. 399, 402; 44 id. 653; 3 Daly 223; 5 Hill 464; H. & D. 136; 2 Hilt. 401; 4 Wend. 367; 5 id. 490; 6 id. 613; 7 id. 516; 9 id. 344; 13 id. 376; 15 id. 127, 315; 23 id. 206.

FRANKLIN v VANDERPOOL (1828) 1 Hall 78.

Assumpsit on a check drawn by the defendant on the F Bank, and delivered to the plaintiff. The defendant had no funds in the bank either at the time or thereafter. No presentation or demand at the bank was proved. The defendant contended that to enable the plaintiff to recover it was necessary to present the check and have payment refused. Judgment for plaintiff. Motion for a new trial.

Oakley, J. Where a drawer has no reason to expect that his bill or check will be accepted, it is an idle ceremony to require it to be presented, and he is not injured by a failure to do so. The check was drawn in bad faith and the jury was bound so to decide. Motion denied.

Cited: 11 Barb. 119; 1 E. D. S. 401; 12 Misc. 21; 6 N. Y. 417; 21 Wend. 375.

CITY BANK v BARNARD (1828) 1 Hall 80.

On promissory note. The note of M, payable to L, was indorsed by the defendants, and discounted by the plaintiffs. The defendants offered to prove that the note was given by M, as a director of the plaintiff, pursuant to an agreement with L that he should resign his seat as director, and sell his stock to M and others in order that they might retain the control of elections in said bank; that it was individually agreed by the directors, that they should pay L a 7 per cent premium upon his stock. The defendants were not allowed to show that plaintiff knew the funds of the bank were applied in payment for the stock, and individual notes, including the original of the one in suit, were given for the premiums. Verdict for plaintiff. Motion for new trial.

Oakley, J. 1. The Act of 1825, ch. 325, under which the purchase of L's stock was void, does not declare void any security given, and held by third parties. 2. The plaintiffs were bona fide holders of the note, and the illegality of consideration does not avoid the note in its hands without notice. Motion denied.

Cited: 32 N. Y. 585.

McLAREN v PENNINGTON (1828) 1 Paige 102.

Injunction, to restrain defendants from terminating a bank's business. The New Jersey legislature incorporated a bank under a charter, reserving therein the power to repeal it. Subsequently the legislature repealed the charter and appointed

defendants trustees, to settle the bank's business. Complainant, a stockholder, contended that the repealing act was void under sec. 10, art. 1, of the Federal Constitution, which prohibits a state from passing any law impairing the obligation of a contract.

Walworth, C. 1. The power to repeal the bank's charter was legally and constitutionally reserved to the legislature. 2. This court will not presume that it has been improperly exercised. 3. The defendants have all the rights which were vested in the corporation at the moment of its dissolution. Injunction refused.

IN RE FRANKLIN BANK (1828) 1 Paige 249.

Bill to obtain a preference for depositors. A receiver's report showed that the assets would not pay more than fifty per cent of the debts. Depositors claim a priority of payment, whereby they would obtain eighty per cent of their debts, and the billholders would recover nothing.

Walworth, C. The money, checks, or bills, which a general depositor deposits, become the property of the bank, and he becomes its creditor. Decree, for an equitable distribution of the assets.

Cited: 41 Barb. 478; 3 N. Y. 421; 61 id. 528; 66 id. 395; 90 id. 535; 2 Paige 451; 2 Sandf. Ch. 266.

ATTORNEY-GENERAL v BANK OF COLUMBIA (1829) 1 Paige 511.

Motion for appointment of a receiver. Defendant, an unincorporated bank, stopped payment. A statute made it the duty of the plaintiff, whenever such a bank was insolvent, to bring this action. Plaintiff alleged the statutory facts on information and belief, and a master was appointed to receive nominations for a receiver. Defendants' nominee, a director and creditor, against whom there was no personal or individual objection, was rejected by the Chancellor. Motion denied. Appeal.

Walworth, C. 1. As the attorney-general cannot be presumed to have positive knowledge, he may make a statement of facts alleged on information and belief and give the defendant opportunity to rebut. 2. The creditors have a right to claim the appointment of an impartial receiver. 3. Ordinarily an appeal suspends all further proceedings in this court, but in this case, it would not prevent the designation of the person to be appointed, that he might be ready to act when the court of errors has disposed of the appeal. 4. The appointment will be suspended, until the court of errors meets, unless some person interested brings the case again before me, upon a suggestion that something further should be done for the safety of the fund. Decree accordingly.

Cited: Clarke 369; 3 N. Y. 421; 15 id. 200; 7 Paige 160; 2 Sandf. Ch. 266.
Aff'd: 3 Wend. 588.

BRUYN v RECEIVER OF MIDDLE DIST. BANK (1829) 1 Paige 584.

Where a bank failed, owing the cashier for arrears in salary, and holding money deposited to his credit, it was held that the cashier had no lien on the assets of the bank; and that he occupied the same position as other creditors of the institution.

IN THE MATTER OF MIDDLE DIST. BANK (1829) 1 Paige 585.

Where, in an action by the receiver of a bank, the debtor sought to offset a demand he held against the bank at the time of the receiver's appointment, it was held that the right to offset was not affected by the appointment of the receiver; that where the real debtor is unable to pay, and resort is had to the indorser, such indorser can offset bills of the bank, which he held at the time the bank stopped payment; and that, where the bills are obtained after stoppage of payment, they cannot be offset by the debtor.

Cited: 4 Abb. N. C. 218; 40 Hun. 498.

HAXTUN v BISHOP (1829) 3 Wend. 13.

Assumpsit on promissory notes. Plaintiffs were receivers of a bank which had stopped payment after the discount, and before the maturity, of the note in suit. Plaintiffs declared as endorsees of the note before maturity, and also produced an assignment to them of all the bank assets in trust for its creditors. The defendant

contended that a transfer of the note was void under sec. 6 of the act to prevent fraudulent bankruptcies, which rendered void any assignment to any person in contemplation of insolvency. The court decreed the transfer void. Defendant's motion for a nonsuit, on the ground that the suit should have been instituted in the corporate name of the bank, or in the name of the plaintiffs as receivers, was denied. The defendant claimed in setoff the amount of certain bank notes of the insolvent bank, payment on which had been refused, and the amount of others on which no demand had been made. The court ruled that the suit was properly brought in the names of plaintiffs, and the setoff should be allowed. Verdict directed for defendant. Motion to set aside.

Savage, C. J. 1. The plaintiffs, either as assignees or as receivers, are trustees for the creditors of the bank, but not for the bank itself, or its stockholders. 2. The plaintiffs, having a lawful title to the note on which this suit is brought, may set out any correct legal title, either as indorsees or as receivers. 3. The setoff cannot be admitted because: (1) the note on which this suit is brought, was assigned by the bank before the defendant brought the notes which he seeks to set off; (2) the maker of a promissory note can never set off against the indorsee a demand against the payee, provided the note was indorsed bona fide, and for a valuable consideration, before maturity. New trial granted.

Cited: 6 Barb. 372; 7 id. 655; 15 id. 65; 16 id. 287; 21 id. 223; 28 id. 37; 33 id. 442; 34 id. 230; 36 id. 470, 636; 50 id. 335; 3 Barb. Ch. 124; 2 Hilt. 31; 65 Hun. 46; 5 Lans. 308; 4 Misc. 245; 10 id. 683; 3 N. Y. 242; 15 id. 216; 21 id. 411; 57 id. 362; 140 id. 568; 8 Wend. 654; 21 id. 386; 24 id. 376.

BANK OF COLUMBIA v ATTORNEY-GENERAL (1829) 3 Wend. 588.

Information and bill, for injunction, and receiver, under Act of April 21, 1825, sec. 17, which enacted that whenever any incorporated bank became insolvent, the attorney-general or a creditor might apply to a court of chancery and on proof, secure an injunction and the appointment of a receiver. The Attorney-General alleged that the bank was wholly insolvent, to the best of his knowledge and belief. Injunction allowed. Decree: that a receiver under bond be appointed; but no one who had been within six months an officer or agent of the bank, should be nominated. Appeal.

Sutherland, J. 1. It is not sufficient for the Attorney-General to allege, in general terms, that he believed the bank to be insolvent; he must state the facts and circumstances upon which that belief is founded, and if they are such as to raise a fair presumption of its insolvency and are uncontradicted by the bank, the fact of insolvency is proved within the meaning of the act. 2. By the sixth section of the act, which provides that "whenever any incorporated company shall have remained insolvent for one whole year, or for one year shall have neglected or refused its notes, it shall be deemed to be dissolved," the legislature did not intend to make a refusal for a shorter period incompetent as presumptive evidence of insolvency. 3. The chancellor has the right to appoint a receiver. 4. The chancellor may fix the amount of the receiver's bond. 5. The act of the chancellor in excluding the officers of the bank from the list of nominations for receiver was discretionary, and no appeal lies. Decree affirmed.

Cited: 53 Barb. 103; 15 N. Y. 200; 2 Sandf. Ch. 266.

Affirming 1 Paige 511.

SMITH v SPIES (1829) 2 Hall 477.

Assumpsit, on special contract. The defendant agreed with the plaintiff that he would purchase from him, all the notes of the N Company that he would buy. The plaintiff purchased such notes from time to time, and delivered them. Defendant declined to take one lot. The same day, the N Company failed. The plaintiff had on hand \$83, which he had received in due course of business, and \$289 which he had taken of P, as security for the payment of a note. Judgment for full amount of notes. Appeal.

Oakley, J. 1. The contract was to take all of the notes which the plaintiff should purchase. To this extent the contract, not having been rescinded, was binding, even up to the time of the failure. 2. But among the bills presented were those which the plaintiff held from P as a pledge for the payment of a note. The property in those still remains in P. Judgment modified to amount purchased by plaintiff.

 DACY v CHEMICAL M'F'G CO. (1829) 2 Hall 550.

Assumpsit to recover money deposited in the defendant. The plaintiff's wife was entrusted by him with certain moneys, for the purpose of making a deposit in some bank. The wife opened an account with the defendant in her own name, not revealing the fact of her coverture. The whole amount was thereafter drawn out by her on various checks, before the defendants learned that she was a married woman. The husband sought to recover the amount so paid, on the ground that payment to the wife was unauthorized. Judgments for defendants. Motion for new trial. Appeal.

Oakley, J. 1. The wife, being the agent for purpose of deposit, might fairly be presumed to have authority to draw checks. 2. If the wife abused the trust reposed in her by the plaintiff, the defendants ought not to suffer. The bank had a right to presume, in the absence of notice, that she was a feme sole. Motion denied.

Cited: 4 Paige 136; 38 Supr. 25.

 PEOPLE v BREWSTER (1830) 4 Wend. 498.

Debt, for a penalty. The Act of April 21, 1818, Stat. vol. 4, ch. 242, prescribed a penalty for keeping any office of deposit for the purpose of discounting promissory notes. Defendant kept an office as an exchange broker. He sometimes discounted promissory notes. But he never received or solicited money as deposits. Plaintiff nonsuited. Motion to set aside.

Sutherland, J. 1. This was a penal act, and therefore to be construed strictly. 2. It was not intended to prohibit individuals or corporations from lending their own proper funds on promissory notes by way of discount or otherwise. Motion denied.

Cited: 17 Barb. 381; Clarke 452; 17 Wend. 174, 381.

 JACKSON v BROWN (1830) 5 Wend. 590.

Ejectment. The plaintiff claimed under a mortgage from the Bank of N to the people of the state. The defendant acquired the property at a judicial sale and contended: 1, That the bank had no power to mortgage its real estate; 2, that, if it had, the mortgage in this case was not well executed; 3, and that the comptroller had no authority to accept the mortgage on behalf of the state. The act of incorporation authorized the bank to convey any estate, real or personal, in their possession, for the use of the corporation. Verdict for plaintiff. Motion for new trial.

Sutherland, J. 1. The general authority to sell and convey includes the authority to mortgage. 2. A mortgage made by the cashier under a resolution of the directors requesting its execution is as much the act of the corporation as though the cashier, by their verbal request, had drawn the bond in the presence of the directors and affixed the seal before they dispersed. 3. The state comptroller has authority, without any express legislative provision, to accept additional collateral security from any of the debtors of the state. Motion denied.

Cited: 15 N. Y. 67; 1 Sandf. Ch. 290.

 HINSDALE v BANK OF ORANGE (1831) 6 Wend. 378.

Assumpsit. Plaintiff cut bills of the defendant in half and sent them at different times through the mail. Only one set arrived and this was presented and payment of the whole amount demanded. The defendant objected: 1, That the plaintiffs had failed to prove ownership; 2, that the loss of the other halves had not been shown; 3, that there could be no recovery under a declaration containing only the common money counts; and, 4, that a bond of indemnity should have been tendered. Objections overruled. Verdict for plaintiffs. Motion for new trial.

Marcy, J. 1. The severing of the bills destroyed their negotiability. If negotiability does not belong to a separate half of a bill or note, there can be no objection to sustaining this action on account of the non-production of the lost halves, that would not exist if those halves had been actually destroyed. 2. No special count was necessary. Judgment for plaintiffs.

Cited: 4 Bosw. 224; 16 N. Y. 586, 588.

MERCHANTS BANK v SPICER (1831) 6 Wend. 443.

Assumpsit. The defendant deposited with plaintiff, a bank, a check drawn by the L Association on the T Bank, indorsed by the payee W, and bearing the defendant's initials. The next day the check was delivered to the porter of the T Bank, and on the same day it was returned as not good, and the defendant was so notified. The L Association had no funds in the T Bank on the date of the check. A witness called by plaintiff was objected to as interested, having given a written guaranty to plaintiff for the payment of the check. Plaintiff's counsel thereupon delivered the guaranty to the witness and told him he might destroy it, which he did. The judge then declared him a competent witness. Verdict for plaintiff. Motion for new trial.

Marcy, J. 1. As the defendant is sued as an indorser, the plaintiff must establish a due presentment for payment and a notice of non-payment to the defendant, which it has done. 2. The objection, that the writing of the initials of the defendant's name was not sufficient to charge him as an indorser, is not valid against the right to recover on the money counts. 3. If the witness had no other interest than what was created by the guaranty, it was effectually removed by the voluntary surrender of the instrument and its subsequent destruction. New trial denied.

Cited: 10 Wend. 307; 20 id. 220; 21 id. 373; 2 Hill 429; 1 Den. 478; 52 Barb. 334; 3 Lans. 32; 11 Hun. 485; 12 id. 517; 42 N. Y. 541.

BANK OF ROCHESTER v BOWEN (1831) 7 Wend. 158.

Assumpsit on promissory note, against the makers. Among the makers was the firm of A & S, which signed by A. The note was made to obtain a loan for B, one of the makers, which fact was known to the cashier of plaintiff, when the loan was negotiated. There was no evidence of A's authority to subscribe his firm's name to the note nor of subsequent ratification of the act. The court charged that if the jury found that the firm name of A & S was signed without the knowledge and consent of S, they must find for defendant. Verdict for plaintiff. Motion to set aside.

Nelson, J. 1. A joint and subsisting indebtedness in all defendants must be shown. 2. Knowledge of the cashier, was knowledge of the bank. 3. If S did not authorize the use of the firm name by A, the firm, without ratification, was not bound. The verdict was contrary to the evidence. New trial granted.

Cited: 25 App. Div. 419; 15 Barb. 516; 7 Daly 317; 21 Hun. 182; 159 N. Y. 199; 45 Supr. 101; 14 Wend. 138, 145, 157; 15 id. 366; 18 id. 477, 481.

NICHOLS v GOLDSMITH (1831) 7 Wend. 160.

Assumpsit, against indorser of a promissory note. Demand and notice were denied. The note, payable at the N Bank, was left in that bank for collection. On the day it became due there were no funds there to meet it. Plaintiff was allowed to prove that C, the then cashier of the bank, made a memorandum on the back of the note, "notified indorser by mail, to E, July 13, 1824, for C H-C." C was in the habit of giving notice of protest to C H, the notary of the bank. C died before the trial. Verdict directed. Judgment for plaintiff. Motion to set aside.

Savage, C. J. 1. The demand was sufficient. 2. Protest in this case was unnecessary. 3. The evidence of notice was competent, and, prima facie, sufficient. Motion denied.

Cited: 16 Wend. 595; 2 Hill 538; 4 id. 131; 4 Barb. 518; 9 id. 401; 14 id. 304; 16 id. 149; 48 id. 155; 63 id. 116; 2 T. & C. 122; 9 Hun 241; 3 N. Y. 445; 8 id. 75; 31 id. 121; 51 id. 91; 5 Duer 599; 1 Edw. Ch. 97; H. & D. 121; 18 Misc. 218; 24 App. Div. 562; 36 id. 282.

PENNINGTON v TOWNSEND (1831) 7 Wend. 276.

On bank check, against drawee discounted by plaintiff. The check was sued on by a foreign banking corporation, doing business in New York. An act of New York of April 21, 1818, prohibited any person, association or corporation from doing banking business without authority of the legislature of the state. Defendant refused to pay on the ground that the act of discounting was illegal. Plaintiff contended that by art. 4 of the United States Constitution, full faith and credit

must be given the act of a sister state, and that under its act of incorporation, it could transact banking business in New York. Judgment for defendant. Error.

Nelson, J. The protection intended is prevention of banking without the authority of the legislature of this state and the application of the statute within the state is universal, and without exception unless qualified by the same power which enacted it, or by some paramount law.

Cited: 14 Wend. 255; 15 id. 185; 20 id. 400; 25 id. 650; 10 Barb. 106; 17 id. 404; 36 id. 215; 37 id. 299; 62 id. 407; 2 Keyes 118; 4 N. Y. 481; 36 id. 58.

CLARKE v THE BROOKLYN BANK (1832) 1 Edw. Ch. 361.

Injunction. Defendant's charter named seven commissioners to receive subscriptions to the capital stock. By sec. 10 the commissioners were to apportion the stock among the subscribers, in such manner as a majority of them should deem most advantageous to the interest of the bank. The subscribers of twenty shares or more were not to receive less than twenty shares on distribution unless the subscription exceeded the whole amount of capital stock; no commissioner was to be allowed more than 250 shares, if without it the whole of the stock was taken up. Plaintiff subscribed for twenty shares. There was an excess of subscription; and the commissioner apportioned none to plaintiff but returned his deposit. Plaintiff contended that the commissioners had no right to take 250 shares each and withhold his subscription. The bill prayed an injunction, and a new distribution.

McCoun, V. Ch. 1. The commissioners are entitled to 250 shares apiece. 2. It has been left to the unrestricted and uncontrolled judgment of the commissioners, to apportion the stock in such a manner as they may deem best. The words "apportion" and "among" certainly do not require that every subscriber should receive some stock. Motion denied.

BANK OF NIAGARA v JOHNSON (1832) 8 Wend. 645.

Debt, against the defendant, as one of the directors of the plaintiff, for a penalty alleged to have been incurred under sec. 2, of Act of April 21, 1825, which provided that it should not be lawful for the directors of any incorporated company to divide, withdraw, or in any way pay the stockholders any part of the capital stock, or to reduce the capital stock without the consent of the legislature. The declaration alleged that in 1825 the directors of the N Bank passed a resolution directing their cashier to pay to three persons the amount which had been paid on the capital stock held by them, and that, at the passage of such resolution, the defendant, being a director, was present and did not dissent. The defendant pleaded: 1, general issue; 2, nul tiel corporation; 3, that on January 1, 1830, the bank surrendered its rights, privileges and franchises; 4, 5, 6, that on that day it had been insolvent, had neglected to redeem its notes and had suspended its ordinary business for a year, whereby it was dissolved; 7, that on January 1, 1830, the bank surrendered the rights, privileges and franchise, and thereby ceased to be a body politic. Plaintiffs replied admitting their insolvency and suspension of payment, and the consequent suspension of their ordinary business as a corporation; but averred that before the commencement of this suit two receivers were appointed, and an injunction issued against the bank restraining the exercise of privileges as a corporation; that the claim in the declaration mentioned was duly transferred to the receivers, as trustees for the creditors of the plaintiff. Demurrer to replication, assigning among other special causes, that it is not alleged that this suit is brought by the direction of the receivers.

Sutherland, J. 1. The receiver may prosecute for the penalty given by the act, as well as upon contracts in the name of the bank. The penalty is a debt, to be collected for the benefit of the creditors of the bank. 2. The demurrer on the ground that the replication does not aver that the suit was brought by the direction of the receivers is well taken. The replication shows that this claim was transferred from the bank to the receivers, and it ought to have averred that the suit was brought by their direction. 3. The third and seventh pleas are bad, inasmuch as they do not show any fact by which the plaintiffs had surrendered their corporate rights. Judgment for defendant.

Cited: 5 App. Div. 7; 125 N. Y. 440; 160 id. 681; 1 Robt. 147; 3 Sandf. 653; 9 Wend. 382; 23 id. 257.

McKINSTER v BANK OF UTICA (1832) 9 Wend. 46.

Action on the case for neglect of the defendants to give notice of non-payment of a note left with M for collection. The plaintiff being indebted to P, delivered D's note to him as collateral security. S and X were indorsers of the note. The note having become due, and notice of non-payment not having been given to the indorsers, P took the note from the bank and called on the plaintiff for payment, which was made. The maker and one of the indorsers became insolvent before, and the other indorser after, the note was due. The note was assigned to F for whose benefit the suit was brought in the plaintiff's name. The judge submitted to the jury the question whether the note was left with the defendants for collection. Verdict for plaintiff. Motion for a new trial.

Sutherland, J. 1. It is the duty of a bank with whom negotiable paper is left for collection, to take the necessary measures to charge indorsers upon default of the maker, and the bank is responsible to the owner of the note for neglect or omission to perform such duty. The question was properly submitted to the jury. 2. The action was properly brought in the plaintiff's name. Motion denied.

Cited: 8 Barb. 399; 41 id. 350; 6 Robt. 350; 11 Wend. 473; 15 id. 487; 22 id. 228. Aff'd: 11 Wend. 473.

ONTARIO BANK v BUNNELL (1833) 10 Wend. 186.

Trespass de bonis asportatis. Plea: justifying the taking as the proportion of a village tax assessed upon plaintiffs. Defendants, trustees of the village, averred that the assessors assessed the real and personal property of plaintiff, and that the collector, on plaintiff's refusal to pay the personal property tax, seized and carried away enough of plaintiff's money to pay it. The corporation of the village was declared by the act incorporating it capable of raising money by taxation for certain purposes, the money so to be raised to be assessed upon the freeholders and inhabitants of the village according to law.

Nelson, J. 1. The term "inhabitant" includes a corporation, occupying an office or building in the town, ward or village, in conducting the business of their corporation for many purposes, and especially with reference to the burdens of taxation for public purposes. 2. The plaintiff's capital stock was liable to taxation. 3. The amount assessed is conclusive in this action and cannot be inquired into. Judgment on demurrer for defendants.

Cited: 7 Barb. 421; 15 id. 439; 28 id. 321; 39 id. 529; 7 Hill 282; 39 Hun. 529; 1 Keyes 309; 15 N. Y. 455; 15 Wend. 243.

MOHAWK BANK v BRODERICK (1833) 10 Wend. 304.

Assumpsit. Plaintiff, a bank, declared as indorsee of a check drawn by L to defendant's order, and by them indorsed to plaintiff. The check was deposited by M, to whom the defendants delivered it, in the plaintiff, and the amount was entered to M's credit. Three weeks later, the check was sent to the bank on which it was drawn, payment refused, and notice of protest given. L was insolvent at the time the check was given, but continued in business until two weeks later. There were no funds to meet the check at any time. Special verdict.

Savage, C. J. 1. As between a holder of a check and an indorser, payment must be demanded within a reasonable time. 2. Here the check was not presented with all the dispatch and diligence which was consistent with the transaction of other commercial concerns. Greater diligence is required in presenting checks than in presenting bills of exchange. 3. A postdated check is not like a bill of exchange, but is simply payable on or after, the day on which it purports to bear date. Judgment for defendants.

Cited: 10 Barb. 372; 52 id. 600; 2 Duer 598; 4 id. 129; 1 E. D. S. 401, 511; 2 Hill 429; 2 Hilt. 275; 24 Hun 282; 3 Lans. 32; 9 Misc. 382; 12 id. 20; 8 N. Y. 195; 82 id. 403; 100 id. 56; 128 id. 22; 1 Robt. 348; 1 Sheld. 396; 13 Wend. 551; 20 id. 206; 21 id. 373; 23 id. 623. Aff'd: 13 Wend. 133.

BANK OF UTICA v McKINSTER (1833) 11 Wend. 473.

Action on the case, for breach of duty in neglecting to demand payment of a note. P had control of a note and was to receive proceeds if paid, if not, the note was to be returned to plaintiff, who remained responsible to P for money owed. P left note at defendant bank with instructions to put proceeds to his credit. Note

was not paid and defendant bank failed to notify indorsers who were solvent at that time, but not subsequently. Plaintiff lost his debt. Note returned by defendant bank to P, who was paid by plaintiff, and who then returned note to the plaintiff. Judgment for plaintiff. Error.

Walworth, C. 1. Plaintiff was the proper person to bring the suit. 2. The subsequent payment of the debt to P is not material to the plaintiff's right to recover. Judgment affirmed.

Cited: 8 Barb. 399; 19 id. 399; 41 id. 349; 9 Bosw. 463; 16 Hun. 202; 15 N. Y. 168; 69 id. 387; 6 Robt. 350; 15 Wend. 487; 22 id. 225, 228.

PEOPLE, EX REL. v THROOP (1834) 12 Wend. 183.

Mandamus, for inspection of books. Plaintiff, one of thirteen directors of a corporation, demanded of defendant, also a director, an inspection of a book of the company. His refusal was approved by a resolution of the directors, which further instructed employees not to permit plaintiff to inspect the book, on the ground that he was hostile to the company.

Savage, C. J. 1. Every director has an equal right to the inspection of the books. A mandamus is the appropriate and only remedy at law. 2. Resolutions to be valid, must be reasonable and operate on all alike. 3. Whatever may have been the hostility manifested by the relator, the conduct of the board of directors, and that of the cashier, cannot be justified. 4. As the rule to show cause has performed the office of an alternative writ, there can be no impropriety in granting a peremptory writ in the first instance. Mandamus ordered.

Cited: 31 App. Div. 73; 20 Abb. N. C. 197; 2 Barb. 417; 50 id. 283; 13 Daly 5; 1 Edm. 551; 34 Misc. 328; 5 N. Y. 566; 27 id. 387; 159 id. 259.

BANK OF ITHACA v KING (1834) 12 Wend. 390.

Certiorari, to review proceedings held before a justice of the peace, who imposed a fine on officers of plaintiff, for not appearing to work on highways, after being assessed so to do. Summons was served on cashier of plaintiff, who appeared and objected to assessment. Fine imposed. Plaintiff sued out writ of certiorari to this court.

Savage, C. J. 1. A corporation cannot be compelled to work on the highways. 2. A tax is a sum of money to be paid by owners of property severally, to defray public expenses. 3. The statutes in regard to highways require personal service. The provision for pecuniary contribution is merely a substitute for work. Judgment reversed.

OSWEGO BANK v OSWEGO VILLAGE (1834) 12 Wend. 544.

A village tax voted previous to the commencement of business by a bank, but assessed after the bank has begun to derive an income from its capital, is valid, and the bank is liable for the assessment.

ONTARIO BANK v LIGHTBODY (1834) 13 Wend. 101.

To recover a balance due on bank bills. The action was for the difference between the nominal amount of the bank bills and the amount realized thereon. Plaintiff presented his check to defendant and received bills of the F Bank, which had previously stopped payment unknown to the plaintiff and defendant. Plaintiff then offered the bills to defendant bank, which refused to accept them. After depositing the bills with the receiver of F Bank, he received a dividend. Verdict for plaintiff. Error.

Walworth, C. When a bank stops payment, its bills cease to be a conventional representative of the legal currency of the country, whether the holder is aware of that fact or not; and if they are afterward passed to a person ignorant of the failure, he does not agree to sustain the loss which has already accrued to the holder of the bills. Judgment affirmed.

Cited: 50 Barb. 114; 65 id. 303; 1 C. C. 104; 4 Duer 162; 3 E. D. S. 56; 6 Hill 341; 37 Hun 26; 40 id. 580; 30 N. Y. 278; 43 id. 163; 116 id. 205.

MOHAWK BANK v BRODERICK (1834) 13 Wend. 133.

On check against indorsers. The check was transferred to M previous to its date. M deposited it at the plaintiff bank, where it was credited as cash. Plaintiff retained the check twenty days after its date, during which time the maker failed, and then made good his account at the M & F Bank. Two days after the maker had thus made good his account at the M & F Bank, plaintiff sent check to the M & F Bank and demanded payment, which was refused. Notice was given defendants. Daily mails passed between the towns in which the plaintiff and the M & F bank were located, and the distance was very short. Judgment for defendants. Special verdict. Error.

Walworth, C. 1. A postdated check is payable at sight any time after the day of its date. 2. The holder must use reasonable diligence in presenting it for payment. The court must determine the question of diligence, where there is no dispute as to the facts. The holders of this check did not use reasonable diligence in presenting it for payment. Judgment affirmed.

Cited: 53 App. Div. 488; 28 Barb. 621; 52 id. 334, 599; 4 Duer 129; 1 E. D. S. 402; H. & D. 413; 24 Hun 283; 3 Lans. 32; 8 N. Y. 195; 23 id. 41; 100 id. 56; 6 Robt. 418; 13 Wend. 551; 20 id. 194, 206; 23 id. 623.

GOUGH v STAATS (1835) 13 Wend. 549.

Assumpsit, to recover from indorser on postdated checks. Plaintiff sued on three checks which were negotiated previous to their dates. They were presented for payment six, seven, and thirteen days, respectively, after their dates, and payment was refused, as the drawer had no funds in the bank. Notice was given to defendants. The court ruled that the plaintiff had not used due diligence. Plaintiff submitted to nonsuit, with leave to move for new trial.

Sutherland, J. 1. Between the holder of a check and an indorser or third person, payment must be demanded within a reasonable time, which is a question of law. 2. Where all parties live in the same place, a delay of six to thirteen days in presentment constitutes laches. 3. The indorser will not be exonerated even if the drawer was not injured by the delay. 4. Defendant cannot be charged as a guarantor in this form of pleading. Motion denied.

Cited: 28 Barb. 621; 2 Bosw. 505; 1 E. D. S. 402; 2 Hill 429; 9 Misc. 382; 23 N. Y. 41; 71 id. 441; 128 id. 22; 1 Sheld. 396; 21 Wend. 378.

UNITED STATES BANK v STEARNS (1836) 15 Wend. 314.

Assumpsit to recover money overpaid to defendant on checks. The teller of plaintiff, a bank, was allowed to testify that, by mistake, he overpaid the defendant on checks drawn on the United States Branch Bank; also that he had given a bond for the correct discharge of his duties. Defendant insisted on production of the charter. Verdict for plaintiff. Motion for new trial.

Savage, C. J. 1. In a suit brought by a foreign corporation, an exemplification of the charter should be produced, if required, to prove its legal existence. 2. The courts of the State of New York have no judicial knowledge of acts of Congress creating corporations. 3. One interested may testify, if the necessity is general, because of the improbability that any one not interested would have knowledge of the facts. New trial granted.

Cited: 24 Wend. 469; 4 Denio 397; 20 Barb. 158; 24 id. 398; 37 id. 606; 38 id. 595; 10 Hun 145; 19 N. Y. 121, 485.

ALLEN v MERCHANTS BANK (1836) 15 Wend. 482.

Assumpsit on bill of exchange. Plaintiff deposited the bill for collection, and defendant forwarded it to the P Bank, which delivered it to a notary, who presented it the same day, but payment was refused. As the notary failed to make seasonable protest and to give notice, the indorsers were released. Plaintiffs introduced evidence to show usage as to liability, which consisted of the opinion or understanding of the witnesses. Judgment for defendant. Error.

Nelson, J. 1. Defendants became responsible to forward the bill seasonably to a bank or other suitable agent at the place of payment. 2. Nothing in the transaction implies an assumption of risk by defendants for the fidelity of the agent abroad. The holder may look to the foreign bank or notary for any default on their part. 3. The bank to which the bill was sent was plaintiff's agent. 4. Proper

evidence of usage and custom was admissible. Such evidence must be as to the practice in respect to the business of which usage is alleged. Judgment affirmed.

Cited: 3 Hill. 563; 19 Barb. 397, 403; 22 id. 630; 7 N. Y. 463; 150 id. 217; 3 Lans. 94. Reversed: 22 Wend. 215.

PLATT v LITTELL (1836) Anth. N. P. 358.

Where the president of a bank executed a note of the bank payable to himself, and thereafter obtained a loan by delivering the note as security, it was held, that the note was void under the Act of May 14, 1840; and as the loan was made on the security of the indorser's names, a nonsuit was proper.

CUNNINGHAM v PELL (1836) 5 Paige 607.

To obtain satisfaction of judgment obtained against a bank. The complainant sought to satisfy the judgment out of the property of a director. The bank's charter provided that, on dishonor of its notes, process might be issued against the directors as well as against the bank, and if execution could not be satisfied out of the bank's property, the directors should be individually liable. Notes held by complainant were dishonored. Judgment for complainant. An execution against the bank's property was returned unsatisfied. The bank was not made a party to the suit. Complaint alleged a fraudulent breach of trust on the part of the directors, all of whom were not joined as defendants. Demurrer.

Walworth, C. 1. To make the president and directors individually liable, the process must be sued out against them individually and duly served. 2. It is not necessary to make all the fraudulent directors parties to a bill filed for the purpose of obtaining satisfaction of a fraudulent breach of trust. 3. The bill is defective, in that the corporation is not made a party. Demurrer allowed.

Cited: 67 Barb. 483; 10 Bosw. 676; 3 Hun. 391; 53 N. Y. 490; 88 id. 62; 99 id. 195; 141 id. 454; 11 Paige 20; 3 Sandf. 474; 5 T. & C. 229.

REED v BANK OF NEWBURGH (1837) 6 Paige 337.

Accounting. The defendant, in pursuance of an agreement, made a loan to plaintiff, president of the T Bank, upon T Bank stock, as security, and gave plaintiff a proxy to vote such stock. Plaintiff transferred the stock to H, defendant's cashier. On the day of the election, plaintiff tendered H payment by offering a package of bills of the T Bank. The offer was refused on the ground that it was not a legal tender. H also revoked the proxy and voted upon the hypothecated stock himself. H knew that the plaintiff was using the funds of the T Bank in attempting to pay his own debt, and was engaged in a fraudulent scheme to wreck the T Bank, by putting in his own board of directors. Bill dismissed. Appeal.

Walworth, C. 1. There was neither a legal tender of the amount due on the note, nor even an offer to pay the same in anything which H was authorized to accept. 2. If there were sufficient reasons to make it the duty of the holder of the stock, as an honest man, to exercise the right of voting himself, and not to permit his proxy to be used to promote fraud and injustice, other motives which may have influenced the agent of the defendant to do his duty cannot prejudice the defendant's rights. Decree affirmed.

Cited: 44 N. Y. 658; 45 id. 837; 62 id. 157.

BANK COMMISSIONERS v BANK OF BUFFALO	} (1837) 6 Paige 497.
BANK COMMISSIONERS v CITY BANK	
BANK COMMISSIONERS v COMMERCIAL BANK	

Injunction for appointment of receivers. The Bank of Buffalo and the City Bank were charged with making loans to directors, exceeding one-third the capital stock. The City Bank was also charged with continuing in business without permission, after its neglect to pay a protested draft. The Commercial Bank was charged with exchanging its bills for the Bank of L's bills. The excessive loans made by the City Bank were made to a firm of which one of its directors was a member. The president of the City Bank had neglected to inform the directors of the draft.

Walworth, C. 1. The court has the power to decree upon the dissolution of the defendants. 2. The corporation is liable for a violation of its charter, where the directors and officers were authorized to make loans at their discretion. 3. The

loan to the firm was a loan to the director, and in violation of the bank's charter. 4. The continuance in business without permission, after the neglect to pay the draft, was a violation of the City Bank's charter. 5. The exchange of bank bills was prohibited by the statute, and was a violation of the charter. The loans and discounts must be presumed to have been made by the authority of the directors. 6. The banks are solvent, and it will advance the public interest to allow them to resume. Neglect to inform themselves of the amount loaned by the officers to the directors does not justify violation of law. The fact that the officers made additional loans and discounts to directors on paper on which they were responsible, without ascertaining whether the legal limit was exceeded, did not exempt the bank from forfeiture. Injunction dissolved.

COMMERCIAL BANK v. HUGHES (1837) 17 Wend. 94.

Assumpsit. T drew a bill of exchange for \$1,500, 30 days, to his order, indorsed first by him, second by R, and third by defendant. T, after maturity, presented his check for \$1502 and tendered \$10 in cash to plaintiff, a bank, demanding the bill, which the cashier refused to deliver. T had then \$1,505.04 on deposit with the plaintiff, provided it was not authorized to charge to his account \$900, the amount of a draft drawn by him, on which C was indorser and on which T received the money. This \$900 draft was never presented to the drawees for acceptance or payment. Subsequent to the time it was payable, T told the cashier of plaintiff that the \$900 draft need not be sent on, and that he would arrange the matter the next day. He refused to settle. Defendant released T as the prior indorser on the bill in suit, and under objection called him as a witness. T showed that previous to the date of the \$900 draft, he had paid R & S, on whom the draft was drawn, \$717.54, which, as between him and C, the latter was bound to pay; that he did not examine his account, or know that the draft had not been paid, until his talk with the cashier; that if plaintiff recovered he would lose the \$900. C was in good credit, but subsequently failed and absconded. Verdict for defendant. Motion for a new trial.

Cowen, J. 1. A first indorser, released and offered as a witness by his indorsee, is competent to testify. 2. Where the indorser has plainly suffered nothing from want of demand and notice, none need be made or given; but the drawer is presumed to have been injured until all chance of damage is proved to have been removed. 3. T and the plaintiff were mutually indebted, and he could call only for the balance due him. New trial granted.

Cited: 1 Abb. N. C. 359; 37 App. Div. 441; 11 Barb. 119, 354; 13 id. 165; 17 id. 385; 34 id. 300; 41 id. 478; 1 Denio 375; 5 Duer 87; 4 Hill 266; 6 id. 299; 2 Hilt. 274; Hoffm. 61; 21 Hun 454; 25 id. 41; 77 id. 159; 7 Lans. 375; 20 N. Y. 20; 44 id. 450; 52 id. 426, 548; 60 id. 288; 74 id. 473; 90 id. 537; 99 id. 133; 107 id. 182; 122 id. 383; 21 Wend. 375; 4 Hill 266; 6 id. 299; 3 T. & C. 263.

ADAMS v. ORANGE COUNTY BANK (1837) 17 Wend. 514.

Assumpsit to recover deposit, on admission of indebtedness. Plea: Statute of Limitations. Plaintiff's agent deposited money in defendant, a bank, to plaintiff's credit, and forwarded to plaintiff a certificate of deposit, which plaintiff never received. Eight years later the defendant, in pursuance of the statute, published a verified statement of its deposits, the names of depositors and dividends declared on its stock, which had remained unclaimed for two years back. The statement contained the name of plaintiff, and the amount and date of his deposit. Seeing the statement, plaintiff caused payment to be demanded, which was refused. The plaintiff contended that the Statute of Limitations was avoided by the published admission of indebtedness, from which a new promise to pay ought to be inferred. Question of sufficiency of demand was submitted to jury, who found for plaintiff. Defendant was not allowed to prove it had paid the money on the certificate of deposit. Verdict for plaintiff. Motion for new trial.

Bronson, J. 1. The question on whether there was sufficient demand of the money deposited before suit was brought, was properly submitted to the jury. 2. No sufficient ground was laid for the presumption that the certificate was negotiated. 3. No action could be maintained against the bank, until after a demand of the money. 4. There was sufficient evidence from which to infer a new promise, as there was an unequivocal admission of the original indebtedness, without any qualifications whatever. New trial denied.

Cited: 19 Barb. 461. •

STALL v CATSKILL BANK (1837) 18 Wend. 466.

On promissory note, against indorser. A member of defendant's firm indorsed a note in the firm name for the accommodation of the maker without the defendant's knowledge. Another member of the firm requested R to get the note discounted at the plaintiff bank, which he did, instructing the cashier to address the parties at R H, to which place the latter subsequently sent notices of protest. Defendant proved the place of business of his firm was M, not R H. The cashier of plaintiff, being objected to as an interested witness, swore that just before the trial, knowing he would be called as a witness, he had sold his stock in plaintiff bank and expected to buy it back after testifying. His testimony was admitted. The judge charged the jury that if the plaintiff bank was a holder in good faith, not knowing defendant's ignorance as to the transaction, it could recover. Judgment for plaintiff. Error.

Walworth, Ch. 1. If a stockholder sell his stock, he is then a competent witness without reference to the reasons for which such sale was made, unless he has reserved some right to compel a retransfer of the stock. 2. Plaintiff was a bona fide holder of the indorsement of the firm, and is not chargeable with any notice of the matter now set up by defendant. 3. R was the agent of the firm for the purpose of getting the note discounted, and the sending of the notice of protest as directed by him was sufficient to charge the firm as indorsers. Judgment affirmed.

Cited: 25 App. Div. 417; 7 Barb. 150; 66 id. 193; 9 Bosw. 445; 4 Hill 262; 6 Hun 347; 21 id. 182; 39 id. 115; 20 Misc. 302; 8 N. Y. 410; 14 id. 628; 16 id. 136; 26 id. 508; 44 id. 687; 51 id. 93; 116 id. 293; 159 id. 199, 200; 20 Wend. 219; 21 id. 645.

HERKIMER CO. BANK v COX (1839) 21 Wend. 119.

In an action by a bank against the indorsers of a promissory note, a certificate of a notary of the bank, who was also its cashier and a stockholder, is not competent to prove presentment, protest and notice.

BANK OF SALINA v BABCOCK (1839) 21 Wend. 499.

Assumpsit to recover on misappropriated note. G made a note payable to defendant, which was indorsed by the latter and by T and G. The note was discounted at plaintiff bank and the proceeds credited to T and G. Subsequently old notes drawn by them were canceled, and charged to their account according to custom. Defendant proved that as the note was made and intended for the benefit of the payee; and that as plaintiff had not given value, but only canceled old debts with proceeds, he could not recover. The judge charged that acceptance of the note by the plaintiff, would not discharge the parties to the previous notes from their liability. Judgment for defendant. Motion for new trial.

Nelson, C. J. 1. The cancellation of the securities held by the plaintiffs, was the same thing in legal effect, as drawing out the proceeds of the note; plaintiffs therefore parted with value in giving up old securities for new paper. Motion granted.

Cited: 4 Barb. 310; 6 id. 447; 12 id. 21; 18 id. 192; 24 id. 564; 31 id. 190; 33 id. 626; 43 id. 392; 47 id. 163; 8 Bosw. 527; 5 Denio 337; 4 Duer 377; H. & D. 370; 2 Hilt. 89; 34 Hun 103; 12 N. Y. 555; 25 id. 149; 31 id. 114; 37 id. 442; 76 id. 526; 81 id. 223; 24 Wend. 116; 1 Hill 515; 6 id. 98; 36 Supr. 279.

THOMAS v DAKIN (1839) 22 Wend. 9.

On bill of exchange against drawer. Defendant drew three bills which were discounted at the C Bank, an association formed under the General Banking Act of 1838. The act authorized suits to be brought in the name of the president. Plaintiff sued as president. Defendant demurred on the ground that no cause of action existed in favor of plaintiff, but rather in favor of the bank; that the Act of 1838 was void, because it did not receive a two-thirds vote of the legislature as required by the constitution in creating corporations. Plaintiff contended that these associations are not corporations; and that if they are, the act authorizing them may be passed by majority bill.

Nelson, C. J. 1. The associations are corporations. 2. The legislature possessed no power to pass a general law, like the one under consideration, by a majority bill, but it will be presumed that it was passed by a two-thirds vote until the contrary is clearly shown. Demurrer overruled. Judgment for plaintiff.

Cited: 8 Barb. 615; 10 id. 60; 17 id. 360; 1 Denio 14; 2 id. 382, 390; 1 Hill 617; 2 id. 34; 5 id. 211; 7 id. 504, 513; 52 Hun 441; 6 N. Y. 173; 8 id. 324; 15 id. 55, 183; 33 id. 280; 71 id. 126; 128 id. 361; 133 id. 282; 23 Wend. 165; 25 id. 608.

ALLEN v MERCHANTS BANK (1839) 22 Wend. 215.

Assumpsit to recover for neglect to give notice of non-acceptance to indorsee. Plaintiffs deposited with defendant for collection, a bill of exchange drawn in Y, on a house in P. It was lost to plaintiffs because the notary of the P Bank to which it was forwarded by defendant for collection, after having presented it to the drawees and noted its non-acceptance, returned it to the bank without giving notice of non-acceptance to the indorsers. Such notice was not required in that state. On the notary's again presenting the bill for payment, which was refused, he protested it and sent notices for the drawer and plaintiffs to the defendant. Plaintiffs, on receipt, notified A, the indorser, and subsequently sued him. They failed on the ground of want of notice to him of non-acceptance. Plaintiffs tried to prove usage in Y, that banks receiving bills for collection became responsible for their agents to whom the bill was sent. The judge charged the jury that defendant was not liable, on general principles of law, but instructed them to consider whether there was any such usage. Exception. Judgment for defendant. Affirmed. Error.

Senator Verplanck. 1. By depositing the bill in question with the bank, and receiving it for collection, the bank became liable for any neglect of duty occurring in that collection. 2. Those who undertake to collect foreign paper, are as much bound to inform themselves as to what is necessary to protect holders of such paper, as if it were domestic and governed wholly by their own local law. 3. The notary did all which was required by law in noting the bill for protest; the giving notice of protest, though an important duty, was not necessarily official. 4. The charge was erroneous. Judgment reversed.

Cited: 37 App. Div. 606, 607, 609; 8 Barb. 399; 19 id. 395; 22 id. 630; 40 id. 407; 41 id. 349, 350; 64 id. 102; 2 Duer 595; 3 Hill 563; 1 Hun 287; 16 id. 201; 59 id. 385; 3 Lans. 90, 94; 6 id. 454; 11 Misc. 289; 7 N. Y. 461; 10 id. 265; 11 id. 211; 15 id. 168; 116 id. 498; 118 id. 447; 128 id. 30; 133 id. 102; 150 id. 247; 6 Robt. 350; 3 Sandf. 189; 3 T. & C. 714; 22 Wend. 364.

COMMERCIAL BANK v KORTRIGHT (1839) 22 Wend. 348.

Assumpsit, for bank's refusal to permit transfer of stock on books. The holder of a certificate of the stock of defendant executed an assignment, omitting the name of the assignee, and sent it to his agent to be used as collateral security for a desired loan. Plaintiff loaned the money on the certificate. The assignor defaulted. Plaintiff filled in the blank and presented the certificate to the defendant's president for transfer on the books to plaintiff. The president refused to transfer the shares. Plaintiff proved that it was the custom to execute such transfers in blank for the purpose of assigning the legal title. Judgment for plaintiff. Error.

Senator Verplanck. 1. The transfer on the books of the bank was not necessary to give plaintiff a legal title. 2. The bank, in defending this suit, has ratified its president's act. 3. The testimony as to the custom was legal evidence not to vary the law but to show the intention with which the power was so executed in blank. 4. The bank is liable for the highest price of the stock at any time after demand and before trial. Judgment affirmed.

Cited: 2 Barb. 299; 11 id. 584; 24 id. 296; 38 id. 555; 47 id. 40, 44; 2 Duer 598; 4 id. 520; 1 E. D. Smith 243; 6 Hill 243; 7 id. 94; 39 Hun 565; 43 id. 159; 45 id. 582; 7 Lans. 321; 3 Misc. 70; 2 N. Y. 450; 10 id. 458; 13 id. 624; 14 id. 560; 20 id. 507; 22 id. 529; 24 id. 334; 26 id. 312; 30 id. 86; 34 id. 52, 83; 46 id. 331; 48 id. 593, 605, 608; 49 id. 222; 52 id. 210; 53 id. 222; 54 id. 535; 55 id. 46, 335; 59 id. 108; 67 id. 282; 75 id. 219; 76 id. 368; 158 id. 600; 165 id. 200; 3 Robt. 403; 1 Sandf. Ch. 415; 25 Wend. 695; 26 id. 219.

COMMERCIAL BANK v BANK OF THE STATE (1839) 4 Edw. Ch. 32.

Bill to compel defendant to make good a deficit of \$2,000 of notes of plaintiff. The evidence of the clerks of defendant was that it received one week \$56,520 of notes of plaintiff; that they were counted, put up in small packages, and these packages all put together in one bundle, sealed up and sent to plaintiff. The cashier and a clerk of plaintiff testified positively to receiving the package, opening it,

carefully handling and counting the notes, arranging them by denominations, and to finding a deficiency of \$2,000. At the same time they were preparing the package for plaintiff, defendant's clerks were putting up packages to send to other county banks.

The Vice-Chancellor. It is fair to conclude that defendant's clerks were correct as to the amount of the notes of plaintiff taken in. A mistake might have taken place at defendant's bank, as to the amount contained in the bundle sent to plaintiff, which no examination at the office would disclose. A parcel containing just \$2,000 may have got separated from the rest, and may have been sent to some other county bank, and found its way into the hands of dishonest clerks. The burden is upon plaintiff to make out its case. This we think it did by the positive testimony of the cashier and clerk whose evidence was positive and who were not in a position to make a mistake. Decree for plaintiff without costs.

WARNER v BEERS (1840) 23 Wend. 103.

On promissory note, against indorsers. The plaintiff sued as president of the N Bank, doing business under the Act of 1838. The N Bank was third indorsee on a note on which defendant was an indorser. Defendant demurred on the following grounds: 1, that plaintiff individually had no cause of action; 2, that there was no authority by law for plaintiff to sue for the bank; 3, that if the bank was not a corporation, the declaration was defective, as it did not state to whom the promise was made; 4, that an unincorporated association cannot sue in its president's name; 5, that these associations are corporate bodies, and the act allows any number to be created, and therefore it violates the constitution and is void. Defendant argued that since the constitution prohibits formation of unlimited number of corporations by any act passed by legislature, the Act of 1838, which permits such formation, is void; and that the act did not receive the assent of two-thirds of the legislature and is therefore void. Judgment for plaintiff. Error.

Walworth, Ch. 1. The Banking Law of 1838 is valid, although it may not have received the assent of two-thirds of the members elected to each branch of the legislature. 2. The associations organized in conformity with the Act of 1838 are not bodies politic or corporate within the spirit or meaning of the constitution. Judgment affirmed.

Cited: 3 Abb. N. C. 413, 439; 5 Barb. 187; 17 id. 320, 334, 341; 18 id. 459; 2 Denio 381, 389, 402; 1 Hill 465, 617; 4 id. 391, 401; 5 id. 211; 7 id. 290, 505, 509; 30 Hun 121; 42 id. 352; 55 id. 71; 3 N. Y. 486; 10 id. 305; 15 id. 55, 183; 17 id. 527; 33 id. 280, 285; 70 id. 342, 368; 158 id. 185; 1 Sandf. 693; 25 Wend. 608, 682.

BANK OF SANDUSKY v SCOVILLE (1840) 24 Wend. 115.

Assumpsit against maker and indorsers of a promissory note. Defense: usury. The note was an accommodation note that had been discounted at a usurious rate by W, a broker, and discounted by the plaintiff in June, 1837, to extinguish a debt due by W to the plaintiff. The plaintiff had no knowledge of the usury. Verdict for the plaintiff. Motion for new trial.

Bronson, J. 1. The note was transferred before the Usury Act of 1837 took effect. 2. Since the plaintiff discounted it to extinguish W's debt, it is the same as though W had received the money and applied it on the note. Plaintiff, having thus taken it for value and without notice of the usury, may recover on it. New trial denied.

Cited: 2 Barb. 566; 6 id. 447; 12 id. 21; 18 id. 192; 24 id. 564; 31 id. 626; 43 id. 392; 47 id. 163; 8 Bosw. 527; 5 Denio 337; 4 Duer 377; H. & D. 370; 34 Hun 103; 12 N. Y. 555; 31 id. 114; 32 id. 584; 81 id. 226; 2 Sandf. 117; 36 Supr. 279.

DELAFIELD v KINNEY (1840) 24 Wend. 345.

Assumpsit. The declaration alleged that the E Bank, as president of which defendant was sued, made and delivered an instrument, designated as a promissory note and as a certificate of deposit, by which the defendant certified that V had deposited in said bank a sum named, payable to his order six months after date; that V indorsed the instrument to the plaintiff with the defendant's knowledge; and that the defendant thereby became liable and promised to pay the said sum to the plaintiff. Demurrer.

Bronson, J. If this action is against the defendant personally, the counts are defective as alleging merely that the defendant certified to receipt by the bank of

the money, without himself undertaking to refund it, or if he did so promise, then without consideration. If the action is against the bank, it should have been sued in its corporate name; for, though the bank may be properly sued either in its corporate name or, by statute, in the name of its president, yet it has no authority to make a contract by the latter name, and the acts are alleged to have been done by the defendant. Demurrer sustained. Judgment for defendant.

Cited: 19 Barb. 184; 33 id. 540; 1 Denio 15; 6 Hill 241; H. & D. 115; 6 N. Y. 172; 25 id. 576; 74 id. 238; 1 Sandf. 694; 25 Wend. 613.

PEOPLE v PHOENIX BANK (1840) 24 Wend. 431.

Quo warranto. The information charged defendants with claiming to be and acting as a corporation. Plea: that defendants were created and continued as a corporation by acts of legislature. Replication: forfeiture of charter by usury. Rejoinder: that subsequent to the acts complained of, a director of the company had been appointed by the governor and senate, whereby the forfeiture was waived. Demurrer to rejoinder.

Bronson, J. The appointment of a state director was perfectly consistent with the intention to insist on the forfeiture. Without the concurrence of the assembly, the governor and senate had no authority to waive it. Demurrer sustained. Judgment for plaintiff.

Cited: 2 Hill 175; 54 Hun 386; 128 N. Y. 249.

PARMLY v TENTH WARD BANK (1840) 3 Edw. Ch. 395.

Motion, for a receiver. Plaintiff held a bill for \$500 against defendant, which plaintiff was unable to collect because defendant was insolvent. Defendant had discontinued business, and had a large amount of notes, outstanding and unpaid. By sec. 27, R. S., under which defendant was incorporated, a bank could be dissolved in the same manner as moneyed corporations could. Moneyed corporations could be dissolved by petition by attorney-general, by a creditor, or by stockholders for neglect to make a semi-annual report of affairs to the comptroller, or a violation of any provisions of the act. Plaintiff contended that defendant was insolvent, as it had not paid the note, and that a refusal to pay debts came within the act.

McCoun, V. C. 1. Discontinuance of business, coupled with reputed insolvency and inability to pay debts, is not a violation of the act. 2. Whatever rights the petitioner has as a creditor are cognizable at law, and he must be left to pursue them there. 3. Although the note was not such as the bank could issue, nevertheless the petitioner is a creditor. Motion denied.

KNOX v GOODWIN (1841) 25 Wend. 643.

On bill of exchange. Plea, usury. The plaintiff was the president of the Bank of V, organized under the general banking laws of the state. The Bank of V discounted a bill of exchange for defendant, and deducted discount and charges for collection. It gave the drawer a certificate of deposit payable in 15 days. When the certificate was being drawn, the defendant said he wished it drawn to B, at 15 days. The cashier said he would prefer to draw it at sight, as it would take 15 days to send it to and from Ohio. The defendant claimed that this was usury, inasmuch as the interest on the amount of the certificate was secured and agreed to be paid on the loan. The court held that this was not per se a usurious contract. Verdict for plaintiff. Motion for new trial.

Nelson, C. J. 1. The bill was discounted without any stipulation for, or intention to take, usurious interest. 2. The payment at a future date was not made a part of the agreement or condition of discounting the bill. Motion denied.

Cited: 5 Denio 91; 14 Barb. 149; 4 N. Y. 474.

WOODRUFF v MERCHANTS BANK (1841) 25 Wend. 673.

Case, for omission by the defendant's notary to duly present and protest a bill of exchange, sent to the defendant for collection. The bill was drawn on the cashier of a bank, and duly accepted by him as cashier. It was dated November 15, 1838, and was payable to the order of G, sixty days after date. It was presented and protested on January 14, 1839. Defendant offered proof of a custom at Y, where the bill was payable, not allowing days of grace on bank checks. Defendant con-

tended, this instrument was a bank check. Verdict for defendant. Motion for new trial.

Nelson, C. J. It is essential that a bank check be payable to bearer on demand. This instrument contains every distinguishing characteristic of an ordinary bill of exchange. Accordingly, the usual days of grace should have been allowed. New trial granted.

Cited: 18 Barb. 296; 63 id. 504; 2 Duer 604; 6 Hill 176; 2 Hilt. 153; 70 N. Y. 216; 91 id. 82.

BANK OF WATERTOWN v ASSESSORS (1841) 25 Wend. 686.

Mandamus to cancel assessment. The plaintiff was organized under the General Banking Laws of 1838. Its capital consisted of \$46,000 in state stocks, and \$39,000, in bonds and mortgages. These securities had been transferred to the comptroller in compliance with the Act of 1838. The defendants assessed the plaintiff on \$70,000 to defray the expenses of the village. The plaintiff contended that the property of an association thus formed is not liable to taxation.

Nelson, C. J. Associations formed under the General Banking Laws of 1838 are corporations, and as such liable, like other moneyed institutions, to be taxed on all lands and personal estate. Motion denied.

Cited: 2 Hill 353; 52 Hun 442; 133 N. Y. 282.

DAVENPORT v CITY BANK OF BUFFALO (1841) 9 Paige Ch. 12.

To compel delivery of bank bills, in the possession of the receiver of an insolvent bank. Complainants had loaned to defendant bank a promissory note to enable defendant to obtain a loan from another bank. Defendant's cashier sealed up the package of defendant's notes in question, and placed them in its vaults with a memorandum that they were intended to secure complainants against loss on their note. The transaction did not appear on defendant's books. Subsequently defendant went into the hands of a receiver. The note was protested, and the complainants became liable as indorsers. The Laws of 1842, ch. 247 forbid a moneyed corporation, which is subject to the Safety Fund Act, from pledging or hypothecating its notes. Defendant received the proceeds of complainant's note which was discounted by the other bank.

Walworth, C. 1. As the bank retained control of bills, there was merely a nominal hypothecation and complainants obtained neither a legal nor an equitable lien upon the bills contained in the package. 2. The note is a valid debt because defendant received the proceeds. If the complainants paid the note, they should be allowed principal and interest out of funds of defendant remaining in the hands of the receiver. Order accordingly.

SHEPARD v GUERNSEY (1841) 9 Paige Ch. 357.

To restrain state comptroller from preferring creditors whose notes have been protested, and to have funds applied ratably. The W Bank deposited proceeds of stock with the state comptroller as required by the Banking Law of 1838, to secure payment of its circulating notes. Subsequently the bank became insolvent. Some of its notes were protested, and the protests were filed with the comptroller. Creditors who first filed protests claimed to be entitled to preferences in the distribution of the fund over subsequent protestors, and over creditors who did not protest. The fund was not sufficient to pay all claims in full. Sec. 4, Act of 1838, declared that it shall be lawful for the comptroller to apply trust funds in his hands to the redemption of protested notes, and to adopt such measures for the payment of all the circulating notes as will most effectually prevent loss to their holders. Injunction granted. Motion to dissolve.

Walworth, C. 1. It was the intention of the legislature to make the stocks, bonds, and mortgages, transferred to the comptroller by a banking association, a common fund for the security of all the circulating notes of the institution, which, upon their face, purported to have been secured. 2. Equality among persons having a common right to payment out of a fund provided for the benefit of all, is equity. The claims for preferences cannot be sustained. Motion denied.

CANAL BANK v BANK OF ALBANY (1841) 1 Hill 287.

Assumpsit on a draft. The draft was drawn on the plaintiff, a bank, in favor of B, and was sent through defendant, a bank, for collection. Plaintiff, after pay-

ing the draft, discovered that B's name had been forged, and demanded that the money be refunded. Plaintiff proved by B that his indorsement was a forgery. Defendant was not permitted to prove that it was an agent for collection, and that it was the custom of banks not to disclose their agency when making a collection. Verdict for plaintiff. Motion for new trial.

Cowen, J. 1. The person whose name was forged, was not interested and was competent to prove the forgery. 2. The plaintiff, having paid the money under mistake, can recover. 3. The evidence in regard to the custom of banks not disclosing their agency, was properly excluded. New trial denied.

Cited: 50 Barb. 114; 55 id. 90; 59 id. 555, 556; 1 Daly 148; 1 Denio 612; 6 Duer 486; 76 Hun 478; 1 Lans. 19; 5 id. 396; 22 Misc. 724; 1 N. Y. 116; 3 id. 236; 4 id. 155; 6 id. 232; 10 id. 75, 83; 17 id. 208; 19 id. 503; 38 id. 310; 40 id. 395; 45 id. 304; 46 id. 81; 54 id. 475; 59 id. 77; 75 id. 562; 85 id. 212; 91 id. 79; 118 id. 473; 165 id. 128; 2 Robt. 411; 5 id. 585; 2 Sandf. 255; 35 Supr. 290; 37 id. 156; 1 Sweeny 72.

TALBOT v BANK OF ROCHESTER (1841) 1 Hill 295.

Assumpsit, for money had and received. Plaintiff in July, 1838, inclosed in a letter, a certificate of deposit on the X Bank, payable to plaintiff and indorsed to W. W never received it. Defendant paid the money on a forged indorsement and collected the amount from the X Bank. It purported, when produced, to have been delivered to defendant in August, 1838. Defendant was notified of the forgery in September, 1838. Motion for a nonsuit, on the ground that there was no privity entitling the plaintiff to maintain the suit against the defendant. That title in the certificate, or in the proceeds, was not in the plaintiff. That there was laches in giving notice of the forgery. Motion overruled. Verdict for plaintiff. Motion for new trial.

Cowen, J. 1. The plaintiff was entitled to the proceeds of the certificate, in an action for money had and received. The title had not passed from plaintiff. 2. Plaintiff's right to recover was not lost by laches. New trial denied.

Cited: 4 Daly 224; 28 Misc. 325; 6 Hill 125; 6 N. Y. 220; 17 id. 207; 75 id. 563; 86 id. 407.

NATIONAL BANK v NORTON (1841) 1 Hill 572.

Assumpsit on promissory note. The note, discounted and held by the plaintiff, was indorsed in the name of the firm of which defendants had been members, and also by N, one of the partners, after dissolution. At the time of dissolution, a notice was given that the defendant N was authorized to settle the partnership affairs and to sign the firm name for that purpose. One of the plaintiff's directors unofficially knew of the dissolution of the firm. Nonsuit. Motion for new trial.

Cowen, J. 1. After the dissolution of a firm, the partner could not bind his firm by the renewal of a firm note. 2. Knowledge by a director of a bank, unless official, or in respect to his agency, cannot operate against the bank. The bank was not bound by the knowledge of the director. The plaintiff could not go behind the note in order to recover. New trial ordered.

Cited: 28 Abb. N. C. 95; 2 Barb. 554; 3 id. 533; 6 id. 250; 8 id. 578; 24 id. 332; 26 id. 584; 4 Daly 312; 2 Hill 521; 11 Hun 35; 18 id. 41; 23 id. 503; 24 id. 262; 32 id. 392; 58 id. 193; 14 Misc. 609; 2 N. Y. 531; 12 id. 289; 37 id. 323; 44 id. 520; 54 id. 539; 61 id. 649; 69 id. 575; 89 id. 631; 96 id. 559; 139 id. 313; 159 id. 211; 4 Sandf. 97.

PEOPLE v ASSESSORS (1841) 1 Hill 616.

Mandamus, commanding the assessors to strike out an assessment. The relator was a banking association organized and doing business under the Laws of 1838. The defendants were the assessors of the village, in which the relator was located. They assessed the relator's capital stock. The relator contended that it was not a corporation, and that its capital stock was not liable to taxation.

Bronson, J. The association was a corporation, and its capital stock was liable to taxation. Motion denied.

Cited: 22 Abb. N. C. 194; 5 Barb. 11; 8 id. 230; 1 Denio 15; 2 id. 390, 395; 4 E. D. S. 692; 2 Hill 353; 3 id. 391; 4 id. 22; 6 id. 38; 7 id. 512; 52 Hun 442; 54 id. 366; 3 N. Y. 486; 15 id. 183; 21 id. 408; 9 Paige 415.

STANTON v WILSON (1841) 2 Hill 153.

Assumpsit to recover stock subscription. Plaintiff was the president of a bank. Defendant subscribed for some of its capital stock, prior to the date fixed for commencing banking business. Defendant contended that the suit was improperly brought by the president of the bank. Verdict for plaintiff. Motions in arrest of judgment, and for a new trial.

Cowen, J. The action was properly commenced in the name of the president of the bank. Motions denied.

Cited: 7 Barb. 163; 17 id. 574; 18 id. 308; 21 id. 467; 29 id. 338; 32 id. 619; 5 Hill 480; 4 Hun 138; 22 id. 364; 10 N. Y. 557; 14 id. 353; 16 id. 463; 3 Sandf. 164.

BANK OF ORLEANS v MERRILL (1842) 2 Hill 295.

On certificate of deposit. The defendant, a bank, organized under the General Banking Law, issued a certificate of deposit to the order of B at six months with interest. B indorsed it to the plaintiff. Demurrer.

Per curiam. 1. The instrument is in effect a negotiable promissory note. 2. It cannot be sanctioned as the basis of a right of recovery without disregarding the provisions of the statute against the issue of spurious and illegal currency. Judgment for defendant.

Cited: 17 Barb. 386; 67 id. 410; 3 N. Y. 33; 14 id. 178; 15 id. 263; 60 id. 268.

BANK OF UNITED STATES v DAVIS (1842) 2 Hill 451.

Assumpsit, on bills of exchange, against drawer and indorser. A director of plaintiff by fraudulently representing that bills which had been given to him to discount were his own property, procured them to be discounted by the plaintiff, and appropriated the proceeds. Plaintiff had no other knowledge of how the director obtained the bills. Notes issued by plaintiff and used for discounting the bills, were obtained after its charter had expired. Act of 1833, p. 395, allows proof of service of notice on all parties to a note. The bills not being paid, were protested, and the notary's certificate of protest was sent by mail to plaintiff's cashier, who remailed it to the drawer and indorser. Verdict for plaintiff. Motion for new trial.

Nelson, C. J. 1. The notary's certificate was properly received as evidence of demand and protest. Under the Act of 1833, p. 395, the bank's cashier had notice. Plaintiff was not required to send notice to any one but its principal. 2. That the payment was made in notes of the old bank should have been affirmatively proved to constitute a defense. 3. Plaintiff is responsible for the fraud of its director and cannot recover. New trial granted.

Cited: 22 App. Div. 619; 3 Barb. 532; 13 id. 345, 351; 15 id. 178; 20 id. 476; 25 id. 502; 35 id. 441; 38 id. 551; 40 id. 118, 272; 40 id. 118; 41 id. 345; 6 Daly 564; 3 Hill 275; 4 id. 133; 1 Hun 278; 14 id. 603; 19 id. 357; 23 id. 401, 503; 28 id. 87; 32 id. 110, 327; 77 id. 56; 16 Misc. 87, 532; 21 id. 34; 10 N. Y. 185; 15 id. 230; 21 id. 487; 26 id. 513; 34 id. 135; 37 id. 323; 38 id. 467; 40 id. 454; 43 id. 238; 50 id. 316; 52 id. 280; 61 id. 32; 72 id. 295; 76 id. 390; 82 id. 306; 98 id. 95; 99 id. 134; 111 id. 457, 610; 118 id. 569; 139 id. 313; 148 id. 518; 2 Redf. 543; 45 Supr. 415, 552; 3 T. & C. 674.

CAYUGA COUNTY BANK v HUNT (1842) 2 Hill 635.

On bill of exchange against indorser. Plaintiff was the indorsee, and defendant the indorser of a bill accepted by S & Co. No place of payment was mentioned. All the parties to the bill, except plaintiff, lived in New York. Plaintiff gave in evidence the certificate of a notary to the effect that when the bill was presented at the acceptor's place of business, no one could be found; that the wife of one of the partners, who had died before the bill became due, refused payment. Plaintiff also gave in evidence a notary's certificate of protest, dated about two years after presentment. The bill was delivered to the plaintiff's cashier while in New York to be discounted and the cashier gave his draft for part and had the plaintiff send the balance less the exchange. Exchange was charged and also 1 per cent as the difference between New York and country funds. Verdict for plaintiff. Motion for a new trial.

Cowen, J. 1. It was no objection that the certificate of notice of protest was

drawn some time after notice was given. 2. The mode of presenting the bill to the widow of the deceased partner was immaterial. 3. In the absence of evidence to the contrary, there arises the presumption that the bill was presented during business hours. 4. There was no usury. Motion denied.

Cited: 15 Barb. 331; 30 id. 91; 44 id. 74; 6 Duer 445; 31 Hun. 520; 12 N. Y. 232; 19 id. 142; 27 id. 142; 87 id. 10; 2 Sandf. Ch. 157; 3 id. 260, 319

BANK OF ORLEANS v SMITH (1842) 3 Hill 560.

Money paid by mistake. The T Bank received a note from defendant for collection, and sent it to plaintiff, which mailed it to the B Bank. It was lost in transmission. Plaintiff, under the mistaken supposition that it was paid, sent the amount to the T Bank, and it was paid to defendant. Verdict for plaintiff. Motion for new trial.

Nelson, C. J. 1. Plaintiff was defendant's agent, and responsible only for a faithful discharge of duty. 2. The T Bank was also defendant's agent. The action was properly brought against defendant. 3. The money having been paid by mistake, under such circumstances plaintiff can recover it back. Judgment on verdict. Reversed on points raised in pleadings and not appearing in the bill of exceptions.

Cited: 7 Hill 595; 8 Barb. 322; 19 id. 396, 405; 22 id. 630; 36 Hun 344; 7 N. Y. 461; 11 id. 212; 64 id. 319; 116 id. 499.

SAFFORD v WYCKOFF (1842) 4 Hill 442.

Assumpsit, on bill of exchange against drawer. Plaintiff was the bona fide holder of a bill of exchange drawn by a bank, of which the defendant was president. The bank was properly organized. The bill was a negotiable bill in the usual form, and was signed by the cashier only. Defendant contended that the bill not being signed by the other officers, and not authorized by the comptroller as a circulation bill, was void. There was no statute declaring such a bill to be void, and there was no evidence that the bill was issued as money. Judgment for defendant. Error.

Hopkins, S. A lawfully organized bank can draw a bill of exchange in the ordinary form. Reversed.

Cited: Anth. N. P. 359; 5 Barb. 187; 17 id. 323, 369; 25 id. 111; 1 Bosw. 195; 4 Edw. Ch. 167; 3 N. Y. 34; 7 id. 340; 10 id. 457; 14 id. 216, 631; 15 id. 67, 167, 222, 260; 16 id. 129; 19 id. 160, 164, 311, 382; 22 id. 302; 27 id. 559; 40 id. 178; 11 Sandf. Ch. 290; 8 Hun 347.

CONGER v TRADESMAN'S BANK (1842) Lalor's Supp. 34.

On promissory note against indorsers. The plaintiff discounted a note made and indorsed by the defendants, and in so doing received seventeen cents more than the legal rate of interest. Plea: usury. The evidence tended to show that the last day of grace fell on Sunday; and that interest was computed including that day, when strictly the note should have been paid on Saturday. The question, whether there was an intent to take usury, was left to the jury. Judgment for plaintiff. Error.

Cowen, J. The question was properly submitted to the jury. The principle *de minimis non curat lex* applies. Judgment affirmed.

Cited: 2 Hun 508; 5 T. & C. 45.

BANK COMMISSIONERS v JAMES BANK (1842) 9 Paige Ch. 456.

Petition for a receiver of property of defendant. Laws of 1840, ch. 202, provide that banking corporations not carrying on business in New York City must have agents in New York City or Albany for the purpose of redeeming their circulating notes; that if such agents refuse to redeem notes on demand, the banks must pay interest thereon; that if such notes and interest are not paid within twenty days after presentation, the banks may be proceeded against by the bank commissioners, as for a violation of their charters. Defendant had an agent in Albany who refused to pay its notes when presented. They were not again presented at the expiration of twenty days.

Walworth, Ch. It is necessary to leave the circulating notes of a bank with its agency until the termination of the twenty days from their first presentation

for payment, or to present them a second time at or after the expiration of that period, in order to render a neglect to redeem such bills at the agency or to pay the extra interest thereon, an absolute forfeiture of the charter of the bank. Petition dismissed.

ONTARIO BANK v SCHERMERHORN (1843) 10 Paige 109.

To foreclose mortgage. Defendant, as security for a loan, gave his note and mortgage to the plaintiff. The copy of the bill served gave by mistake, the date of the note and the mortgage as April instead of August. Defendant set up as defenses: 1, Usury; 2, that a part consideration was a former note discounted by the plaintiff, as to which it was unlawfully agreed that defendant should receive the proceeds by a draft on Albany or New York, payable in thirty days, and should allow a premium on the draft. The Safety Fund Act of 1829, provides that no moneyed corporation subject to its provisions shall issue any bill or note of the said corporation, unless payable on demand without interest. Defendant's only witness testified that defendant applied for a loan to pay a debt in New York, and received a draft at forty-five days at a discount of \$29 instead of being charged a premium. Decree for plaintiff. Appeal.

Walworth, Ch. 1. There was no usury. 2. In the absence of proof that the draft was issued in such a form as to violate the spirit and intent of the statute, the court is bound to presume the contrary was a fact. 3. As the defendant was not misled, and the plaintiff could have amended as a matter of course, the mistake in the date forms no grounds for a reversal. Decree affirmed.

Cited: 5 Barb. 28; 17 id. 340; 30 id. 91; 2 Daly 259; 5 Denio 89; 3 N. Y. 33; 15 id. 225; 17 id. 539; 19 id. 142; 11 Paige 252.

MATTER OF THE CITY BANK OF BUFFALO (1843) 10 Paige 378.

Application by receiver for instructions. A bill was filed by the bank commissioners against the C Bank, and the petitioner was appointed receiver. The chancellor made a final decree in 1841 continuing the existence of the corporation so far only as might be necessary to collect the foreign debts. The parties whose claims had not been allowed not having agreed to a referee nor applied to the chancellor for an appointment, as authorized by the R. S., the receiver got an order referring their claims to a master. The Act of 1843, abolishing the office of bank commissioners, made no provision for the revival or continuance of suits in chancery commenced by or in the names of the bank commissioners, and the master doubted whether he had a right subsequently to proceed in the execution of the order of reference to him.

Walworth, Ch. 1. This court has the power, if the revival is absolutely necessary for the purposes of justice, upon a proper bill filed to allow the proceedings already instituted to be continued. A revival, however, does not appear necessary; all that is necessary is to direct an order to be entered that the master proceed to entertain and determine the validity of the claims. 2. The right of the creditors against whose claims the master has reported, to except to his report, must be exercised within the usual time. Decree accordingly.

BANK OF OWEGO v BABCOCK (1843) 5 Hill 152.

Case. Defendant, the cashier of plaintiff, failed to make the proper entry in order to give notice on a note sent plaintiff for collection. The plaintiff gave in evidence the judgment in the suit by the owner of the note against it, and the payment of the judgment. Defendant had been notified that the plaintiff would hold him liable. The court instructed that the plaintiff, having been held liable for the negligence of the defendant, could recover. Verdict for plaintiff. Motion for new trial.

Bronson, J. 1. The judgment was evidence against the defendant only for the purpose of showing plaintiff's damage. 2. Plaintiff was bound to show culpable negligence on the part of the defendant in order to recover. New trial granted.

SUYDAM v MORRIS CANAL AND BANKING CO. (1843) 6 Hill 217.

To recover a loan. Plaintiff was a foreign banking company, with an exchange office in New York. Plaintiff, by its cashier, made a loan to defendant on his check. Plaintiff's charter limited its business to a city in the state where it was incor-

porated. A statute of New York forbade the keeping of an office of discount and deposit for transacting business. There was no evidence of fraud or bad faith. Judgment for plaintiff. Error.

Dickinson, P. The making of a single loan in good faith will not be held to be a violation of the statute. Judgment affirmed.

Cited: 11 Barb. 215; 17 id. 383; 64 id. 178; 66 id. 114; 6 Lans. 455.

LONG ISLAND BANK v TOWNSEND (1843) Lalor's Supp. 204.

Where a promissory note was indorsed by two persons jointly, and, after it became due, one of the indorsers deposited funds in the bank to his own individual account: Held, that the funds so deposited could not be applied towards the payment of the note, without the assent of the party making the deposit.

LEAVITT v BEERS (1843) Lalor's Supp. 221.

Assumpsit. Pleas: setoff and payment. The defendant, as president of a defunct bank, was greatly indebted to it. The defendant had paid a goodly part of his indebtedness in cash and securities, and as to the balance, an arrangement was made with the directors of the bank, that he should be allowed to transfer to them, from time to time, within a year, securities sufficient to satisfy the balance. The receiver refused to accept the securities as tendered. The defendant also claimed a commission on a loan made by the bank to himself individually. Finding for plaintiff. Motion to set aside referee's report. Denied. Error.

Nelson, C. J. 1. The tender of these securities according to the agreement, and within the time limited, amounted to proof of complete payment. The fact that the securities, which the defendant was authorized to take up in discharge of his debt, were illegal, is no excuse. 2. There being no agreement to allow the president commissions, his claim was properly rejected. Report set aside. Order reversed.

LEAVITT, REC'R v YATES (1843) 4 Edw. Ch. 134.

Bill to set aside a trust deed, executed between the N Banking Co. and trustees, to secure the payment of eight hundred promissory notes of the company, four hundred being for \$500 each and four hundred for \$1,000 each. They were payable in thirteen months, in favor of clerks of the company, who indorsed them to give them currency. A foot note to each one stated that the aggregate of \$600,000 was secured by trust deed of \$800,000 securities. They were delivered to directors and agents to raise money for the company. Plaintiff was receiver of the company and sought to have the securities, assigned by the deed, delivered to him. The company was organized under the General Banking Law of 1838. Plaintiff objected to the validity of the deed, in that the resolution authorizing it was not passed at a regularly convened board such as the by-laws required. It was adopted when a quorum was present and was signed by the proper officers. The company's power to borrow money was denied. Its pecuniary affairs had become embarrassed by speculation in state stocks. Its power to loan or put in circulation notes as money was urged to be in violation of the Act of 1830 (1 R. S., 712).

McCoun, V. Ch. 1. The objection to the legality of the resolution is not well founded. Whether the meeting was convened and held in accordance with the by-laws is not material so long as the meeting held that day was not objected to by any of the officers or directors. 2. The company under the General Banking Law might borrow money to discount notes and purchase stock or other securities, to deposit with the comptroller; but it could not borrow to speculate, or to engage in business other than banking. 3. The notes issued were of the character of circulating notes and restrained by the Act of 1830. They were void, and the assignment in trust must be set aside. 4. They were also void for the further reason that they were not secured with the comptroller, and signed and registered. 5. If any of the holders were induced to accept the notes on the strength of the trust and to relinquish other securities, equity will remit to the parties their original rights and securities, provided they show their debts to be fair and within the scope of the authority of the officers and directors of the company. 6. Questions as to the rights of innocent creditors holding these notes can be considered on the original bill without a cross bill. 7. The statutes relating to insolvency of moneyed corporations apply to associations under the Banking Act of 1838. Trust deed set aside.

Cited: 22 App. Div. 1; 5 Barb. 33; 7 Daly 279; 15 N. Y. 218, 293.

BANK COMMISSIONERS v LA FAYETTE BANK (1843) 4 Edw. Ch. 287.

Petition against receiver for interest on bank bills. The petitioners, as bona fide holders and owners of bank bills issued by defendant, caused due demand to be made on defendant for payment. Payment was refused. For the purpose of winding up the bank, which was not insolvent, a receiver was appointed. An order was thereafter entered authorizing the receiver to pay all the debts and demands of the bank in full, without interest. This was done, and a surplus remained. Petitioners received the principal moneys on their bank bills without prejudice.

McCoun, V. Ch. The billholders, who had the bills of the bank presented and payment demanded, are entitled to the ordinary lawful interest from the time of demand until actual payment of the principal. Order accordingly.

VALK v CRANDALL (1843) 1 Sandf. Ch. 179.

To foreclose a mortgage made by defendants, C and his wife, as security for a bond given in payment of stock in a state bank. The mortgage was given to the president of the bank, before all the steps necessary for its incorporation had been taken. Defendant C had signed the subscription list and after the bank was properly organized, paid interest on the bond. Subsequently the mortgage and bond were assigned to the plaintiff. Defendant contended that the mortgage was void, and that the loan was usurious, because interest was charged before the bank was legally incorporated.

Sandford, Ass't V. Ch. 1. Defendant C having recognized the bank after it had taken all the necessary steps for its organization, the mortgage was valid as to him. 2. The mortgage was not valid as to the wife. 3. There was no usury. Decree for complainant as to defendant C. Bill dismissed as to wife.

Cited: 17 Barb. 574; 26 N. Y. 80; 3 Sandf. 164.

BOISGERARD v NEW YORK BANKING CO. (1844) 2 Sandf. Ch. 23.

Bill for injunction and the termination of the affairs of a bank. Defendant, an insolvent state bank, borrowed money from complainants. In the written contract defendant was not described by its corporate name, but there was no doubt as to its identity. Defendant contended that the contract was invalid because not in the corporate name; and illegal because not executed according to law, and, also, because the defendant used the money for illegal purposes; and that complainant could not institute such proceedings. Defendant was insolvent and had failed to file the required reports of its financial condition.

Sandford, Ass't V. Ch. 1. The contract was not void because not made in the bank's name. 2. The defective execution would not prevent the plaintiff's recovering on the contract. 3. The complainant was not affected by any illegal contract made by defendant for using the money borrowed from complainants. 4. The defendant being insolvent and having failed to comply with the law, the complainant properly brought the bill to have its affairs terminated. Decree for complainant.

Cited: 3 N. Y. 485; 15 id. 219.

HOLFORD v BLATCHFORD (1844) 2 Sandf. Ch. 149.

Bill against receiver of the C Bank on a bill drawn by plaintiffs on H & Co., bankers, London, and sold by plaintiffs to the C Bank. In payment the C Bank gave a certificate of deposit, including 2½ per cent exchange, and 1 per cent commissions, in addition to the regular rate of interest, payable on demand, but by agreement in six days. In four months the bank made a partial payment, and gave a new certificate for the balance including a commission for forbearance, and two months later another payment was made. Defense: usury. The current rate of exchange at the time of deposit was 8 per cent. It was urged that the bill in the hands of the drawer had no legal existence, and was only an exchange of credits; that admitting it to be the subject of a sale, the exaction of more than current exchange and interest was a device to obtain more than lawful interest for the forbearance of price during the stipulated term of credit; that plaintiffs took a commission for forbearance of the price.

Sandford, Ass't V. Ch. 1. The thing sold was money or funds on London. The bills were the instruments of transfer. Foreign exchange is an undertaking

by the drawer in one country that a person in another country shall pay money there at a stipulated time; and if the latter fail to pay, subjects the drawer to damages, in addition to the amount in the bill. It is a commodity which is bought and sold like merchandise. 2. The contract was a sale merely, and it cannot be held that the charge of $1\frac{1}{2}$ or $2\frac{1}{2}$ per cent beyond the cash price on a sale of exchange on credit in addition to interest was a device to cover usury. There was no usury, although the commission formed a part of the original agreement and was included in the first certificate. The renewals did not affect the original sale. Decree for plaintiffs for contract price of the bills with interest.

Cited: 4 N. Y. 368; 15 id. 242; 4 Sandf. Ch. 300.

DOWNES v PHOENIX BANK (1844) 6 Hill 297.

Assumpsit, to recover a deposit. Suit was commenced by an attachment. Plea: non-assumpsit. Defendant was a foreign bank, in which plaintiff was a depositor. Defendant's clerk wrote up plaintiff's book, showing the amount to his credit. There was no demand before suit was commenced, and there was no evidence of the plaintiff's residence. Motion for a nonsuit. Motion denied. Verdict for plaintiff. Motion for a new trial.

Bronson, J. 1. After appearing and pleading in bar, it was too late to raise the objection that the suit was not properly commenced. 2. A demand should have been made by the depositor, before he sued for the deposit. 3. The balance struck, as shown by the plaintiff's bank book, was no evidence of a change of the contract under which the money was received in deposit. New trial granted.

MATTER OF BANK OF DANVILLE (1844) 6 Hill 370.

To set aside election of directors of a bank. The bank was organized under the Banking Law of 1838 and the directors elected at the time fixed by its charter. There was a contest as to whether six of the directors were elected. Six others claimed their places.

Bronson, J. The court has no power to set aside the election. Motion denied. Cited: 5 Barb. 15; 1 Denio 15, 523; 3 N. Y. 486.

GAFFNEY v COLVILLE (1844) 6 Hill 567.

To enforce liability of a bank director. The declaration contained numerous counts, as follows: 1, That plaintiff was a stockholder in the bank; that defendant was a director and, with other directors, was wrongfully contriving to defraud plaintiff; that he unlawfully caused a dividend to be made to the stockholders out of the capital stock; 2, that defendant and the other directors did wrongfully withdraw and pay to the stockholders a portion of the capital stock of the bank, and did thereby reduce the capital stock; 3, that defendant unlawfully caused notes to be received and discounted by the bank, with the intent of enabling certain of the stockholders thereof to withdraw portions of the money paid in by them on their stock; 4, that defendant, with the other directors, wrongfully received stock of other corporations, in exchange for the shares, notes, bonds and other evidence of debt of the bank; 5, that defendant as a director, wrongfully loaned money and made discounts of the corporate funds of the bank to the directors, or on paper on which they were responsible, exceeding one-third of the capital stock of the bank actually paid in; 6, that defendant as a director, discounted large notes for stockholders, and thus enabled them to withdraw payments on stock; 7, that defendant made large loans to directors out of the bank's fund at a time when the loans on which such directors were responsible exceeded one third of the bank's capital. 1 R. S., ch. 589, sec. 1, provided that it shall not be lawful for the directors in any moneyed corporation, to make dividends except from the surplus profits; nor to divide or reduce the capital stock without legislative consent. Sec. 10 provides that every director who shall violate any provision of the preceding sections of this article, shall be liable personally to the creditors and stockholders to the full extent of any loss they may respectively have incurred from such violations. Demurrer to each count.

Bronson, J. 1. The acts complained of could not be done by a single director. In declaring against one director, therefore, it must be alleged that he had the concurrence of other directors. 2. Where a stockholder has received an illegal dividend, he is not concluded by that fact, unless he knew that the dividend was

made from capital, and not from surplus profits. 3. The count that the directors caused a dividend to be made was bad. 4. The third count should have been that the directors did the act. 5. It was the duty of the directors to inform themselves before they declared a dividend. Their ignorance can be no answer to the action. 6. The second count is not double. 7. Merely receiving a note, whatever might be the intent, could work no damage. Judgment for plaintiff, on the second count. Judgment for defendant, on the other counts.

Cited: 7 Barb. 195; 10 Bosw. 677; 67 Hun 338; 81 id. 190; 5 N. Y. 467; 154 id. 281.

DOWNER v MADISON COUNTY BANK (1844) 6 Hill 648.

Assumpsit, on promissory note. The note was made by V, to the order of W who, with R, indorsed it over to the plaintiff. Before maturity, the plaintiff left the note with the defendant for collection. Defendant sent it to the C Bank, where it was payable. Soon after the note fell due, it was returned by the C Bank with a notarial certificate annexed, stating that it had been protested and that notice had been given to the indorsers. The plaintiff sued R the second indorser, but judgment was given for defendant. The maker and first indorser were insolvent, but R was able to pay, if he had been duly charged. The court instructed the jury that the plaintiff was entitled to recover the costs and expenses in the R suit, besides the amount of the note with interest. Verdict for plaintiff. Motion for a new trial.

Bronson, J. 1. The only immediate or necessary damage which the plaintiff sustained by the breach was the loss of his debt. The defendant is not answerable for the remote consequences of its default, however injurious they may have been to the plaintiff. 2. New trial granted, unless the plaintiff consents to reduce the verdict to the amount of the note with interest.

Cited: 57 App. Div. 460; 11 Barb. 371; 13 id. 665; 19 id. 39, 395; 22 id. 287; 29 id. 640; 41 id. 349; 3 Lans. 280; 15 N. Y. 168.

SUPERVISORS v THE PEOPLE (1844) 7 Hill 504.

Mandamus. Defendants, the assessors, refused to assess the capital stock of an association doing a banking business. Relators, tax payers, commenced proceedings to compel such assessments. By statute a tax was levied upon all moneyed corporations, deriving an income from capital. The bank was organized under the General Banking Law. Judgment for relator. Error.

Porter, J. Associations organized under the General Banking Law are corporations, and are subject to taxation on their capital stock. Judgment affirmed.

Cited: 5 Barb. 11, 15; 30 id. 369; 1 Denio 16, 18; 2 id. 387; 52 Hun. 442; 3 N. Y. 485; 7 id. 340; 15 id. 183, 187; 17 id. 527; 133 id. 284.

POTTER v BANK OF ITHACA (1844) 7 Hill 530.

On promissory note. The note was made by the defendant, and discounted by the cashier of the plaintiff, while in New York City. The cashier was acting for the plaintiff in securing a demand then due, and entered the transaction in the plaintiff's books upon his return. The plaintiff's charter limited its operations of discounting to the village of Ithaca. Judgment for plaintiff. Error.

Sherman, S. The transaction was not a violation of the plaintiff's charter, and the bank may recover. Judgment affirmed.

COMSTOCK v WILLOUGHBY (1844) Lalor's Supp. 271.

Debt, on a bond. The defendant being about to establish a banking institution under the law of 1838, obtained state stock, for the purpose of depositing it with the comptroller as security for an issue of notes. An arrangement was made with plaintiff as president of the M Bank, and P & Co., whereby defendant agreed to give the M Bank his bond and mortgage for said stock; the M Bank at the same time agreeing to issue to P & Co. its stock in exchange for the state stock when organized. Defendant set up violation of the charter powers of the M Bank in making a loan or exchange of stocks; and illegality of consideration. Judgment for plaintiff. Appeal.

Beardsley, J. 1. An institution organized under the General Banking Act, may acquire title to stocks, for the purpose of transferring them to the comptroller as

security for circulating notes. 2. The bank was authorized to increase its capital and number of associates whenever it saw fit. 3. There is nothing illegal or contrary to the policy of the General Banking Act in the transaction. Judgment affirmed.

BANK OF LYONS v DEMMON (1844) Lalor's Supp. 398.

On a promissory note. The defendant was induced to purchase stock in the plaintiff by reason of a representation made by an officer thereof, that he could return the stock and take up the note given in payment, whenever he might elect. The defendant subsequently returned the stock and demanded the return of the note, which was refused. A receiver was thereafter appointed for the bank, and he brought suit on the note. Verdict for plaintiff. Motion for new trial.

Beardsley, J. 1. The bank, by suing on the note, affirmed the transaction. The suit was properly brought in the name of the bank. 2. While the parol evidence of the agreement could not be received to vary the written instrument, yet proof of its execution would operate as an accord and satisfaction. The receiver was not a bona fide purchaser. 3. A corporation may act by its agents, and is bound by their acts without any formal resolution defining their powers. A contract may be implied against a corporation; it may affirm the acts of an assumed agent, and become bound by them. New trial ordered.

Cited: 2 T. & C. 655.

LEAVITT v STANTON (1844) Lalor's Supp. 413.

Assumpsit to recover balance on deposit. Plaintiff was president of the A Bank, and defendant was president of the E Bank. Defendant, by way of setoff, gave in evidence a draft on the E Bank, drawn by the A Bank in favor of R, the same having been paid by defendant. This draft turned out to be a forgery. Defendant alleged negligence on the part of the plaintiff, and offered to prove knowledge of forgery by plaintiff, and that genuine checks had previously been drawn by plaintiff in favor of R, and paid by defendant. Judgment for plaintiff. Motion for new trial.

Nelson, C. J. The facts offered to be proved fell short of gross carelessness, which should be established. New trial denied.

DEBOW v PEOPLE (1845) 1 Denio 9.

Indictment for passing forged bank notes. One of the counts charged that the defendant intended to defraud the Bank of N, an association organized under the Banking Law of 1838. The act was passed by less than a two-thirds vote of the members of the legislature. The defendant contended that the act of incorporation was unconstitutional and void; that the bank was not in existence; and that it could not therefore be defrauded. Verdict for the People. Appeal.

Bronson, C. J. 1. The assent of two-thirds of the members of the legislature is requisite to every bill creating a corporation. 2. The constitution applies to all kinds of corporations. Associations formed under the General Banking Laws are corporations. 3. The assent of two-thirds of the members of the house not having been obtained, the act is utterly void, and companies organized thereunder have no legal existence. Judgment reversed.

Cited: 2 Denio 101; 30 Hun 121; 3 N. Y. 485; 25 id. 387; 33 id. 281; 1 N. Y. Cr. 224; 5 Park 298. Overruled in part, 2 Denio 380.

GILLETT v CAMPBELL (1845) 1 Denio 520.

On promissory note. Plea, failure of consideration. The defendant made a note in favor of the S Bank, to cover the interest due on a mortgage held by it. The defendant proved that the plaintiff had assigned the mortgage to the C Bank, before the note was made. The plaintiff objected to the evidence, on the ground that the president and cashier had no authority by the by-laws to make and execute an assignment. R. S. 591, sec. 8, provided that no assignment could be made unless authorized by a previous resolution of the board of directors. Non-suit. Motion for new trial.

Bronson, C. J. 1. On proof of the assignment of the mortgage there was no consideration for the note. 2. The instrument without a seal, though not sufficient to convey a fee, was good as an assignment of the mortgage debt. 3. The corporation is liable for acts of its agents within the scope of their general power,

and the assignment was for the legitimate purposes of the bank. 4. The official signatures of the president and the cashier, furnish presumptive evidence that the contract was made by the association. 5 R. S. 591, sec. 8, does not apply, as no provision was made in the charter for a board of directors. New trial denied.

Cited: 3 Barb. 229; 5 id. 187; 6 id. 335; 12 id. 200; 20 id. 163; 33 id. 339; 36 id. 401; 3 N. Y. 248, 486; 15 id. 47, 133; 17 id. 532, 548; 47 id. 312; 116 id. 200.

WATERVLIET BANK v WHITE (1845) 1 Denio 608.

On promissory note, against maker. The note was payable to the order of W, at plaintiff's bank. It was indorsed in blank by W and O, and had a special indorsement, "pay to O, cashier or order. K, cashier." O was cashier of the plaintiff, and K cashier of the F Bank. The note was for the accommodation of W and O, discounted by the F Bank, and sent to plaintiff for collection. Plaintiff charged the note to defendant's account and paid it to the holder, and put its canceling mark upon it, which denoted only that it had been charged. The account was insufficient to meet the note. Judgment for defendant, on report of referee. Motion to set aside report.

Jewett, J. 1. The note was not in fact paid to either of the banks by the maker or either of the indorsers. 2. It was not paid or canceled as between the parties. 3. Plaintiff took it as a purchase from the F Bank and was entitled to the same remedies which the holder had. 4. The first indorsement was in blank and the note passed by delivery afterward; the subsequent indorsement in full did not prevent its further transference. 5. A transfer to O, cashier, was a transfer to the bank. Motion granted.

Cited: 3 Barb. 528; 24 id. 562, 567; 31 id. 188, 193; 38 id. 315; 41 id. 593; 11 N. Y. 202; 13 id. 317; 19 id. 319; 36 id. 338; 50 id. 401.

GIFFORD v LIVINGSTON (1845) 2 Denio 380.

Assumpsit against the maker of a note. Plaintiff was president of the payee bank which was organized under the General Banking Act of April 18, 1838. Defendant demurred setting up that the note was payable to the bank. He also contended that the act was unconstitutional in that it did not receive the two-thirds assent of each branch of the legislature; and that the General Banking Law was an act creating a body corporate, within the meaning of the provision of the constitution requiring a two-thirds assent to the act. Demurrer sustained. Judgment for defendant. Appeal.

Walworth, C. 1. The act is constitutional. 2. The two-thirds provision is not intended to apply to such general legislation. Judgment reversed.

Cited: 5 Barb. 11, 187; 9 id. 87; 17 id. 34, 334; 3 N. Y. 485; 5 id. 393; 10 id. 305; 15 id. 183; 25 id. 387; 133 id. 86, 284.

BANK OF VERGENNES v WARREN (1845) 7 Hill 91.

Replevin, for a crop. Plaintiff obtained a judgment against M, subsequent to one obtained by the F Bank. The F Bank bought in the land on which a crop was growing. Plaintiff bought the F Bank's interest in the land, from its cashier under a sealed instrument, and obtained a sheriff's deed. The certificate attached to plaintiffs' judgment was not sworn to before a proper officer, and there was no vote authorizing the cashier of the F Bank to sell. Prior to the issuance of the sheriff's deed, the defendant's assignor recovered a judgment against M, and took the crops. Defendant contended that plaintiff did not obtain title, because of the invalid certificate and because the board of directors had not authorized the sale. Nonsuit. Motion for a new trial.

Bronson, J. 1. The plaintiff acquired the title held by the F Bank. 2. A person is not required to go to the board of directors, in order to buy property of a bank. New trial granted.

Cited: 13 Abb. N. C. 368; 9 Barb. 25, 31, 200; 33 id. 339; 64 id. 557; 3 Denio 256; 4 id. 147, 484; 7 Lans. 351, 403; 1 N. Y. 292; 4 id. 560; 10 id. 66; 15 id. 194, 531; 45 id. 378; 47 id. 311; 65 id. 577; 67 id. 282; 85 id. 193; 116 id. 200.

DYKERS v LEATHER MANUFACTURERS BANK (1845) 11 Paige Ch. 612.

On check. S gave P a check on defendant, asking him not to present it immediately. P presented the check to the defendant bank, and the teller paid it. On the same day S gave plaintiff a check, and deposited money with defendant to make it good. He also drew several other checks for which, exclusive of the P check, he had sufficient on deposit. Hearing then that P's check had been paid, S ordered payment on the others stopped. Plaintiff's check and the other checks were then presented and payment was refused. S drew out all of his deposit and divided it among all the checkholders except the plaintiff, ratably. Decree for defendant. Appeal.

Walworth, C. The drawing a check upon a bank is not a specific appropriation of the funds of the borrower to the payment of that particular debt. The drawer might countermand the payment at any time before his draft was actually paid or accepted. The plaintiff was not entitled to any preference over other creditors. Decree affirmed.

SWIFT v BEERS (1846) 3 Denio 70.

On promissory note. The N Banking Co. organized under the general banking laws, made its promissory note for sixty days, at 7 per cent interest, in favor of the plaintiff. Defendant guaranteed its payment. By the Act of 1840, such institutions were prohibited from making any promissory notes not payable on demand without interest. Nonsuit. Motion for new trial.

Bronson, C. J. 1. The note is directly within the terms of the prohibition of the act. 2. The guaranty partakes of the nature of the principal contract, and is also void. New trial denied.

Cited: 3 Barb. 226; 5 id. 28; 8 id. 438; 17 id. 386; 26 id. 602; 35 id. 249; 36 id. 216; 3 N. Y. 34; 15 id. 225, 274; 17 id. 539.

SAGORY v DUBOIS (1846) 3 Sandf. Ch. 465.

To compel stockholder to pay balance on stock subscription. The defendant, with D and six others, formed a bank, on October 10, 1838, under the Act of April 18, 1838. The association was called "The New York Banking Company." Articles were filed and the certificate was recorded in the county clerk's office of New York County and filed in the office of the Secretary of State on November 3, 1838. Seven directors of whom the defendant was one were named in the articles. Seven instalments were called for, and three dividends were declared and credited as payments on the stock. The defendant paid half the nominal amount of his subscription. The company suspended and the plaintiff was appointed receiver. The losses were known to the directors before the last dividend was declared.

Sandford, V. Ch. 1. The associations organized in pursuant to the act, are corporations and as such are liable to the provisions of law in respect to moneyed corporations. 2. The receiver had the right to bring this action. 3. Defendant cannot accept the franchises conferred, and repudiate the terms and conditions with which the legislature accompanied them. 4. One who subscribes for shares in an incorporated banking company, thereby becomes liable to pay the amount of such share to the company or its receiver. 5. The credit which the defendant received for the amount of the third dividend not having been earned, is not to be regarded as a payment of such amount, and the same is still due on his subscriptions. Decree for complainant.

Cited: 3 Sandf. 104; 17 Barb. 576; 27 id. 334; 7 Bosw. 121; 17 Hun 438; 28 id. 137; 3 N. Y. 485; 26 id. 145; 159 N. Y. 275.

AUSTIN v DANIELS (1847) 4 Denio 299.

Money had and received. The defendant, a cashier, and H, president of the C Bank, in establishing a new bank, bought state stock on credit of the C Bank, and pledged the responsibility of the C Bank therefor. The defendant signed the contract as cashier. To pay for this stock, money was taken from the C Bank with the president's assent, and applied toward the purchase price. The C Bank becoming insolvent, a receiver was appointed, who sued to recover the balance of the defendant's individual account, for the purpose of applying the same in payment of losses sustained by the above transactions. Finding for plaintiff. Motion to set aside referee's report.

Beardsley, J. 1. The C Bank had no power to deal in state stock, and the president and cashier could not pledge its responsibility for their individual engagement. 2. The assent of the president was no excuse for the defendant. 3. Officers are not agents of the corporation, and if they abuse their power, they are responsible to their principal. Motion denied.

Cited: 44 App. Div. 197; 10 Bosw. 692; 17 Misc. 210; 82 N. Y. 79; 86 id. 45; 125 id. 80.

ECHARTE v CLARK (1847) 2 Edm. Sel. Cas. 445.

On drafts. The plaintiff, the owner of the drafts payable in St. Louis, left them with S & Co., bankers in New York, for collection. S & Co. transmitted them to the defendants, their correspondents in St. Louis. The money was paid and defendants credited it to S & Co. in general account, but in no other manner accounted for it. Plaintiff never received any payment on the drafts.

Edmonds, J. 1. The defendants were the agents of the plaintiff, and were directly responsible to him for negligence in collecting and for the money when collected. 2. The crediting of S & Co. with the amount, is not such a paying over as to exempt the agents from their liability to the real owners. Judgment for plaintiff.

TAYLOR v BRUEN (1847) 2 Barb. Ch. 301.

Injunction. The defendant was the president and agent of the C Bank of New Jersey and as such attended at places in New York City with funds of that bank to discount notes for its benefit. The plaintiff made his note payable to C & Co., and it was indorsed by them as accommodation indorsers and discounted in the City of New York by the defendant with funds of the C Bank. The defendant brought suit on the note in his own name. Plaintiff filed this bill to obtain a discovery from the defendant of his alleged violation of the restraining law, to aid the plaintiff and his indorsers in their defense at law upon the note, and for an injunction to restrain the proceedings in the suit at law until such discovery be had. Injunction granted. Order denying motion to dissolve injunction. Appeal.

Walworth, Ch. 1. The discounting of this note was in violation of the provisions of the laws of this state against unauthorized banking, and the defendant has rendered himself personally liable to the penalty prescribed thereby (1 R. S. 712). 2. He is not bound to disclose any facts tending to show that he has been guilty of an act which can subject him to a penalty. Order reversed and injunction dissolved.

Cited: 2 Abb. N. C. 159; 5 id. 171; 7 Daly 245; 44 Supr. 312.

HENRY v BANK OF SALINA (1847) 1 N. Y. 83.

On promissory note, against H, as surety, and P, as principal. P's counsel stated that the note had been presented by P to plaintiff bank for discount, but had been refused. The plaintiff's teller, knowing that fact, subsequently discounted it, paying only part value by corrupt agreement with one of the defendants. The teller was excused from testifying on the ground that his evidence might make him liable for misdemeanor; and that by statute he would make himself liable to a forfeiture for discounting a bill which had previously been presented and refused. Motion for new trial denied. Judgment for plaintiff. Error.

Bronson, J. 1. A witness is not bound to speak where the answer may subject him to anything in the nature of a forfeiture of his estate or interest. 2. A party is not at liberty to start a question, on a motion for a new trial or in a court of review, which might have received a satisfactory answer on the trial. Judgment affirmed.

Cited: 11 Barb. 109, 211; 36 id. 215; 54 id. 527; 3 Daly, 9; 12 id. 40; 6 Hun 289; 27 id. 250; 38 id. 551; 38 N. Y. 186; 7 Robt. 585.

COGILL v AMERICAN EXCHANGE BANK (1847) 1 N. Y. 113.

Money had and received on a bill upon which the name of the payee had been forged. S and B were partners. B drew a bill in the firm name on the plaintiff, payable to T, whose name he forged as indorser. The C Bank discounted it, knowing nothing of the forgery. Subsequently the C Bank sent the bill to defendant bank for collection, which was accepted and paid at maturity by plaintiff. B absconded. Learning of the forgery, plaintiff brought the action. The judge

charged that plaintiff was not entitled to recover. Judgment for defendants. Error.

Bronson, J. 1. The C Bank acquired good title to the bill. 2. S and B affirmed that the indorsement of the payee was genuine. 3. A bona fide holder may treat a bill, put into circulation by the drawer with a forged indorsement upon it, as payable to bearer. 4. The drawing and negotiating of the bill by one partner was in effect the act of both. Judgment affirmed.

Cited: 34 Barb. 211; 7 Daly 140; 16 id. 73; 53 Hun. 365; 11 N. Y. 405; 15 id. 576; 40 id. 462; 41 id. 475; 140 id. 560; 159 id. 436, 459; 38 Supr. 425; 1 Sweeny 72; 2 id. 695.

ARNOLD v CLARK (1848) 1 Sandf. 491.

Money had and received. S & Co. sent to the defendants, a New Orleans Bank, notes and bills of exchange for collection, and drew on them sight and time drafts. These transactions were entered by each party in "Account No. 1." The defendants in like manner, forwarded to S & Co. sight and time drafts for collection or sale and drew on them. These transactions were entered by each party under "Account No. 2." Plaintiffs placed the note in question in the hands of S & Co. for collection, who indorsed it in blank and mailed it to the defendants for collection. Defendants received and collected it, and on the same day transferred the amount from account No. 1 to account No. 2 to the credit of S & Co., who failed a few days after. The balance was against S & Co., and the defendant claimed the right to hold this money.

Sandford, J. 1. The defendants were sub-agents of the plaintiffs' agents; and having received the money without any consideration, which entitled them to retain it against the real owners, they must restore it to the latter. 2. Banks and bankers, merely by their custom of crediting each other with the avails of notes and bills collected, cannot affect the right of owners of such notes and bills, who have lodged them with the remitting bank for collection. Judgment for plaintiff.

Cited: 9 Bosw. 343.

GODDARD v MERCHANTS BANK (1848) 2 Sandf. 247.

Assumpsit, to recover the amount of a forged draft paid to the defendant. It purported to be drawn by H, cashier of the C Bank, upon the A Bank, payable to the order of M, who took the draft to the R Bank, and, being identified, got it cashed. The draft was forwarded through various banks to the defendant, which presented it to the drawee, where payment was refused and protest made. The plaintiffs learned of the protest and intervened for the honor of the drawer, for whom they were agents and paid it. The defendant passed the payment to the credit of the bank from whom it received the draft. The forgery was discovered and notice given to the defendant, before the amount was paid to its correspondent. Judgment for plaintiff, subject to the opinion of the court.

Vanderpoel, J. 1. Money paid under a mistake of fact can be recovered back, in an action for money had and received. 2. The act of the plaintiffs in paying the bill is sanctioned by commercial law. Plaintiffs used due diligence when the forgery was discovered in giving notice. Judgment affirmed.

Affirmed: 4 N. Y. 147.

TYLEE v YATES (1848) 3 Barb. 222.

On non-negotiable note against maker, payable to the N Trust Co., to pay interest on defendant's bond and mortgage held by the company. The note was assigned with others to Y to secure the payment of post notes issued by the Trust Co. The post notes were void. Defendant's bond and mortgage had been assigned to persons not parties to this suit. The parties stipulated that no objection should be made on the trial to the right of the plaintiffs to prosecute the note, declared on in their own names, with the like effect as if the same had been negotiable, with liberty to the defendant to make any setoff to the same that he could, if the same had been sued in the name of the Trust Company. The defendant gave evidence tending to establish a claim against the Trust Company which would be a setoff against the note in their hands. The court below ruled that the assignment was valid and transferred to the plaintiffs a good title to the note, and that as defendant neglected to give notice of any setoff, or defense, when the transfer was made, he was estopped from making any setoff or setting up any defense that existed at the time of the transfer. Verdict for plaintiff. Error.

Sill, J. 1. A party who sees his obligation transferred to a bona fide purchaser for a valuable consideration, without giving notice of any defense or set-off which he may claim against it, is estopped from setting up any against such purchaser. 2. The assignment of securities as collateral for void notes was also void, and under it no title whatever was obtained to the note upon which the suit was brought. Judgment reversed.

Cited: 17 Barb. 404; 26 id. 602; 28 id. 49; 36 id. 216; 62 id. 407; 3 N. Y. 34; 15 id. 293; 55 N. Y. 623.

WRIGHT v BOYD (1848) 3 Barb. 523.

On draft against the acceptor. The drafts were drawn in favor of L, cashier of W's bank, and discounted by the bank. There was a special indorsement on them directing the payment to the plaintiff, a new banking house, and the indorsement was signed by L, as cashier. The indorsement directed the amount, if collected, to be credited to W's bank, and not otherwise. The court, against objection, allowed the special indorsement to be stricken out. The defense was that plaintiff was not payee or indorsee, and that the drafts varied from the copies attached to the declaration, and could not be introduced in evidence. Judgment for plaintiff. Motion for new trial.

Gridley, J. 1. There was no objection to striking out the special indorsement made for the purpose of collection. 2. Defendant could not be misled by any omissions in copies of the drafts attached to the declaration. 3. The drafts being drawn in favor of L, as cashier, were in law in favor of the bank. They were made to transfer to the new association, with an indorsement which was a guaranty of collection, and it had a right to prosecute this action in its own name. Motion denied.

Cited: 9 N. Y. 174; 19 id. 319.

LEAVITT v BLATCHFORD (1848) 5 Barb. 9.

Bill, to cancel notes and a trust deed made in the name of the N Co. of which plaintiff was receiver. The N Co., in order to purchase 5,000 shares of its own stock, drew bills on P & Co., which were accepted and twice renewed. After the second renewal it was agreed that certificates of deposit for the amount of the bills should be given to P & Co., payable twelve months after date. Instead, however, promissory notes payable in twelve months, signed by the president and cashier of the N Co. were given. At the same time a deed of trust was executed which recited that the credit was created for the exclusive benefit of the N Co.; that the N Co. had assigned certain securities in trust to the defendant, attorney in fact of P & Co., and M, and had delivered to P & Co. certificates of deposit. The deed provided that the defendant and M should hold the securities so assigned until the whole of the said certificates of deposit and the renewals thereof were paid. In case of default on the part of the N Co., it was provided that the trustee should stand possessed of the securities so assigned for the holders of the certificates, and should proceed to realize the money and pay them to P & Co. The N Co. became insolvent and its receiver, the plaintiff, asks to have the notes set aside on the ground of illegality.

Edwards, J. 1. The general laws in reference to moneyed corporations apply to banking associations. 2. The notes were void by the provisions of the statute. 3. A banking association has the power to borrow money. Decree for plaintiff declaring notes invalid.

Cited: 20 App. Div. 205; 8 Barb. 230, 237; 39 id. 614; 2 Hun. 594; 15 N. Y. 191, 219; 21 id. 408; 3 Sandf. 146.

SWARTWOUT v MECHANICS BANK (1848) 5 Denio 555.

Assumpsit, for the balance of a bank account. The plaintiff was collector of the customs from October 1, 1833, to November 1, 1838. During that period he kept a bank account with defendant in the name of S, collector. On November 1, 1838, the account showed a credit balance of \$751. The deposits on this account were very frequent and in large amounts. The plaintiff also kept another account with the defendant in the name of S in which the deposits were small. The latter account was balanced in 1838. In 1844, the plaintiff's interest in the balance of the former account having been assigned to J, he presented a check, signed "S, late collector," which defendant refused to pay. The defendant claimed the right to

apply toward the amount due to defendant from the government, the balance to the credit of S, collector, assuming that it belonged to the United States. The referee reported in favor of plaintiff. Motion to set aside the report.

Whittlesey, J. 1. The defendant, to protect itself from payment to the plaintiff, must show that by its account so kept, it is liable to pay the United States the balance. 2. It must be assumed that this deposit was, like any other one, liable to be drawn only by the depositor. 3. A mere deposit by a collector in his own name with his official addition, is no accounting for the money received by him in his official capacity. Motion denied.

Cited: 24 N. Y. 428.

MERCHANTS BANK v MCINTYRE (1849) 2 Sandf. 431.

Money had and received. The M Bank delivered to H, a draft on plaintiff, as follows: "At sight pay this, my first check, second unpaid, to the order of H," H indorsed the draft to G, who never received it. One month later defendants received the draft indorsed with G's name, payable to their order, with instructions to make certain purchases after deducting their commissions. The plaintiff paid the draft to defendants. Subsequently H inclosed the duplicate draft to G, who delivered it to the D Bank for collection. It was duly presented to plaintiff and paid. After plaintiff paid the second draft, it called upon defendants to repay the amount of the first draft, which was refused.

Oakley, C. J. 1. Having no information to the contrary, the plaintiff dealt with the defendant as owner of the draft. 2. Where one presents a draft or check to a bank for payment, the party presenting it, will be held responsible to the drawee for the authenticity of the signature. Judgment for plaintiff.

PALMER v YATES (1849) 3 Sandf. 137.

Foreclosure of mortgage. The defendant, a director of the A Bank, gave the mortgage to the bank in consideration of shares of its capital stock. This bond and mortgage with other securities were assigned by the bank to trustees to secure a bond issue made by it. These securities were afterward assigned by the trustees to the plaintiff, a special receiver of the bank. By the bank's articles of association, its directors, as a board, were empowered to make rules and regulations for its business, not inconsistent with law and the articles of association; the business to be conducted under two divisions, the first to embrace dealings in bonds, mortgages, and securities; and the second, banking business, strictly so called. A separate committee of the directors had exclusive charge of each division. The finance committee of the first department authorized the bond issue and directed the president to transfer the mortgages and other securities to the trustees. The resolution authorizing the assignment was passed after the assignment. 1 R. S. 591, sec. 8, provided that no conveyance, assignment or transfer, not authorized by a previous resolution of its board of directors, should be made "of any of its effects." The defendant contended that under the statute the title set up through the trustees was invalid.

Duer, J. 1. The bank had authority to make the assignment to the trustees. 2. A bank director is presumed to have knowledge of the lawful transactions of the bank. 3. The by-laws were not inconsistent with law. 4. There was a sufficient compliance with the statute. Decree for plaintiff.

PALMER v LAWRENCE (1849) 3 Sandf. 161.

Foreclosure of a mortgage, by the receiver of a bank. On the organization of the bank H subscribed for shares. Before he paid for the stock he sold it to the defendant. It was agreed between all the parties that the defendant should execute a mortgage direct to the bank instead of paying H. The defendant claimed that he was not responsible to the bank; and that the organization was illegal because the capital named in the certificate had not been paid at the time of filing the certificate, although it had been subscribed. Transferred to this court by virtue of an Act of the legislature of March 24, 1849, before decision.

Duer, J. 1. When the bank permitted H to transfer his shares, it released him from personal liability and accepted the bond and mortgage of the defendant in satisfaction of the debt. This was a novation, and the original debt was a just and valid consideration for the new promise. 2. The defendant and those claiming under him are estopped from denying the corporate existence of the bank with

which he contracted. The certificate filed by the bank was in exact conformity to the terms of the statute, and is evidence of the truth of the facts which it recites. Decree for plaintiff.

Cited: 16 Barb. 287; 17 id. 574; 21 id. 64; 25 id. 241; 27 id. 334; 29 id. 311; 42 id. 654; 66 id. 114; 4 Bosw. 600; 5 Duer 677; 6 id. 181; 6 Hun 72; 25 N. Y. 209; 108 id. 254; 38 Supr. 564; 3 T. & C. 308.

WHITE v SPRINGFIELD BANK (1849) 3 Sandf. 222.

To cancel a note. Plaintiffs had accepted and paid bills for the accommodation of H & L, and delivered the notes to L to discount and remit the avails to meet the amount of the drafts paid. The defendant bank refusing to discount it, L delivered the note indorsed by H & L to the bank, receiving from it a draft drawn by H & L on the plaintiffs, but not accepted by them, which the bank had discounted for H & L. When the bank gave up this draft, it held certain promissory notes as collateral security for unaccepted drafts only, and it afterward discounted other drafts for H & L which were not accepted. The bank had no notice of the plaintiffs' claim.

Duer, J. The bank parted with value upon the faith of the title which it acquired to the note in controversy, and whether this value was parted with at the time the note was accepted, or at any subsequent period before notice of the plaintiffs' claim, is immaterial. Decree for defendant.

Cited: 18 Barb. 192; 24 id. 562; 43 id. 24, 392; 1 Bosw. 237; 3 id. 97; 5 id. 199; 1 Duer 362; 5 id. 269; 12 N. Y. 555; 31 id. 114; 5 Sandf. 10; 36 Supr. 279.

LEAVITT v PALMER (1849) 3 N. Y. 19.

Bill to cancel notes and an assignment of securities in trust to secure the same. The complainant was the receiver of an insolvent bank, which had, in March, 1840, in order to raise money to buy its own stock, given D a letter of credit on defendants, bankers in London, for which D was to draw bills on defendants at ninety days' sight, to be covered by him at maturity, but with a right of renewal. These bills were twice renewed, and in November, 1840, the bank made forty-eight negotiable promissory notes, payable one year after date with interest, and delivered them to defendants on account of the liability on the letter of credit. To secure payment of these notes, the bank executed a trust deed and assigned securities in trust. Decreed that the notes were void, but that the trust deed and assignment of securities were valid. Appeal.

Bronson, J. 1. The promissory notes are void because in violation of the Act of May 14, 1840, forbidding banking associations to issue bills or notes unless payable on demand without interest. 2. The trust deed and assignment are illegal because given solely to secure the illegal notes and as part of the same transaction. Decree modified.

Cited: 5 Abb. N. C. 255; 31 App. Div. 206; 8 Barb. 237; 14 id. 362; 17 id. 319, 340, 386; 26 id. 602; 37 id. 348; 40 id. 441; 67 id. 410; 10 Daly 514; 2 Hun 594; 4 Lans. 244; 4 N. Y. 392; 7 id. 515; 9 id. 150; 10 id. 308; 13 id. 119; 14 id. 178; 15 id. 101, 102, 103, 151, 155, 179, 180, 219, 220, 224, 225, 231, 232, 243, 263, 272, 274, 293, 296; 16 id. 514; 17 id. 539; 21 id. 495; 22 id. 302; 40 id. 178; 44 id. 91, 92, 93; 60 id. 268; 2 Robt. 494; 6 id. 77; 3 Sandf. 146; 51 Supr. 392; 2 Sweeny 223; 5 T. & C. 145.

NEW HOPE AND DELAWARE B. CO. v PHOENIX BANK (1849) 3 N. Y. 156.

Assumpsit. The plaintiff was incorporated in New Jersey to build and maintain a bridge, with power to enlarge its capital by subscription and to dispose of surplus money at pleasure. Under the latter clause it engaged in banking business. D, the cashier of defendant bank, was one of the plaintiff's managers, and on June 30, 1835, loaned a large sum of money to defendant. The next day he notified plaintiff's cashier of the loan, and the latter replied, approving his action. On November 26, 1835, the managers of the plaintiff appointed a committee, including D, with power to look after the company's interest in New York; in November, 1836, another committee, including D, was appointed to invest the company's funds. This action charged defendant with permitting the funds of the plaintiff company to be withdrawn from the bank and loaned without authority. Judgment for defendant. Error.

Ruggles, J. 1. The cashier of a banking company is its agent in its ordinary business, and the notice of this loan to the plaintiff's cashier was notice to the company. 2. Since no objection was made when the managers twice took action in relation to the business in New York, the defendant was discharged from liability by a ratification and adoption of the act of D. Judgment affirmed.

Cited: 4 Bosw. 442; 29 N. Y. 560; 80 id. 169; 96 id. 558.

CUYLER v SANFORD (1850) 8 Barb. 225.

On promissory note against maker and indorsers. Plaintiffs carried on a banking business. At the time at which the note in suit was discounted by plaintiffs, they sold defendant a draft therefor, on which they charged a premium. Defenses: illegal consideration and usury. The Act of 1835, prohibiting corporations from selling drafts to pay notes discounted by them, was claimed to be applicable to plaintiffs. Nonsuit directed. Motion for new trial.

Welles, J. 1. The proof does not legally establish that the first note was void, since it did not show that the plaintiffs had not the right to issue circulating notes. Defendant's proposition that the note was given under such circumstances as to render the transaction illegal, was an affirmative one, and the onus probandi was upon him. 2. Sec. 1, ch. 307, session laws of 1835, applies only to moneyed corporations and not to individual bankers. 3. There was no evidence that the premium charged was unreasonable or exorbitant or was made a cover for usury. New trial granted.

Cited: 21 N. Y. 408.

VAN AMEE v BANK OF TROY (1850) 8 Barb. 312.

Trover, for the value of a note. Plaintiffs alleged that the note was endorsed by them and delivered to the C Bank solely for collection; that the C Bank delivered it to the defendants for the same purpose; and that thereafter the C Bank failed, and a receiver was appointed through whom a demand had been made. Defendant set up an agreement and practice between the C Bank and themselves, by which they mutually remitted notes, which were credited and a balance struck each Monday; and sought to setoff against the note, a balance due from the C Bank.

Hand, J. Defendants received the note for collection merely and they cannot, as against the owner, retain the note as having a lien thereon for an unpaid balance due them from the C Bank, in the absence of an express agreement providing for such a lien. Judgment for plaintiffs.

Cited: 25 Hun. 106; 26 N. Y. 455.

BANK COMMISSIONERS v ST. LAWRENCE BANK (1850) 8 Barb. 436.

To determine legality of claim. The defendant, being embarrassed, authorized V and R, its president and cashier, to raise money to redeem its circulating notes. They purchased state stocks, and gave therefor what purported to be defendant's notes signed by themselves as president and cashier. The notes were protested and paid by V at the bank's request. V acted as the bank's agent. Defendant became insolvent, and the referee appointed to determine the claims of creditors, reported in favor of V's claim. Judgment for V. Exception. Disallowed. Motion for rehearing. Granted.

Cady, J. V acted as agent of the bank in giving the notes, and by paying them he became entitled to reimbursement by the bank. Affirmed.

Cited: 7 N. Y. 513.

BANK OF COMMERCE v UNION BANK (1850) 3 N. Y. 230.

Assumpsit, for money paid by mistake. The N Bank drew a draft on plaintiff payable to the order of "J. Durand" for \$105. It was afterward altered so that it appeared to be a draft for \$1005 to the order of "J. Bonnet," and in this condition and bearing the indorsement of "J. Bonnet," it was sent to defendant for collection by the S Bank. Plaintiff, on the draft being presented by the defendant, paid it to the latter. Thereafter the plaintiff learned of the alteration. The defendant refused to refund the money on demand by the plaintiff. Judgment for plaintiff. Appeal.

Ruggles, J. The defendant obtained the money of the plaintiff without right and on the exhibition of a forged title as genuine. The rule that the drawee is

bound to know the handwriting of the drawer applies only to the signature and not to the body of a bill. Judgment affirmed.

Cited: 36 App. Div. 116; 55 Barb. 90; 62 id. 105; 1 Daly 148; 16 id. 73; 59 Hun. 498; 76 id. 475; 77 id. 598; 5 Lans. 396; 6 Misc. 62; 22 id. 724, 728; 10 N. Y. 75, 83; 38 id. 310; 40 id. 380, 395, 396, 400; 46 id. 81; 59 id. 77; 64 id. 319, 323; 67 id. 463; 91 id. 116; 100 id. 54; 118 id. 473; 5 Robt. 468, 585; 15 id. 634; 18 id. 827; 37 Supr. 149.

DRY DOCK BANK v AMERICAN LIFE INS. TRUST CO. (1850) 3 N. Y. 344.

Bill, to cancel a trust deed and bills of credit, on the ground of usury. By agreement the defendant was to deliver to the complainant its certificates of deposit for 48,000 pounds, payable in London with interest at 5 per cent. Complainant was to deliver in exchange its bills of credit for 50,000 pounds payable to defendant three years later, at five dollars to the pound, with interest at 6 per cent. A deed of trust of real estate worth double the amount, was given by the complainant to secure the bills of credit, each of which recited that its amount was part of a loan of 50,000 pounds. The true value of the pound sterling was \$4.87, and the cost of remitting to London 2 per cent. The understood object of the agreement was to enable the complainant to resume payment. The certificates of the defendant brought less than par. A decree declaring the bills usurious and the deed void was reversed by the supreme court. Appeal.

Gardiner, J. Under color of an exchange or sale of securities the object of these parties was a loan in which the defendant's certificates were received in lieu of money, and for the forbearance of the debt thus created one party was to secure, and the other ultimately to receive, more than the legal rate of interest. The bills of credit and trust deed are consequently void. Decree reversed.

Cited: 26 App. Div. 318; 56 id. 292; 11 Barb. 78; 14 id. 147; 28 id. 510; 30 id. 630; 34 id. 167; 4 Bosw. 331, 351; 7 Hun. 254; 2 Lans. 418; 4 N. Y. 374, 472, 475, 477; 5 id. 317; 7 id. 368; 14 id. 115, 119, 137; 25 id. 276; 27 id. 142; 31 id. 615, 616, 617, 622, 629; 37 id. 448; 62 id. 347.

GILLET v MOODY (1850) 3 N. Y. 479.

Bill, to annul agreement. Complainant was the receiver of the S Bank. An agreement was made between the directors of the S Bank when insolvent, and the defendant, also a director, in pursuance of which the defendant received Arkansas bonds in exchange for shares of the S Bank. The complainant contended, that under 1 R. S. 589, sec. 1, providing that directors of moneyed corporations could not apply any portion of their funds, except the surplus, to the purchase of its own stock, the act of the directors was forbidden. The defendant contended that although the bank was formed under the general law, it had no board of directors, and consequently, the statute did not apply. Decree for defendant. Appeal.

Bronson, C. J. The transaction comes directly within the letter and spirit of the statute. As to creditors, the transaction was void irrespective of the statute. Decree reversed.

Cited: 24 Abb. N. C. 103; 33 App. Div. 48; 15 Barb. 266; 16 id. 303; 17 id. 576; 22 id. 603; 9 Bosw. 685; 4 Daly 325; 7 id. 279; 54 N. Y. 392; 7 id. 340, 341, 347; 9 id. 150; 15 id. 47, 133, 183, 186, 187, 188, 247; 17 id. 528, 529, 532, 542, 548, 549, 550; 21 id. 408; 73 id. 574; 77 id. 275; 79 id. 271; 86 id. 46; 119 id. 53.

GODDARD v MERCHANTS BANK (1850) 4 N. Y. 147.

For money paid by mistake. M presented to the R Bank a forged draft drawn on C. The R Bank forwarded it for collection to defendant, a bank, which gave it to a notary. The drawee, for want of funds, refused payment. Plaintiff, on being notified, called at the office of the notary and left his check for the amount, but did not see the draft until the following day, when he pronounced it a forgery. The defendant contended that the failure of the plaintiff to discover the forgery at an earlier date was negligence. Judgment for plaintiff. Appeal.

Bronson, C. J. 1. The plaintiff has neither done any wrong, nor neglected any duty. 2. Defendant is in no worse position than if plaintiff had not intervened. Affirmed.

Cited: 55 Barb. 90; 6 Misc. 62; 10 N. Y. 75; 40 id. 461; 46 id. 81, 82; 55 id. 214; 59 id. 17, 19; 64 id. 320; 5 Sandf. 431; 35 Supr. 295; 1 Sweeny 72.

CASE v MECHANICS BANKING ASSOCIATION (1850) 4 N. Y. 166.

Conversion. The plaintiff sent checks to H, his agent, to be converted into cash. H indorsed them to defendant and deposited them to his personal credit. Defendant then gave H certified checks for the full amount of his deposit, which he used in his own business. H subsequently failed. Defendant did not know that H was an agent of the plaintiff. Defendant moved for nonsuit. Denied. Judgment for plaintiff. Appeal.

Pratt, J. 1. Until the plaintiff had shown some fraud, committed on him by his agent, the defendant was not called on to show that it had received the paper bona fide and for a valuable consideration. 2. Defendant paid a full consideration for the checks and certificates at the time of their negotiation. Judgment reversed.

Cited: 14 Daly, 365; 2 E. D. S. 161; 88 Hun 4; 119 id. 365; 43 N. Y. 301; 5 Robt. 603; 46 Supr. 517.

THATCHER v BANK OF THE STATE OF NEW YORK (1851) 5 Sandf. 121.

On bill of exchange drawn by plaintiff on T, payable to W & R at defendant bank. The bill was accepted by T and indorsed to the X Co. and by it to the E Bank which held it at maturity. Plaintiff left with the paying teller of the defendant a certified check to pay for the bill, when presented. The bill was presented and payment refused. Defendant contended that the paying teller had no authority to bind the bank by receiving the money, and that he was the agent of the plaintiff, not the bank, in the transaction. Judgment for plaintiff. Appeal.

Sandford, J. The paying teller became the agent of the parties who left the money with him, and the bank is not responsible for his conduct in regard to it. Judgment reversed.

Cited: 3 E. D. S. 51. Aff'd: 5 Sandf. 122.

SACKETT'S HARBOR BANK v LEWIS COUNTY BANK (1851) 11 Barb. 213.

On a guaranty of inland bills, for which the consideration paid defendant was \$9,000 in cash and a quantity of butter. Plaintiff proved the guaranty executed by the defendant's president, and a resolution previously passed by the defendant's board of directors authorizing the president to guarantee any notes the bank might hold, and negotiate same for the bank's benefit. Plaintiff also proved that, in order to secure a debt, it was obliged to take the butter; the charters of both banks provided that they should not deal or trade in buying or selling merchandise, unless in selling the same when pledged for debts due. The judge decided that the contract out of which the guaranty arose, was void. Plaintiff nonsuited. Exceptions.

King, J. 1. As the plaintiff obtained the butter in settlement of a debt, it had a right to sell it. 2. An isolated transaction of buying on the part of the defendant is not within the restriction of the charter. New trial granted.

Cited: 17 Barb. 383; 66 id. 114; 43 Supr. 484.

WATSON v BENNETT (1851) 12 Barb. 196.

Conversion, against B and W, the cashiers of two banks, individually. Defendants averred that the property belonged to L; that their banks had each recovered a judgment against L; that the sheriff levied on the property under executions on the judgments, and sold it. Plaintiff offered a paper, in the form of a bond, from the two banks to the sheriff, not sealed, and signed "B, cashier S Bank;" "W, cashier O Bank." Defendants objected because the writing was the act of their respective banks. Sustained. Judgment for defendants. Appeal.

Allen, J. 1. If the defendants acted as mere instruments of their respective banks, they incurred no responsibility; but not if they, upon their own responsibility and without special direction from the directors, but acting within the general authority conferred upon them by general usage or by the by-laws of the corporation, had directed the sale of this particular property. 2. Without evidence, the court should not assume, as matter of law, that the direction to sell the property, which is implied by giving the writing of indemnity, was the act of the corporation, and not of the defendants. Judgment reversed.

Cited: 8 Daly 534; 42 Hun 540.

MERCHANTS BANK v SPALDING (1851) 12 Barb. 302.

On promissory note against indorser. The defendant admitted the signature of maker and his own as indorser, due presentation, dishonor, protest and notice, and the amount with interest. Defendant proved the discount of the note in November, 1845, by the F Bank of New Jersey; that the directors knew at the time that P, the maker, intended to use the proceeds in New York; that the bills paid P were \$5 notes and less. The court charged that the circulation of such bills, at the time of the transaction, was not illegal, and directed a verdict for plaintiff. Appeal.

Edward, S. J. 1. The circulation in this state of such notes of denomination less than \$5 was illegal. 2. But, when the contract is completed in another state, and where the whole offense consists of mere knowledge of an intent on the part of another to do an act contrary to the statutory law of this state, it cannot be said that a party possessing such knowledge is guilty of actual moral turpitude, unless it appear that he also knew the act was illegal. Judgment affirmed.

Cited: 9 N. Y. 53; 14 id. 175; 1 Sheld. 237.

HOYT v THOMPSON (1851) 5 N. Y. 320.

To collect a debt. The M Co. was a New Jersey corporation, with authority to engage in the banking business. The charter was silent as to the powers of the president and cashier. The L Co., being indebted to the M Co., executed to it a mortgage on rolling stock. The M Co. becoming indebted to the State of Michigan, the president and cashier, without the knowledge of the directors, assigned, as collateral security, the debt due from the L Co., which was subsequently purchased by the defendant. The plaintiff's assignor having obtained a judgment against the M Co., whose assets were transferred by the receiver of the M Co. to the plaintiff's assignor, this proceeding was brought to collect the debt from the L Co., on the ground that the assignment to the State of Michigan was invalid for lack of ratification by the directors of the M Co. Demurrer on the ground that the receiver had no power, under the laws of New Jersey, to assign a debt due to the M Co., from a citizen of this state. Sustained. Judgment for defendant. Appeal.

Ruggles, C. J. 1. As the charter of the M Co. gave no authority to the president and cashier, the assignment by them to the State of Michigan was void. 2. The power to assign is general, and by no means limited by the terms of the statute to property in the possession of the receiver, and it embraces all choses in action whether the evidence of the right to recover was in the possession of the receiver or not. 3. The sale to plaintiff was not void for champerty. Judgment reversed.

Cited: 5 Abb. N. C. 136; 24 App. Div. 44, 45; 35 id. 222; 32 Hun 395; 2 Keyes 129; 6 Lans. 32; 10 N. Y. 66; 12 id. 626; 19 id. 225; 25 id. 583, 587; 26 id. 457; 27 id. 557; 32 id. 43; 39 id. 310; 45 id. 91; 47 id. 312; 60 id. 287, 291; 68 id. 53; 84 id. 385; 99 id. 446; 156 id. 201; 12 Robt. 611; 5 id. 718; 49 Supr. 358; 2 T. & C. 155; 4 id. 174.

DUNN v COMMERCIAL BANK (1852) 11 Barb. 580.

Assumpsit, for refusal to transfer stock. The plaintiff gave B four certificates of stock with power of attorney to transfer to plaintiff's name. The stock had been assigned by G to plaintiff. B demanded the transfer. The certificates were made out in the usual form to G, transferable only on the bank's books by the stockholder or his attorney. To three of them were attached ordinary assignments and powers of attorney in blank, signed by G. In the assignment and power of attorney attached to the fourth, the plaintiff's name was written in pencil. Verdict for plaintiff. Motion for new trial.

Taggart, P. J. 1. Thenaked possession of the certificates and blank assignments and powers of attorney is not evidence of title. 2. The holder of an instrument is not authorized to write the contract under which he claims, over the signature, unless proof of consideration and contract is first made. 3. Admitting plaintiff is the actual owner, he gave neither B nor the bank officers power to make transfer. New trial granted.

Cited: 43 Hun 482; 75 N. Y. 217; 3 Robt. 171.

GOLDSMID v LEWIS COUNTY BANK (1852) 12 Barb. 407.

To recover money paid under a stipulation. The plaintiff held a draft discounted for M, on the indorsement of A, plaintiff's cashier. The defendant applied to the plaintiff for specie. Thereupon circulating notes of the defendant were sent to A, with a letter from M, telling A to apply a part of the notes to the payment of the draft and to use the balance to raise the specie. A did so. The letter was sent without the knowledge or consent of the defendant. On a stipulation reserving the plaintiff's rights, it refunded the amount applied on the draft. The referees reported for plaintiff. Motion to set aside report.

Cady, J. The plaintiff gave no consideration for the notes applied in payment of the draft, and if its remedy on the draft is lost through its own negligence, that furnishes no reason why it should recover. Report set aside.

Cited: 16 Barb. 551; 27 id. 54; 52 id. 601.

JERMAIN v DENNISTON (1852) 6 N. Y. 276.

On promissory note. The defendant was the indorser of W's note held by the A Bank. It was protested, and continued to be held by the bank, until insolvency, when it passed to the plaintiff. The defendant's offer to produce in evidence the books of the bank and the passbook of W, the entries in which were all made while the bank owned the note, to prove payment of the note to the bank before it was transferred and after it was due, was rejected. Judgment for plaintiff. Appeal.

Ruggles, C. J. The entries offered acted as an actual discharge of the debt due on the note, and were prima facie evidence that the note was paid before it went out of the hands of the bank and should have been received. Judgment reversed.

Cited: 37 Barb. 263; 21 N. Y. 250, 251; 48 id. 244, 246; 72 id. 554.

POLLOCK v NATIONAL BANK (1852) 7 N. Y. 274.

To compel the issue of new certificates and an account for dividends. A brother of complainant, being in the employ of defendant, a bank, transferred, by means of a forged power of attorney, stock in defendant belonging to the complainant. Defendant canceled the certificates upon their delivery. Defendant contended that it had only a limited number of shares, all of which were issued, and for that reason it had no authority to issue any to the complainant. Decree for defendant. Appeal.

Gardiner, J. The bank is bound to issue new certificates and account for the dividends, or if, upon inquiry, it should be ascertained that it has no stock which it can transfer, then the value of the shares must be paid. Decree reversed.

Cited: 38 Barb. 555; 57 id. 147n; 7 Daly 332; 4 Duer 541; 32 Hun 192; 34 N. Y. 52, 85, 87; 49 id. 289; 76 id. 369.

TALMAGE v PELL (1852) 7 N. Y. 328.

Foreclosure of mortgage. While this proceeding was pending, the Trust Co. which held the mortgage, transferred it to the Ohio Canal Commissioners, who were allowed to file a supplemental bill to have the benefit of the proceeding, joining the receiver of the Trust Co. as a defendant. The mortgagor defended on the grounds of usury and fraud, in that the company had taken the mortgage in payment of a stock subscription, which was induced by the advertisement that the company had \$2,000,000 of stock subscribed, when, in fact, it was arranged that so much of that stock as was not paid for, should be taken back by the company, and that part of the \$2,000,000 of stock, not paid for by one of the previous subscribers, was issued to the mortgagor. The receiver of the company defended on the ground that the transfer of the mortgage to the commissioners was illegal and void. The company had previously purchased a large amount of bonds of the State of Ohio, and being unable to pay part of the certificates of deposit given in payment therefor, had bought additional bonds to be sold and the proceeds applied on those certificates, giving for these new bonds new certificates of deposit secured by the transfer of this mortgage, with others, as security. Foreclosure decreed. Appeal.

Gardiner, J. 1. The proofs failed to sustain the charge of fraud. 2. Every association organized under the Act of 1838 authorizing banking, is a "moneyed

corporation." 3. They have no power to purchase state or other bonds to sell for profit or to raise money, except as they may be received in good faith as collateral security or in payment of a debt. The assignment of this mortgage, being collateral to an illegal transaction, will not support this action. Decree reversed.

Cited: 26 Barb. 602; 44 id. 74; 9 Bosw. 685; 5 Daly 248; 7 id. 279; 4 Duer 522; 34 Hun 17; 71 id. 570; 7 N. Y. 516; 12 id. 501; 14 id. 141, 168, 176, 178; 15 id. 47, 82, 133, 155, 181, 183, 187, 224, 238, 241, 247, 271, 274; 16 id. 513; 17 id. 530, 531, 542, 549; 22 id. 303; 39 id. 31, 32; 40 id. 179; 73 id. 574; 77 id. 70, 275; 84 id. 633; 95 id. 121; 119 id. 52; 127 id. 257.

NEW YORK LIFE INS. & TRUST CO. v BEEBE (1852) 7 N. Y. 364.

Foreclosure of mortgage. Defenses, usury and illegal consideration. The plaintiff agreed to buy from S, bonds and mortgages belonging to him, paying one-fourth in cash and the balance in certificates of deposit, payable in twenty years, with 4½ per cent interest. Defendant applied to S to obtain a loan from the plaintiff. The mortgage was made, payable directly to plaintiff, with 7 per cent interest; but was turned over by S to the plaintiff with a written representation that it was given for a debt previously due to S. S paid the cash to defendant, sold the certificate issued for the balance, and paid over the proceeds to him. The plaintiff's certificates were below par at the time, and similar ones were being taken up by plaintiff at a discount. Bill dismissed. Appeal.

Welles, J. 1. As the R. S. forbid the issue of evidences of debt, on loans or for circulation as money, and the charter of the plaintiff expressly forbids the same thing, the certificate issued to the defendant was illegal. 2. Even if the company had the right to loan its certificates of deposit, the transaction was void for usury, the certificates being known to be below par in value. 3. The representations of S are not binding upon the defendant, for, even if S acted as his agent, these representations were not within the scope of his agency. Judgment affirmed.

Cited: 20 Barb. 506; 35 id. 441; 12 Hun 44; 27 id. 186; 3 Keyes 290; 14 N. Y. 137; 15 id. 155; 77 id. 70; 139 id. 151; 41 Supr. 46; 43 id. 114; 1 Sweeny 526.

MONTGOMERY CO. BANK v ALBANY BANK (1852) 7 N. Y. 459.

Negligence for failure to present a draft at maturity and give notice of dishonor. The plaintiff being the owner of a draft on G, in New York, indorsed it for collection and sent it to its correspondent, the A Bank, which also indorsed it for collection and sent it to the B Bank, its correspondent in New York. The latter failed to present it at maturity and to give notice of dishonor. This action was brought against both banks. Judgment for plaintiff. Appeal.

Jewett, J. The B Bank was the agent directly guilty of the neglect, and is therefore answerable for its neglect to the A Bank alone. The latter is alone answerable to the plaintiff for the neglect of the former. Judgment as against the A Bank, affirmed; as against the B Bank, reversed.

Cited: 17 App. Div. 496; 57 id. 459; 22 Barb. 630; 41 id. 349; 16 Hun. 201; 36 id. 344; 39 id. 188; 75 id. 443; 3 Lans. 90; 22 id. 552; 47 N. Y. 574; 63 id. 238; 69 id. 387; 116 id. 498, 499; 117 id. 393; 118 id. 447, 451, 453, 473; 128 id. 30; 6 Robt. 350; 2 T. & C. 122.

MONTGOMERY BANK v MARSH (1852) 7 N. Y. 481.

On promissory notes against makers and indorsers. One note was payable at the plaintiff bank, the other in New York. Both were duly presented for payment and protested, notice being mailed to the defendant M, an indorser, at C, where he formerly resided. Before the notes were made, M had moved his residence from C to X, across the river, where there was another post office, but he continued to have an office at C, and a letter box in the post office there. He contended that the notices mailed to him at C were not sufficient to charge him as indorser. A stockholder in the plaintiff was allowed to testify for it. Judgment for plaintiff. Appeal by M.

Jewett, J. 1. When the indorser of a bill or note does not reside where it is payable, notice of dishonor may be mailed to him at his residence, or if he is in the habit of receiving mail at an adjoining town, then at either place. The notice here was sufficient. 2. A stockholder in the plaintiff is not a party to this action

or a person for whose immediate benefit it is prosecuted, within the meaning of the code, and therefore is a competent witness. Judgment affirmed.

Cited: 18 App. Div. 192; 17 Barb. 601; 21 id. 174; 28 id. 508; 4 Bosw. 537; 9 id. 308; 5 Duer 581; 6 id. 494; 62 Hun 486; 2 Misc. 229; 13 N. Y. 552, 554.

BANK COMMISSIONERS v ST. LAWRENCE BANK (1852) 7 N. Y. 513.

Notes made by a president of a bank, payable at a future date with interest, for the purpose of purchasing stock with which to redeem circulating notes of the bank, are void under Stat. 1840, p. 306, sec. 4, which forbids the issue of notes by a banking association, unless payable on demand and without interest; and, also, because the power to purchase stock for the purpose of pledging it to raise money, is not conferred by sec. 18 of the Banking Act.

MITCHELL v COOK (1852) 7 N. Y. 538.

Foreclosure of mortgage. The defendant borrowed money of the W Bank, and gave his mortgage to the president as security. The mortgage was assigned to the state comptroller to secure the redemption of the bank's circulating notes. The bank's credit becoming impaired, the plaintiff, having a large amount of its notes, employed the president of the bank to obtain a reassignment to him of the mortgage. The president paid to the comptroller the amount of the mortgage in notes supplied by the plaintiff, and receiving a retransfer of the mortgage to himself, delivered it to the plaintiff. Decree for plaintiff. Appeal.

Welles, J. As the General Banking Law authorizes the comptroller to reassign or transfer such securities only when the person or association by whom they were deposited fails to redeem them, and as the plaintiff could not therefore purchase the mortgage directly from the comptroller, he had no right to do it thus indirectly, and is entitled to no relief. Judgment reversed.

Cited: 29 Barb. 253; 9 N. Y. 497.

WILLETS v PHOENIX BANK (1853) 2 Duer 121.

On checks. Plaintiffs purchased four checks, drawn by T, on the defendant, after the defendant had certified them as good. At the time of the certification, T had sufficient funds deposited with the defendant to pay them. On the plaintiff's presenting the checks to the defendant, it refused to pay them. Three of the checks were made payable to "bills payable" and one to the order of "1658," and were not presented for payment for two months after date. Verdict for plaintiff, subject to the opinion of the court.

Oakley, C. J. 1. The certifying of a check is an appropriation of the funds to the credit of the check and a promise that upon demand they shall be applied to its payment. 2. A draft payable to a fictitious person is in judgment of law payable to bearer. Judgment for plaintiff.

Cited: 67 Barb. 33; 2 Duer 121; 4 id. 220; 28 N. Y. 428; 66 id. 21; 89 id. 429.

BURBANK v BEACH (1853) 15 Barb. 326.

On bill of exchange against indorser. Plaintiff was the nominal proprietor of the E Bank, and all contracts were in his name. A notary certified to presentment, demand and refusal of payment of the bill "at the office of the acceptor"; and to protest and "notice of non-payment" on the same day to the drawer and indorsers by mail. Defendant objected to the reading of the bill, on the ground that the protest and notice were insufficient for failure to show the hour when demand was made, or authority in the person making it; and because it did not appear that the notice was given to defendant. Overruled. Defendant claimed that the plaintiff was not a proper party; and that there was a non-joinder of parties, as there were others owning interests in the bank. P testified that the bill had been discounted for his accommodation, and that after it was due, he signed a mortgage on the agreement of the plaintiff to extend the time of payment. Judgment for plaintiff. Appeal.

Strong, J. 1. The plaintiff "as trustee of an express trust" is a proper party under the code; and the objection of non-joinder should have been taken in the answer. 2. The evidence of presentment, demand and notice is sufficient. 3. A

fatal objection to the verbal agreement is that it contradicts the mortgage. Moreover it did not discharge the defendant. Judgment affirmed.

Cited: 67 Barb. 432; 6 Duer 446.

SYRACUSE CITY BANK v DAVIS (1853) 16 Barb. 188.

On promissory note against indorser, discounted by plaintiff. Defense, no such corporation. There were irregularities in plaintiff's certificate of organization, and a special act was passed February 5, 1852, for the relief of the bank, making the organization legal. Defendant claimed that the act was unconstitutional, as granting a special charter for a bank. The act did not profess to create a corporation; it only remedied defects in one already created. Verdict for plaintiff, subject to the opinion of the court.

Gridley, J. 1. The defects in the organization of plaintiff were cured by the remedial statute. 2. The legislature had the power to pass an act to remedy the irregularities and defects in the certificate. Judgment for plaintiff.

Cited: 9 Hun 309; 26 N. Y. 63; 41 Supr. 511.

EXCHANGE BANK v MONTEATH (1853) 17 Barb. 171.

On draft. The plaintiff discounted the draft for the C Bank. It was signed "J and M, agents," accepted by "H, agent," and indorsed "O, cashier of the C Bank." J drew the draft, with the knowledge of M, for the accommodation of the C Bank. J and M were authorized to draw, indorse, and accept such drafts as were necessary for the business of the defendants in A, and H had like authority in N. Plaintiff nonsuited. Judgment for defendant. Appeal.

Harris, J. The case should have been submitted to the jury with the instruction, that the plaintiff would be entitled to recover if J was the general agent of the defendants, and as such was authorized to make and indorse notes and bills of exchange for the benefit of his principals, and the draft so made and indorsed was received and discounted by the plaintiff in the ordinary course of business. Judgment reversed.

Cited: 24 Barb. 375; 51 Hun 66; 8 Misc. 264; 26 N. Y. 509; 46 Supr. 517; 3 T. & C. 526.

CHESTER v KINGSTON BANK (1853) 17 Barb. 271.

To recover money paid on a note. W, being indebted to the defendants, borrowed plaintiffs' notes to give as security, telling defendants the notes were accommodation notes. At the same time, W also left, as security, the business paper of S. The defendants discounted S's paper for W, and applied the proceeds to W's debt. The S note not being paid, the defendants, after having started suit against S, took a bond in the place of the note, conditioned for payment on a certain day, but gave with it a secret agreement that it should be satisfied if the defendants recovered the W debt of the present plaintiff. The defendants did so recover, and, on plaintiffs' requisition, assigned the S note to them. Plaintiffs found the S note was discharged, and brought suit to recover of defendants the amount due on the S note.

Edmonds, P. J. The defendants have impaired the indemnity to which the plaintiffs had a right, by so dealing with the S claim as to make it entirely unavailable to all parties, and must therefore account to the plaintiffs for the amount thereof. Judgment for plaintiffs.

Cited: 16 N. Y. 336.

CURTIS v LEAVITT, REC'R (1853) 17 Barb. 309.

Bill to establish a trust. Crossbill to declare it void. The T Trust Company was organized under the Act of 1838 with a capital of \$2,000,000 and issued bonds. It executed two trust deeds, called the million and the first half-million trusts, to secure payment of its bonds issued to those amounts. The controversy involved the validity of the bonds, and rights of parties to have them paid out of the property of the trust. Defendant was appointed receiver under the statute concerning "proceedings against corporations in equity," he claimed all the funds, contending that the trust conveyances and bonds were void. P & D, an English firm, held in pledge part of the bonds and were entitled to share in the trust funds, if the trusts were valid, and if their debt was lawful. The deed was made between the company of the first part, plaintiffs of the second part, and members of the

firm of P & D of the third part. It recited that the company had issued 900 bonds aggregating one million dollars, and that the T Co. had assigned to plaintiffs to hold as trustees, certain bonds as security to bondholders, until default in the payment of the 900 bonds, or part thereof, or interest. Plaintiffs in the deed covenanted to pay P & D all money to be raised out of the bonds and mortgages assigned, to be paid over to the holders of the 900 bonds. Plaintiffs were also given power to sell and invest the proceeds of bonds for purposes of the trust. The bonds were in the form of negotiable bills of exchange, drawn on P & D. The directors endeavored, by the aid of the trusts, to avert insolvency, but the company failed. The defendant urged: 1, that the company, being a moneyed corporation, was subject to the 1 R. S., sec. 588, to prevent the insolvency of moneyed corporations, and that the trusts were void, because they were not authorized by a previous resolution of the board of directors, and that bondholders were not bona fide holders; 2, that the trust conveyances were void under the statute, because they were made by the company "when insolvent or in contemplation of insolvency" and with intent to give preference to particular creditors; 3, that they were void because made with intent to defraud creditors; 4, that the company, being a banking corporation, had no power to borrow money; 5, that the bonds, being unsealed, were promissory notes, and in violation of law; and 6, that they were void because held in trust for the grantor. The company gave an order to certain banks on P & D for three hundred of the half-million trust bonds, which was satisfied by delivering 290, on account of which discrepancy it was claimed the transaction was usurious and void under the New York law. Certain certificates of deposit were issued contrary to the Act of 1840. In 1840 the company owed P & D large sums. Later they made other advances, and surrendered certain state stocks, that they might be sold for the benefit of the company, they, however, receiving the proceeds and continuing advances till the trusts were formed. In 1846 P & D proved their account, but the receiver refused to allow it. These debts were caused by time bills, drawn on them by the company, contrary to the statute, and, as P & D contended, therefore invalid. Two hundred and fifty thousand dollars worth of bonds were pledged to Philadelphia banks for loans.

The above facts are taken from 15 N. Y. 9.—Ed.

Roosevelt, J. 1. Joint stock associations, organized under the Act of 1838, are not corporations within the provisions of the late constitution. 2. Enactments of a remedial or directory character are applicable to such associations; but provisions creating misdemeanors and imposing forfeiture cannot be extended by implication. 3. The Act of May, 1840, extending penal regulation to such associations, was a legislative assertion, binding on the judiciary, that such regulation did not previously apply. 4. The T Co. had power to borrow money to the extent of its capital as a necessary incident of banking; and the bonds given as evidences of such loans, and the trust mortgage collateral to them, are valid. 5. The Statute of 1830 has no application to this association. 6. The statute, declaring conveyances and assignments of personal property, "made in trust for the use of the person making the same" void, has no application to trust mortgages made bona fide to raise money to pay creditors. 7. The provision in the same statute as to immediate delivery cannot apply to things in possession and not to things in action. 8. Those assignments were not fraudulent as to creditors. 9. The provisions of the R. S., forbidding the making of certain transfer by any moneyed corporation without the sanction of a previous resolution of its board of directors, or manager, is inapplicable. 10. The trust mortgages were sufficiently ratified by the association. 11. The bonds were sufficiently sealed. 12. The notes, which come within the Act of 1840, must not only be on time or interest, but "on the similitude of bank notes, or adapted for circulation as money." 13. All the bonds took effect before the statute prohibiting time notes as currency went into operation. 14. The certificates of deposit were not bills or notes issued or put into circulation within the Act of 1840. 15. The 6 per cent bonds, sold under par in England, were not usurious. 16. The loan made by the Philadelphia banks is not usurious. 17. The receiver cannot plead the defense of usury. Judgment for defendant.

Cited: 30 Abb. N. C. 125; 5 Duer, 466; 16 Hun 554.

Modified: 15 N. Y. 9.

PELHAM v ADAMS (1853) 17 Barb. 384.

To recover deposit. Plaintiff deposited \$470 in the defendant's private bank, and received a certificate of deposit certifying that the money was payable on re-

turn of the certificate properly indorsed, with interest at 5 per cent on demand, or 6 per cent if not called for in one year. Six months later plaintiff demanded payment and was refused. Defendant set up the Statute of 1840, providing that no bank or banker should put in circulation any bill or note unless the same should be payable on demand and without interest. Plaintiff claimed interest only from the time of demand. Judgment for plaintiff with interest. Appeal.

Parker, J. 1. It was lawful for the bank to receive deposits and agree to pay interest on them. 2. The certificate of deposit was not an element in the creation of the indebtedness, nor does it affect the validity of the transaction. 3. Plaintiff was entitled to interest from the time of deposit, had he claimed it. Judgment affirmed.

Cited: 1 T. & C. 427.

WHITE v AMBLER (1853) 8 N. Y. 170.

Money had and received. The plaintiff, receiver of a bank, produced its cash receipt book and proved two entries to the defendant's credit aggregating \$542 and the defendant's check of the same date for \$642, the execution of which was admitted. The plaintiff's clerk testified that the book produced was a ledger containing the defendant's account and that the balance against the defendant was \$100. The bank's books, from a year before the transactions mentioned to the date of its failure, were offered in evidence and showed the same balance due from the defendant. Motion for nonsuit allowed. Affirmed at the General Term. Appeal.

Gardiner, J. 1. Without proof of the original entries by the clerks who made them, or proof of their handwriting and an attempt to account for their absence, the books of the bank, merely proved by a stranger to be such, were not evidence that the defendant's account was overdrawn. 2. The check proved nothing against the drawer, the legal presumption being that it was drawn upon funds of the defendant in the bank. Judgment affirmed.

Cited: 30 Hun 299; 40 id. 302; 55 N. Y. 442; 165 id. 221.

JONES v PHOENIX BANK (1853) 8 N. Y. 228.

Assumpsit. The defendant bank offered a reward for the apprehension of S for forgery, and the recovery of the money paid on forged checks or a proportionate part thereof. The plaintiff, then a minor, recovered most of the money, but did nothing toward the arrest of S. Arbitration was agreed to, and one-fifth was awarded to plaintiff, and paid to plaintiff's guardian. On coming of age, the plaintiff had an accounting with his guardian concerning this money, and released him. Two years later he brought this action. Motion for nonsuit granted. Affirmed at General Term. Appeal.

Johnson, J. 1. The apprehension of the offender, coupled with either a complete or partial recovery of the money, entitled the successful person to the whole or a part of the reward according to the amount recovered. 2. Plaintiff, when of age, having sanctioned the arbitration, received his share and discharged his guardian from all liability, thereby debarred himself from questioning the submission of the award. Judgment affirmed.

Cited: 33 N. Y. 551; 38 id. 250; 49 id. 261; 95 id. 192.

MERCHANTS BANK v SPALDING (1853) 9 N. Y. 53.

On notes against indorser. P made a note payable to the defendant at R Bank of New Jersey and defendant indorsed it. Plaintiff bank sued as the agent of the R Bank. P stated to president of R Bank, who discounted the note, that he would spend the money in this state, and that small bills would be available. About half the proceeds of the note were received in bills of less than five dollars. By Act of 1830, the circulation in this state of bank notes issued by foreign corporations, under the denomination of five dollars, was illegal. The court refused to charge that, if the note was discounted with notice that the bills of less than five dollars were to be put in circulation in this state, plaintiff could not recover; or that the discounting of the note, knowing the intent, was evidence of such agreement. Court charged that such circulation was legal. Verdict for plaintiff. Affirmed at General Term. Appeal.

Denio, J. 1. There was no evidence upon which the jury could find an agreement between P and the plaintiff, by which the former was bound to pay out the small bills in this state. 2. Where the act, to be done in another state, is simply the

violation of a positive law, and it is not shown that the parties were cognizant of the law, the contract is valid and should be enforced in such other state. 3. They are not chargeable with knowledge of these laws. Judgment affirmed.

Cited: 7 Abb. N. C. 73; 11 App. Div. 415; 17 Barb. 317; 4 Bosw. 446; 16 N. Y. 514; 29 id. 571; 77 id. 578, 583; 93 id. 36; 1 Sheld. 237.

BECKWITH v UNION BANK (1853) 9 N. Y. 211.

To recover deposit, On August 24, H executed to the plaintiff a general assignment of all property in trust for creditors. The defendant had no notice of it until the 28th, when the plaintiff demanded payment of a deposit standing to H's credit. Previously defendant discounted for H, who indorsed it, a bill of exchange which had been accepted by the drawee. This bill matured August 27, was protested for non-payment, and charged by the defendant against H, claiming to apply the deposit in payment. Judgment for plaintiff, affirmed at General Term. Appeal.

Johnson, J. 1. The substantial rights of the defendant are not affected by the substitution of the assignee as plaintiff, in place of the assignor. 2. The bank had no lien on the deposits of H, which would have permitted it to draw out the whole balance of cash to H's credit on August 24. Judgment affirmed.

Cited: 15 App. Div. 609, 611; 32 id. 492, 493; 33 Barb. 163, 303; 59 id. 90; 10 Bosw. 19; 1 C. C. 14; 24 Hun 97; 2 Keyes 489; 25 N. Y. 634; 37 id. 402; 41 id. 216; 80 id. 563; 91 id. 26; 35 Supr. 261.

WALKER v BANK OF THE STATE OF NEW YORK (1853) 9 N. Y. 582.

To recover the amount of a bill. U Bank, of which the plaintiff was president, discounted a note drawn by the Empire Mills on H, to the order of F, and by him indorsed. It was forwarded for collection to the defendants, the New York correspondents of U Bank, before maturity. Defendants presented it to the drawee, who wrote across its face "accepted payable at Ex. Bank, Empire Mills, by E. C. Hamilton, Treas." Defendant treated this as a regular acceptance, and omitted to protest the bill, or to give notice of non-acceptance to the drawer and indorsers, then in good credit, but who failed before the bill matured. Verdict for plaintiff. Affirmed at General Term. Appeal.

Selden, J. 1. It is the duty of an agent who receives, for collection, a bill of exchange payable at some future time, to use due diligence in presenting the same for acceptance, and if he fails to do so, or to give notice, in case acceptance is refused, he will be liable. 2. The words written by H did not constitute a personal acceptance, and the defendant had no right to receive anything short of an acceptance, without giving notice. Judgment affirmed.

Cited: 19 Abb. N. C. 125; 9 Bosw. 463; 12 Hun 102; 11 N. Y. 215; 26 id. 123, 124; 46 id. 75; 47 id. 573; 69 id. 387; 84 id. 382; 6 Robt. 350.

TALMAN v ROCHESTER CITY BANK (1854) 18 Barb. 123.

On a guaranty. M, being indebted to the defendant, to procure the means of payment, assigned to the A Co. six instalments of a bond and mortgage which the A Co. took on the guaranty of payment of all instalments by the defendant, and paid the proceeds to M, who handed them to the defendant to be applied to his indebtedness. The mortgagor failed to pay the instalments. Demurrer on the grounds: 1, no cause of action; 2, failure to allege consent of board of directors; 3, want of authority on the part of the cashier; 4, want of consideration. It was also contended that the complaint set forth in some respects, not facts, but evidence of facts. Overruled. Judgment for plaintiff. Appeal.

Mitchell, P. J. 1. The bank may enter into the covenants of guaranty. 2. The contract was binding on the bank. 3. The guaranty executed under the bank's seal, and reciting a lawful consideration, sets forth, prima facie, a cause of action. 4. The statement of evidence from which the law draws a conclusion of fact is, in effect, a statement of fact. Judgment affirmed.

Cited: 1 Hun 539; 4 T. & C. 115.

TRACY v TALMAGE (1854) 18 Barb. 456.

On certificate of deposit. In 1839, the T Bank, formed under the General Banking Law of 1838, known as the Free Banking Law, bought bonds of the State of

Indiana, for which it gave certificates of deposit payable at a future date, with interest. Upon the renewal of some of these, plaintiff sued the receiver of the T Bank. The T Bank, under the act, was authorized "to discount not only bills and notes," but "other evidences of debt." The bonds were payable in London. Sec. 2 of the act further provided that whenever any association of persons, formed for the purpose of banking under this act, shall legally transfer to the comptroller any portion of the public debt created by this state, or such other states as shall be approved by the comptroller, such association shall be entitled to receive an equal amount of circulating notes. Neither the State of Indiana nor its agents had any notice or suspicion that the purchase was for any other object. The Act of 1846 declares no banking association shall put in circulation any notes or bills of such association, unless the same shall be made payable on demand and without interest. The receiver insisted that the contract, out of which this claim arises, being prohibited by law, the association was under no obligation to pay for or return the bonds, or account for any portion of the avails; and objected to the form of the subsequent delivered evidences of the company's engagement to pay, that is, to the negotiable obligations of the company, payable not on demand, but on time, with interest.

Roosevelt, J. 1. The power to discount bills or notes granted by the Act of 1838 is general and without restriction. 2. That the legislature assumed that the general power to purchase bills carried with it the authority to purchase state bonds, is evident from the second section of the act; and it made no difference that the bills were payable in the future. 3. The T Bank was not subject to the penal provisions of the former banking law. 4. Assuming that the renewed certificates are within the Act of 1846, they are simply void and leave the original obligations standing in full force. Decree for plaintiff.

Cited: 18 Hun 41. Modified: 14 N. Y. 162. Explained: 82 N. Y. 302.

CLARK v METROPOLITAN BANK (1854) 3 Duer 241.

To recover penalty. Defendant was a corporation existing by virtue of the General Banking Law. Under an act passed May 7, 1839, such institutions were not allowed to receive in payment notes or bills drawn by an individual or corporation resident without the state. For an offense against these provisions, a penalty was imposed. J paid to the teller of defendant, a bank note of a foreign bank, which was applied in part payment of the note of C held by the defendant for collection. The teller had no authority from the directors, president or cashier of said bank to receive the note. Judgment for plaintiff. Appeal.

Oakley, C. J. 1. There being no evidence that the teller acted under authority from the board of directors, or that the act was subsequently adopted by them, the act was not within the general scope of the teller's employment so as to render it liable, and defendants are not chargeable with violating provisions of Act of 1839. 2. If the authority of an agent, however general, is capable of being executed in a lawful manner, it will never be extended so as to render the principal liable in a criminal prosecution. Judgment reversed.

Cited: 10 Daly 531; 2 Hun 62, 596; 3 id. 594; 6 Lans. 505; 73 N. Y. 10; 6 Robt. 411; 4 T. & C. 263; 5 id. 147; 6 id. 303.

LEAVITT v FISHER (1854) 4 Duer 1.

To determine the right to a transfer of stock. G borrowed from the A Bank upon a stock note, pledging stock of the F Bank as collateral. At the same time, G delivered a transfer, executed in blank by M, the original owner, to the bank. Plaintiff, president of the A Bank, delivered the assignment to G to enable him to procure a transfer from the F Bank to the A Bank. G transferred his shares to plaintiff as president of the A Bank, and, on surrendering the original certificate to the F Bank, demanded a new certificate for the A Bank. M died, and defendant was appointed his administrator. The F Bank refused to transfer the stock under R. S., sec. 57, which provided that no assignment or transfer of any effects for the benefit of a moneyed corporation, shall be valid in law unless made direct to the corporation and by name. Defendant contended that G obtained the stock surreptitiously from M, and that G, a codefendant, was improperly a party to the action, in that he was not directed to be made a party by an order of interpleader made prior to the commencement of this action; that if he were properly

before the court, notice of his claim should have been given defendant before trial; and that the case was not one in which a judgment could be rendered against codefendants. Judgment for plaintiff. Appeal.

Duer, J. 1. The holder of shares of stock, accompanied by a blank power of attorney to transfer, is presumptively the equitable owner of said stock, and without notice his title cannot be impeached. 2. The power is not limited to the person to whom it was delivered, but enures to the benefit of subsequent bona fide holders. 3. The power is not exhausted by the first use, nor revoked by the death of the party giving it. 4. The transfer was not to plaintiff individually, but as president of the bank, and by name to the bank itself. 5. Where an order of interpleader directs a suit between parties, any parties may be joined who are necessary to the determination of the suit. 6. An objection to an excess of parties must be taken by an answer or demurrer; and if not so taken, is deemed waived. 7. The service of the answer of one defendant on his codefendant is not required. Judgment affirmed.

ENO v CROOKE (1854) 10 N. Y. 60.

On a judgment. F Bank recovered separate judgments against the defendant as maker, and S as indorser, of promissory notes. It collected the latter, and, at S's request, assigned the other to B, who, becoming insolvent, made a general assignment to the plaintiff. In this action on the judgment against the defendant, it was contended: 1, that B took the judgment under the assignment in trust for S, and that it did not pass to his assignee; 2, that the presumptive value of the judgment was the amount thereof, and, exceeding \$1,000, it could only be sold pursuant to a resolution of the bank's directors according to the statute; 3, that payment of the judgment against S extinguished this one except as to costs. Judgment for plaintiff. Affirmed at General Term. Appeal.

Allen, J. 1. It did not appear that B took the judgment, by assignment, as trustee for S; and since there was no necessity for the intervention of a third person to take title for S, the presumption is that it was not taken in trust. 2. Upon payment of the judgment against S, the bank held it as trustee for S, and the statutory requirement of authority from the directors does not apply to property so held; and since the assignment was executed by the cashier, under the bank's seal, his authority is presumed by the law. 3. Payment of the judgment against S did not extinguish this one against the defendant, though it entitled S to the benefit of it, and the assignment at his request was valid. Judgment affirmed.

Cited: 33 Barb. 340; 40 id. 284; 14 Hun 321; 40 id. 214; 2 Lans. 474; 17 Misc. 137; 12 N. Y. 227; 26 id. 415; 47 id. 311, 312; 78 id. 135; 4 Redf. 80; 40 Supr. 428.

WEISSER'S ADM'R v DENISON (1854) 10 N. Y. 68.

To recover balance of a deposit. The defendant admitted a balance in the bank to the credit of the plaintiff's intestate, but the plaintiff claimed a larger amount because the bank had paid forged checks drawn in the intestate's name. The bank book of the intestate, with the paid checks, was returned to him several times after the forgeries commenced, but the intestate left them to his clerk, who had forged the checks, to examine, and he took out the forged checks. As soon as the intestate discovered the forgeries, he notified the bank. Judgment for plaintiff for the entire sum claimed. At General Term this was reduced to the amount admitted to be due, with the amount paid on forged checks before the bank book was first returned showing such checks. To this plaintiff assented. Appeal.

Allen, J. 1. Since the intestate did nothing to give currency to the forged checks or to influence the bank to part with its property thereon, he was not estopped from setting up the forgery. 2. As to the return of the checks with the bank book balanced, the retention of these the first time made the statement a stated account; but a stated account is liable to be opened by evidence of fraud or mistake; so, as to the preceding checks, the intestate was not bound by the payment of those forged; and as to the subsequent checks, as there was no loss to the defendant by reason of the negligence of plaintiff's intestate, the bank cannot avail itself of the defense that the deceased acquiesced therein, but the loss must fall on the bank. 3. The intestate was not affected by the knowledge of his clerk, nor bound by his action in the matter. Judgment affirmed.

Cited: 32 App. Div. 320; 60 id. 247; 62 Barb. 105; 11 Daly 241; 9 Hun 693;

23 id. 504; 44 id. 83; 6 Misc. 62; 8 id. 280; 10 id. 683; 35 id. 124; 11 N. Y. 405; 50 id. 316; 73 id. 428, 429; 84 id. 213; 91 id. 81, 111, 116; 126 id. 328, 330, 331; 144 id. 688; 151 id. 10; 154 id. 729.

BURROWS, REC'R v SMITH (1854) 10 N. Y. 550.

Foreclosure of mortgage, or to compel payment of a stock subscription. The plaintiff was receiver of the F Bank. In May, 1838, the defendant was induced to sign the bank's articles of association, on the assurance that the bank would loan him money to pay off former incumbrances, and take a mortgage on his farm for the stock. Later, the defendant was induced to execute the bond and mortgage, without appraisement of his farm and before the money was advanced to pay off the incumbrances, to be held subject to the conditions of the subscription until the incumbrances were removed. The person with whom the bond and mortgage were left, delivered them to the bank, without authority from the defendant, and the conditions were never performed. The bank was not organized under the articles signed by the defendant, but under new ones containing material alterations, but no promise to pay for stock, and the defendant signed the new certificate on the assurance that it was a mere matter of form not affecting his rights. No stock was allotted, or dividends paid, to the defendant. Bill dismissed. Affirmed by Supreme Court. Appeal.

Taggart, J. 1. The bond and mortgage were never absolutely delivered, and, since the defendant was not treated as a stockholder, they could not have been received in payment for stock as proposed. So there can be no foreclosure. 2. Even if the defendant's subscription to the new articles be construed to be an acknowledgment by him that he was a stockholder, he was not a stockholder in fact, and since the stock has never been allotted to him and cannot be, he should not be made to pay for it. Judgment affirmed.

Cited: 52 Barb. 171.

COMMERCIAL BANK v UNION BANK (1854) 11 N. Y. 204.

Assumpsit, on bill of exchange. H, drawee's agent, drew a bill on W of Troy to order of B, who indorsed it. The bill was delivered to payee in satisfaction of claim against the drawee. The former deposited it in W Bank, by which it was credited as a cash deposit of the payee. S, cashier of W Bank, indorsed the draft to the plaintiff bank payable to plaintiff's cashier, and sent it to the plaintiff at Philadelphia. Subsequently plaintiff's cashier indorsed it to the defendant's cashier and sent it to the defendant for collection, which thereupon sent it to the T Bank for the same purpose. On the day of receipt, the T Bank presented the draft to W, who drew his check to include this draft, which check was charged to his account, and the draft delivered to him. W deposited in the T Bank \$28,348, of which \$14,000 was in sight drafts on H. These drafts were not paid, being held at the request of W till the next day and then paid out in Albany. H, in New York, continued to accept the drafts of W during that day, and W drew his checks for \$18,000, which were paid, and made a like deposit, but of which \$13,000 was in drafts on H which were not paid. On the same day W advised H not to pay the drafts, and the day after notified the T Bank that his drafts would not be paid. The draft in question was returned three days after delivery to him, protested and notice sent. Defendant moved to suppress depositions on the ground that the witnesses' answers were statements written down at their request by the plaintiff's attorney, though there was no suggestion that the witnesses had been imposed upon; and also because some of the interrogatories and answers were improper. Judgment for plaintiff. Affirmed at General Term. Appeal.

Allen, J. 1. The defendant is estopped from denying the title of the plaintiff to the bill, for all the purposes of this action. 2. If the bill was not paid by the transactions, then the drawer and indorsers were discharged by the omission of the agent of defendant, for which loss the defendant is liable. 3. There was not sufficient ground for suppressing the deposition. 4. That some of the interrogatories and answers were improper is not sufficient to suppress an entire deposition. Judgment affirmed.

Cited: 49 App. Div. 368; 22 Barb. 630; 52 id. 334; 9 Bosw. 647; 10 Daly 182; 16 Hun 201; 39 id. 587; 11 Misc. 286; 26 N. Y. 455; 47 id. 573; 86 id. 46; 89 id. 577; 118 id. 447; 123 id. 340; 128 id. 30; 133 id. 102; 5 Robt. 592; 6 id. 350, 417; 44 Supr. 533.

MORGAN v BANK OF STATE OF NEW YORK (1854) 11 N. Y. 404.

On deposit. The defendant paid checks drawn on it by the plaintiff, in which the name of the payee was forged. Judgment for plaintiff. Affirmed at General Term. Appeal.

Johnson, J. The money not having been paid according to the plaintiff's order, he is entitled to recover. Judgment affirmed.

Cited: 30 Misc. 385; 73 N. Y. 426; 85 id. 212; 91 id. 80, 81; 2 Robt. 411; 45 Supr. 16.

FARMERS AND MECHANICS BANK v BUTCHERS BANK (1855) 4 Duer 219.

On checks. G drew five checks on the defendant, which, by a fraudulent arrangement with the teller of the defendant, were certified to be good. G paid these certified checks to the plaintiff, and they were passed to his credit as payment for his instalments on stock subscribed for. The stock was issued by the plaintiff to G, who transferred it to others. The plaintiff did not present the checks for a year. The teller had general authority to certify checks, qualified by the direction not to certify them without funds. Judgment for plaintiff. Appeal.

Hoffman, J. 1. The plaintiff stands in the character of a bona fide holder of the checks without notice of the fraud. 2. As between the holder and the bank, the acceptance renders the bank the primary debtor. 3. Plaintiff was not guilty of laches. Judgment affirmed.

MOTT v UNITED STATES TRUST CO. (1855) 19 Barb. 568.

Bill, to compel the delivery of a note and stock certificate. The complainant, M, one of the directors of the K Bank, borrowed money from the K Savings Institution, giving his note, secured by the certificate of bank stock in question. The managers of the bank were the trustees of the savings institution. The latter became insolvent, and the defendant was appointed receiver. The charter of the savings institution, as amended, provided that its funds should be invested, or loaned, on public stocks or private mortgages; and that, when loaned on such stock and mortgages, a sufficient bond or other satisfactory personal security in addition should be required of the borrower. The trustees were authorized to "keep on deposit," on interest or otherwise, in such suitable form as they might direct, an available fund not to exceed \$100,000. The complainant moved for an injunction restraining the defendant from prosecuting the note on the ground that the loan was not legal.

Roosevelt, J. 1. Before the court will interpose in complainant's favor, he must tender back the principal and interest of the moneys taken. He who asks equity must do equity. 2. A deposit, payable with interest, is neither more nor less than a loan. A certificate of deposit, stipulating to return the money with interest, is a promissory note engaging to refund such loan. If the note be payable on demand, and the maker be able and honest, the deposit which it represents is in the "available form." 3. Under the charter, so long as the deposit is in a form to draw interest and available, it may be deposited with an individual, or a banker, or a banking association as the trustees may direct. Motion denied.

Cited: 43 Supr. 484.

UNITED STATES TRUST CO. v BRADY (1855) 20 Barb. 119.

On promissory note. The K Savings Institution loaned money to defendant, and took his note, secured by shares of stock in the K Bank. The institution became insolvent and plaintiff was appointed receiver. Defendant claimed that, by Act of April 15, 1853, relative to savings banks, the loan was illegal. He also contended that the act creating the plaintiff was unconstitutional, on the ground that plaintiff was a banking institution created by special charter. Judgment for plaintiff. Appeal.

Mitchell, P. J. 1. The note in suit was in violation neither of the charter of the institution, nor of the Act of 1853. The act permits a loan on stock, and there is no prohibition except as to personal security. A loan secured by stock is deemed to be made on the security of the stock. 2. The charter of the plaintiff is not unconstitutional. It is not a corporation created for banking purposes. Judgment affirmed.

Cited: 30 Barb. 39; 48 id. 612; 27 N. Y. 448.

EAST RIVER BANK v GEDNEY (1855) 4 E. D. Smith 582.

On check, against the drawer. The check was drawn by defendant on the R Bank and given to plaintiff. Plaintiff sent it to the M Bank one day after date. On the same day it was returned by the M Bank to plaintiff with a notice that the R Bank had no funds to pay it. When plaintiff presented the check a day or two later, R Bank had failed. If it had been presented on the day it was issued, or the day after, it would have been paid. The defendant first had notice of the non-payment after it had been presented to the R Bank by plaintiff. The court refused to instruct that plaintiff was entitled to recover, and instructed that if, in consequence of the delay of plaintiff in making the presentment or giving notice to defendant, the check was not paid and defendant was injured, plaintiff should bear the consequence. Verdict for defendant. Motion for new trial. Denied. Appeal.

Ingraham, J. 1. The plaintiff should have given notice to the maker when the check was returned, instead of losing another day by presenting it at the R Bank. 2. There was no error in the charge; and, with proof of injury to the drawer from the failure of the bank, the judge could not have charged as requested. Order affirmed.

Cited: 9 Bosw. 463; 38 Supr. 196.

WARHUS v BOWERY SAV. BANK (1855) 5 Duer 67.

To recover deposit. F deposited with defendant a sum of money, receiving a passbook with the entry of the deposit. F subscribed his name to the regulations and by-laws of defendant, but was not informed for what purpose his signature was required. The by-laws provided, that no depositor had the right to demand any part of the principal or interest without producing the passbook. That he shall subscribe and thereby sign his assent to the rules and by-laws. F died, and plaintiff, his administrator, demanded the deposit on exhibiting to defendant his letters of administration. Payment was refused without the passbook, which plaintiff could not produce. No evidence was offered as to the loss or destruction of the book. Plaintiff contended that the rules and by-laws were intended solely for the government of the defendant, and could not affect the rights of third persons. Judgment for plaintiff. Appeal.

Duer, J. 1. The regulations were not unreasonable. 2. The regulations were binding upon the intestate and upon the plaintiff, and it cannot be pretended that they have been complied with. 3. Plaintiff neither produced the passbook when he demanded payment, nor did he allege that it was lost or destroyed or offer proof of the fact. Judgment reversed.

Cited: 2 Daly 229; 33 Supr. 446. Aff'd: 21 N. Y. 543.

MARVINE v HYMERS (1855) 12 N. Y. 223.

On promissory note payable at D Bank and indorsed by defendants. D Bank discounted the note for the account of S, the maker; and being dishonored, it was transferred to the plaintiffs. Defendants claimed that there had been no valid transfer, and that the note was void for usury. S had procured notes, indorsed by defendants, to be discounted at the D Bank. Upon each discount the bank retained the interest in advance, at 7 per cent, and paid the balance to S, in sight drafts on New York, $\frac{1}{2}$ of 1 per cent being charged as a premium of exchange. To pay the discounted notes and drafts, S made the note in suit, on which the interest was calculated erroneously, so that the new note was for too large a sum by \$1.79. Judgment for plaintiff. Affirmed at General Term. Appeal.

Denio, J. 1. The D Bank had the same right which any other holder would have, to transfer the note by indorsement. 2. Upon the discounting of commercial paper, not having a longer time to run than bills usually discounted by bankers, interest on the whole amount agreed to be paid at maturity, not exceeding the legal rate, may be taken in advance. 3. The error in calculation does not make the contract usurious, since to constitute usury there must be an illegal agreement. 4. The transaction was not usurious on account of the payment of the premium of exchange. Judgment affirmed.

Cited: 13 N. Y. 315; 19 id. 143, 144, 145, 254, 315; 27 id. 142; 32 id. 613; 33 id. 67; 52 id. 649; 87 id. 54.

GILLET v PHILLIPS (1855) 13 N. Y. 114.

Bill to set aside a sale. The S Bank stopped specie payments in 1841. In 1842, the cashier sold certain notes of over \$1,000, at less than their face value, to the defendant, a director, to raise funds to redeem the circulating notes of the bank. Plaintiff was appointed receiver of the bank, in 1843. Rev. Stat., sec. 8, declared that a transfer of over \$1,000, except to one without notice, be void, unless authorized by a previous resolution of the directors; and prohibited a corporation, insolvent or in contemplation of insolvency, from making a preference as to creditors. Decree for plaintiff. Affirmed at General Term. Appeal.

Gardiner, C. J. 1. The contract was illegal, and the bargain to consummate which the money was paid by defendant, was unlawful; and a party to it cannot recover or set it off. 2. The cashier and defendant were both chargeable with knowledge. Judgment reversed.

Cited: 5 Bosw. 27, 325; 18 Hun 296; 36 id. 465; 77 id. 48; 15 N. Y. 47, 133, 141, 187, 188, 200, 201, 247, 289; 17 id. 532, 542, 550; 26 id. 415; 99 id. 316; 114 id. 174.

BANK OF GENESEE v PATCHIN BANK (1855) 13 N. Y. 308.

On bill of exchange, holder against indorser. P drew the bill payable to the order of "S, Cas.," addressed to and accepted by R, treasurer of the R Co. It was indorsed by S, cashier of defendant, a bank, to "B, Pt." Plaintiff, a bank of which B was president, discounted similar paper received from the defendant. S testified that he had no authority from the bank, which had no directors, to indorse the note. Evidence tended to show that S indorsed it to raise money for accommodation of the R Co. Defendant did not expressly plead that the plaintiff was not a corporation. The court charged, that if the cashier S had special authority from the defendant to indorse the draft, the defendant was bound by the indorsement, though it was to raise money for accommodation of the R Co. Judgment for plaintiff. Affirmed at General Term. Appeal.

Denio, J. 1. Where the defendant does not expressly plead that the plaintiff is not a corporation, the latter does not have to prove its corporate existence. 2. The officers of a banking association have no power to engage the institution as the surety for another, in a business in which it has no interest. 3. The charge was erroneous. Judgment reversed.

Cited: 30 Barb. 628; 33 id. 541; 36 id. 334; 59 id. 232; 5 Bosw. 176, 222; 7 id. 497; 5 Hun 155; 34 id. 336; 48 id. 391; 64 id. 178; 85 id. 492; 90 id. 365; 3 Keyes 343, 610; 16 N. Y. 129; 18 id. 239; 22 id. 278; 25 id. 363, 603; 31 id. 45; 34 id. 59, 60; 31 id. 45; 35 id. 506; 50 id. 401; 57 id. 131; 60 id. 291; 62 id. 72; 90 id. 630; 116 id. 292; 118 id. 474; 1 Sheld. 282; 2 Sweeny 427.

PEOPLE v WALKER (1856) 21 Barb. 630.

To compel contribution to a safety fund. On April 22, 1829, an act was passed extending the charter of a bank of which defendants were trustees. By this act the bank was made subject to all the provisions of the "Act to create a fund for the benefit of creditors of certain moneyed corporations," passed April 2, 1829. The bank filed a written consent to become subject to the act extending its charter, and it was thereupon extended to January 1, 1850. The bank fund provided for by the Act of April 2, 1829, became impaired by the payment of debts of an insolvent corporation. The bank was notified on October 11, 1841, that it was required to pay to the state treasurer one half of 1 per cent of its capital stock annually thereafter, to reimburse this fund. These payments were to be made on or before January 1. The bank paid the tax annually in December of each year, down to and including 1848. Assets came into their hands sufficient to pay all the debts of the bank. The defendants contended that the charter expired on December 31, 1849, and the payments made each year in December were for the current year and not the past year: therefore its payment in December, 1848, was for the year 1849. Judgment for defendants. Appeal.

Gould, J. 1. The assuming by the State of the liability to collect and pay, and being the only power to collect, invest and pay, constituted the state the proper party plaintiff. 2. The payment by the bank for eight successive payments puts a practical construction on the law that annual notice from the state to pay was not necessary. 3. The expression "on or before the first day of January" means that the payment may be made at any time before January 1. 4. As to the non-

existence of the bank on January 1, 1850, if the payment were due on December 31, 1849, the defendants are liable. Judgment reversed.
Cited: 73 N. Y. 390. Reversed 17 N. Y. 502.

SMITH v ESSEX COUNTY BANK. (1856) 22 Barb. 627.

Money had and received. G gave a note to B, payable at the defendant, a bank. B indorsed the note and left it with the defendant for collection. After maturity and protest, G paid the note which was delivered to him. Defendant did not turn over the proceeds to B. Subsequently B obtained a judgment against G for the amount of the note. G assigned this claim to the plaintiff. The plaintiff obtained a judgment in the justice's court. Judgment affirmed in the county court. Appeal.

C. L. Allen, P. J. 1. The defendant was the agent of the payee and no omission or misapplication of the fund could prejudice the maker, who was entirely absolved on paying the note at the place where it was made payable. 2. The bank was the legal holder of the note so far as the maker was concerned, and unless it had been obtained by the latter by fraud, a payment to the bank as holder absolved the maker. Judgment reversed.

GODIN v BANK OF THE COMMONWEALTH (1856) 6 Duer 76.

On check, drawn by S & Co. on defendant, a bank, in favor of the plaintiff, and postdated July 25. On July 12, a final settlement of accounts had taken place between S & Co. and the defendant, showing a balance in S & Co.'s favor of \$10.21. S & Co. on examining the account found two checks amounting to \$90, dated July 25, which had been paid by defendant before due. The checks were returned to defendant for payment. Payment was refused. Next day S & Co. assigned to plaintiff, who sues for the amounts of the two checks. Defendant contended the account was closed and the postdated checks were rightfully paid. Judgment for plaintiff. Appeal.

Slosson, J. 1. A check may be antedated or postdated, without affecting its legal character as an obligation, but the date determines when it becomes payable. 2. The amount of the checks were never, in contemplation of law, withdrawn from the bank, and the defendant became bound, on presentation, to pay it, and having refused, is liable in this action. Judgment affirmed.

Cited: 5 Misc. 424; 100 N. Y. 56; 49 Supr. 72.

GRIFFIN v RICE (1856) 1 Hilt. 184.

To recover a balance by the assignee of C, a depositor in the A Bank. Before the bank had notice of the assignment, a note of C, payable at the bank, was presented and paid. C had only a small balance, besides collateral, which the bank collected, and from the proceeds repaid itself the amount of the note. Defendant contended that it was entitled to credit for payment of the note. The plaintiff proved a custom of the bank, by a witness who was not a banker. Judgment for plaintiff. Appeal.

Ingraham, J. 1. There was no necessity for showing a man to be an expert in banking, in order to prove a usage. 2. The payment of the note was, by the direction of C, payable at the bank, and without notice of the assignment, the bank was justified in paying it, and should be allowed to set off that amount. Judgment reversed.

Cited: 4 Misc. 521.

FARMERS BANK v BUTCHERS BANK (1856) 14 N. Y. 623.

On checks certified without authority. G drew five checks which were certified by the teller of defendant bank, though they were not drawn against funds, and the teller had no authority to certify checks for which there were not sufficient funds on deposit. The plaintiff, a bank, was a bona fide holder for value. Judgment for plaintiffs. Appeal.

Denio, C. J. By authorizing their teller to issue certified checks, defendants authorized him to hold out the existence of funds alleged to be on deposit with them, and to promise that such funds should not be diverted before the checks were presented. Judgment affirmed.

Cited: 33 Barb. 546; 67 id. 32; 2 Hun 61; 3 id. 151; 6 id. 347; 26 id. 127; 35 id. 245; 25 N. Y. 297, 597, 601, 603, 604, 605; 26 id. 508; 31 id. 45, 299; 37 id. 190, 322; 50 id. 581; 89 id. 435; 107 id. 183; 4 T. & C. 262; 5 id. 287.

BROWN v BROWN (1857) 23 Barb. 565.

To recover a deposit, drawn from a savings bank by defendant. B, husband of defendant, deposited money, and gave instructions to have it paid either to himself or wife, and both entered their names on the signature book of the bank, and the entry was made by the bank, "to be drawn by either." The husband took the passbook. B died, and the next day defendant drew the money. The administrator of B brought the action. Judgment for plaintiff, subject to opinion of this court.

Strong, T. R., J. 1. In making the deposit B manifestly did not intend to give the money to defendant, because a delivery of the money, or at least of the evidence of the deposit investing her with full control over it, was indispensable to such a gift. 2. The intestate was the sole creditor of the bank, and the entry of the names in the signature book, with the words added by the clerk, formed no part of the contract. 3. Defendant was a mere agent in the matter, whose authority was revoked by the death of her husband. Judgment for plaintiff.

COWLES v CROMWELL (1857) 25 Barb. 413.

To collect a stock subscription. The defendant was an original subscriber for 340 shares of the capital stock of a bank of which plaintiff was receiver, and paid for 50 shares. The other shares he transferred to other persons with the consent of the bank. The shares he transferred were all paid for except the shares in question. The defendant offered to prove that the transfers were made in pursuance of an agreement among the associates entered into at the time of the subscription, and that he was to be released on his substituting responsible and acceptable transferees in his place, was overruled. Act of 1849, ch. 226, p. 340, declared that persons, who were stockholders at the time of contracting a debt, should be responsible therefor; but should be exonerated from such responsibility in respect to any stock transferred on the books of the bank previous to any default in the payment of such debt, to any resident of the state in good faith, and substituted the liability of the assignee in place of the original stockholder. Judgment for plaintiff. Appeal.

Mitchell, P. J. 1. A person agreeing to take stock, who has transferred the stock in good faith, with the consent of the bank to a person who is liable to the bank, does not remain liable for the stock transferred. 2. It was error to reject the evidence, as it was material to show the intention of the bank. Judgment reversed.

Cited: 52 Barb. 172; 28 Hun 133, 136; 94 N. Y. 420; 158 id. 583.

LIVINGSTON v BANK OF NEW YORK (1857) 26 Barb. 304.

To terminate the affairs of a bank. The plaintiff, as owner of bank bills issued by defendant, presented them and demanded specie, which was refused. He moved—*ex parte*, on his complaint, which was based on information and belief—for an order requiring the defendant to show cause why a temporary injunction should not be granted, and a receiver appointed. The Act of 1849, authorizing a permanent injunction upon a mere refusal to pay specie, required further satisfactory proof that the plaintiff's demand could not be satisfied out of any property of the defendant. The bank had property more than sufficient to satisfy all demands. Under the statute, the bank, after suspension, had twenty days, and might have sixty more, to settle with its creditors.

Roosevelt, J. 1. The mere suspension of specie payments, of itself and by itself, does not settle the question of solvency. 2. Where a statute says that a certain thing may be done after twenty days, or after sixty and twenty days, precisely the same thing cannot be done under a previous statute, *ex parte*, without waiting a day. 3. An affidavit based on information and belief is not sufficient to show that a bank is insolvent. Motion denied.

Cited: 53 Barb. 420; 3 Robt. 707; 51 Supr. 236.

MORFORD v FARMERS BANK (1857) 26 Barb. 568.

On promissory note. The note was made by a railroad company payable to the order of the defendant, a bank, which, by its president, indorsed it to N, who indorsed it over to the plaintiff. The defendant never owned the note, or had any interest in it, and never authorized the president to indorse it in its name. The defendant contended that it was not authorized to make an accommodation indorsement. Judgment for defendant. Appeal.

Clarke, J. Even if the president had been authorized to make the indorsement, yet as the bank never owned or had any interest in it, the indorsement would have been a mere accommodation indorsement, and an accommodation indorsement would not be binding unless the plaintiff had discounted it in good faith in consequence of representation made by the bank, that it was the owner of the note. Judgment affirmed.

Cited: 30 Barb. 423; 90 Hun 368; 116 N. Y. 292.

ARNOLD v SUFFOLK BANK (1857) 27 Barb. 424.

Money had and received. The plaintiff purchased, and had transferred to him, ten shares of the defendant bank's capital stock. His demand for the certificate of stock from the bank was refused. The bank became insolvent, and a trust company was made its receiver. Plaintiff made the trust company a defendant, but stated no cause of action against it. The plaintiff was indebted to the bank for more than the value of the stock. Articles of association provided that no stockholder who owed the bank should be permitted to transfer his shares, or receive a dividend thereon. Verdict for plaintiff. Motion for new trial, denied. Appeal.

Emott, J. 1. The plaintiff has no right to maintain an action against the receiver on a money demand against the bank, when there is no cause of action shown against the receiver. 2. The law implies a promise to deliver the certificates on the ground that where an obligation is imposed by law upon a corporation, a promise of performance will be implied. 3. The measure of damages is the value of the stock, or its highest price in the market at any time after the demand and refusal. 4. The provisions of the by-laws create a lien upon the stock in favor of the bank for the debts of the holder, and the holder can no more assert, or maintain any rights of ownership, or establish any right to damages from an interference with his absolute control of the stock, than he can claim the right to sell it without satisfying the debt. It makes no difference that the debt was a partnership debt. The debts of a partnership, although joint, are yet the debts of all the partners, for which the individual property of all is liable. Order reversed.

Cited: 53 Barb. 503; 3 Misc. 70; 59 N. Y. 108; 124 id. 340; 49 Supr. 2.

McCREADY v RUMSEY (1857) 6 Duer 574.

Damages, for refusal to transfer stock. Plaintiff purchased from C, twenty shares of the stock of the S Bank of which defendant was president; and C executed an assignment of the shares on the back of the certificate. C had bought the stock from J, and at the time of sale the stock stood in J's name in the books of the bank. The certificate had attached to it, a power from J for the transfer of the stock. J was indebted to the bank for subscriptions for the stock. Sec. 19 of the Laws of 1838 provided that no shareholder should be permitted to transfer his shares who owed a debt to the association. Plaintiff demanded of defendant the transfer of the stock. Defendant refused, on the ground that J was indebted to the bank. Verdict for defendant. Appeal.

Hoffman, J. The bank had a valid lien on the stock, as against J, by reason of non-payment of the subscriptions. The assignee took with the rights and liabilities that his assignor had. Judgment affirmed.

Cited: 78 Hun 96; 46 N. Y. 335.

UNITED STATES TRUST CO. v HARRIS (1857) 2 Bosw. 75.

On promissory note, against the maker. The note was made to the E Bank, of which plaintiff was receiver. Defense: that the note was given for shares of stock of the E Bank previously purchased by it, and issued to the defendant, and that the note was received by the bank, and the stock issued to the defendant in violation of sec. 1, art. 1, ch. 8, R. S., entitled "Regulations to prevent the insolvency of moneyed corporations and to secure the rights of their creditors and stockholders."

Defendant sought to counterclaim rent of the banking house. The rent was not due until some time after the note became due. Judgment for plaintiff. Appeal.

Bosworth, J. 1. The note was not void under the statute in question for that applies only to an original subscriber for stock. 2. It was not unlawful for the bank to sell on credit, shares of its stock which it had previously purchased, or to take a note for the amount payable at the expiration of the credit. 3. The bank having become the owner of the stock, and having sold and transferred it to the defendant, he is liable to pay for it at the purchase price. 4. The rent being undue, could not be set off. Judgment affirmed.

Cited: 9 Bosw. 594; 10 id. 19; 2 Keyes 341; 82 N. Y. 47.

CURTIS v LEAVITT, REC'R (1857) 15 N. Y. 9.

Bill to establish a trust. Cross bill to declare it void. This is an appeal from a judgment sustaining the trust and the claims of stockholders and upholding the validity of the bill. For a statement of the facts, see 17 Barb. 309, ante p. 897.

Comstock, J. 1. The million and the half-million trusts are not void under the statute cited, for the trusts were not made with the intent to give a preference to particular creditors and 2 R. S. 135, sec. 1, does not apply to instructions for active purposes. 2. The T Co. had power to borrow money; and prior to 1840, banking associations could issue time paper, to secure a debt for money loaned, if such paper was not intended to circulate as money. 3. The pledge of the bonds prior to 1840, was valid, and entitled the pledgees to the benefit of the two trusts, along with the other bondholders. 4. These bonds, when issued, pledged, and sold, were English contracts, and the loans, belonging to the million trust, were not usurious, being exempted from the usury laws by statute. 5. Even if the loans were usurious, the defendant receiver, representing the corporation, is prohibited by the Statute of 1850 from setting up usury. 6. The loan of \$250,000 was a Pennsylvania contract, and inoperative only for the excess of interest over 6 per cent. 7. The pledge of the two hundred and seventy bonds of the half million trust, was valid because the intention was to secure the payment of the money loaned, and the assignees of the pledgees have a right to share in the benefit of the half million trust as holders of the bonds. 8. The general account of P D against the T Co. is a valid debt, to be reduced, however, by computing interest at 5 per cent instead of 7, and by striking out the commissions on the sale of so many of the million bonds as they themselves purchased. Decree modified.

Cited: 7 Abb. N. C. 74; 6 App. Div. 219; 12 id. 364; 22 id. 355; 23 id. 217; 25 id. 160, 510; 37 id. 217; 26 Barb. 37, 213; 27 id. 572; 28 id. 196, 334; 30 id. 629; 32 id. 314; 33 id. 339; 35 id. 247, 600; 37 id. 599; 40 id. 441; 41 id. 349; 46 id. 618; 47 id. 17; 61 id. 209; 63 id. 424; 65 id. 270; 3 Bosw. 295; 4 id. 155, 601; 7 id. 551; 9 id. 685; 1 Daly 294; 3 id. 273; 7 id. 323; 2 Hilt. 527; 2 Hun 595; 4 id. 234, 422; 5 id. 611; 6 id. 585; 13 id. 407; 18 id. 295; 25 id. 45; 35 id. 131; 42 id. 383; 51 id. 563; 69 id. 570; 80 id. 485; 90 id. 210; 1 Keyes 600; 2 id. 126; 3 id. 455; 7 Misc. 209; 10 id. 690; 13 id. 742; 23 id. 209; 25 id. 100; 31 id. 59; 32 id. 460; 17 N. Y. 52, 522, 524, 533, 534, 535, 537, 538, 542, 551, 556; 19 id. 165, 166; 21 id. 299; 22 id. 474, 514; 23 id. 276; 25 id. 576; 26 id. 414; 27 id. 557; 30 id. 264; 32 id. 217, 476; 33 id. 670; 35 id. 69; 44 id. 91; 45 id. 116; 49 id. 641; 57 id. 532; 66 id. 381; 69 id. 32; 73 id. 466; 77 id. 579; 78 id. 180; 79 id. 447; 94 id. 176; 96 id. 85, 472; 97 id. 651; 98 id. 362; 106 id. 410; 114 id. 133; 116 id. 444; 119 id. 53; 123 id. 108; 141 id. 164; 144 id. 172; 151 id. 37; 154 id. 701; 162 id. 496; 164 id. 255; 6 Robt. 411; 1 Sheld. 229; 33 Supr. 145; 38 id. 156; 40 id. 156; 5 T. & C. 146; 6 id. 450.

GILLET v VAN RENSSSELLAER (1857) 15 N. Y. 397.

For interest on advance dividend. Defendant signed and delivered to the plaintiff, receiver of X Bank, a receipt, put in evidence, reading: "I bought a house under foreclosure sale for \$400 and paid the receiver \$91 costs of foreclosure, having taken a deed. The balance of the bid, \$308, is allowed to stand unpaid, until a dividend is declared in the matter in which defendant is receiver, and in case I am entitled to such dividend, this balance is to apply as an advance dividend of this date, and what is not so applied I agree to account for to Gillet, the receiver, as money advanced by him to my use on this date, to be paid after the making of such dividend to him individually." At the same time defendant delivered other receipts amounting to \$15,000. The court refused to charge that the plaintiff was not entitled to interest until after default in payment; and that he was not entitled to

interest on the receipts, so far as they applied upon the indebtedness of the bank to defendant, but only on the amount overpaid. Judgment for plaintiff. Affirmed at General Term. Appeal.

Bowen, J. 1. Interest is collectible on money advanced and in effect the defendant agreed to pay interest. 2. The defendant should be charged with interest prior to the time the dividend was declared, namely, from the time he received the money. Judgment affirmed.

Cited: 48 Hun 256; 162 N. Y. 426; 1 Robt. 18.

FARMERS BANK v BUTCHERS BANK (1857) 16 N. Y. 125.

On checks, certified without authority. G drew checks on defendant bank, payable to plaintiff's cashier. The checks were certified by defendant's teller. The teller was accustomed to certify checks, but when G applied he stated that the checks were merely for security. The president testified that the teller had no authority to certify except by special permission, unless the drawer had sufficient funds in the bank. Checks were sent to plaintiff and applied as cash for G. The judge charged, that the teller had authority to certify checks, so as to bind the defendant to pay them to bona fide holders; that if the plaintiff took the checks without notice of an agreement between the teller and G, in payment of a debt due, it was a bona fide holder for value; but it was not if it took the checks as collateral security. Judgment for plaintiff. Affirmed at General Term. Appeal.

Selden, J. 1. The plaintiffs were holders, for value, of the checks in question, the evidence was sufficient and the charge of the court correct. 2. When paper is, upon its face, in all respects such as the corporation has authority to issue, the person taking the paper need not inquire further. 3. A bona fide holder for value, of a negotiable check, certified by a special agent, whose authority is limited to cases where the bank has funds of the drawer in hand, can recover though the bank has no such funds. Judgment affirmed.

Cited: 54 App. Div. 568; 3 Bosw. 605; 8 id. 294; 2 Hun 61; 3 id. 151; 6 id. 347; 25 id. 609; 26 id. 127; 33 id. 596; 63 id. 372; 70 id. 528; 90 id. 368; 3 Keyes 344; 4 Lans. 306; 6 id. 492; 4 Misc. 570; 22 id. 100; 16 N. Y. 335; 19 id. 159; 23 id. 463; 25 id. 297; 26 id. 508; 27 id. 384; 29 id. 632; 31 id. 45; 34 id. 61; 35 id. 506; 37 id. 190, 322; 50 id. 401; 52 id. 352; 57 id. 131, 393; 59 id. 72; 60 id. 292; 73 id. 594; 89 id. 429; 98 id. 608; 102 id. 340; 107 id. 183; 120 id. 152; 122 id. 174; 134 id. 108; 34 Supr. 342; 35 id. 287; 36 id. 477; 3 T. & C. 357; 4 id. 262; 5 id. 287. S. c.: 14 N. Y. 623, ante p. 907.

CHESTER v BANK OF KINGSTON (1857) 16 N. Y. 336.

Money paid in ignorance of secret agreement. W procured plaintiffs to make notes for his accommodation, which he indorsed and delivered to the defendant bank to hold as collateral security for his liability to defendant on a note. He was also indorser on "Swift" note, which had been discounted for him. The bank sued the indorsers on the "Swift" note, and the plaintiffs on their notes. Later the indorsers on the "Swift" note agreed to withdraw the defense, and executed a bond to the bank to pay the amount of the "Swift" note in eight months, which bond was given under a secret parol agreement that the bank would try to collect the amount secured thereby from the makers of the accommodation paper, and if successful the bond should be returned. The bank recovered judgment on these notes against the plaintiffs, and transferred to them the "Swift" note, and the bond. Plaintiffs sued on the note and bond; but seeing that they could not recover because of the secret agreement for the first time known to them, they abandoned the suits, and filed a bill to recover the amount they had paid on the "Swift" note. Judgment for plaintiff, for amount paid on the "Swift" note. Appeal.

Comstock, J. 1. The bank had no right to deal with the "Swift" note so as to postpone the remedies to which the plaintiffs were entitled on being subrogated to that security. 2. If there is a defense to the bond, the plaintiffs are entitled to recover their money paid in ignorance of the facts. 3. That the bond was held as collateral may be shown, for such evidence does not vary the written undertaking. Judgment affirmed.

Cited: 63 App. Div. 421; 42 Barb. 390; 20 Hun 9, 353; 76 id. 556; 3 Keyes 278; 6 Lans. 371; 17 N. Y. 434; 31 id. 284; 32 id. 701; 33 id. 32; 34 id. 26; 64 id. 402; 127 id. 140; 130 id. 230; 51 Supr. 351.

CENTRAL BANK v EMPIRE STONE DRESSING CO. (1858) 26 Barb. 23.

On promissory notes. In 1852, the plaintiff, a bank in Connecticut, loaned S its bank bills under the denomination of \$5 for the purpose of circulating them in New York. S gave his note in payment for the bills. On May 8, 1854, S gave his note to the defendant, which indorsed it for its secretary, and before maturity the note was delivered to the plaintiff in payment of a loan of its bank bills to the defendant. The loan was ostensibly made to the defendant to avoid all questions as to the legality of the loan under the plaintiff's charter, but was in reality made to S, who owned most of the defendant's stock. At the time the contracts were made, there was a New York law prohibiting the circulation of foreign bank bills under \$5. This law was repealed before the suit was instituted. Judgment for plaintiff. Appeal.

Peabody, J. 1. On the grounds that the transactions were in fact with the defendant, or if not really so, that the plaintiff was misled by S, the agent of the defendant, the defendant is liable for the indorsement. 2. By the repeal of the law, the contracts made under it, whose considerations were always morally good as between the parties, became valid. 3. The plaintiff was a banking corporation and such a contract was within the scope of any banking business. Judgment affirmed.

Cited: 35 Barb. 600; 5 Bosw. 289; 90 Hun 368; 116 N. Y. 292.

SENECA COUNTY BANK v LAMB (1858) 26 Barb. 595.

On promissory note. Defendant L made the note, payable forty days after date, at the C Bank. The note was indorsed by defendants D and H, and discounted by the plaintiff, a bank, at the rate of 7 per cent per annum in advance. The note had no inception before it was so discounted. Art. 36 of the act of incorporation provided that "the said corporation shall also be subject to the provisions contained in the act entitled 'An act to create a fund for the benefit of creditors of a certain moneyed institution, and for other purposes,' passed April 2, 1829." Art. 33, of that act, provided "that every moneyed corporation subject to this act shall be entitled to receive the legal interest established; but on all notes discounted, which shall mature in sixty three days from the time of such discount, the said moneyed corporation shall not take or receive more than 6 per cent per annum in advance." Judgment for defendants. Appeal.

Davis, P. J. Where the contract sought to be enforced springs out of a violation of the statutes of the state, the court will leave the parties to the illegal transaction, where it finds them, withholding from both, its aid in enforcing it. Judgment affirmed.

Cited: 3 Hun 665; 12 id. 44; 25 id. 95; 6 T. & C. 171.

PATCHIN v RITTER (1858) 27 Barb. 34.

Money had and received. The plaintiff carried on a banking business in Buffalo under the name of "The Pratt Bank." A tax was assessed against the bank by the Supervisors of Erie County, and the receiver of taxes issued a warrant for the collection thereof, and gave it to the defendant, a constable, to collect. Defendant took this money from the office of the Pratt Bank in settlement of the tax. The bank was located in the First Ward of Buffalo, and plaintiff resided in the Ninth Ward. Statute of 1847, sec. 4, provided that all individual bankers are declared subject to taxation upon the full amount of capital paid in, which shall not be less than the amount of circulating notes, without any deduction for the debts of such individual banker. The plaintiff contended that the assessment and warrant were not against him, or against any natural or artificial person, and was therefore void. Judgment for plaintiff. Appeal.

Davis, P. J. 1. An individual banker doing business under the General Banking Laws of this state, who assumes a special name, by which his business as banker is characterized and known, may be assessed by that name, and the warrant for collection of the tax, issued against such name, may be levied upon the money and property used in the business of such banker. 2. Whether such banker was taxable in the town or ward in which the assessment was made, cannot be raised to affect the validity of process, regular on its face, against the officer making it; nor can a banker doing business in the name of a corporation be permitted to deny that it is a lawful corporation and not taxable by its apparently corporate name. Judgment reversed.

Cited: 42 App. Div. 416; 30 Barb. 618.

HOOKER v FRANKLIN (1858) 2 Bosw. 500.

On check. Plaintiff, the president of the C Bank, sued defendant as indorser. The check was drawn by a railroad company on the A Bank, in favor of C, and by him indorsed and deposited to his credit in the C Bank on the same day. The following day the C Bank sent the check to the A Bank, through the clearing house, according to the usage of banks in New York City. On the same day the check was returned by the A Bank to the C Bank, payment having been stopped by the drawer. The defendant alleged that on the day the check was drawn there were sufficient funds of the drawer in the A Bank to meet the check, and that its non-payment was owing to the negligence of the C Bank in presenting it; and that the presentation of the check at the clearing house by the C Bank, and there having it passed to their credit, was a payment so far as defendant was concerned. Judgment for plaintiff. Appeal.

Bosworth, J. 1. The C Bank having complied with the usage of banks was not bound to use any greater diligence. 2. The transaction at the clearing house did not operate as a payment of the check by the A Bank. 3. The A Bank never accepted the check, or agreed to pay it, or credit its amount to the C Bank. Judgment affirmed.

MABEY v ADAMS (1858) 3 Bosw. 346.

To enforce director's liability. The R. S. read as follows: "Regulations to prevent the insolvency of moneyed corporations, and to secure the rights of stockholders and creditors." Sec. 10 provided that the directors should contribute toward the payment of debts of the corporation. The complaint alleged; that the defendant, a director in the E Bank, by reason of the false representations published in the articles of the association as to the amount of stock paid in, and the value thereof, induced the plaintiff to purchase stock from the bank; that the bank afterward became insolvent, and the money paid by plaintiff was wholly lost. The representations complained of took place before the plaintiff became a stockholder. Demurrer to complaint. Overruled. Appeal.

Slosson, J. 1. The defendant cannot be chargeable individually for false statements contained in the articles of association, which necessarily preceded his election as director. 2. The plaintiff is not entitled to the benefit of sec. 10 of the statute, for that applies only to those stockholders who are such when the violation is committed. 3. The plaintiff has no cause of action, because the stock was purchased from the bank itself, and not from a previous holder, who had a right of action against the directors individually. 4. As director, the defendant is not chargeable with knowledge of the value of stock. 5. Banking associations are within the provisions of the act relative to the insolvency of moneyed corporations. Judgment reversed.

WILLIAMSON v MILLS (1858) 2 Hilt. 84.

On note, against indorser. M, a depositor in B Bank, had a note discounted, giving as collateral another note indorsed by the defendant. When the discounted note matured, the cashier, under the impression that M had a balance sufficient to meet it, charged the note to his account and delivered the collateral. On discovering that the balance was not sufficient, and on defendant's request, the collateral was returned. In a suit on the collateral by plaintiff, as president of the bank, the defendant contended that the charging of the note to M was a discharge of the indorser on the collateral. Judgment for plaintiff. Appeal.

Daly, J. Charging the note of M to his account could not operate as a payment of the loan unless the bank so intended; and that it did not so intend, was evident from the demand of the return of the security. Judgment affirmed.

GRAVES v AMERICAN EXCHANGE BANK (1858) 17 N. Y. 205.

Conversion, for paying draft to wrong person. Bill of exchange was drawn by M on defendant, a bank, payable to plaintiff's assignor or order. H purchased this draft. Plaintiff's assignor resided at M, but H sent his draft to him at S, fifteen miles from M. Subsequently discovering his mistake, he procured it to be forwarded from S to M. It was never received. Plaintiff's assignor, G, had directed H to send the money "in any way that was safe." A man of the same name as G, received the draft at the post office, indorsed and sold it for value to B. It was finally presented to, and paid by, defendant. Plaintiff's assignor, after such pay-

ment, assigned his interest to plaintiff, who demanded it of defendant. Judgment for plaintiff. Affirmed at the General Term. Appeal.

Comstock, J. 1. The debtor was justified in procuring the draft and sending it by mail to his creditor. 2. When it reached the right place, the draft became the property of the person to whom it was directed, and by assigning it to plaintiff, he waived his objections founded upon supposed departure from his instructions. 3. The payment by defendant in good faith, upon the indorsement of the wrong person, did not impair the title of the true owner, and he could claim it wherever he could find it. Judgment affirmed.

Cited: 76 Hun 478; 14 Misc. 175; 57 N. Y. 259; 73 id. 426; 75 id. 563; 85 id. 212; 91 id. 28, 79, 81; 119 id. 200; 2 Robt. 411; 2 Sweeney 694.

PEOPLE v WALKER (1858) 17 N. Y. 502

To recover tax after bank charter expired. The defendants were directors of the M Bank, the charter of which was to continue in force "until January 1, 1850," The Safety Fund Act required banks to make certain contributions to the safety fund, on January 1, of each year. The question was whether the charter expired December 31 or January 1, and whether the directors as trustees should pay the tax. Judgment for plaintiff. Affirmed at General Term. Appeal.

Johnson, C. J. 1. On January 1, 1850, the corporation had ceased to exist, the word "until" being used in the exclusive sense. 2. Only corporations existing on the day payment was to be made, are liable for the tax. Judgment reversed.

Cited: 5 App. Div. 417; 30 Misc. 214; 111 id. 623; 73 N. Y. 390.

CITY BANK OF COLUMBUS v BRUCE (1858) 17 N. Y. 507.

On promissory note, against makers. Defendants made a note for \$5,000 to the order of the C Co. D, its president, at its direction, indorsed it to S, as collateral security for a demand which he held against the company. Plaintiff, at the company's request, paid the demand of S and took up the note, crediting the excess on an account he had against the company. Payment was demanded from defendants. The directors of the C Co. passed a resolution that any stockholder indebted to it on stock notes might pay the debt by transferring stock to it. This was done by surrendering subsequently issued stock to the amount of \$133,000. Resolutions were passed to increase the capital from \$50,000 to \$90,000 and authorizing the officers to receive subscriptions. Stock was accordingly issued for the note in question. Each defendant offered to prove that signature of the other was obtained by fraudulent representations as to the solvency of the company. Refused on the ground of interest. The proof was that the company was insolvent. Sec. 64 of Law of 1845 stated that all evidences of debt should be made by special indorsement, payable solely to the C Co. Judgment for plaintiff. Affirmed at General Term. Appeal.

Selden, J. 1. The surrender of the stock to the amount of \$133,000 was a valid transaction. The requirements of the charter in reference to original subscription have no application to this case. 2. The directors need no special authority to transfer stock, and therefore there was sufficient consideration for the note. 3. Each defendant being interested in the suit, was incompetent to testify. Sec. 64 is directory merely, and non-compliance should not be regarded as affecting the title. 4. The evidence of fraud was insufficient. 5. The company had power to purchase its own stock and reissue it unextinguished. Judgment affirmed.

Cited: 60 App. Div. 217; 55 Barb. 371; 2 Bosw. 88; 4 id. 443; 32 Hun 272; 44 id. 145; 87 id. 440; 1 Lans. 331; 29 N. Y. 561; 85 id. 458; 134 id. 213; 6 Robt. 411.

LEAVITT v BLATCHFORD (1858) 17 N. Y. 521.

Bill to set aside a trust deed and bonds secured thereby. The N Trust Co., organized under the General Banking Act of 1838, having issued certificates of deposit, which were held by Philadelphia banks, and which were approaching maturity, and being financially embarrassed, issued the bonds in question. They were payable to M or his assigns, in five years, at a London bank with interest at 6 per cent, and were secured by an assignment of securities in trust to the defendant. These bonds were signed in blank, and received by the Philadelphia banks in exchange for the maturing certificates of deposit. Plaintiff was receiver of the Trust Co. The grounds of this bill were that the trust conveyance was usurious

and violated the statutes prohibiting conveyance by an insolvent moneyed corporation with intent to give a preference to particular creditors; that the company had no power to issue the bonds secured by it; and that it was forbidden, by an act of May 14, 1840, to issue bills on notes, not payable on demand and without interest. Judgment for defendant. Appeal.

Harris, J. 1. The general provisions of the R. S. relating to moneyed corporations have no application. 2. The trust on which these securities were transferred to the defendants was not for the benefit of the company any more than is every mortgage for the benefit of the mortgagor. 3. If a preference, this was only such as a debtor is allowed to make; and, since the purpose was obviously to prolong the company's existence, the other creditors were not delayed or defrauded. The Act of 1840 did not apply to these bonds. 4. The power to borrow money carries with it the power to execute assurances for repayment, and these bonds, not being either negotiable bills or notes, they need not be payable on demand without interest. 5. The receiver could not plead usury. Judgment affirmed.

Cited: 30 Barb. 92; 45 id. 647; 4 Bosw. 601; 5 id. 27, 175; 2 Daly 226; 2 Keyes 126; 21 N. Y. 408; 25 id. 576; 47 id. 311; 95 id. 121; 96 id. 86.

MATTER OF EMPIRE CITY BANK (1858) 18 N. Y. 199.

To enforce liability of stockholders in banking corporations. A receiver was appointed, and the bank enjoined from further transactions, by an order stating the bank to be a joint stock association doing a banking business, and issuing bank notes to circulate as money. The receiver reported the debts and assets with the names of the stockholders; these were referred to a referee to apportion the debts among the stockholders. The Act of 1849, ch. 226, contained general provisions as to the liability of stockholders and as to practice in proceedings to enforce it. On confirmation, various stockholders objected. Appeal.

Denio, J. 1. Holders of stock, by hypothecation merely, are liable as stockholders under this act. 2. The trustees of certain shares for the bank were not legally such, but merely purchasers who relied upon the bank's managers to carry the debt contracted in the purchases until a resale, and are liable under the act. 3. Stockholders, who were also creditors, are not entitled to a setoff, except as to the share to which they are entitled pro rata with all creditors. 4. This act does not impair the obligation of any contract, express or implied. There was never any right in defendants to trial by jury. Proceedings under the act, as here carried out, are due process of law, the stockholders having an opportunity to be heard before the referee. 5. This was a bank of issue within the meaning of the act. 6. The referee properly passed on the amount of the debts and determined who were liable therefor. 7. The orders granting extensions of time for these proceedings were warranted by the act, and the delay is not a valid objection. 8. The court had general jurisdiction of the proceeding. Judgment reversed.

Cited: 3 Abb. N. C. 429; 14 id. 508; 25 id. 146; 35 App. Div. 568; 45 id. 323; 39 Barb. 101, 120; 41 id. 522; 43 id. 167; 54 id. 588; 55 id. 171; 60 id. 398; 15 Daly 149; 3 Hun 563; 7 id. 241; 20 id. 359; 43 id. 363; 2 Keyes 253; 5 Lans. 16; 17 Misc. 366, 537; 22 id. 257; 23 id. 210; 26 id. 666; 23 N. Y. 514; 27 id. 150; 35 id. 314; 45 id. 359; 48 id. 317; 53 id. 284; 70 id. 227, 357; 72 id. 106, 239; 82 id. 201; 85 id. 458; 96 id. 531; 105 id. 484; 112 id. 75; 164 id. 397; 6 T. & C. 317.

THE SACKETTS HARBOR BANK v CODD (1858) 18 N. Y. 240.

On bills of exchange, against drawer. Defense: that the consideration of the bills was the sale by plaintiff to defendant, of circulating notes of Canadian banks at a greater rate of discount than authorized by the statute. Ch. 223, Laws of 1853, prohibited bankers from receiving foreign bank notes at a rate of discount exceeding one-quarter of 1 per cent, and from uttering them as circulation within the state. The defendant, an individual banker, received from plaintiff, an incorporated bank, two sums in Canadian bank bills, one at a discount of one-quarter of 1 per cent, and one at a higher rate. Plaintiff knew that the bills were received for the purpose of sending them to Canada for redemption. Defendant gave his checks drawn on himself in payment for the bills, and the checks were exchanged for the defendant's draft on which this suit was brought. These drafts were not paid. Judgment for plaintiff. Affirmed at General Term. Appeal.

Comstock, J. 1. There is no prohibition on banks or bankers against selling or uttering foreign bank bills for any purpose except circulation as money within

this state. 2. The language in which the offense is defined and the penalty declared, does not include the customer making the deposit or delivering the notes. 3. Defendant was bound to pay for the notes, and plaintiff could recover on the drafts. Judgment affirmed.

Cited: 37 Barb. 599; 66 Hun 538; 71 id. 570; 21 N. Y. 496; 25 id. 168; 48 id. 363.

MATTER OF THE RECIPROCITY BANK (1859) 29 Barb. 369.

For confirmation of referee's report. The referee was appointed to apportion the debts and liabilities of the Reciprocity Bank among its stockholders, under the Act of April 5, 1849. The bank was incorporated under the Laws of 1822, which required a two-third vote to alter any charter of any corporation. Under the law of 1849, the charter was altered without a two-thirds vote. In the bank's charter, the right to alter or repeal the charter was reserved. Some of the stockholders were married women.

Greene, J. 1. Both the constitution and statute apply in plain terms to this corporation. 2. The constitution and statute are not in conflict with the United States Constitution. 3. The existence of the power to alter the charter does not depend upon the manner in which it was exercised. A two-thirds vote was not necessary to amend the charter. The legislature was governed by the constitution in force at the time the Act of 1849 was passed. 4. Married women who own stock in banks in their own right are personally liable to the amount of their stock. Report confirmed.

Reversed: 22 N. Y. 9, on another point.

PERKINS v CHURCH (1859) 31 Barb. 84.

To enforce stockholders' liability. The complaint alleged that the plaintiffs paid certain drafts for the accommodation of the M Bank, a Wisconsin corporation; that the defendant was a stockholder in said corporation, and under the laws of Wisconsin was individually responsible for its debts to the amount of his stock. Demurrer to complaint on grounds which appear in the opinion.

Ingraham, J. 1. It was not necessary for the plaintiff to aver in his complaint that the corporation was insolvent. 2. There was nothing to prevent the plaintiff from proceeding to collect his claim either from the corporation or from those who, by the charter, were made responsible for the debts, without any limitation. 3. The bank was not a necessary party. Demurrer overruled. Judgment for plaintiff.

Cited: 50 Barb. 434; 26 Hun 339; 33 Misc. 373.

ILION BANK v CARVER (1859) 31 Barb. 230.

Damages for fraud. The complaint alleged that C, a director of plaintiff, pretended to sell to P, an irresponsible person, his stock in the bank, of the value of \$15,000 for \$17,250; that P, with the connivance of C and the cashier, a son of C, immediately pledged the same to the bank as security for his note, executed to the bank, at the same time, and received therefrom, \$17,250 in bills of the bank. The evidence showed that on January 8, this transaction came to the knowledge of the other officers of the bank. On February 1, the bank passed resolutions repudiating the whole transaction, and authorizing the attorney of the bank to tender back to C the stock and demand the amount of money received. A copy of the resolutions was not served on defendants until April 8. Judgment for defendant. Appeal.

Pratt, J. 1. In an action against the defendant directly for damages, no laches on the part of the plaintiff short of the Statute of Limitations will constitute a defense. 2. This was an executed contract and, although the plaintiff, by his laches, may have lost his right to repudiate the transaction, yet the complaint is sufficiently broad to cover a claim for damages. Judgment reversed.

Cited: 57 Barb. 323; 14 Hun 153.

CITY BANK OF NEW HAVEN v PERKINS (1859) 4 Bosw. 420.

On bills of exchange. M, the cashier of the Bank of A, borrowed a large sum of plaintiff's circulating bills on the security of the bills of exchange. The bills were sent from time to time to the Bank of A, which was to redeem them weekly

at the A E Bank. The interest was regularly paid by the A E Bank to plaintiff, for account of the Bank of A. The loan was continued for over three years, at which time the A E Bank declined to redeem the notes. Plaintiff then obtained from the A E Bank, a transfer of collection paper held by it belonging to the Bank of A, among which were two bills of exchange made by defendant, payable at the A E Bank, and on which the suit was brought. The whole management of the bank had been intrusted to M, who as cashier, agreed that \$60,000 of its collection paper should be pledged to the A E Bank as security for the loans from plaintiff. Defendant contended that the cashier had no power to borrow the money. Verdict for plaintiff. Exceptions.

Bosworth, C. J. 1. The cashier had authority to borrow the money for the bank, and the bank is liable for its repayment. 2. Plaintiff obtained possession of the bills of exchange lawfully and for a just purpose, as it was attempting to collect them to satisfy a valid debt due it from the Bank of A. Judgment for plaintiffs on verdict.

Cited: 64 Barb. 342; 8 Daly 534; Affirmed: 29 N. Y. 554.

BUTTERWORTH v KENNEDY (1859) 5 Bosw. 143.

On note against maker. The note was discounted for him by the C Bank, on the security of 20 shares of the bank's stock. The note was not paid at maturity. The bank failed, and plaintiff was appointed receiver. The stock had not been sold by the bank, but had been transferred on the bank's books, to be held as security. Defendant contended that the stock, having been transferred on the books of the bank, became extinguished when not paid for sixty days after maturity, under 1 R. S. 591; and that the duty imposed by the statute was to sell the stock. Verdict directed. Judgment for plaintiff. Appeal.

Bosworth, C. J. 1. The statute did not make it the absolute duty of the directors of the bank to sell the stock, even though the note was not paid within sixty days after maturity. 2. The stock is not thereby actually extinguished, nor the debt to its pledgor satisfied. Judgment affirmed.

Cited: 130 N. Y. 618; 5 Bosw. 143.

BUTTERWORTH v PECK (1859) 5 Bosw. 341.

On note made by defendant to the order of T, for his accommodation, and discounted by the I Bank. \$280 of its proceeds were standing to the credit of T, on the books of the bank, when plaintiff was appointed receiver in insolvency. T was a stockholder and depositor at the time. Before the note matured, the bank declared a dividend of \$70 in T's favor, and placed that sum to his credit. T drew two checks, one for \$280 and another for \$70, on the bank, and at the same time indorsed a check for \$700 drawn on the bank by M to T's order, on funds on deposit to M's credit in the bank. Defendant, at the maturity of the note, tendered the three checks to the receiver, who declined to accept them. The court charged that the checks for \$280 and \$70 were properly chargeable against the note, but that the \$700 check could not be allowed as a setoff. Verdict for plaintiff. Appeal.

Hoffman, J. 1. The check was not an appropriation of a specific fund. 2. It gave no right of action as against the bank, without acceptance, and therefore it cannot constitute a right of setoff. Judgment affirmed.

Cited: 160 N. Y. 201.

BARBOUR v LITCHFIELD (1859) 4 Abb. Dec. 655.

On a bond. Plaintiff's assignor, being indebted to the bank of which defendant was cashier, made defendant, as cashier, his agent to collect certain claims. The defendant gave the bond as cashier and agreed to pay a certain part of the proceeds to plaintiff's assignor. Defendant had ceased to be the cashier before suit was commenced. Judgment for plaintiff. Appeal.

Gray, J. The defendant having ceased to be cashier, was not liable on the bond. Judgment reversed.

CODD v RATHBONE (1859) 19 N. Y. 37.

On two promissory notes, one payable to R C, president, the other to R C individually; and also for a balance due on a running account for money loaned to and paid out for defendant. Plea: that plaintiff agreed to lend defendant un-

current funds, which were 1 per cent less in value than money, and received 7 per cent interest on such funds as money. Plaintiff was an individual banker under the Act of 1838. Without setting it up in his answer, defendant contended that plaintiff could not recover, because ch. 355, Laws of 1839, provided that bankers, authorized by law, could not buy or lend any bank bills or notes at less than par. Judgment for plaintiff. Appeal.

Grover, J. 1. The payment of defendant's checks, drawn for uncurrent funds by the plaintiff, was not a violation of the statute against usury. 2. The defendant, having failed to set up his defense, cannot make use of it on appeal. 3. Plaintiff, being an individual banker, was not a corporation. Judgment affirmed.

Cited: 33 Barb. 80; 16 Daly 539; 9 Hun 480; 26 id. 322; 2 Keyes 510; 1 Misc. 288, 321; 20 N. Y. 358; 44 id. 424; 54 id. 580, 581; 35 Supr. 246; 57 id. 140.

OLIVER LEE & CO.'S BANK v WALBRIDGE (1859) 19 N. Y. 134.

On promissory note against makers and indorser. Defense: usury. The note was made at the City of Buffalo, payable in New York City 75 days after date. Defendant offered to prove that the rate of exchange between New York and Buffalo was one-half of 1 per cent in favor of the former place, and that the transaction was entered into with the design of enabling the plaintiff bank to realize, in addition to the legal rate of discount, the one-half of 1 per cent exchange on the sum. Refused. Judgment for plaintiff. Affirmed at General Term. Appeal.

Comstock, J. The transaction was not usurious, and the evidence was properly excluded. Judgment affirmed.

Cited: 41 Hun 50; 19 N. Y. 255; 33 id. 55a, 58, 67, 614.

BARNES v ONTARIO BANK (1859) 19 N. Y. 152.

On certificate of deposit, issued by the cashier of defendant, and given to C, an agent, to negotiate. The sum advanced was less than the face value. The court refused to charge for defendant that the negotiation at less than the face value of the bank's paper in New York City, with a request that payment should not be demanded for 30 days, put the plaintiff on inquiry, and placed on him the onus of showing he was a bona fide holder for value. Motion for nonsuit. Denied. Judgment for plaintiff. Affirmed at General Term. Appeal.

Comstock, J. 1. As the bank had power to borrow money and the cashier power to sign certificates of deposit, the certificate signed by the cashier alone was valid. 2. Sec. 21, ch. 250, Laws of 1838, providing that contracts made by a banking association shall be signed by the president or vice-president and cashier, did not affect the certificate. 3. The proposition that the plaintiff must prove himself a bona fide holder, was properly overruled. Judgment affirmed.

Cited: 67 Barb. 409; 1 Dem. 401; 15 Hun 343; 23 id. 263; 7 Misc. 111; 19 N. Y. 311; 27 id. 557; 57 id. 131; 59 id. 77; 60 id. 268, 269; 94 id. 176; 36 Supr. 477; 48 id. 52.

INTERNATIONAL BANK v BRADLEY (1859) 19 N. Y. 245.

On promissory notes against makers and indorsers. The note was dated at Buffalo and was payable in 60 days to the order of defendant P. Both P and the maker B were residents of Buffalo. Defendant W, an indorser did not reside in Buffalo. Plaintiff, a bank organized under the General Banking Law, discounted the note for defendants at 7 per cent of its full face value, and gave in exchange therefor plaintiff's sight drafts on New York, charging the current rate of exchange, one-half of 1 per cent. These drafts paid other drafts previously made by defendants and discounted by plaintiff. Plaintiff had no knowledge at the time of the transaction that such was their purpose. The Safety Fund Act of 1829, ch. 94, restricted chartered banks to 6 per cent interest on discounted paper maturing within 63 days. An act purported to continue the Recorder's Court of Buffalo under the title of Superior Court of Buffalo, with additional powers; it provided that it should have jurisdiction of actions upon contracts made in Buffalo, and also in cases where the defendant resided in Buffalo; that its jurisdiction in all cases should be presumed. Judgment for plaintiff. Appeal.

Allen, J. 1. The act did not establish a new and independent court. 2. There was not only a presumption of jurisdiction, but the evidence showed that the contract was made in Buffalo, and that the court had jurisdiction over W. 3. It was

not usury to retain interest at 7 per cent upon the full face value, or to exact a premium for exchange, because banks organized under the General Banking Law, were not subject to the restrictions of the Act of 1829. Judgment affirmed.

Cited: 3 Abb. N. C. 461; 30 Barb. 92; 46 id. 102; 7 Daly 199; 21 N. Y. 409, 410; 33 id. 59, 67; 53 id. 459, 461.

BANK OF GENESEE v PATCHIN BANK (1859) 19 N. Y. 312.

On bill of exchange, against indorser. S, cashier of the defendant, sent the bill to the plaintiff for discount. It was payable to the order of "S. B. Stokes, Cas.," and was indorsed in the same way; the letter inclosing it was signed in the same way, and was on the defendant's letterhead. Plaintiff discounted the bill by draft on New York, and the proceeds were credited to a railroad company for which the bill was made, on the books of the bank. Judgment for plaintiff. Appeal.

Gray, J. The indorsement by a cashier in his official capacity, sufficiently shows that the indorsement was made in behalf of the bank. Judgment affirmed.

Cited: 45 App. Div. 91, 444; 48 id. 328; 30 Barb. 223; 5 Bosw. 176, 222; 5 Hun 155; 66 id. 143; 85 id. 496; 3 Keyes 344; 4 Lans. 306; 24 N. Y. 61; 29 id. 630, 631; 31 id. 44; 35 id. 506; 44 id. 397; 46 id. 74; 50 id. 401; 118 id. 474; 139 id. 307; 158 id. 657; 1 T. & C. 317; 3 id. 355.

BANK OF ATTICA v MANUFACTURERS AND T. BANK (1859) 20 N. Y. 501.

To compel transfer of stock. H owned shares in defendant. His certificate of stock stated that the stock was transferable on the books, by H or attorney, on the surrender of the certificate. H, being indebted to plaintiff, transferred the certificate to plaintiff for value, but defendant refused to transfer the stock on the books, relying on a by-law which forbade a stockholder to make any transfer of his stock, until he was free of debt to the bank. H was indebted to the defendant. Plaintiff put in evidence the certificate of stock, and the assignment on the back thereof. Defendant proved authority of the board of directors, and the by-laws mentioned, but failed to prove notice of such by-law, or that the directors did not consent to the transfer. Judgment for plaintiff. Reversed at General Term. Appeal.

Denio, J. 1. The quality of transferability being attached to the shares, the corporate body has no authority to interfere with the disposition which any shareholder may see fit to make, except so far as such authority is conferred by the act itself. 2. The association cannot agree in the articles that matters, which the legislature had declared might be contained in them, should be the subject of regulation by the directors in forming their by-laws. Judgment reversed.

Cited: 48 N. Y. 605; 59 id. 104, 107.

BRIDENBECKER v LOWELL (1860) 32 Barb. 9.

On promissory note against indorser. The defendant indorsed G's note for \$1,000, dated July 22, 1855, and G had it discounted by the bank of which plaintiff was president. Subsequently, G had notes for \$3,800, partly indorsed by E, C, and P, the bank's cashier, discounted by the bank. G paid the bank. G paid the bank \$524.50 through a chattel mortgage given to E. In 1856, G moved to Wisconsin and the cashier sent to E in Wisconsin, the notes of G, indorsed by E, with a statement of all G's indebtedness to the bank, to obtain securities from G. E sued G, and in settlement G conveyed to E real estate in Wisconsin absolutely, and gave \$300 cash, which E sent to the bank, and the notes were delivered by it to G. This settlement was for E's liability on G's notes solely, and the bank was notified and acquiesced in it. Afterward the bank realized \$2,220.50 on a mortgage given by G to the bank on August 10, 1855, conditioned to pay all paper which G was liable. This money was deposited in the cashier's name until it was appropriated. C's note was paid from this fund with defendant's consent. P, the cashier, without authority of the directors or knowledge of defendant, paid two notes of G, on which he was indorser, from this fund. Subsequently E became cashier, and on the day he entered on his duties, E and P, without the directors' or defendant's knowledge, applied part of this fund to the payment of a note which had been canceled and delivered up by E to G. The defendant was away and relied upon the cashier to protect his interests. Judgment for plaintiff. Appeal.

Allen, J. 1. The bank, by placing the notes in E's hands, consented to be bound by his acts, and to this extent constituted him its agent. 2. The cashier acted within his authority. 3. The bank ratified the acts of E. 4. The mortgage

fund was received by the cashier for a debt due the bank, and was the money of the bank from the time of its receipt. 5. P and E were agents of the bank occupying a confidential relation toward it, and could not act in matters in which they had a personal interest. 6. P's act was a fraud on defendant. 7. The fund being in possession of the bank, if the law did not appropriate it ratably, and the debtor has not done so, the creditor alone could make the appropriation. 8. The defendant had a legal and equitable right to share ratably in the fund and security provided for the bank's debts, and this could not be affected or impaired by any act of the bank or its officers. Judgment reversed.

Cited: 34 App. Div. 165; 68 id. 462; 35 Barb. 479; 44 id. 471; 49 id. 202; 2 Daly 109; 31 How. 98; 32 id. 350; 42 Hun 538; 92 id. 397; 21 Misc. 285; 27 N. Y. 559; 58 id. 306; 83 id. 86; 112 id. 551; 43 Supr. 492; 2 Sweeny 46; 3 T. & C. 355.

WARNER v CHAPPELL (1860) 32 Barb. 309.

On promissory note against indorser. Plaintiff sued the defendant as indorser. P made notes which were indorsed by defendant for his accommodation. The notes were dishonored at maturity, and a suit having been brought thereon against all the parties by the R Bank, the plaintiff, at the request of P and for his benefit solely, paid to the attorney of the bank the whole amount of the notes, and thereupon received the notes from the attorney, who had previously obtained authority from the bank to sell the notes. The suit by the bank was discontinued. Judgment for plaintiff. Appeal.

Smith, J. 1. The notes were valid in the hands of the plaintiff. 2. The authority of the attorney to make the transfer to plaintiff will be presumed to have been contained in a proper resolution of the board of directors of the bank. Even if there was an omission on the part of the directors to pass such a resolution, the plaintiff, being a purchaser for the full value of the notes without notice of the omission, will be protected under sec. 8 of art. 1, title 2, ch. 18, R. S. Judgment affirmed.

HALLETT v HARROWER (1860) 33 Barb. 537.

Conversion of goods. The summons and complaint were entitled: "Samuel Hallett, president of the Bank of Hornellsville v Gabriel T. Harrower." The complaint commenced "Samuel Hallett, plaintiff, complains against the defendant and says that he is president of the Bank of Hornellsville, a moneyed corporation established under an act passed April 18, 1838." The plaintiff put in evidence a copy of a certificate by Samuel Hallett, of his intention to commence the business of banking as an individual banker in Hornellsville, certified by the superintendent of the Banking Department. Objection. Exception. He also proved that under this certificate, he deposited securities with the bank superintendent, went into business as a banker, and signed the bills of the bank. Objection. Exception. The defendant moved for a nonsuit on the ground that the plaintiff had failed to prove the Bank of Hornellsville a corporation. Motion denied. Verdict for plaintiff. Motion for new trial.

Smith, J. 1. The action must be deemed an action commenced by the plaintiff, as a corporation under the General Banking Act. 2. The certificate does not prove the corporate character of the plaintiff, and was improperly received for that purpose. 3. The parol evidence of H, showing that he established the Bank of Hornellsville under such certificate, was also improperly received. The plaintiff cannot make out his corporate character in that way. New trial granted.

FARMERS & CITIZENS BANK v SHERMAN (1860) 6 Bosw. 181.

On promissory note against maker. The note was given for the accommodation of P, who had made agreements with the plaintiff by which he was to supply lumber to it. On the delivery of certain quantities of the lumber from time to time, plaintiff agreed to return to P such of the paper held by it as he might require. P delivered the lumber according to the agreement, and notified the plaintiff that he desired to withdraw the note, but the plaintiff appropriated the lumber toward the payment of other notes of P, which left a balance in the plaintiff's favor. Verdict for defendant. Motion for new trial. Denied. Appeal.

Bosworth, C. J. 1. P had the right to require the plaintiff to deliver up the note at the time he made the demand. 2. The conditions of the agreements hav-

ing been carried out, it needed only the fact that P should require the note in suit to be returned to him, to entitle the defendant to have it deemed paid. Judgment affirmed.

Cited: 26 Misc. 863; 34 Supr. 97; 2 Sweeny 428. Affirmed: 33 N. Y. 69.

DAYTON v BORST (1860) 7 Bosw. 115.

On stock subscription. Defendant subscribed to the stock of a banking association, whose certificate of association provided that the capital stock should be \$50,000, divided into 2,000 shares. Defendant subscribed 1,990 shares, and afterward assigned them to P & J, but did not pay the subscription. Defendant and his associates never chose directors, nor carried on the business of banking. T recovered judgment against the bank. Plaintiff was appointed receiver without notice to any of the officers of the bank, as they could not be found. Defendant contended that he was not a subscriber, and that plaintiff could not coerce him to pay; and that the order appointing plaintiff receiver was void. Judgment for plaintiff. Appeal.

Bosworth, C. J. 1. The order is not void. The fact that no officer of the bank could be found on whom service of notice for the appointment of a receiver could be served, left the court of chancery at liberty, in its discretion, to make the appointment without notice to the bank. 2. The certificate of association, estopped the defendant from denying that he was a subscriber for the number of shares. He is liable, equally as he would be if an actual subscriber. Judgment affirmed.

Affirmed: 31 N. Y. 435.

APPLICATION FOR REC'R OF LEE'S BANK (1860) 21 N. Y. 9.

To enforce shareholder's liability under the Act of 1849. The bank was organized under the Act of 1838. It commenced business in 1844, and issued notes up to the time of its failure in 1857. Subsequently one of the stockholders instituted this proceeding. The articles of association, and certificate of incorporation, exempted shareholders from individual liability for its debts. It was contended that the Act of 1849 did not apply to corporations previously existing, and that if it did, it was in violation of the Constitution of the United States, as impairing the obligation of a contract. Legislature reserved right to withdraw franchise. Referee's report charged \$170,000 upon shareholders. Affirmed. Appeal.

Denio, J. 1. The power of the corporation to contract at all, was a corporate franchise, and subject to the control of the legislature by force of the reservation. 2. The provision in the constitution, and the Act of 1849, imposing personal liability on the stockholders, applied to existing banks of issue, and did not impair the obligations of any contract to which the appellants were parties. Judgment affirmed.

Cited: 22 N. Y. 12; 24 id. 156, 350; 26 id. 116; 27 id. 118; 77 id. 482; 79 id. 459; 113 id. 318; 145 id. 97. Affirmed: 1 Black (U. S.) 587.

ROCHESTER CITY BANK v ELWOOD (1860) 21 N. Y. 88.

On bond of G, assistant bookkeeper of plaintiff bank, given for discharge of his duties. Breach, embezzlement of funds of the bank. The action was against the surety. Nonsuit. Affirmed at General Term. Appeal.

Wright, J. Where a person, employed by a bank to assist in keeping its books, avails himself of the situation to defraud his employers, the surety who has vouched for his honesty, and engaged that he will be faithful in every way to the trust reposed in him, should answer for any loss accruing from his fraudulent or criminal conduct. Judgment reversed.

Cited: 24 Hun 615; 47 id. 296; 4 Keyes 256; 17 Misc. 210; 36 N. Y. 467; 83 id. 263; 87 id. 214; 90 id. 122; 98 id. 471; 104 id. 449; 120 id. 566; 41 Supr. 67; 3 T. & C. 391.

ROBINSON v BANK OF ATTICA (1860) 21 N. Y. 406.

To recover the value of notes. The receiver of the H Bank of B, organized under the General Banking Law, sued to recover the value of promissory notes transferred by it to defendant. The H Bank procured two postdated checks to be drawn on it, and after certifying them, procured, through the agency of the accommodation drawer, a loan on their security from defendant. Defendant had no knowledge that the loan was for the benefit of the H Bank. On August 30, 1857,

the H Bank, when insolvent, delivered to the drawer for defendant, certain moneys and six promissory notes which had been discounted by the bank. The defendant accepted the notes and surrendered the checks to the drawer, who canceled them. The defendant had notice sufficient to put it on inquiry that the notes belonged to the H Bank, and also that the latter was insolvent. Judgment for plaintiff in Special Term. New trial granted at General Term. Appeal.

Wells, J. 1. The R. S., providing that it shall not be lawful for any incorporated company to make any transfer or assignment, in contemplation of insolvency, to any one whatever, applies to banking associations, which are corporations. 2. The transfers were void. Order of General Term reversed. Judgment of Special Term affirmed.

Cited: 7 App. Div. 110; 9 id. 303; 27 id. 184; 34 Barb. 229; 31 Hun 336; 59 id. 478; 79 id. 110; 4 Misc. 245; 15 id. 400; 33 N. Y. 96; 59 id. 10, 11; 94 id. 339; 43 Supr. 488; 1 T. & C. 402.

ONEIDA BANK v ONTARIO BANK (1860) 21 N. Y. 490.

On drafts, signed by L, cashier of defendant, payable to P and delivered to him. The drafts were delivered four weeks before their respective dates. P had an account with the bank, and for each draft gave his check. P at once indorsed the drafts and procured them to be discounted by plaintiff bank. The drawees refused to accept, and notice of dishonor was given the defendant as drawer. P deposited the funds received with the defendant to his credit and represented to plaintiff that he was acting for himself, and plaintiff discounted the drafts for him, and not for defendant. Judgment for defendant. Appeal.

Comstock, C. J. 1. The transaction had all the forms of a loan. 2. Under the Statute of 1840, providing that bills and notes issued by banks shall be payable on demand, without interest, the plaintiff can reject the security if void, and recover the money or value which he advanced on receiving it. 3. P transferred to plaintiff his right to demand and recover the sums of money which he loaned to defendant. 4. The defendant cannot object that 7 per cent interest was charged on drafts maturing in sixty-three days. 5. No question having been made on the trial, that the pleadings did not present the facts as they were treated, such question cannot be raised in the higher court. 6. The presumption is that the consideration on the transfer by P was money. 7. The complaint was sufficient. Judgment reversed.

Cited: 8 App. Div. 431; 16 Hun 615; 17 id. 335; 43 id. 553; 71 id. 407, 408; 44 id. 57, 92, 233, 234; 48 id. 363; 49 id. 9; 56 id. 218; 57 id. 533; 77 id. 70; 97 id. 312; 98 id. 287; 107 id. 185; 153 id. 415; 1 T. & C. 427.

BANK OF TOLEDO v THE INTERNATIONAL BANK (1860) 21 N. Y. 542.

The pleadings put in issue the incorporation of the plaintiff bank under the laws of Ohio. The statute of Ohio required the filing of a certificate, an examination by bank commissioners, who should certify their approval to the governor, and the latter's proclamation that the bank was authorized to do business. Plaintiff proved due filing of its certificate, user of franchises under its articles of association in Ohio, and that defendant had dealt with it under its corporate name for several years. Judgment for plaintiff. Appeal.

Denio, J. The plaintiff has sufficiently proved itself to be a corporation under the laws of Ohio. Judgment affirmed.

Cited: 37 Barb. 606; 4 Misc. 174; 25 N. Y. 575; 65 id. 571; 140 id. 584.

WARHUS v BOWERY SAV. BANK (1860) 21 N. Y. 544.

To recover a deposit. The plaintiff's intestate, a German, but little acquainted with English, deposited money in the defendant, a savings bank, and received a passbook containing by-laws printed in English. One by-law required the production of the passbook on demands for money. The plaintiff demanded the money and defendant demanded the passbook, which was not produced. It was neither produced nor accounted for at the trial. Judgment for defendant. Appeal.

Davies, J. The plaintiff cannot recover without producing the passbook or giving some evidence of its loss or destruction, or in some way accounting for its non-production. We see nothing unreasonable in the regulation, which was in accordance with the incorporation requirements. Judgment affirmed.

Cited: 2 Daly 229; 38 Hun 258; 53 id. 259; 62 N. Y. 179; 4 T. & C. 307.

IN THE MATTER OF THE RECIPROCITY BANK (1860) 22 N. Y. 9.

To enforce stockholders' liability. Art. 8, sec. 7, of the constitution of 1846, provided that stockholders in banks of issue should be individually liable after 1850. Ch. 226, of the Laws of 1849, provided for the enforcement of this provision. R Bank was organized under a special law in 1834. L, a stockholder, was a married woman, who owned stock before her marriage, after which the married woman's acts were passed. Her husband never reduced it to possession. D, a married woman and stockholder, transferred her shares to her husband without consideration, the day before the bank failed. A, before the bank's failure, transferred his stock to the bank. The assets, real estate and shares in action were nominally more than the liabilities. The real estate was not converted, because of depression in prices. It was not shown that the assets were insufficient. Order affirming report of referee apportioning debts among stockholders. Appeal.

Comstock, C. J. 1. This bank is within art. 8, sec. 7, of the constitution of 1846, and the Act of 1849. 2. The provision of the constitution of 1821 did not enter into the compact of the state and the corporators. 3. Under ch. 226, of the Laws of 1849, a married woman is liable as a stockholder to assessment for corporate debts. 4. The transfer by D was void as in fraud of creditors. 5. As the bank cannot be a purchaser, A was not exonerated from his liabilities as stockholder. 6. A receiver appointed under the Act of 1849 must make a bona fide attempt to convert the general assets in his hands and declare a dividend, before the debts can be apportioned among stockholders. 7. Mere pecuniary loss was not a sufficient reason for failing to dispose of property before proceeding against stockholders. Judgment reversed.

Cited: 27 App. Div. 184; 39 id. 152; 42 id. 497; 45 id. 247; 41 Barb. 522; 60 id. 286; 9 Daly 438; 19 Hun 587; 2 Keyes 253; 2 Misc. 222; 23 id. 203, 206; 26 id. 669; 23 N. Y. 511, 512, 513, 514, 516; 133 id. 30; 145 id. 92.

SMITH v LANSING (1860) 22 N. Y. 520.

To compel defendant to convey real estate to plaintiff, receiver of a bank. Defendant was chief financial officer of the bank, and acted without a board of directors. To secure public funds for deposit, he gave his personal bond and procured other sureties. Afterward, mortgages owned by the bank were foreclosed, and he took title in his own name to indemnify himself and sureties, after buying in the property with funds of the bank. The bank failed. Defendant refused to convey title, unless he and his sureties were released from their bonds. There was no fraud. Judgment for plaintiff. Appeal.

Wells, J. 1. The position of the defendant was not incompatible with his right to purchase the property in question in his own name for his individual security. 2. That defendant did not take such indemnity at the time the liabilities were incurred, is of no consequence, and plaintiff is not entitled to have the property conveyed to him without relieving the defendant on his bonds. Judgment reversed.

Cited: 14 Abb. N. C. 263; 39 Barb. 157; 13 Hun 601; 84 N. Y. 199.

DIVEN v PHELPS (1861) 34 Barb. 224.

On promissory note. The defendant made his note to the Y Bank for \$500. Subsequently the bank became insolvent and plaintiff was appointed receiver. After this the defendant acquired bills of the bank to the amount of \$513. These he tendered to the plaintiff, as receiver, in payment of his note, which were refused. Defendant's claim to have these bills set off against the plaintiff's demand, was denied. Judgment for plaintiff. Appeal.

Johnson, J. The moment a moneyed corporation becomes insolvent, the rights of all its creditors attach equally to all its assets, and whoever takes its bills afterward, being indebted to such corporation, takes them subject to this right of all the creditors to share equally in its assets. The debtor must pay his debt and take his dividend arising from his ownership of bills acquired under such circumstances. Judgment affirmed.

Cited: 90 Hun 438; 43 Supr. 488.

MARSH v ONEIDA CENTRAL BANK (1861) 34 Barb. 298.

To recover deposit. The deposit was made by H. The defendant alleged that the money was deposited in part payment of a note of H held by the bank and

past due, and by way of a counterclaim set up a judgment recovered against H upon the note. H assigned his claim for the deposit to the plaintiff. Judgment for plaintiff. Appeal.

Allen, J. 1. The plaintiff, as the assignee of a chose in action, not negotiable, takes subject to all the legal as well as equitable rights of the defendant against the assignor. 2. The deposit, not being a special deposit, created the relation of debtor and creditor between the depositor and the bank. 3. The bank had the right at any time to apply the amount in payment of the note then past due. It was optional with the bank to do this, and postponing it until after the recovery of the judgment did not affect the right. Judgment reversed.

Cited: 4 Abb. N. C. 218; 5 Hun 184; 66 N. Y. 273; 40 Supr. 23.

IRVING BANK v WETHERALD (1861) 34 Barb. 323.

On promissory note against indorsers. W made a note, payable at plaintiff bank, which was indorsed by defendants and discounted by the S Bank. Afterward W entered into partnership with D under the name of W & Co., and W directed plaintiff to charge its notes to the firm. W died before the note in suit matured. After his death and before maturity, D directed the bank not to charge W's individual notes to the firm. The S Bank presented the note to plaintiff and its teller certified it as paid and charged it to the firm. W had no funds, and W & Co. had not enough to pay the note. The S Bank stamped the note paid. Plaintiff discovered the mistake, notified S Bank of the same, requested the return of the note, and on refusal paid the S Bank, and had it presented at its own counter and protested. The court held that the certificate of the teller was not actual payment; that notice to the S Bank of the mistake exonerated plaintiff from liability; that the subsequent payment, without compulsion of law, or legal obligation, or request from the indorsers, discharged the note. Judgment for defendants. Appeal.

By the Court. 1. If plaintiff was exonerated from liability to S Bank by the notice of mistake, the note was valid in the hands of any one to whom it was transferred. 2. The subsequent demand, protest and notice were good and inured to the benefit of plaintiff. 3. If plaintiff had refused payment, and the S Bank had sued and recovered, such recovery would not have been a payment to relieve the parties, but would have transferred the title to plaintiff on payment of the judgment. Judgment reversed.

Aff'd: 36 N. Y. 335.

IN THE MATTER OF VAN ALLEN (1861) 37 Barb. 225.

To apply deposit to payment of note. Application of S to have his deposit in the A Bank, insolvent, applied by the receiver to the payment of a note held by the bank against him at the time of the insolvency, and about to mature. The receiver also applied for instructions.

Hogeboom, J. 1. A receiver is an officer of the court and it is proper for him to apply to it for instructions. 2. Where the creditor of a bank, who owes a debt to the bank which is not due, notifies the receiver of his wish to apply to the satisfaction of the debt, his claim arising from his deposit in the bank, and insists upon the same, the receiver should make the application. 3. The one claim should be applied upon the other. So ordered.

Cited: 4 Abb. N. C. 218; 10 Misc. 686; 62 N. Y. 146; 85 id. 617; 114 id. 622; 5 Robt. 363.

SCOTT v OCEAN BANK OF NEW YORK (1861) 23 N. Y. 289.

On bill of exchange. L, the owner of the bill, remitted it for collection to O, with whom he had an account. O presented the bill which was accepted, but did not credit L with the amount. Subsequently O transferred the bill to defendant bank to secure a precedent indebtedness. Plaintiff was assignee of L. Judgment for defendant. Reversed at General Term. Appeal.

Lott, J. 1. Defendant never acquired any rights to the bill, as against plaintiff's assignor. 2. The defendant was not a bona fide holder for value. Judgment affirmed.

Cited: 3 Keyes 341; 26 N. Y. 455; 47 id. 442; 90 id. 534; 114 id. 34; 117 id. 394.

IN THE MATTER OF THE HOLLISTER BANK (1861) 23 N. Y. 508.

To enforce shareholders' liability. The H Bank became insolvent, and a receiver was appointed under ch. 226, Laws of 1849, who converted all the assets, except certain demands, and reported his schedules to the court, more than 180 days after his appointment. The court postponed the sale of certain demands, and allowed a dividend to be made. The general report of the referee, appointed to apportion the shareholders' liability, left some demands unconverted. Sec. 28 of the above act provided for an appeal to the General Term from a justice's decision confirming a receiver's report, and from a judgment of the General Term to the court of appeals. Sec. 27 provided that no appeal should be taken from an order of a justice referring any matter to a referee under the act. By the act, demands could not be sold by a receiver without judicial authority, and a dividend had to be declared within 180 days. The General Term reversed the order of confirmation at Special Term, and the order directing a reference. Appeal.

Selden, J. 1. This appeal is authorized by sec. 28 of ch. 226, Laws of 1849, and sec. 27 of this act does not prohibit the General Term from reversing the order of reference provided for by the act, but simply prohibits a direct appeal from such order. 2. It is not required that demands in litigation be converted and applied, before proceeding against stockholders. 3. It can make no difference that the receiver allowed 180 days to elapse, if he shows that the judge directed a postponement of the sale of the assets. Judgment reversed.

Cited: 2 Keyes 253; 23 Misc. 203; 26 id. 669.

PARK BANK v WOOD (1861) 24 N. Y. 93.

To commute taxes. Agreed case. Plaintiff claimed the right to commute for its taxes. Chap. 654, Laws of 1853, provided that this might be done by showing to the supervisors that its profits "had not been during the preceding year" equal to 5 per cent on the capital stock. Plaintiff was organized in March, and claimed benefit of statute in the following July. Judgment for defendant. Appeal.

Lott, J. To entitle the bank to the benefit of the statute it should have been in existence for a year previous to the annual meeting of the board of supervisors. Judgment affirmed.

Cited: 25 N. Y. 313.

BANK OF NEW YORK v FARMERS BANK (1862) 36 Barb. 332.

On bill of exchange against endorser. The defendant denied the contract of indorsement but admitted that its cashier, for the sole purpose of facilitating the collection of the bill, wrote on the back thereof: "Pay E. Ludlow, Cas., or order; P. S. Campbell, Cas.," and transmitted it to its agents for collection only. The plaintiff claimed to recover on the sole ground that the name of the cashier appeared on the bill. Judgment for defendant. Appeal.

Clerke, P. J. It is not shown that the cashier of the defendant was authorized to indorse paper on its behalf for the purpose of binding the defendant on a contract of indorsement. Judgment affirmed.

Cited: 41 Barb. 593. Aff'd: 29 N. Y. 619.

LUND v SEAMANS BANK FOR SAVINGS (1862) 37 Barb. 129.

To recover deposit assigned to plaintiff. The complaint alleged the deposit by L; that L drew upon the defendant in his favor; the refusal of defendant to pay the draft; and the assignment of the draft and deposit book to plaintiff. Defendant answered; 1, that it had no knowledge or information sufficient to form a belief whether the depositor L, or plaintiff, was ever the lawful owner; 2, on information and belief, it alleged that P, and others, residing in Sweden, were the owners, fraudulently deprived of the deposit; that it had no knowledge or information sufficient to form a belief whether L drew the draft, or whether the same was presented to the defendant. Demurrer by plaintiff. It was claimed in reply that the code, sec. 153, did not permit a demurrer. Order sustaining demurrer to answer, with leave to amend. Appeal.

Leonard, J. 1. The code permits a demurrer to an answer only when it contains new matter. The demurrer to the first defense is not well taken. 2. The de-

defendant cannot interpose rights of third parties as a defense. Order affirmed as to demurrer to second defense only.

Cited: 6 Abb. N. C. 398; 5 Den. 373; 62 Hun 347; 35 Supr. 383; 49 id. 231; 51 id. 94.

LEGGETT v BANK OF SING SING (1862) 24 N. Y. 283.

To enforce transfer of shares of bank stock. The plaintiff was assignee of L. whose note, not yet matured, defendant held. The plaintiff did not notify the bank of the assignment until after the bank had accepted the assignor's note for a debt. The defendant's articles of association provided that no shares should be transferred unless the shareholder making the transfer should previously discharge all debts due by him to the association. These provisions were known to plaintiff. The referee held that the debt not having matured at the time of the demand of transfer, the plaintiff was entitled to a transfer of the stock. Judgment for plaintiff. Appeal.

Wright, J. 1. The provision of the articles of association was intended to embrace all debts, whether payable presently or in the future. 2. One becoming the owner of stock, subject to a provision of articles of association, giving the bank such a lien, and of which he has knowledge, but who omits to give bank notice of his ownership, and thereby enables his vendor to have credit on the faith of his being a stockholder, has no superior equity to be enforced. Judgment reversed.

Cited: 19 Abb. N. C. 389; 3 App. Div. 552; 20 id. 428; 23 id. 487; 43 Barb. 168; 53 id. 503; 11 Daly 325; 50 Hun 149; 58 id. 422; 78 id. 93; 83 id. 94; 59 N. Y. 102, 107; 81 id. 300.

SCRANTOM v FARMERS BANK (1862) 24 N. Y. 424.

On deposit. The plaintiff, being indebted as an individual to an estate of which he was executor, procured a check for money due him individually to be made payable to himself as executor, and deposited it in the defendant bank to the credit of himself as executor. Subsequently, a creditor of the plaintiff procured judgment against him for more than the amount of the deposit, and a receiver, appointed in supplementary proceedings, demanded and received from the defendant, the money that had been so deposited. A referee decided that the plaintiff had appropriated the money to the payment of his indebtedness to the estate, and, though insolvent, he had a right to make such a preference. Judgment for plaintiff. Appeal.

Sutherland, J. The defendant, having received this money on deposit from the plaintiff as executor, had no right to pay it out to a receiver appointed for plaintiff as an individual and authorized merely to demand and receive his property generally. Judgment affirmed.

Cited: 45 Barb. 396; 3 Daly 38; 26 Misc. 416; 32 id. 286; 61 N. Y. 594.

EHLE v CHITTENANGO BANK (1862) 24 N. Y. 548.

A dividend of the profits of a banking corporation, declared by the directors payable "in New York State currency," is payable in cash, and cannot be paid in depreciated bank notes. Evidence of the cashier's understanding of the meaning of "New York State currency" is not competent to show the understanding of the directors, or prove a known custom.

Cited: 9 Abb. N. C. 426; 52 Barb. 66; 48 Supr. 380.

MEADS v MERCHANTS BANK (1862) 25 N. Y. 143.

On certificate of deposit. Counterclaim, on a check and note certified by the teller of the I Bank, of which the plaintiff was receiver. The note was made by the president of the I Bank, and, when presented to that bank at maturity, was marked "good" by its teller, according to a custom among the banks to thus certify paper and include it the next day in the settlement between the two banks. When the note was thus certified, the account of its maker was overdrawn, but defendant, being ignorant of that, did not protest the note and, on request of the maker, did not include it in the next day's settlement. The check drawn on the I Bank by its president, was certified by the teller before delivery to the defendant, and, at a time when the drawer's account was good, was received in exchange for collateral securities of the drawer held by the defendant, and at the drawer's request was held out of the settlement between the banks, and kept by the defendant for three years. Judgment for defendant. Appeal.

Smith, J. 1. The defendant was a holder of these instruments for value, without notice of any irregularities. 2. The certification by the teller made these instruments direct obligations of the bank, binding it to pay them on presentation. 3. The lapse of time, being less than the period fixed by the Statute of Limitations, did not discharge this liability. Judgment affirmed.

Cited: 43 Barb. 392; 50 id. 125; 67 id. 33; 3 Hun 151; 4 id. 235; 12 id. 540; 35 id. 245; 29 N. Y. 632; 31 id. 114; 36 id. 337; 43 id. 177; 52 id. 352; 59 id. 77; 89 id. 428; 134 id. 107; 35 Supr. 294; 5 T. & C. 287.

HOFFMAN v MILLER (1862) 9 Bosw. 334.

Interpleader. The defendant, owner of a bill of exchange, indorsed it in blank and deposited it with L for collection only. L forwarded it to the plaintiff indorsed "for collection." L afterward delivered to the defendant a written order on the plaintiff requiring him to deliver the bill to the defendant, as the rightful owner. This the plaintiff refused to do, claiming that L was heavily indebted to him. M and N were sued as acceptors of the bill, but having no defense, and both the plaintiff and defendant claiming the bill, paid the money into court and prayed to have the claimants interpleaded. Judgment for plaintiff. Appeal.

Bosworth, C. J. The plaintiff had notice that L had received the bill for collection only, and that he sent it for collection for the owners. The actual inference would be that the payees were the owners, it being indorsed only by them, and by L. Judgment reversed.

BUFFALO CITY BANK v CODD (1862) 25 N. Y. 163.

For the value of bills. Defendant, a Buffalo banker, agreed to procure for the plaintiff, a Buffalo bank, the redemption of Canada bank bills at a discount of one-fourth of 1 per cent, and to pay for them by a time draft on New York. Thereupon plaintiff delivered to him two lots of such bills, some of which were under the denomination of \$5, and received a time draft on New York. Plaintiff had received these bills in course of business, some at a discount of one-fourth of 1 per cent, others at par, but never for debts due it. Defendant subsequently transmitted the bills to the issuing banks in Canada for redemption. He afterward refused to pay the drafts, contending that the transaction violated the Act of 1853, which prohibited banks or bankers from issuing or circulating foreign bank bills within the state; also the Act of 1839, which prohibited banks from paying out for paper discounted or purchased by them any bank bill not received by them at par for debts due; also the Act of 1830, which forbade the passage, circulation, or receiving in payment of any foreign bank note under \$5; also the Act of 1850, ch. 251, which forbade bankers from issuing time drafts. Upon the trial plaintiff delivered the drafts into court, to be canceled. Judgment for plaintiff. Appeal.

Wright, J. 1. The transaction was not an issuing, uttering or circulating of the bills, as money, but was a redemption of the bills effected by the defendant as plaintiff's agent. 2. The time draft was void as to plaintiff who may sue in disaffirmance of the illegal part of the contract and may recover upon an implied assumpsit the value of the bills as measured by the lawful rate of discount agreed on. Judgment affirmed.

CLAFLIN v FARMERS BANK (1862) 25 N. Y. 293.

Assumpsit, on three checks drawn on the defendant bank and certified by its president. The president had authority to certify checks but with the correlative duty of immediately charging them to the drawer's accounts. Two of the checks sued on were drawn by the president himself, and all were certified at his office. Plaintiffs held the checks for a year without presentation, or without making any arrangement for their payment. The plaintiffs contended that they were holders in good faith and for value. Judgment for plaintiffs. Appeal.

Smith, J. 1. The general authority of the president to certify checks did not extend to his own checks. 2. The plaintiffs cannot be considered bona fide holders of the president's checks, because the fact that he was certifying his own checks was patent upon their faces, and charged plaintiffs with the duty of investigating his authority. Judgment reversed.

Cited: 44 App. Div. 517; 55 id. 5; 14 Daly 23; 14 Hun 333; 56 id. 416; 58 id. 548; 70 id. 154; 77 id. 58; 22 Misc. 536; 24 id. 179; 5 Lans. 252; 34 N. Y. 64; 61 id. 243, 244; 63 id. 100; 64 id. 447; 138 id. 449; 139 id. 151; 141 id. 379; 143 id. 564; 4 Robt. 702.

LEONARDSVILLE BANK v WILLARD (1862) 25 N. Y. 574.

On promissory note, against makers and indorsers. Pleas, usury, and that plaintiff was not a corporation. The plaintiff gave in evidence its certificate of incorporation, executed according to the General Banking Law, and recorded in the county clerk's office, but the required copy had not been filed with the secretary of state. The plaintiff had issued bank notes, and the proceeds of the notes sued on were advanced in such currency. It was not shown that securities had been deposited as required by statute, before commencement of banking business. It was also objected that the plaintiff, if a corporation, could not sue in its corporate name. The banking law provided that suits might be prosecuted in the name of the president of a banking association. Judgment for plaintiff. Appeal.

Denio, C. J. 1. Where a certificate of incorporation has been executed under a general law authorizing the formation of corporations, and there has been a user of corporate powers under color thereof, and the party setting up the want of corporate existence has recognized the corporation by transacting business with it as such, the proof is *prima facie* sufficient. 2. The statute, allowing such a corporation to sue in the name of its president, does not take away the common law right to sue in its corporate name. Judgment affirmed.

Cited: 44 App. Div. 147; 45 Barb. 647; 16 Daly 342; 71 Hun 476; 65 N. Y. 571; 99 id. 279.

WILLITTS v WAITE (1862) 25 N. Y. 577.

Interpleader. The plaintiff, in behalf of the A Bank of New York, brought this action to compel interpleader between the receivers and the creditors of the C Bank of Ohio, as to their claims on moneys in the A Bank to the credit of the C Bank. The C Bank, having become insolvent, receivers of its property were appointed in Ohio, under an Ohio statute, and they demanded of A Bank the fund in dispute. Subsequently creditors of the C Bank commenced actions in New York against it, and attached its funds in the A Bank. The C Bank's charter provided that, in case of its insolvency, all its property should pass to receivers for distribution. Judgment for the attaching creditors. Appeal.

Sutherland, J. 1. The title of the receivers was by operation of law and not by voluntary act of the corporation. 2. Where the devolution of title is by operation of the law of another state, it is not effective as to funds in this state, as against creditors pursuing the remedies afforded by the laws of this state. 3. The acceptance by the C Bank of its charter, subject to such provisions in case of its insolvency, does not make this a voluntary conveyance to the receivers. Judgment affirmed.

Cited: 5 Abb. N. C. 136; 19 id. 400; 24 App. Div. 45; 39 id. 159; 1 Hun 649; 21 id. 175; 88 id. 399; 6 Lans. 32; 32 N. Y. 43; 45 id. 92; 61 id. 528; 84 id. 386, 401; 99 id. 438; 140 id. 235; 156 id. 201; 162 id. 191; 1 Sweeny 222; 4 T. & C. 173.

UNION BANK v MOTT (1863) 39 Barb. 180.

For overdraft. Defendant gave M a power of attorney to draw or indorse checks for him to be used in plaintiff bank, where the power was lodged. M entered into collusion with B, a bookkeeper of plaintiff, who entered false credits to defendant. The deposits and checks were usually made by M. The referee found that defendant did not authorize overdrafts, had no knowledge of them, and that he received no part of the proceeds. Judgment for defendant. Appeal.

Peckham, J. 1. Borrowing money from plaintiff by means of check of M was not the purpose of defendant. 2. The power of attorney was an authorized draft upon his money, not upon his credit. 3. A bank must know whether it has funds to meet checks. 4. The defendant had no knowledge of the fraud, that was carried on by M and the bookkeeper, by which the loss was sustained. 5. The act of the clerk was the act of the bank. 6. The bank must look to its bookkeeper. On account of the reception of improper evidence the judgment must be reversed.

BUTTERWORTH v O'BRIEN (1863) 39 Barb. 192.

Damages for fraud, of bank president. Plaintiff was the receiver of the bank. Defendant deposited in the bank, certain notes signed by a fictitious drawer, and drew thereupon money in lieu of the notes, and fraudulently disposed of it. Judgment for defendant. Appeal.

Ingraham, P. J. 1. The claim for dividends belongs to the creditors and not to the receiver. The receiver cannot collect such moneys for the benefit of stockholders. 2. The possession of the notes by the receiver, is presumptive evidence that the moneys have not been repaid. 3. If the notes were fictitious, a good cause of action exists against the defendant, and the claim is one that would belong to the receiver. Judgment reversed.

Cited: 48 Barb. 96, 465; 10 Misc. 690; 42 N. Y. 86.

PRUYN v VAN ALLEN (1863) 39 Barb. 354.

To distribute bank assets among stockholders. Defendant was the receiver of an insolvent bank in which petitioner had stock. Before the receiver had determined the value of the bank's assets, an assessment was collected from the stockholders. Petitioner contended that the proceeds of the assets discovered after the assessment should be paid over to the stockholders, instead of to the bank's creditors, some of whom had not been fully paid.

Hogeboom, J. The stockholders are not entitled to the assets so long as there are creditors whose claims have not been fully paid. Petition denied.

HAGUE v POWERS (1863) 39 Barb. 427.

To recover deposit made with the defendant, a banker. Plaintiff demanded his deposit and defendant tendered him payment in United States treasury notes. Plaintiff refused to accept them, upon the ground that the Act of Congress of February 25, 1862, under which they were issued, was unconstitutional, and that the notes were not legal tender. Submitted to the court under sec. 372, code of civil procedure.

Smith, J. 1. Congress had the power to authorize the issue of treasury notes to circulate as money. 2. The act was constitutional. 3. Having the power to authorize the issuance of such notes, Congress also had the power to make them legal tender for payment of public and private debts. Judgment for defendant.

Cited: 67 Barb. 346; 3 T. & C. 606.

HURBERT v CARVER (1863) 40 Barb. 245.

On certificate of deposit. Plaintiffs deposited with defendants, a Chicago Banking firm, bank bills issued by Illinois banks, and received the certificate of deposit. At the time, the bank bills were passing for their par value, and the certificate called for Illinois currency. The defendants refused to pay the certificate, except in uncurrent bills issued by Illinois banks. They contended that it was the custom to pay in the same kind of bills whether current or not. Judgment for plaintiff. Appeal.

Clerke, J. 1. The certificate was a valid promise to pay in Illinois currency. 2. Plaintiffs were not bound to accept uncurrent bank bills. Judgment affirmed.

PEOPLE EX REL. v COMMISSIONERS OF TAXES (1863) 40 Barb. 334.

To reduce an assessment. Relator was a bank, the capital stock of which had been assessed by defendants, the assessors, after having deducted the amount of its real estate and the stock held by literary and charitable societies. The cashier's affidavit stated that the bank had more than its capital stock invested in stocks and bonds of the United States, and that its debts exceeded its other personal property. A statute made banks taxable on a valuation equal to the amount paid in or secured. Relator contended that banks were only taxable on a valuation of all their property equal to the paid-in or secured capital stock. Judgment for defendants. Certiorari.

Sutherland, P. J. 1. Banks are taxable on the valuation of their stock equal to the amount paid in or secured. 2. The assessment was proper. Judgment affirmed.

Cited: 46 Barb. 593.

DIVEN v DUNCAN (1863) 41 Barb. 520.

For confirmation of receiver's report. A stockholder of an insolvent bank instituted proceedings to wind up its affairs. Subsequently, in another proceeding, plaintiff was appointed receiver. Plaintiff's report was sent to a referee to appor-

tion the debts among the stockholders. Defendants, stockholders, contended that the proceeding was barred by the earlier proceeding; that the executors and administrators of deceased stockholders were not liable; that the death of a stockholder, who died after publication of liability had commenced, but before it was completed, abated the proceedings, and that his executrix was not liable; and that objections made to the receiver's report previous to the assessment on the stock were available. The referee reported charging the defendant with the debts of the bank.

Smith, J. 1. The action was not barred by the stockholders' suit to wind up the bank's affairs. 2. The stockholders were not concluded by the receiver's proceeding. 3. Executors and administrators are chargeable on account of the stock held by their testators or intestates. 4. The publication, having been commenced while the stockholder was living, his death did not abate the proceedings. Report confirmed.

SALT SPRINGS BANK v SYRACUSE SAV. INSTITUTION (1863) 62 Barb. 101.

On check. The defendant, a savings institution, paid a check drawn on the plaintiff, a bank, purporting to have been made by C, payable to H. Across the face was written "Truesdell." The plaintiff's teller, Truesdell, was in the habit of certifying checks in that way. The names of C and Truesdell were forgeries. The check was presented by the defendant to the plaintiff, and paid by the discount clerk, the teller being out of the bank. The next day the forgery was discovered. C, the supposed drawer, had no funds in the bank and was not a depositor. On demand the defendant refused to pay back the money. Case agreed.

Mullin, J. 1. A check on a bank is, in substance, a bill of exchange payable on demand, and governed by the same rules applicable to those securities. 2. The plaintiff was bound to know whether the pretended drawer was or was not a customer of the bank, and whether his account would justify the payment of the check. 3. The plaintiff was guilty of negligence. Judgment for defendant.

MARTIN v BLYDENBURGH (1863) 1 Daly 314.

On bank bill. The N Bank, of which defendant was president, was a state bank of issue, and plaintiff was the owner of one of its bills, duly registered and numbered. The banking law made no provision for the issuance of new bills in place of those lost, though it provided for the retirement and reissue of mutilated bills; and provided that banks bearing such bills should deposit securities therefor. Plaintiff accidentally tore his bills and lost one of the parts, the one retained having the number and other evidences of identification. His application to the superintendent of banking to authorize the bank to issue a new bill on surrender of the part retained, was refused. Payment was refused on the part presented to the bank. The bank claimed that it was entitled to indemnity, as well as for the inconvenience suffered in getting a new bill issued. Judgment for plaintiff. Appeal.

Daly, F., J. 1. This was not a lost, but a mutilated, bill, within the meaning of the statute. 2. There could be no indemnity because there was no risk in receiving the part retained by plaintiff and issuing a new bill in place of the original. Judgment affirmed.

WERNER v GERMAN SAV. BANK (1863) 2 Daly 406.

To recover interest. Plaintiff alleged that defendant savings bank was incorporated under a law requiring it to pay 1 per cent per annum interest more on deposits of less than \$500 than it paid on deposits over that amount; that defendant paid 5 per cent per annum on sums over \$500; that plaintiff had a deposit of \$250, but that it refused to pay him more than 5 per cent per annum, and he asked judgment for 6 per cent per annum. The Act of 1853, under which the action was brought, provided for this; but the Act of 1859, under which defendant was incorporated, made it the duty of the trustees to regulate the rate of interest to all depositors without distinction. The trustees had fixed the rate at 5 per cent per annum. Demurrer. Sustained. Judgment for defendant. Appeal.

Brady, J. The provisions of the Act of 1859 are inconsistent with those of the Act of 1853, and the latter must give way to the former. Judgment affirmed.

Cited: 6 Abb. N. C. 375; 8 Daly 468; 37 Hun 418.

ANDREWS v ARTISANS BANK (1863) 26 N. Y. 298.

To recover deposits. Plaintiff fraudulently induced defendant bank to discount a note and withdrew the amount from the bank. Subsequently he made deposits. When defendant discovered the fraud, it deducted from plaintiff's account the amount fraudulently credited. Afterward, at the maturity of the note, defendant protested it, and caused notice to be given plaintiff as indorser. Defendant claimed, by way of counterclaim, the amount which would be due the bank by disregarding credit of the note. Defendant's offer to prove the counterclaim was not allowed because the contract was not an express one. Judgment for plaintiff. Affirmed at General Term. Appeal.

Denio, C. J. 1. The credit which the plaintiff obtained on defendant's books, was unavailing, either as a contract for the payment of the sum which was in form credited, or as evidence of money of the plaintiff in defendant's hands. 2. It is not required by the code that the contract, on which the counterclaim is based, should be an express one. 3. The defendant did not affirm the transaction by its subsequent conduct. Judgment reversed.

Cited: 73 N. Y. 559; 90 id. 229; 26 App. Div. 204.

McBRIDE v FARMERS BANK (1863) 26 N. Y. 450.

Attachment to recover the proceeds of two notes. Plaintiff was assignee of the M Bank, a foreign corporation, which had forwarded the notes to the C Bank for collection. The C Bank forwarded them to defendant, a bank, also a foreign corporation, for collection. The C Bank and defendant were correspondents and kept an open account of such collections. C Bank failed, and its cashier gave M Bank an order on defendant for the amount of the notes. Defendant refused payment, alleging the application of the proceeds to a balance due it from C Bank. Judgment for plaintiff. Affirmed at General Term. Appeal.

Balcom, J. 1. Defendant did not give valuable consideration for the notes and was not a bona fide holder. 2. That plaintiff's assignor was a foreign corporation, did not prevent plaintiff from maintaining the action and commencing it by attachment. 3. The case is not altered by the holder's receiving payment of balances or by omitting to collect a balance, because of a promise to pay the note. 4. No demand for the money was necessary after defendant had appropriated the proceeds of the note to its own use and had notice that it belonged to M Bank. Judgment affirmed.

Cited: 44 Barb. 178; 46 id. 21; 54 id. 235; 67 id. 451; 12 Hun 533; 16 id. 553; 18 id. 418; 28 id. 273; 34 id. 31; 75 id. 92; 3 Keyes 340; 1 Lans. 458; 9 Misc. 347; 31 N. Y. 284; 32 id. 47; 47 id. 442; 54 id. 539; 73 id. 277; 81 id. 22; 118 id. 453; 159 id. 500; 34 Supr. 388; 48 id. 388; 6 T. & C. 404.

MINER v VILLAGE OF FREDONIA (1863) 27 N. Y. 155.

To set aside a tax assessment. Plaintiff was an individual banker, under the General Banking Law, carrying on business at F, where he resided with his family. He afterwards removed his family to the village of D and was assessed for village tax at F, on the amount of his banking capital. He paid under protest. Case agreed. Judgment for defendant. Appeal.

Davies, J. A banking association has a situs and is an inhabitant of the city, town, or ward in which its office of discount and deposit is located, and is taxable in that place, and as the same rule is applicable to individual bankers, the tax was properly levied. Judgment affirmed.

Cited: 46 Barb. 329; 22 Hun 294; 73 id. 99; 87 id. 342; 80 N. Y. 234.

IN RE HOLLISTER BANK OF BUFFALO (1863) 27 N. Y. 393.

To enforce stockholders' liability. The Hollister Bank becoming insolvent, a receiver was appointed, who made dividends of the cash in his hands among the creditors, leaving a balance of debts of the bank. An apportionment was made on the stockholders, which was confirmed and docketed as a judgment. Thereafter, on petition, a second reference was ordered, all of the stockholders not having paid, and a second apportionment, which was confirmed. Some stockholders appealed.

Emott, J. The Act of 1849, ch. 226, does not provide for the failure or inability of a portion of the stockholders to respond to the assessment and gives

no authority or jurisdiction to make more than one judgment, the first apportionment and judgment remaining unreversed. Order reversed.

Cited: 2 Keyes 251; 32 N. Y. 369; 162 id. 192.

METROPOLITAN BANK v VAN DYCK (1863) 27 N. Y. 400.

Injunction to restrain the defendant, the superintendent of banks, from disposing of securities deposited by the plaintiff bank for the redemption of its currency. The superintendent was authorized to sell the securities to pay the notes upon the failure of the plaintiff to pay them, on demand, in the lawful money of the United States. Payment in coin was refused, but a tender was made of United States treasury notes issued pursuant to the Act of Congress of 1862. The note was thereupon protested. Defendant relied on the unconstitutionality of the Legal Tender Act. Judgment for plaintiff. Appeal.

Davies, J. 1. Congress has power to make the treasury notes of the government, issued for such a purpose, a legal tender, as well in payment of debts due the United States, as those of a private nature. 2. What is lawful money at the time of payment, is the lawful money, intended and referred to in the obligation, and the act does not impair the obligation of contracts. 3. The defendant is only authorized to sell the securities in the event of plaintiff's refusal to redeem in lawful money of the United States. Judgment affirmed.

Cited: 45 Barb. 622, 635; 47 id. 490; 49 id. 331, 341; 52 id. 429; 53 id. 461; 56 id. 388; 7 Hun 42; 32 N. Y. 476; 34 id. 654; 41 id. 607n; 4 Robt. 66; 5 id. 515.

FARMERS BANK v BUTCHERS BANK (1863) 28 N. Y. 425.

To recover the amount of checks certified by the teller of defendant bank. The checks were not drawn against funds. The teller had authority to certify, only when the drawer's funds covered the check. Plaintiff had no notice of the teller's private instructions, and had relied on his certification on other occasions when checks were paid. Judgment for plaintiff. Appeal.

Brown, J. The bank is responsible to holders in good faith, and for value, notwithstanding private directions not to certify, in the absence of funds, without special permission. Judgment affirmed.

Cited: 64 Barb. 198; 67 id. 32; 3 Hun 151; 35 id. 245; 42 id. 538; 107 N. Y. 183; 5 T. & C. 287.

STATE BANK v BANK OF CAPITOL (1864) 41 Barb. 343.

Negligence, in failing to protest a draft. Plaintiff, a bank for collection, sent to defendant the draft to collect. Payment being refused, defendant sent notices to all the parties, and plaintiff forwarded them. The payee though misdescribed in the notice, received it. The owner recovered from him, and he recovered from the plaintiff. Judgment for plaintiff. Motion for new trial.

Hogeboom, J. 1. A mere collecting agent, in the absence of a special agreement or commercial usage, discharges his duty by making a proper demand of payment and sending notice of non-payment to his principal. 2. Sending notice to all parties might have been evidence of a special agreement if such a custom had been shown. Motion granted.

Cited: 26 App. Div. 180.

ROBB v ROSS COUNTY BANK (1864) 4 Barb. 586.

On bill of exchange against indorser. The S Bank drew a bill of exchange on A, in favor of B, who indorsed it to the defendant, a bank. The bill was indorsed by defendant's cashier individually, to the O Co. With such indorsement thereon, the plaintiff became a holder for value. On default, the bill was protested for non-payment. Complainant dismissed on the ground that the cashier was not authorized to bind defendant by his indorsement. Judgment for defendant. Appeal.

Sutherland, J. 1. The presumption is that the plaintiffs were bona fide holders. 2. The presumption is that the bank had power of negotiating bills, and its cashier authority to indorse them. 3. Where a bill is indorsed for a special purpose, such fact will not affect the rights of a bona fide holder without notice of such purpose. 4. Where a bill is indorsed by a cashier of a bank in his official capacity, one has a right to assume that the indorsement was made in behalf of the bank, and by its authority. Judgment reversed.

HOFFMAN v VAN NOSTRAND (1864) 42 Barb. 174.

Accounting. Plaintiff's assignor deposited stock, in an insurance company, as security for a loan by the N Bank, of which defendants had been president and directors. The stock was sold by the N Bank prior to the sale and transfer by it of all its property to the B Bank, a new corporation. There was no evidence that the stock was received by B Bank, or that a demand had ever been made. Plaintiff contended that the defendants were liable as trustees of the N Bank. Judgment for defendants. Appeal.

Clerke, J. The defendants were not liable for any property which did not come into their hands. Judgment affirmed.

Cited: 66 Barb. 155; 21 Misc. 404, 406.

TAYLOR v HUTTON (1864) 43 Barb. 195.

Injunction, to restrain defendant from removing the president of a bank. Plaintiffs were stockholders, and defendants were directors of a bank. Defendants threatened to remove the president. By the articles of incorporation agreed to by all the stockholders and by Act of Congress, the directors were given power to remove the president. Such articles were transmitted to and approved by the comptroller of currency. W, without being elected, was appointed in accordance with the by-laws adopted by the directors, to fill a vacancy in the directorate. No by-laws had ever been adopted by the stockholders. Plaintiff contended that the directors could not act, because the by-laws were never legally made, were not approved by the comptroller, and that it was expedient to defer action for a few days, until the next meeting of the stockholders. Plaintiff moved to have the temporary injunction continued.

Peckham, J. 1. The directors have power to remove the president. 2. The court has no power to act on questions of expediency of this character. Motion denied.

METCALF v MESSENGER (1864) 46 Barb. 325.

Motion to vacate order imposing fine. Defendant was fined for refusal to pay a tax on the capital of a bank. Petitioner, one of three assessors of the town of C made this assessment alone. At the time of assessment, the bank was owned entirely by defendant, who was not a resident of C. At that time the institution had ceased to act as a bank, and was simply keeping office to redeem its circulation.

Welles, J. 1. One of several assessors cannot make an assessment for it is the joint act of all or a majority of them. 2. The defendant was liable to be taxed upon the bank's capital, the same as if he had been a resident of C. 3. When a bank ceases to do business, it is no longer one, except in name. 4. The assessment should have been on the capital. Order reversed.

Cited: 73 Hun 99; 87 id. 342; 58 N. Y. 92; 80 id. 234.

WAKEFIELD BANK v TRUESDELL (1864) 55 Barb. 602.

On promissory note. On February 23, 1855, the B Co. by its treasurer, made its promissory note for \$2,500, with interest, to the order of T, payable at the plaintiff bank, six months after date. The note was indorsed by the payee, and its payment guaranteed by the defendant and others. On August 24, 1855, T paid to the plaintiff, with the funds of the maker, interest on the note up to February 26, 1856. This payment was made with the defendant's knowledge. The cashier indorsed on the note that interest was paid to February 26, 1856. There was no express agreement to wait for the principal to that date. Judgment for defendant. Appeal.

Foster, J. 1. There can be no doubt that the parties understood that the time of payment was extended; if so, it has all the binding force of an express agreement to wait and the right of action was thus suspended, and this discharged the defendant. 2. The cashier is the financial officer of the bank, and his agreement on behalf of his principal, in all matters relating to its business of discounting and banking, are binding upon it, to the same extent as if made by a resolution of the board of directors. Judgment affirmed.

POTTER, REC'R v MERCHANTS BANK (1864) 28 N. Y. 641.

Conversion, for promissory notes. Plaintiff was receiver of the M Bank. B, a clerk of the M Bank, in the absence of the cashier, forwarded to defendant bank, the collection agent for M Bank, a note with direction to place it to the credit of M Bank. B was in charge of the bank, but had no authority to forward the note. Defendant refused discount, but entered the note for collection. M Bank failed. Plaintiff's demand for the note was refused. Defendant claimed a lien for a balance due from M Bank. Plaintiff proved appointment as receiver by recitals in the record. The statute conferred jurisdiction on the Supreme Court to appoint receivers. The court charged, that *prima facie*, the plaintiff might recover the amount of the note and interest. Defendant contended that the action in which the receiver had been appointed could not be proved by the order appointing him. Judgment for the plaintiff. Affirmed at General Term. Appeal.

Mullin, J. 1. B's authority permitted him to forward the note for collection, but not to pledge it as security for the debt of the bank. 2. Recitals in the record of jurisdictional facts are *prima facie* evidence of the facts recited. 3. The instruction, that *prima facie* the plaintiff's damages were the amount which the maker of the note agreed to pay, was correct. 4. In the absence of evidence to the contrary, it is presumed that the maker of a note is solvent. Judgment affirmed.

Cited: 6 Hun 344; 8 id. 312; 37 id. 481; 43 id. 173; 73 id. 286; 5 Lans. 322; 19 Misc. 130; 26 id. 450; 34 N. Y. 492; 48 id. 242; 53 id. 600; 56 id. 387; 57 id. 131; 73 id. 308; 84 id. 417; 94 id. 45; 134 id. 571; 136 id. 161; 147 id. 663; 163 id. 416; 6 Robt. 202; 40 Supr. 405, 533; 51 id. 383; 4 T. & C. 621.

PAYNE v GARDINER (1864) 29 N. Y. 146.

On certificate of deposit. P, plaintiff's intestate, deposited money with the banking firm of S, G & H in May, 1848, receiving the certificate of deposit. In April, 1850, H retired and a new firm, S, G & Co. was formed, and assumed the debts of the old firm. In January, 1853, G retired and the remaining co-partners assumed all debts. Interest was paid P to 1859. This action was brought in November, 1861, alleging demand in June, 1861. S set up the transfer from one firm to another, with consent of P. G set up the same, and relied on the Statute of Limitations of six years. P denied having knowledge of any transfer. Verdict for plaintiff. Motion for new trial. Denied. Appeal.

Mullen, J. 1. A deposit or a loan on a certificate, is not barred by the Statute of Limitations until six years after demand, at which time the statute begins to run. 2. The transaction was a deposit. 3. The transfer from firm to firm, under the circumstances, did not defeat the claim. Judgment affirmed.

BANK OF NEW YORK v STATE BANK OF OHIO (1864) 29 N. Y. 619.

On bill of exchange. Defendant, a bank, discounted it and C, its cashier, indorsed it, and sent it to the O Co. for collection only. Before maturity the O Co. transferred it to plaintiff, a bank, as collateral security. Plaintiff received it bona fide, without notice of ownership. It was payable to the order of C, cashier, who indorsed it to L, cashier. Judgment for plaintiff. Appeal.

Wright, J. The indorsement of C, cashier, was that of the bank for which he was cashier, and bound it to a bona fide holder of the bill. Judgment affirmed.

LEFEVER v LEFEVER (1864) 30 N. Y. 27.

To rescind contract for fraud. Plaintiff was a director of a bank of which defendant was cashier. Plaintiff purchased bank stock on the strength of defendant's false statements. Statements of persons not sworn on the trial were given in evidence and the unsworn statement of one person as to the condition of the bank at the time of the sale was also offered. These affidavits and statements had been given in a proceeding by stockholders to reestablish the bank. Judgment for plaintiff. Appeal.

Wright, J. 1. The statements were not competent evidence. 2. The plaintiff, though a director of the bank, was not bound to know the truth or falsity of defendant's representations, nor is he estopped from setting up his ignorance of the condition of the bank's affairs. Judgment reversed.

REYNOLDS v KENYON (1865) 43 Barb. 585.

Money had and received. The C Bank, of which the defendant was president, had on deposit and for collection in behalf of the plaintiff, a note for \$2,000, made by G, cashier of C Bank, who had sufficient funds. Plaintiff requested G to forward to B, three drafts amounting to \$2,000, and to apply the same on his note. G forwarded the drafts as requested, but, instead of applying \$2,000 on the note, he charged it to the plaintiff's account. This was done with the defendant's knowledge. On learning of the transaction, plaintiff repudiated it, and demanded the \$2,000 charged to his account. Judgment for plaintiff. Appeal.

Bacon, J. 1. If G properly drew on the bank's funds, the loss must fall on the person who put him in a position to perpetrate the fraud. 2. G was clothed with authority by the bank to draw drafts, and the bank is bound to all persons dealing in good faith with him. Such persons are not bound to inquire into facts aliunde. 3. It is not necessary for the protection of the plaintiff that he occupy in all respects the position of a bona fide holder of commercial paper, without notice of any defect in his title. Judgment affirmed.

Cited: 36 Supr. 52.

PEOPLE v ASSESSORS (1865) 44 Barb. 148.

Mandamus to cancel assessment. The relator owned 30 shares of F National Bank stock. The bank's capital stock was invested wholly in United States bonds. The Act of March 9, 1865, enabled state banks to do business under the United States Banking Laws, and provided that their capital should be assessed to the stockholders. The Act of June 3, 1864, prohibited taxation of national bank property at a higher rate than state banks. The state law permitted state banks to deduct, for the purposes of taxation, all non-taxable securities. The tax assessors, pursuant to an act of the state legislature, included these 30 shares in the assessed valuation of the relator's personal property.

Parker, J. 1. Mandamus is a proper remedy. 2. Holders of United States securities are exempt from state taxation. 3. Holders of shares of stock in a national bank are not holders of United States securities. 4. By the act of Congress under which such banks are organized, the shares of such banks can be taxed by the state; the state can impose no higher rate of tax on such shares, than is imposed on the shares of state banks. The state law has discriminated against national banks. 5. Congress has the power to prohibit such taxation altogether, or to modify it. Motion granted.

Cited: 44 App. Div. 240; 55 id. 547, 548; 119 N. Y. 518.

BRIDGE v MASON (1865) 45 Barb. 37.

For failure to present note. Plaintiffs left the note with defendants, bankers, for collection. Defendants' omission to present it for payment at maturity, caused its loss to plaintiffs. The court charged that plaintiffs' damage was the amount the note was worth, in a suit against "such a man as the indorser was shown to be." Judgment for defendants. Appeal.

Per curiam. 1. The judge's charge should have reference to the pecuniary means of the indorser, not to "such a man as he was shown to be." The amount of the note is the prima facie rule for damages. 2. The defendants can show in mitigation of damages that the indorser is wholly or partly insolvent. Judgment reversed.

Cited: 1 Hun 612; 4 T. & C. 76.

COMMERCIAL BANK v TEN EYCK (1865) 50 Barb. 9.

For malfeasance. The defendant was cashier of the plaintiff, a bank, from 1858 to 1862, although practically only head clerk until S's death in 1860. The state owned \$92,000 in railroad bonds, which were left with plaintiff for collection. W, the treasurer of the railroad, requested the plaintiff to loan him the amount of the bonds on his check, to take them up and he would deposit the bonds with the bank as security for his check. The defendant, without the knowledge of any other officer, agreed to the arrangement. No entry of the transaction was made in the bank's books. A few days later, ten of the bonds were sold and the proceeds received by the plaintiff. The rest of the bonds were sent to S & W, bankers in New York, to sell. W gave the defendant a sight draft on S & W for \$70,000,

which was paid and the proceeds received by the plaintiff. W gave to the defendant his note for the balance due the bank on the check discounted to take the bonds. Judgment for plaintiff. Cross appeals.

Hogeboom, J. 1. It not appearing that the note of W is uncollectible, the plaintiff cannot recover, as it in no way appears that it has suffered any damage. 2. After receiving the proceeds of the first lot of bonds sold, the bank cannot deny that it held the bonds, either as its own or as having a special property in them. 3. The bank further adopted the act of the cashier in receiving the money from the brokers. 4. The cashier did the acts in regard to the W loan in the line of his duty, and they were, therefore, the acts of the corporation. 5. The corporation adopted these acts and was therefore bound by them. Judgment reversed.

Affirmed: 48 N. Y. 305.

HOLLISTER v HOLLISTER BANK (1865) 2 Abb. Dec. 367.

Insolvency. Claimants were stockholders in defendant, a state bank, which failed. The receiver of defendant collected of claimants the assessments levied on their stock, and applied for an order directing the payment of the assets among the bank's creditors. The claimants contended that, having paid the full amount of their assessments, they became creditors and were entitled to share in the assets. Order directing the receiver to divide the proceeds among the regular creditors. Appeal.

Davies, J. The stockholders were not entitled to anything until after the payment of all the debts of the bank. Order affirmed.

Cited: 45 N. Y. 742; 156 id. 59.

HOLLISTER v HOLLISTER BANK (1865) 2 Keyes 245.

Insolvency. An assessment by the receiver of defendant bank, among the stockholders was made. It was to pay creditors of the bank. Plaintiffs were stockholders claiming a share of the amount in the receiver's hands, on the ground that, by paying their apportionment, they had become creditors of the bank and should receive a pro rata share of assets. The Act of 1849 made stockholders liable for debts, and stated that if after paying all the debts, there remain other assets, these should be apportioned among stockholders in proportion to their payments. The amount in the receiver's hands, of which the plaintiffs claimed a share, was not enough to cover the claims of the regular creditors. Order directed the receiver to divide amount in his hands among creditors. Appeal.

Potter, J. The stockholders are made debtors to the creditors, and such they must remain until the creditors are paid the amount of the apportionment. Order affirmed.

Cited: 45 N. Y. 742; 156 id. 59. S. c.: 2 Abb. Dec. 367, supra.

PURCHASE v NEW YORK EXCH. BANK (1865) 3 Robt. 164.

Damages for refusal to transfer bank stock. W transferred to plaintiff shares of defendant's stock, with the usual power of attorney to transfer. Plaintiff's demand for a transfer of the stock was refused, as defendant had been enjoined, by an order of court, from transferring the said stock. Judgment for defendant. Appeal.

Monell, J. The injunction prevented the transfer, and gave the defendant a defense. Judgment affirmed.

SCHNEIDER v IRVING BANK (1865) 1 Daly 500.

On deposit. Plaintiffs drew their check in favor of C, on defendant, a bank, but before payment they notified it not to pay the check. The cashier promised not to do so. Defendant paid it, and when the passbook was balanced, this check was charged against plaintiffs, and the check returned to them with the book. They at once returned it to defendant and demanded the money, which was refused. No counterclaim was interposed, the bank resting on its right to pay the check. Judgment for plaintiffs. Appeal.

Cardozo, J. The bank had no right to pay the check after receiving notice not to do so. Judgment affirmed.

Cited: 12 Hun 540.

DAYTON v BORST (1865) 31 N. Y. 435.

On subscription to bank stock. Plaintiff was the receiver, appointed in New Jersey, of a bank organized under the New Jersey laws. Defendant subscribed to all but ten shares, and never paid his subscription. Judgment for plaintiff. Affirmed at General Term. Appeal.

Davies, J. 1. The organization of the corporation and defendant's subscription created a legal liability on his part to pay the corporation the amount of his subscription. 2. The capital stock of the bank was a trust fund for the security of its creditors. 3. The receiver was entitled to maintain this action. Judgment affirmed.

Cited: 22 App. Div. 569, 575; 52 Barb. 171; 6 Hun 294; 28 id. 134; 67 N. Y. 299; 159 id. 273, 276, 277.

BANK OF SALINA v ALVORD (1865) 31 N. Y. 473.

On drafts, against accommodation indorser. Plaintiff, a "safety fund" bank organized under the Laws of 1829, discounted drafts for the drawer at a rate prohibited to such banks. The inception of the drafts was in this contract for the loan of money. The loan was on a discount of a draft for thirty-five days at 7 per cent. Judgment for defendant. Appeal.

Brown, J. 1. The contract on which the bank seeks to recover, is within the prohibition of the statute. 2. Receiving usurious interest is sufficient evidence of a corrupt agreement. Judgment affirmed.

Cited: 8 App. Div. 431; 19 Hun 229; 30 id. 643; 71 N. Y. 170; 79 id. 445.

EAST RIVER BANK v HOYT (1865) 32 N. Y. 119.

On promissory note. Defendants desired to pay a past due note for \$1,000 held by plaintiffs. To allow them to pay it, plaintiff discounted three notes of \$500 each for defendants at 7 per cent. As a condition of the discount, plaintiffs required that \$1,000 should be used as a renewal of their past due note, and that \$500 so to be discounted, should remain on deposit until the note in question, part of the paper to be discounted, should become due, and that defendants should leave their check for \$500 to meet and pay the note in suit when it became due. Interest was deducted in advance for the full amount of the loan. Judgment for defendants. Judgment reversed at General Term. Appeal.

Potter, J. The transaction was usurious and void. Judgment reversed.

Cited: 62 Hun 326; 91 id. 196.

CALLANAN v EDWARDS (1865) 32 N. Y. 483.

On certificate of stock. Defendant C was the owner of a certificate of indebtedness of the N Bank, payable in instalments. He assigned it to the defendant, M Bank, without giving N Bank notice. Plaintiff indorsed a note for C's accommodation, on the representation of the N Bank's cashier that C owned the certificate. The N Bank discounted the note. The note not having been paid, the N Bank entered judgment against the plaintiff. Plaintiff then demanded the application of the balance due on the certificate to the payment of the note. M Bank then gave N Bank notice of the assignment. Judgment for plaintiff. New trial ordered. Appeal.

Wright, J. Discounting C's note could give the N Bank, and through it, the plaintiff, no general or specific lien on the certificate or any equity, as against the real owner of the claim. Order affirmed.

Cited: 3 Keyes 295.

PRICE v LYONS BANK (1865) 33 N. Y. 55.

To cancel bond and mortgage for usury. The plaintiff had been indebted to defendant, a bank situated at Lyons, New York, on promissory notes, made payable in Albany. In renewal of these notes, plaintiff was required to give other notes, also payable at Albany in twenty-five days. At the same time, he was required to pay the discount at the legal rate of 7 per cent per annum, and one-half of 1 per cent in addition, representing the difference in exchange between Albany and Lyons. The notes were renewed at frequent intervals on the same conditions. The bond and mortgage in suit were given to secure the last renewals. Nonsuit. Affirmed at General Term. Appeal.

Brown, J. 1. On renewal of an existing loan no question of exchange can arise when the new obligation is payable at the same place as the old. 2. Any exaction beyond legal interest in such case is usury. Judgment reversed.

Cited: 53 Barb. 356; 41 Hun 48; 33 N. Y. 67; 41 id. 309.

BEALS v BENJAMIN (1865) 33 N. Y. 61.

On promissory notes, against the maker. Defense: usury. Defendants had an agreement with plaintiff, who did business at C, New York, that they should deposit with him and that he should from time to time discount their notes, made payable in New York, and that they should pay "the exchange at the maturity of such note, in case a draft should be purchased to pay the same." The rate of exchange was one-half of 1 per cent in favor of New York. As the notes fell due, the defendants paid them by drafts on New York, which they purchased from plaintiff. These purchases were made with the proceeds of fresh notes which plaintiff discounted. On each purchase of a draft, the rate of exchange was deducted by plaintiff. Judgment for plaintiff. Affirmed at General Term. Appeal.

Davies, J. 1. The plaintiff did not impose it as a condition of discounting defendants' notes that they should be made payable in New York, and that they should purchase drafts and pay exchange to him to retire them at maturity. The agreement was not a device to conceal usury. 2. The agreement of the borrowers to keep their deposits with the lenders did not amount to usury. 3. The agreement to purchase exchange from the lender, with which to take up the notes as they became due in New York, was not usury. Judgment affirmed.

Cited: 60 N. Y. 258; 130 id. 488.

CITY OF UTICA v CHURCHILL	} (1865) 33 N. Y. 161.
VAN ALLEN v ASSESSORS	
WILLIAMS v SAME	

Reversed in 3 Wallace (U. S.) 573.

Cited: 16 Hun 199; 35 N. Y. 424, 425, 426, 430, 432, 441, 444; 36 id. 68; 48 id. 526; 56 id. 557.

PEOPLE v OLMSTEAD (1866) 45 Barb. 644.

Mandamus to compel reduction of assessment. The relator was a banking association organized under the General Banking Laws in effect in 1838. The directors resolved to close the bank, and, for that purpose a dividend of 48 per cent of the capital stock and 19 per cent of the earnings and surplus was paid to the stockholders, and an equal amount of its stock surrendered and canceled. Defendants, tax assessors, assessed the bank on its entire capital as it existed prior to directors' resolution to dissolve. Mandamus granted. Appeal.

Daniels, J. 1. Though the relator is a corporation, it is not a "moneyed corporation" within the statutory regulation which prevents such corporations from reducing their capital without the consent of the legislature. 2. The directors had the power of voluntarily closing up their business and producing their dissolution. 3. The relator is not liable to taxation upon stock so returned to its holders. Judgment affirmed.

Cited: 55 App. Div. 547, 548; 119 N. Y. 518.

PEOPLE v BOARD OF EDUCATION (1866) 46 Barb. 588.

Mandamus to strike bank's name from assessment roll. Relator, a bank, was organized with a capital of \$104,000. Defendant caused the relator's personal property to be assessed at a value of \$102,400, the amount of its paid-up capital. At the time of this assessment, the relator's surplus profits were \$35,000; real estate, \$14,000. It held \$203,500 in United States securities and also \$65,000 in other stocks. The relator did not show that any of its capital was invested in United States securities, or that it had been assessed for any of its property so invested. Mandamus awarded.

Marvin, J. 1. An individual or corporation is liable to taxation upon its capital not invested in United States securities. 2. The state cannot tax such securities whether held by corporation or individual. Writ quashed. Judgment reversed.

Cited: 46 Barb. 599.

MARKET BANK v HARTSHORNE (1866) 3 Abb. Dec. 173.

On check. Plaintiff, the M bank, was the indorser of a check drawn by defendant on G Bank. M, by concealing his insolvency, induced defendant to give him the check. The check was indorsed by M and placed to his credit by plaintiff, in which M deposited. On the same day checks drawn by M were presented through the clearing house and charged against the deposit. Defendant contended that the plaintiff was not a purchaser for value without notice of the fraud. Judgment for plaintiff. Appeal.

Porter, J. The plaintiff was a bona fide holder of the check for value. Judgment affirmed.

Cited: 36 Supr. 278.

WEEDSPORT BANK v PARK BANK (1866) 4 Abb. Dec. 545.

To recover proceeds of drafts. Plaintiff, a bank, sent the drafts to defendant, also a bank, for collection, with directions to apply the proceeds to the payment of notes. The notes were paid in some other way. Subsequently plaintiff gave directions to pay the cash to K, if the drafts had been collected. Defendants then credited the proceeds to K, who used the money. Plaintiff contended that the defendant was liable for the loss. Judgment for defendant. Appeal.

Porter, J. The defendant having followed plaintiff's instructions was guilty of no breach of duty and is not liable. Judgment affirmed.

METROPOLITAN BANK v SMITH (1866) 4 Robt. 229.

On note. Plaintiff, a bank, was \$300 short on the day of the surrender of the note. It was customary in drawing checks to pay notes, to be governed by the figures in the margin of the notes. The collection book, and the entry book, both showed that the note had been entered for \$300 less than the proper amount. Plaintiff produced in evidence the original notice, which had been taken from the original note, and this notice showed \$300 less than the proper amount. The note, produced, had the part torn off where the figures had been written on the top. All the clerks who received payments of notes, testified to putting the amounts in a certain drawer. The note teller testified that the total of the amounts contained in that drawer was \$300 short. Defendant gave direct testimony to the effect that he had paid the proper amount. Judgment for plaintiff. Appeal.

Robertson, C. J. Although plaintiff's evidence was to a certain extent circumstantial, the jury had a right to rely upon it in preference to the direct testimony of one of the defendants, who was interested. Judgment affirmed.

Cited: 125 N. Y. 658.

LAWRENCE v BANK OF REPUBLIC (1866) 35 N. Y. 320.

To recover bank deposit. Plaintiffs, as assignees for the benefit of the creditors of L, an insolvent debtor, deposited a fund in defendant. Defendant refused to pay a check drawn by plaintiffs against this fund. Defendant alleged, as a counterclaim, a prior indebtedness of L to it; that it had instituted, through a sheriff an action against L to recover the debt; that an attachment had been made by the sheriff on the deposit; that the sheriff had subsequently recovered judgment against L in such action, and that execution had been returned unsatisfied; that the assignment to plaintiffs by L, was in fraud of creditors. Defendant contended that it was entitled to apply the deposit in part payment of the judgment. Verdict directed. Judgment for plaintiff. Exception. Reversed at General Term. Appeal.

Morgan, J. 1. When the identity of property assigned for the benefit of creditors is gone, the proceeds cannot be attached as belonging to the assignor. 2. A sheriff has no standing to institute a creditors' suit to reach such proceeds, which he could not otherwise attach as the debtor's property. 3. Defendant was a necessary party to such suit. Defendant does not by reason of its answer, occupy the position, or acquire the lien of the plaintiff in a creditors' suit. 4. The defense was not a proper subject of counterclaim, not being connected with the subject matter of the action. 5. Plaintiffs are entitled to the funds as against defendant, until the assignment is set aside. Reversed at General Term.

Cited: 4 Abb. N. C. 91; 50 Barb. 557; 57 id. 44; 10 Daly 5; 43 Hun 520; 36 N. Y. 566; 50 id. 83, 84, 87; 52 id. 183; 127 id. 516; 153 id. 169.

 NUNNEMAKER v LANIER (1867) 48 Barb. 234.

On check received by defendants in making collection of a draft for plaintiffs. The draft was on the Trust Co. Defendants presented it and received in payment the check of the Trust Co. on the A Bank, and surrendered the draft. The check was not presented that day, although there was time, and all checks of the Trust Co. presented that day were honored. Before business hours of the next day the Trust Co. suspended payment. The check was dishonored and defendants could not get the draft back. Defendants relied upon the existence of a custom in New York City, of taking checks of the Trust Co. without certification, in the same manner as bank checks, and that this saved them from liability for negligence. Judgment for plaintiffs. Appeal.

Leonard, J. 1. Defendants having surrendered the draft, assumed the responsibility of taking the check of the party upon whom the draft was made. 2. It was no excuse that others were in the habit of taking the same risk. 3. The custom, if there was one, of taking the Trust Co.'s check the same as bank checks did not relieve defendants from liability. Judgment affirmed.

Cited: 5 Robt. 592; 6 id. 417.

 LUNT v BANK OF NORTH AMERICA (1867) 49 Barb. 221.

To recover amount of deposits. Plaintiff was assignee in insolvency of C. Two checks in usual form were drawn by C on defendant, and negotiated previous to the assignment, and indorsed by the payee to the claimant. They were presented and payment refused for want of funds, and several other checks of C were presented at the same time and payment refused. Judgment for claimant for amount of the two checks. Appeal.

Leonard, P. J. The checks being in the general form were of the same legal effect as inland bills of exchange, and there was no liability of the party upon whom they were drawn until they were accepted. These checks were not an assignment of any part of the funds in defendant, any more than other checks of C. Judgment reversed.

Cited: 11 Hun 485; 12 id. 540; 70 N. Y. 216, 330; 160 id. 201.

 COOKE v STATE NAT. BANK (1867) 50 Barb. 339.

Attachment. The defendant was organized under the National Banking Act of 1864, and was located at Boston, Mass. The Act of Congress of June 3, 1864, sec. 8, declared that banks might sue and be sued, complain and defend, in any court of law or equity as fully as natural persons. Under the code of procedure, sec. 227, a foreign corporation is defined to be one created by, or under the laws of any other state. Defendant moved to set aside the attachment for want of jurisdiction.

Ingraham, J. 1. Sec. 57, of the Act of 1864, cannot be considered as controlling and modifying the provisions of sec. 8, and, under the latter section, the court has jurisdiction. 2. Where the corporation is located in another state and is foreign both in its origin and its location, it is a foreign corporation under sec. 277. Motion denied.

Cited: 64 Barb. 425; 25 Hun 17; 1 Lans. 494. Aff'd: 52 N. Y. 96.

 BRANCH v ROBERTS (1867) 50 Barb. 435.

To enforce liability of bank director. The plaintiffs, as holders of bills of a bank in Georgia, brought an action against the defendant as director of the bank, to recover damages for the misconduct of the defendant as such director. Demurrer.

Clerke, J. A stockholder cannot sue directors for damages on the ground that his stock was made valueless by their misconduct. If a stockholder cannot maintain such an action, a creditor certainly cannot do so. Judgment for defendant.

 BURRILL v WATERTOWN BANK AND LOAN CO. (1867) 51 Barb. 105.

On counterfeit bank bill. The defendant, a bank, paid out the bill in question to the plaintiff's agent on July 1. The agent paid it the following day to W, who took it to three banks, all of which declined to receive it. W afterward had C give him small bills for it. C then sent the bill to another bank where it was

again refused. C notified W, who returned the bill to the plaintiff's agent. The agent examined the bill by a detector, thought it was good, and paid it out to G who, on August 3, sent it to a bank in Watertown. The bank received it on deposit and paid it out, and, after it had passed through several banks, it was returned to the plaintiff's agent in September. He presented it to the defendant for redemption on September 17, and was refused. Verdict for plaintiff. Appeal.

Morgan, J. 1. The duty of returning the bill must begin from the time the holder had satisfactory evidence, that it was spurious. 2. The question of negligence was for the jury. 3. The court did not err in instructing that the omission of W to return the bill to plaintiff's agent for an unreasonable time, after notice that it was spurious, would not avail defendant. 4. The plaintiff owed no duty to the defendant, which required him to refuse to redeem the bill. Judgment affirmed.

Cited: 19 Hun 283; 3 T. & C. 405.

FIRST NAT. BANK v FANCHER (1867) 52 Barb. 138.

To recover money illegally taken for taxes. The defendant, a tax collector, had a tax warrant, in due form of law, made out by the trustees of the village against the village taxpayers, among whom were several stockholders of the plaintiff, a bank. Some of the stockholders refused to pay the taxes, and others directed the defendant to obtain payment from the bank. He called at the bank for the taxes, and the bank refused to pay them. While there, a money drawer being open, he took out sufficient money to pay the taxes, and paid it to the village treasurer. Judgment for plaintiff. Appeal.

Potter, J. 1. Until dividends are paid by the bank, such dividends are not separated from the other funds of the bank. 2. The stockholder has no specific fund which can be identified and separated from the common moneys of the bank. 3. The bank may be a debtor to the shareholder, with a legal lien created by statute, to meet the stockholder's taxes; but it has no power of attorney, or other authority to pay his debts; not even his taxes. 4. The circulating medium of the bank is by no means the goods, chattels or money of the stockholder, which is alone the subject of levy. Judgment affirmed.

Aff'd: 48 N. Y. 524.

TRUSTEES OF VILLAGE v MORSE (1867) 56 Barb. 380.

To determine validity of tax. Plaintiff, a shareholder in a national bank, was assessed in 1865, on such shares as part of his personal property. In 1866 the tax in question was imposed on plaintiff by trustees of a village for highway labor. The National Banking Act provided that states may tax shares of national banks, but not at a greater rate than other moneyed capital in the state. Laws of 1865, ch. 97, p. 160, sec. 10, provides that shares of national bank stock shall be included in the assessment of personal property. Laws of 1863, p. 435 sec. 1, taxed state banks only on their paid-in capital stock, and shareholders were not taxed at all. Laws of 1864, p. 467, made the village a separate road district, and authorized trustees to assess highway taxes upon the valuations appearing by assessment roll of previous year. Agreed case.

Daniels, J. 1. The assessment of defendant as a shareholder in the bank in 1865 was without valid legal authority and therefore void. 2. The assessment for highway labor in 1866 was valid, as it did not depend in any way upon the legality of taxation for another purpose made the previous year. 3. The trustees had no discretionary power, but were bound to take the assessment roll of the preceding year as a guide, and assess the defendant for his proportionate share of highway labor, after apportioning one day to each male inhabitant liable therefor. Judgment for trustees.

Cited: 2 Hun 500; 46 id. 148; 124 N. Y. 636; 5 T. & C. 38.

KELLY v EMIGRANT INDUSTRIAL SAV. BANK (1867) 2 Daly 227.

To recover a deposit. Plaintiff, a depositor in defendant, lost his passbook, discovered the loss the day following and notified defendant five days later. Meanwhile, defendant had paid out the money to a person presenting the passbook. Sec. 6, ch. 209, Act of 1850, under which defendant was incorporated, provided that deposits should be repaid to each depositor when required, at such times and with such interest as the managers should prescribe. The by-laws printed in the passbook, provided that it should be the depositor's voucher; possession of it

should be sufficient authority to defendant to warrant payment of the funds; that all payments to person producing the passbook would discharge defendant; and that, in case of lost books, defendant would decide who should receive payment, without right of the depositor to question the decision. Judgment for plaintiff. Appeal.

Cardozo, J. 1. The by-law being contrary to law, is invalid. 2. But the plaintiff being negligent in not at once notifying the bank, cannot recover. Judgment reversed.

Cited: 33 Supr. 446. Criticised: Zane on Banks, p. 646.

NATIONAL BANK v GROCERS NAT. BANK (1867) 2 Daly 289.

Money had and received. Plaintiff received, as a deposit, the check of one of its customers drawn on defendant. It went through the clearing house and was credited to plaintiff and debited to defendant in December. The check was discovered to be a forgery. In March, the defendant, in violation of the rules of the clearing house, and of the rights of the plaintiff, returned the check through the clearing house, on the ground that it was a forgery; and the amount was credited to it, and debited to plaintiff. Judgment for plaintiff. Appeal.

Van Vorst, J. The drawee of the check is presumed to know the genuineness of the signature of its customer, and having paid the money, cannot recover it back from the party to whom it was paid. The payment by plaintiff on return of the check was not voluntary. Judgment affirmed.

COMMERCIAL BANK v MARINE BANK (1867) 1 Abb. Dec. 405.

Money had and received. Plaintiff, a bank, indorsed a draft for collection to L, who indorsed it to defendant bank. Defendant and L were correspondents and credited to each other the amounts collected on drafts, but not the drafts themselves. L failed, and the defendant contended that it should apply the proceeds of the draft, which had not been remitted, to the payment of drafts sent to L for collection. Defendants had not drawn on L, and had not sent paper for collection, on the faith of the draft. Judgment for defendant. Appeal.

Parker, J. The draft never having belonged to the defendant, it could not apply the proceeds to the payment of other drafts sent for collection. Judgment reversed.

TURNER v BANK OF FOX LAKE (1867) 4 Abb. Dec. 434.

On draft. Defendant, a bank issued a draft on T. Plaintiffs, the indorsees, sent it to N for collection. The draft was presented, marked paid, and a check taken. On the following day when the check, according to the local custom, was put through the clearing house, it was dishonored. T was insolvent, when he gave the check. Defendant was given notice of non-payment. Relying upon these facts, defendant issued a new draft, which was sued upon. Defendant contended that the original draft had been paid by the check; that the one sued upon was fraudulently obtained; and that it was laches to present the check on the day following its issue. Judgment for plaintiff. Appeal.

Grover, J. 1. The original draft had not been paid by the check, and defendant was liable on the second draft. 2. There was no laches in presenting the check. Judgment affirmed.

Cited: 16 Hun 335; 24 id. 242; 34 id. 30; 38 id. 385; 47 id. 101; 3 Lans. 33; 43 N. Y. 174; 52 id. 548; 80 id. 105; 102 id. 477; 6 Robt. 160, 413; 44 Supr. 339.

COMMERCIAL BANK v MARINE BANK (1867) 3 Keyes 337.

On draft. M drew a draft on C, to the order of plaintiff bank, to which M delivered it for value. Plaintiff indorsed it, and sent it to S & Co. for collection. S & Co. indorsed it and sent it to the defendant bank for collection. S & Co. and defendants had been correspondents, collecting drafts and crediting proceeds to each other after deducting charges for collection. Defendant received the C draft, C accepting it. Defendants sent S & Co. other drafts for collection, until they failed. Later defendant collected the C draft, crediting same to S & Co. At that time S & Co. were indebted to the defendant for more than the amount of the

draft. Payment of the draft from the defendant was refused. Judgment for defendant. Appeal.

Parker, J. The court below erred in assuming that the defendant had transmitted any paper to S & Co on the credit of the draft, and in holding that if the defendant had delayed drawing the amount due it by reason of having this draft, the plaintiff was not entitled to recover. Judgment reversed.

Cited: 47 N. Y. 442; 116 id. 499; 34 Supr. 388.

MECHANICS BANK v STRAITON (1867) 3 Keyes 365.

Where an action was brought on a check payable to "bills payable or order," the expression was deemed equivalent to "payable to bearer," and therefore negotiable, and a complaint is sufficient if it alleges that the plaintiff is the holder and owner of the check for a valuable consideration.

Cited: 9 App. Div. 105.

TURNER v FOX LAKE BANK (1867) 3 Keyes 425.

On bill of exchange against drawer. Defense: fraud. Defendants drew a bill of exchange upon T. Plaintiffs, as indorsees, presented it and received T's check for the amount, in accordance with the regular business custom. They surrendered the bill to T, who stamped it "paid." On the following day, T suspended, and the check was therefore dishonored. The bill of exchange in suit was given by defendants to plaintiffs on the latter's representation that the previous draft had not been paid. The court rejected defendants' offer to prove that, at the time of presentment of the original draft, they had provided T with funds to meet its payment, and that he would have then paid it, in specie, if requested. Judgment for plaintiffs. Appeal.

Grover, J. Defendants' liability is not affected by the fact that they had provided T with funds to meet this particular draft, and the giving of the check did not amount to payment, unless it was, in fact, paid. Judgment affirmed.

Cited: 16 Hun 335; 24 id. 242; 34 id. 30; 38 id. 385; 47 id. 101; 3 Lans. 33; 43 N. Y. 174; 52 id. 548; 80 id. 105; 102 id. 477; 6 Robt. 160, 413; 44 Supr. 339.

PEOPLE, EX REL. v DOLAN (1867) 36 N. Y. 59.

Mandamus, to compel the reduction of an assessment on stock in a national bank. Relator claimed the right to have his personal indebtedness deducted, and that he was subject to taxation only on the balance, under the provisions of the Act of 1866, ch. 761. That statute provided that bank stockholders should be taxed on the value of their shares and that the proportionate value of the bank's real estate, should be deducted from each holder's stock. Mandamus awarded. Appeal.

Parker, J. The statute relied upon by plaintiff, taken in connection with other statutes of the state, on the subject of taxation, does not contemplate the allowance of the reduction claimed. The principle *expressio unius* applies. Order reversed.

DIVEN v LEE (1867) 36 N. Y. 302.

To compel executors to account. Defendants, executors, had invested funds of their testator, L, in stock of the Y Bank. No provision in the will authorized such investment. The Y Bank became insolvent, and plaintiff was appointed receiver. He sued all the stockholders, including defendants, to enforce their liability for the debts of the bank under the Act of 1849. This act confined the jurisdiction of the Supreme Court to proceedings against stockholders as such. No evidence was given to establish any liability of L, as such stockholder. The Act of 1849, ch. 226, made stockholders liable for the bank's debts. The referee reported that respondents "executors of L, deceased" were stockholders, and were responsible individually for the bank's debts. The judgment declared that L was a stockholder, and directed the collection of the deficiency out of the assets held by respondents as executors. Thereupon plaintiff made the present application claiming to be a creditor of the estate of L. Decree for defendants. Appeal.

Scrugham, J. 1. The record produced before the Surrogate contained no evidence that L was a stockholder in the Y bank, but only that respondents were.

Accordingly the court had no jurisdiction to render a judgment declaring him such stockholder, and it was void. 2. Plaintiff was not a creditor of the estate. Order affirmed.

Cited: 48 N. Y. 607.

IRVING BANK v WETHERALD (1867) 36 N. Y. 335.

On promissory note against indorser. The note was made by W, payable to his own order at the plaintiff bank. It was indorsed by W to defendants, who had it discounted at the S Bank. The S Bank presented it to the plaintiff at maturity. The plaintiff certified it as "good," and charged the amount to W. Plaintiff subsequently discovered that W had no funds, and thereupon requested S to cancel the note, which was refused. Plaintiff, on the same day, paid S the face value, received back the note, and procured it to be presented at its own counter again, whereupon it was protested for non-payment and defendants notified of its dishonor. Judgment for defendants. Reversed at General Term. Appeal.

Hunt, J. Neither the certification of the note by plaintiff, nor the advance to S of the amount, constituted a payment so as to discharge the indorsers. Plaintiff received it back as a purchaser from S, and thereupon duly charged the defendants. Judgment of General Term affirmed.

Cited: 60 App. Div. 206; 3 Hun 755; 65 id. 190; 59 N. Y. 77; 89 id. 429, 431; 31 Misc. 229; 6 T. & C. 182.

FARMERS BANK OF GENESEE v PARKER (1867) 37 N. Y. 148.

On bill of exchange against acceptor. Defense: usury, under the laws of Ohio. The drawers applied to M at Toledo, Ohio, for the discount of a draft, payable in New York. It was drawn to the order of M, and was discounted by defendant in Buffalo, N. Y. M retained six per cent interest and a collection charge of one-half of one per cent. It thereupon indorsed and remitted the bill to plaintiff at Buffalo, with a request to rediscount, and remit the proceeds to New York. Plaintiff acting in good faith, procured defendant's acceptance, rediscounted it for M, and remitted the proceeds to New York. Defendant relied upon a statute of Ohio which limited banks to a discount rate of six per cent under penalty of forfeiture of the debt, excepting that the discount of a bill payable elsewhere "at the current discount" was not prohibited, provided no agreement should be for the actual payment of the bill at any other than the nominal place of payment. Judgment for plaintiff. Appeal.

Porter, J. 1. Plaintiff was a purchaser for value without notice. 2. In respect to such persons under the Ohio laws, it is no defense that the contract was usurious as between the original parties. Judgment affirmed.

WESTFIELD BANK v CORNEN (1867) 37 N. Y. 320.

On promissory note against maker. The note was made by the defendant, by B, his attorney, payable to the order of C. Defendant was not allowed to show that the note was made as an accommodation to C; that it was not within the scope of B's authority; and that it was made without defendant's knowledge or consent. J, a director of plaintiff, learned the object for which the note was made. J was not acting as director in discounting the note. Judgment for plaintiff. Appeal.

Parker, J. 1. Although a director of the plaintiff, J did not acquire his knowledge of the transaction, while acting for it, in discounting notes. 2. The evidence does not show that notice of the object of the note was given him as a director. 3. He was not agent of the bank in this transaction, and the rule that notice to the agent, is notice to the plaintiff, does not apply. Judgment affirmed.

Cited: 4 Daly 312; 2 Hun 61; 11 id. 488; 18 id. 41, 315; 23 id. 503; 26 id. 127; 6 Lans. 144; 21 Misc. 290; 82 N. Y. 308; 111 id. 457; 4 T. & C. 262; 6 id. 403.

CHATHAM BANK v BETTS (1867) 37 N. Y. 356.

On promissory note, against makers and indorsers. The maker B, alone defended, setting up: 1, that P was the real party in interest; 2, that the note was for accommodation of T, and that P received it under a usurious agreement. The note had been made for the accommodation of defendant T, one of the indorsers. Defendant P, the subsequent indorser, acted as the agent of B and T in getting

plaintiff bank to discount it. Plaintiff discounted it at a lawful rate of interest, but P retained for himself a sum out of the avails, which, if considered as interest, would equal the rate of 25 per cent per annum. The court refused to charge that the fact that P retained such a proportion of the money, would constitute usury; and that judgment should be for defendant; but charged that if this had been done pursuant to an usurious agreement between P and T, the note would be void in plaintiff's hands. Judgment for plaintiff. Affirmed at General Term. Appeal.

Davies, C. J. 1. The court properly refused to instruct as requested, since such an instruction would withdraw from the jury the question whether or not the note was discounted by P before it was transferred to the bank. 2. The payment of money by the drawee in obtaining the discount did not affect the draft with usury, and a bona fide holder can recover thereon. Judgment affirmed.

Cited: 4 App. Div. 587; 79 Hun 64.

MONROE CO. SAV. BANK v ROCHESTER } (1867) 37 N. Y. 365.
ROCHESTER SAV. BANK v SAME }

To restrain collection of taxes. The taxes were assessed under the Act of April 23, 1868, on a "valuation of personal property" consisting in the case of each plaintiff of the excess of its nominal assets over its liabilities. The act provided for the taxation of the privileges and franchises of savings banks "to an amount not exceeding the gross sum of their surplus earned." Funds of the plaintiffs, to a large amount, were invested in United States securities. It was contended that as securities were exempt from taxation, the assessments were illegal. Judgment for defendants. Affirmed at General Term. Appeal.

Fullerton, J. 1. The privileges and franchises of a bank are property, and as such taxable. 2. The tax was levied upon the franchises and privileges, and not the property employed or accumulated profits, and it makes no difference that the funds were invested in the United States securities. Judgment affirmed.

Cited: 92 N. Y. 341, 345, 347; 4 T. & C. 262.

JOHNSON v BANK OF NORTH AMERICA (1868) 5 Robt. 554.

Deceit. The plaintiffs drew a draft on G & L, payable to L & Co., who deposited it with the defendant bank for collection. The defendant presented it on May 13, to G & L, who gave their check on the A Bank. The defendant presented the check to the A Bank through the clearing house on May 14, when payment was refused. The defendant obtained the draft from G & L, and presented it for payment to them. On refusal, it was protested. Notice of protest dated August 13, was sent to the plaintiff and the payees. On August 15, the plaintiffs telegraphed the P Bank to protect their checks on G & L. On the same day they telegraphed L & Co. to present the draft to the P Bank. It was presented and paid. The defendant paid the money to L & Co. The A Bank paid all checks of G & L presented on August 13. The plaintiffs had no knowledge that the draft had been paid by the check, but believed that it was protected on the first presentation, and claims a fraudulent concealment in the failure to disclose to the P Bank the prior payment of the draft. Judgment for plaintiffs. Appeal.

Robertson, C. J. 1. The acceptance of a negotiable instrument for a debt is not per se, without a distinct agreement, a payment. 2. Fraud is not to be presumed, but proved and the innocence of the defendant is to be presumed. 3. As the drawees had no funds in the bank, the defendants were not bound to go through the idle ceremony of presenting it. 4. As between the maker and holder of a check, the failure to present it the day after it is made, discharges the maker. 5. The burden of proof in the case is on plaintiff. Judgment reversed.

Cited: 3 Lans. 31, 33; 42 N. Y. 542; 82 id. 403; 6 Robt. 413, 414, 415, 418, 419.

AYRAULT v PACIFIC BANK (1868) 6 Robt. 337.

To recover damages, for failure to make proper demand. The plaintiff deposited two notes with the defendant bank for collection. The maker's signature was illegible and the discount clerk wrote his name legibly in pencil, above his signature. The plaintiff told the clerk that the maker lived with K on 39th Street, between Ninth and Tenth Avenues, but the clerk made no memorandum of the address. The notes were not paid when due, and the defendant gave them to a notary to protest. Not finding the maker's name in the directory, he asked the defendant

where the holder lived, and was told that he lived in Poughkeepsie. The defendant had previously sent notices to the plaintiff's firm directed to the W Drove Yard, New York City. He sent notices to the indorser. He made no demand of the maker, or effort to find him. The defendant contended that, having handed the notes to a notary to protest, its duty was discharged; and it was not liable for the negligence of the notary. Judgment for plaintiff. Appeal.

Robertson, C. J. 1. If the holder of a note tells the bank where the maker lives and the bank fails to make a memorandum of it, the bank is responsible. 2. The employment of a notary to make the demand, does not discharge the bank from the obligation of procuring a proper presentment. 3. A want of actual demand was *prima facie* a case of negligence, and the burden was on defendant to show due diligence. 4. The deposit of the notes for collection implied an obligation to present them for collection and have the indorsers duly charged. Judgment affirmed.

COLE, REC'R v RYAN (1868) 52 Barb. 168.

To enforce the liability of a stockholder. Several persons subscribed to articles of association for the purpose of organizing the M Bank. A certificate was filed, signed and acknowledged by B and seven others, the defendant being one. The defendant never paid anything on account of the stock, and transferred his stock on the books to B in 1859. Afterward B, who had acquired all the stock, gave the bank his note, for 50 per cent of the whole amount of the stock. The bank held the note until May, 1861, when B transferred all the stock to R, who gave the bank his note for \$50,000 and B took up his note. In June, 1861, a receiver was appointed for the bank. No debt of the bank, due at the time of defendant's transfer, was unpaid when the receiver was appointed. B, at the time, was reputed to be a man of wealth. Judgment for defendant. Appeal.

Marvin, J. 1. Defendant was a stockholder and liable at any time prior to the transfer to B. 2. The stock is personal property and transferable, and the transferee succeeds to all the rights and liabilities of the transferrer. 3. The transfer being in good faith, the transferee was substituted, in regard to liability, in the place of the original owner. Judgment affirmed.

Cited: 28 Hun 133; 158 N. Y. 583.

CLARKE NAT. BANK v BANK OF ALBION (1868) 52 Barb. 592.

On check. In November, 1865, B drew his check for \$6000 and postdated it, January 10, 1866. While the check was in his hands, B called C, the assistant cashier of the defendant bank, into his office, who wrote across the face of the check "Good. A J Chester, A Cash." At the time of the certification, B's account at the bank showed a small balance, and he owed the bank on overdue paper. B's account remained the same until after the check was presented. On December 1, 1865, B indorsed the check to W & Bros., who cashed it, less the discount up to January 10, 1866. W & Bros. indorsed the check on March 7, 1866, to the plaintiff, and they were credited on the plaintiff's book for the amount less the cost of collection. Judgment for defendant. Appeal.

Barker, J. 1. The cashier had no power to make the certification unless he had the funds of the drawer in hand, and this limitation on the general authority of the cashier is, in law, presumed to be known by all the bank's customers, and others who act upon the statements of the bank's agent. 2. The agent is not authorized to make the certification until on or after the day the check is made payable. 3. Checks are supposed to be drawn on a previous deposit, and are an appropriation of so much money in the hands of the banker, and must be regarded as drawn and dated the day they bear date. 4. A check drawn and negotiated before it bears date is regarded as payable on demand on and after the day on which it purports to bear date. 5. The fact that the check was postdated was sufficient notice that the drawer had no funds; and W & Bros. were not *bona fide* holders. 6. The plaintiff having parted with nothing of value on the transfer of the check, is not a purchaser for a valuable consideration. Judgment affirmed.

Cited: 59 Barb. 236; 3 Hun 150; 24 id. 383; 5 T. & C. 286.

ROSENBACK v SALT SPRING NAT. BANK (1868) 53 Barb. 495.

Damages for refusal to transfer bank stock. The defendant bank issued to G, 85 shares of its stock in lieu of the same number of shares of the Salt Springs

Bank. G transferred these shares to H, who obtained a loan from the plaintiff and delivered the shares as security. The loan was not paid, and the plaintiff sold the stock and became the purchaser. The plaintiff's demand that the stock be transferred to him, was refused, because H owed the bank money. The by-laws of the defendant provided that no transfer of stock should be made by any stockholder owing the bank. Judgment for plaintiff. Appeal.

Mullin, J. 1. The acts of Congress of 1863 and 1865 neither expressly nor impliedly authorized a bank to create, by a by-law, a lien, in favor of the bank, on stock held by stockholders, for a security of debts due by them. 2. The by-law, creating or declaring the lien, is void, since it tends to work a forfeiture, and furnishes no justification for refusing to transfer the stock in question. Judgment affirmed.

Cited: 53 Barb. 512.

CLAFLIN v FARMERS AND CITIZENS BANK (1869) 54 Barb. 228.

On checks issued by defendant, a national bank, while a state bank. Defendant failed. By a state statute, a state bank continued a body corporate for the purpose of prosecuting and defending suits and closing its business for three years after it had become a national bank. Sec. 121 of the code gave the receiver of a bank the right to take appeals. An appeal had been taken by the receiver upon a judgment rendered against the state bank in plaintiff's favor, within three years from its becoming a national bank, but the appeal was not heard until some time later. Defendant contended that such an appeal was a defense to a suit against it on the same checks; that the state bank's assets became those of the national bank; and that the receiver could appeal. Judgment for plaintiff. Appeal. Motion to dismiss appeal. Denied. Appeal.

Sutherland, J. 1. The appeal from the judgment against the state bank was a defense to a suit within the meaning of the statute and it must be deemed to exist until such appeal is determined. 2. The receiver could appeal. 3. The assets of the state bank became those of the national bank. Order affirmed.

Cited: 2 Sweeny 427; 1 T. & C. 496.

LINDAUER v FOURTH NAT. BANK (1869) 55 Barb. 75.

On draft. The plaintiff delivered the draft in question, drawn on A B & Co., to the F Nat. Bank of New Orleans for collection. The bank forwarded the draft to the defendant which collected it. The defendant allowed the New Orleans bank to overdraw its account under an agreement that it could hold its remittances for collection as security. Advances had been allowed on the faith of this agreement, and of advices of remittances in which were included the draft in question, until the receipt of which the defendant had refused further advances. After receiving it, the defendant made further advances. The balance still due the defendant was over \$50,000, and it claimed the right to hold the proceeds of the draft against the balance, and refused payment. The referee found that the defendant had made no advance to the bank upon this draft or the credit thereof. Judgment for plaintiff. Appeal.

Clerke, P. J. 1. A bank receiving from another bank negotiable paper for collection, obtains no better title to it, or its proceeds, than the remitting bank had, unless it becomes a purchaser for value, or makes new advances on the faith of it, without notice of any defect in title. 2. It does not become such a purchaser, or make such advances on the faith of it, by reason of having a balance against the remitting bank, for which it has refrained from drawing, or from having made further advances, after the receipt of the negotiable paper. Judgment affirmed.

Cited: 59 Barb. 275; 41 Hun 509; 118 N. Y. 453.

CALDWELL v NATIONAL MOHAWK VALLEY BANK (1869) 64 Barb. 333.

On deposit. The plaintiff deposited money with the cashier of the defendant, with which to purchase United States bonds. A few weeks later the cashier informed the plaintiff that the bonds had been purchased, but it did not appear that the bonds were ever listed on the books of the bank. Thereafter, in 1865 and 1866, the plaintiff received from the bank the semi-annual interest on the bonds; in 1867, the plaintiff obtained a loan on the bonds from the bank, and after repaying it, he demanded his bonds, which could not be found. Defendant contended that it

never received the money, and offered evidence to prove an agreement with the cashier to allow him to purchase such bonds on his individual account. Excluded. Verdict for plaintiff. Motion for new trial. Denied. Appeal.

Morgan, J. 1. In all transactions in which the bank may lawfully engage, the cashier has the power to bind it, even by his tortious acts. 2. Nor is it any defense that there was an understanding between the bank and the cashier, that he should do that kind of business on his own account; unless it is brought home to the plaintiff. 3. Banks are responsible for all contracts which are not forbidden by their charters or some positive statute. 4. Although the bank did not have the benefit of the deposit, it requested the customer to enter into a contract with the cashier for the benefit of the bank, and is estopped from denying that it had plaintiff's money. 5. It is negligence in a bank to fail to list bonds deposited with it by a customer so that their ownership may be known. Order affirmed.

Cited: 119 N. Y. 267; 67 Hun 466.

CHAFEE v FORT (1869) 2 Lans. 81.

To recover deposit. The plaintiff was a regular depositor with B, defendant's assignor, a private banker. B, being insolvent and in contemplation of making a general assignment, received money from the plaintiff for deposit. B, intending that such money should be returned to the plaintiff in the event of an assignment, enclosed it in a paper, and indorsed thereon the name of the depositor. After the assignment, the assignee found the plaintiff's money thus indorsed and set apart, and claimed it as part of the general estate.

Mullin, P. J. 1. As the depositor of a bank is entitled to be informed of the condition of his banker, it was the duty of the defendant's assignor to disclose to his depositors that he was insolvent. 2. The package thus addressed to the plaintiff operated to revest title in him, and the defendant was a mere bailee. Judgment for plaintiff.

Cited: 23 Hun 628; 67 N. Y. 4,600.

LOWEY v INMAN (1869) 2 Sweeney 117.

To enforce stockholder's liability. Defendant was a stockholder in the N Bank of Georgia, incorporated under the laws of Georgia. The plaintiff, owning its bills, sued and recovered judgment. The execution was returned nulla bona. The bank's charter provided that no one not a citizen of Georgia should purchase stock in the bank; that the private and individual property of the stockholders should be liable for the redemption of its bills; that judgment obtained against the bank by any creditor should bind the individual property of each stockholder to the amount of his stock; and that service of a copy of the complaint on the president and cashier should be sufficient notice to render the property liable to the payment of the judgment. Plaintiff brought suit to recover the amount of his judgment. Defendant contended that under the statute the proceeding was in rem, and having no extra territorial effect, could not sustain an action in another state; that the liability created by the statute did not subject him to an action in personam. Demurrer. Sustained. Judgment for defendant. Appeal.

Fithian, J. 1. The liability of the defendant as a stockholder is one created by the statute of incorporation, and can be enforced only in Georgia, in the mode and manner prescribed by the act of incorporation. 2. By the provisions of the statute there is no personal liability whatever charged upon the defendant. Judgment affirmed.

FIRST NAT. BANK v LAMB (1870) 57 Barb. 429.

On promissory note against makers and indorser. Plaintiff was a national bank. Defense: usury. The laws of New York make void, contracts tainted with usury. An act of Congress provides that a national bank may charge the prevailing rate of interest in the state where it is situated; and where illegal interest is stipulated for, it is forfeited; while if actually paid, twice its amount may be recovered from the bank. Judgment for plaintiff. Appeal.

Potter, J. The penalties prescribed for usury by the state law have no application to national banks. The provisions of the act of Congress are sovereign and exclusive. Judgment affirmed.

Cited: 5 T. & C. 485, 487. Rev'd: 50 N. Y. 95.

FORT v McCULLY (1870) 59 Barb. 87.

On promissory note. G, a banker, discounted two notes for the defendants; one due 30 days after August 30, 1869, and the other 30 days after September 2, 1869. G became insolvent, and on September 9, 1869, made an assignment to the plaintiff for the benefit of his creditors. The assignment provided that debts should be paid in the same manner and order as the debts of a bankrupt's estate are paid. Previous to G's assignment, the defendants had been depositing moneys with him from time to time. The defendants offered to pay the plaintiff the notes, less amount of the deposit, which was refused. Case submitted without action under sec. 372 of the code.

Morgan, J. The bankrupt act provides that one debt can be set off against another. The plaintiff can therefore recover only the balance due the assignor after allowing the defendant's offset. Judgment accordingly.

Cited: 24 Hun 96.

LEWIS v PARK BANK (1870) 42 N. Y. 463.

Damages for refusal to pay deposit. P, as Chamberlain of New York City, deposited \$4,000,000, of the city's funds in the defendant. D was thereafter appointed City Chamberlain, in place of P. D designated the B Bank as his depository and so notified defendant. Defendant refused to transfer the deposit. It finally did so, in obedience to a peremptory writ of mandamus obtained by the B Bank. The B Bank assigned its claim for damages to plaintiff, who brought this action in the court of Common Pleas to recover the possible earnings on the deposit for the period during which it had been held. He contended that defendant was estopped by the determination in the mandamus proceedings. Demurrer. Sustained. Judgment for defendant. Affirmed at General Term. Appeal.

Grover, J. 1. The B Bank had no vested legal rights in the money until actual payment to it. The money, on being deposited with defendant, became its property, and the city, its creditor, was the only party aggrieved by the withholding. 2. Defendant is not estopped by the determination in the mandamus proceedings, as the parties were not the same as in the present action. Judgment affirmed.

PARK BANK v WATSON (1870) 42 N. Y. 490.

On promissory notes against maker. The notes were made for the accommodation of the payees, W, M and J, but to be used for a special purpose. W, M and J, before maturity, in violation of the understanding, deposited them with plaintiff as collateral security for one of their notes for \$2,000, then held by the plaintiff. At the same time, plaintiff, as part of the transaction, surrendered to them other notes, previously deposited as collateral, which had gone to protest; one of these notes was worthless, owing to the irresponsibility of the maker, P. Plaintiff had no notice of the fraud. The court charged that the fact that the notes were accommodation paper, to the knowledge of plaintiff, was immaterial, and refused to charge that plaintiff could only recover the balance, after deducting P's worthless note. Judgment for plaintiff. Affirmed at General Term. Appeal.

Lott, J. The surrender of the collaterals made the plaintiff a holder for value, and entitled it to recover, without any deduction for P's note. Judgment affirmed.

Cited: 8 App. Div. 92; 3 Hun 150; 11 Misc. 9; 18 id. 382; 44 N. Y. 374; 52 id. 143; 81 id. 223; 148 id. 702; 36 Supr. 371.

BURKHALTER v SECOND NAT. BANK (1870) 42 N. Y. 538.

On bill of exchange against the drawer. Defendant, on March 24, drew a bill of exchange on C & Co., payable on demand, and in favor of J. J negotiated it to plaintiff bank for value. It was presented on March 26 to C & Co., who gave their check on the N Bank in payment; but there was no agreement by plaintiff to receive it as such. The check was not presented by plaintiff for payment, or certification, until the 27th. Payment was then refused, C & Co. having failed. Thereafter, on the same day, plaintiff returned the dishonored check to C & Co., received the original draft, caused it to be again presented to C & Co. for payment, which was refused. Plaintiff caused it to be protested and notice sent to defendant on the 28th. Defendant took up the dishonored draft and gave in place of it, the one upon which the present action is brought. If plaintiff had demanded payment of the check on the 26th, or early on the 27th, it would have been paid. Defendant

denied its liability upon the ground that the later draft had been given under a mistake of fact. Judgment for plaintiff. Affirmed at General Term. Appeal.

Earl, C. J. 1. Plaintiff used reasonable diligence in demanding payment and giving notice of protest of the original draft. 2. The check did not operate as payment of the draft. 3. The drawee was not discharged. Judgment affirmed.

Cited: 1 Abb. N. C. 50; 16 Hun 334; 24 id. 242; 47 id. 101; 23 Misc. 149; 52 N. Y. 548; 57 id. 642; 77 id. 323, 365; 115 id. 51; 138 id. 497.

SMITH v MILLER (1870) 43 N. Y. 171.

Goods sold and delivered. Defense, payment. Defendants, in payment for merchandise, mailed to plaintiffs their draft on P in New York. Plaintiffs presented it for payment on the day of its receipt, and, received in payment, P's check on a New York bank, where P had funds sufficient to pay the check. On that same afternoon, plaintiffs deposited the check in their New York bank for collection. That bank did not present it for payment, until the following day. Meanwhile P failed, and payment was refused. Judgment for plaintiffs. Affirmed at General Term. Appeal.

Allen, J. 1. It was plaintiffs' duty to present the check at the bank, during the day on which they received it, and obtain the money or a certification, or protest it for non-payment, and not having done so, they were chargeable with negligence and with the consequent loss. 2. The check of P was received in payment sub modo, and could only operate as payment, when paid in fact by the drawees. Judgment reversed.

Cited: 2 Abb. N. C. 50; 26 App. Div. 20; 53 id. 487; 54 id. 344; 16 Hun 335, 27 id. 466; 9 Misc. 382; 16 id. 318; 52 N. Y. 352, 353, 547; 57 id. 642; 77 id. 325, 326; 102 id. 484; 128 id. 23; 58 Supr. 399; 3 T. & C. 149.

POPE v BANK OF ALBION (1871) 59 Barb. 226.

On check. The plaintiff purchased the check in question from G, for value and without notice that it was postdated. The check was forwarded to the defendant bank on which it was drawn and payment was refused. The assistant cashier had, in violation of his duty, written an acceptance on the check when the drawer had no funds. Judgment for defendant. Appeal.

Barnard, J. Any language whether verbal or written employed by an officer of a banking institution, whose duty it is to know the financial standing and credit of its customers, representing that a check drawn upon it is good and will be paid, estops the bank from thereafter denying, as against a bona fide holder of the check, the want of funds to pay the same. Judgment reversed.

Cited: 89 N. Y. 429. Rev'd: 57 N. Y. 126.

DODD v THE FOURTH NAT. BANK (1871) 59 Barb. 265.

On draft. The plaintiff delivered the draft in question to the F Bank of New Orleans for acceptance and collection. It was forwarded the same day by F Bank to the defendant bank for collection, and was collected when due. The F Bank failed and a receiver was appointed, who gave the plaintiff an order on the defendant for the draft. The draft, and afterward the proceeds of the draft were demanded. The defendant had not made any advances in any way after receipt of the draft. Verdict for plaintiff. Exceptions heard at General Term. Motion for judgment on verdict.

Cardozo, J. The evidence is wholly unsatisfactory to support the theory that any specific loan was made on the faith of this draft, and the defendant, therefore, had no title authorizing it to retain the proceeds. Judgment for plaintiff.

Cited: 41 Hun 509; 118 N. Y. 453.

MURRAY v BULLS HEAD BANK (1871) 3 Daly 364.

To recover for counterfeit money paid on check. The oral complaint in the district court, was as follows, "on a counterfeit bill passed by defendants to Gilroy & Reynolds in payment of checks, and assigned to plaintiff, \$20." R sent B to defendant bank to obtain money on two checks drawn on other banks. In the money received therefor was a counterfeit \$20 bill, the amount sued for here. The assignment to plaintiff was not in writing. Judgment for plaintiff. Appeal.

Robinson, J. 1. The complaint was sufficiently definite. 2. A written assignment was not necessary. 3. Cashing checks on other banks is a legitimate part of the business of a bank. 4. Payment in forged or counterfeit money was no payment at all. Judgment affirmed.

WHITE v MECHANICS NAT. BANK (1871) 4 Daly 225.

Conversion. Plaintiffs were owners of certain checks, payable to their order. Their names were forged thereon and the checks passed to defendants, other than the bank, who took without notice, and for full value. They were deposited and collected by defendant bank, and the proceeds placed to defendants' credit. After demand, plaintiffs sued the bank and the receiver of the checks, jointly. Verdict directed for plaintiffs. Exceptions.

Robinson, J. Though the bank acted only as an agent, it is equally liable with the other defendants, and the joint and several action against defendant can be maintained. Judgment for plaintiffs.

Cited: 4 Daly 224; 75 N. Y. 563; 45 Supr. 16.

SCHOENWALD v METROPOLITAN SAV. BANK (1871) 1 Jones & S. 440.

To recover a deposit. The plaintiff deposited with the defendant bank \$100. At the request of an officer of defendant, she wrote her name in German script, in a book kept for that purpose, and was given a passbook in which was entered in plain English writing the amount of the deposit, and the date of its reception. On a page of the passbook, rules and by-laws were printed which provided that a passbook shall be given to the depositor, in which the sum deposited by him shall be entered, and which shall be the evidence of his property in the said institution; that, on making the first deposit, the depositor shall be required to subscribe his or her assent to be governed by the regulations of the institution; that all payments to persons producing the deposit book shall be deemed valid payments to depositors. On September 27, 1869, a stranger presented the plaintiff's passbook to the paying teller, with an order purporting to have been made and signed by the plaintiff, requesting the defendant to pay the bearer \$60. The defendant paid the money on the order, which was forged. Judgment for plaintiff. Appeal.

Barbour, C. J. 1. The bank became bound to pay the plaintiff, unless a special contract was made to a contrary effect. 2. The mere handing over to a depositor of a bank book containing rules and by-laws of the bank, without calling attention to its contents, did not constitute a mutual contract, on which the minds of the parties met. Judgment affirmed.

VAN LEURAN v FIRST NAT. BANK (1871) 6 Lans. 373.

To recover proceeds of treasury notes alleged to have been converted. Defendant bank advertised, as United States depository and financial agent of the government, to exchange "7-30" notes for "5-20" bonds. H was president and principal manager. Plaintiff, at the bank, during banking hours, intrusted H with notes to exchange for bonds. The cashier sent the notes to a broker, with a letter signed as cashier, on paper containing the advertisement, directing their sale and a credit to the bank. The proceeds were credited on the books of the bank to H, whose account was overdrawn for more than the amount. The court directed a verdict for plaintiff. Appeal.

Potter, P. J. 1. Defendant advertised to transact such business as plaintiff desired done, and could perform it only through its officers. None of the indicia belong to individual transactions. The transaction was with defendant and not with the cashier. 2. If the exchange desired included the right to sell, the money received belonged to plaintiff. Entries by the bank officers or clerks, unknown to plaintiff will not bind him. 3. The law presumes that a contract made in the bank, in banking hours, by its officers, carries knowledge to the bank. Judgment affirmed.

Aff'd: 54 N. Y. 671.

FIRST NAT. BANK v GREEN (1871) 43 N. Y. 298.

On promissory note, against maker. The note was discounted by the plaintiff, before maturity, for S, one of the indorsers. Defendant offered to prove that it had been obtained from him by duress and collusion. Rejected. Exception. The evi-

dence tended to show, that from the time the note was discounted, until its maturity, S's deposit in plaintiffs had always exceeded the amount of the note. It was also shown that plaintiff's chief witness, its president, had made prior statements inconsistent with his testimony. Verdict directed for plaintiff. Exceptions. Motion for new trial. Denied at General Term. Appeal.

Rapallo, J. If defendant had been permitted to prove and had proved the defense of duress, the burden would have then been thrown upon plaintiff to show that it was a bona fide holder for value, unless such title was clearly established by the other prior evidence. The other evidence was not so clear and satisfactory as to justify the ruling out of the defense. Order reversed.

Cited: 13 Abb. N. C. 379; 21 id. 156; 2 App. Div. 108; 21 id. 255; 49 id. 462; 53 id. 128; 14 Daly 365; 61 Hun 316; 88 id. 4; 6 Lans. 127; 22 Misc. 22, 26, 27; 27 id. 643; 58 N. Y. 643; 69 id. 372; 106 id. 229, 240; 119 id. 364, 365; 123 id. 204; 145 id. 507; 148 id. 703; 159 id. 199; 162 id. 118; 49 Supr. 342; 4 T. & C. 122.

UNION NAT. BANK v SIXTH NAT. BANK (1871) 43 N. Y. 452.

To recover money paid under mistake of fact. The defendant, having discounted a note for C, payable at the C Bank, sent it to the plaintiff for collection. The note was not paid when due and the C Bank sent notice of protest to all the parties. The defendant, on receipt of the notice, applied to C, who paid the note. The plaintiff, not having received the notice of protest, and believing the note had been paid, remitted the amount to the defendant, which, thinking the note was paid after protest, refunded the amount received from C. Judgment for plaintiff. Appeal.

Folger, J. 1. If money is paid under the impression of the truth of a fact which is untrue, it may be recovered, however careless the party paying may have been. 2. The plaintiff, even if an agent, was correct in presuming that, no notice of protest having been received, payment had been made. 3. Where injury did not necessarily result from the acts of the plaintiff, it does not affect its right to recover, and it is for the defendant to show that injury resulted. Judgment affirmed.

Cited: 8 App. Div. 5; 33 id. 355; 2 Hun 307; 37 id. 590; 58 id. 84; 54 N. Y. 435; 63 id. 457, 459; 64 id. 324; 91 id. 79; 35 Supr. 290; 4 T. & C. 490.

FIRST NAT. BANK v HALL (1871) 44 N. Y. 395.

A check payable "to the order of R, cashier," imports that the bank, of which the person named is cashier, is intended as payee, and an indorsement by such cashier is not necessary to give the bank title. A fraudulent diversion cannot be set up against a bank that is a bona fide holder of a bill.

Cited: 6 Abb. N. C. 91; 48 Hun 391; 54 id. 616; 1 T. & C. 317.

BANK OF THE COMMONWEALTH v MUDGETT (1871) 44 N. Y. 514.

On promissory note. The firm of W and B was formed on May 1, 1862, and opened an account with the plaintiff bank. On May 4, 1863, the firm was dissolved. Notice of dissolution was published in a paper of New York City. On May 20, 1863, defendant W made the note in suit payable to himself. The note was indorsed by himself in the name of W and B. Plaintiff had no notice of the dissolution. Previously the plaintiff had discounted several notes drawn by W, and indorsed by the firm. Defendant B knew of entries in the firm's passbook of these notes. The note was protested at maturity. The certificate stated that notice was served on M, an indorser, by leaving a copy, directed to him, on his desk in the custom house. M was a deputy collector and occupied a desk there. B, a witness for the plaintiff, testified that he was called upon to pass and act on M's signature many times a day. Judgment for plaintiff. Appeal.

Leonard, C. 1. Actual notice of dissolution was necessary to limit the continuation of the transactions. 2. The certificate was prima facie evidence of such facts as were stated in it. 3. Service may be made at the place of business as well as at the domicile. 4. The evidence as to signature of M showed the witness' opportunity to form an opinion and was properly admitted. 5. No witness can tell what he would have done under the circumstances. 6. The question as to the genuineness of other signatures to notes made by defendant, raised collateral and immaterial issues, and it was incompetent for the purpose of comparison or exhibition to the

jury or to test witness' knowledge. 7. Questions tending to remove the inference that a witness had absconded and concealed himself are proper. Judgment affirmed.

Cited: 69 N. Y. 575.

CHEMUNG CANAL BANK v BRADNER (1871) 44 N. Y. 680.

On accommodation draft. C, a member of defendant firm, signed the draft for the firm, without the knowledge or consent of B, his partner, and delivered it to L, blank as to date, amount, payee and drawee. L, in the presence of an officer of plaintiff, a bank, filled the blanks, making himself payee, and his firm drawees, and indorsed it. Plaintiff discounted it, with no knowledge that it was accommodation paper. C's firm had previously dissolved, but no notice had been received by plaintiff. B alone defended, and denied partnership; and that the draft was binding. Judgment for plaintiff. Appeal.

Earl, C. As no notice was given of the dissolution, the draft was that of the defendant firm, and was binding, in the hands of a bona fide holder for value, although made for accommodation. Plaintiff had a right to infer that L was acting as the agent of the drawers, and that he had been intrusted as agent with the draft, with authority to fill the blanks. The drawers were bound by his acts, without receiving the money paid on the draft. It made no difference that the blanks were filled in presence of the lender. Judgment affirmed.

Cited: 114 N. Y. 136.

CONKLIN v SECOND NAT. BANK (1871) 45 N. Y. 655.

To compel a transfer of stock. The defendant was incorporated under the National Currency Act of 1863, which provided that the bank should have a lien on the stock of each stockholder until all the debts of the stockholders were paid. The provisions of this act were not re-enacted in the Act of 1864. The plaintiff's assignor, a private banker, acted as correspondent for defendant, and was a stockholder therein. The certificate of stock had, on its face, an agreement, taken from the by-laws, that the stock was not transferrable until the stockholders' liabilities were paid. The plaintiff's assignor was, at the time of the assignment, indebted to the defendant. The defendant contended it had a lien on the stock. Sec. 35, 13 U. S. Stat. at Large, 110, forbade a national bank to make loans on its own stock. Judgment for plaintiff. Appeal.

Grover, J. 1. The statute, not having re-enacted the provision of 1863, the contention of a lien failed. 2. An agreement by a stockholder, providing that a bank shall have a lien upon his stock for any liability created by him to the bank, is void. 3. A bank can acquire an interest in its stock only by absolute purchase to prevent a loss upon a bona fide debt. Judgment affirmed.

Cited: 29 App. Div. 143; 19 Misc. 564; 162 N. Y. 173, 176.

STRONG v NATIONAL MECH. BANKING ASS'N (1871) 45 N. Y. 718.

Conversion. The plaintiff, with T's consent, deposited bonds with the defendant, a bank, as security for a loan. The plaintiff overdrew his account, and the defendant made a private sale of the security to W, without making any demand, or giving notice to the plaintiff. The amount of the loan and interest was tendered to the defendant, and a demand for possession of the bonds was made. The defendant tried to set off a demand in favor of T for certain of the bonds pledged by him with the plaintiff. Judgment for plaintiff. Appeal.

Rapallo, J. 1. The sale of the bonds was unauthorized. Plaintiff had the right to elect whether to ratify the sale, and claim the benefit of the surplus, or to repudiate it and hold the bank responsible. 2. By the sale, the bank rendered plaintiff responsible to W, and debarred itself from using any part of the claim as an offset. 3. T, having consented to the transfer to defendant, his interest cannot avail the defendant. Judgment affirmed.

Cited: 41 Hun 522; 90 N. Y. 490; 120 id. 157.

ODDIE v NATIONAL CITY BANK (1871) 45 N. Y. 735.

Money had and received. The plaintiffs delivered to the defendant's teller for deposit, a check on the defendant by D, payable to plaintiff's order. The check was stamped and placed on the deposit ticket of the plaintiffs, though it was not

entered on the books. An hour previous to the receipt of this check, the defendant had notice that D had largely overdrawn his account. Plaintiffs demanded of defendant a credit of the check. The bank refused to credit the check to the plaintiff's account. Judgment for plaintiffs. Appeal.

Church, C. J. 1. The defendants paid the check by receiving it as a deposit of money from the plaintiffs. Defendants are estopped from claiming they did not receive the check on deposit. 2. Where a check is presented to a bank for deposit, drawn directly upon itself, it is the same as though payment was demanded. 3. In case of a deposit, the bank becomes the debtor of the depositor, and the title of the deposit passes to the bank. 4. Sufficient demand was made. Judgment affirmed.

Cited: 165 N. Y. 544; 36 Supr. 278; 37 id. 151.

NATIONAL PARK BANK v NINTH NAT. BANK } (1871) 46 N. Y. 77.
 NATIONAL PARK BANK v FOURTH NAT. BANK }

To recover the proceeds of a draft. The R Bank drew a draft on the plaintiff for \$14.20, payable to the order of S. The check was thereafter fraudulently changed to \$6,300, and the name of F inserted as payee. The name of the cashier was erased, and afterward rewritten. The draft was discounted by the L Bank, and by it indorsed to the defendant. The defendant presented the draft to the plaintiff, which paid thereon the sum of \$6,300. Demurrer in first action. Sustained. Order reversed at General Term. Appeal. Demurrer in second action. Overruled. Affirmed at General Term. Appeal.

Allen, J. The drawee of a bill must be satisfied that the signature of the drawer is genuine, and he is presumed to know the handwriting of his correspondent; and if he pays a bill to which the drawers name is forged, he cannot repudiate the acceptance or recover the money paid. In the first action, judgment of General Term reversed. In the second action, judgments of both General and Special Terms reversed.

Cited: 16 Daly 72; 27 Hun 398; 55 N. Y. 213; 59 id. 77; 64 id. 320; 69 id. 317; 89 id. 422, 429; 37 Supr. 150.

AETNA NAT. BANK v FOURTH NAT. BANK (1871) 46 N. Y. 82.

On promissory note. The "F Mills Co." made its note payable at the defendant, a bank, and it was discounted by the plaintiff, a bank, at maturity. The maker sent a check, drawn on another city bank, to the defendant for deposit, and a letter stating that the check was to be charged on the note due the plaintiff. Another note, made by the "F Mills Co.," was presented to the defendant for payment and accepted. The next day the plaintiff presented its note for payment and the same was refused for want of funds. Judgment for plaintiff. Appeal.

Allen, J. 1. The check did not operate as a transfer of any part of the debt, or create a lien on the deposit. 2. An acceptance or a promissory note, thus payable, is equivalent to a check. 3. There existed a contract on which the defendant owed no duty to the plaintiff, and which could be fully performed, without affecting the plaintiff's legal rights. Judgment reversed.

Cited: 34 App. Div. 361; 41 id. 323; 60 id. 245; 13 Daly 408; 3 Hun 724; 12 id. 540; 18 id. 91; 26 id. 271; 31 id. 489; 45 id. 336; 70 id. 90; 76 id. 573; 78 id. 150; 14 Misc. 314; 18 id. 56; 52 N. Y. 4, 11; 54 id. 662; 56 id. 480; 64 id. 44; 68 id. 362; 71 id. 331; 74 id. 473; 80 id. 106; 82 id. 392; 88 id. 239; 107 id. 182; 122 id. 383; 124 id. 331; 126 id. 327; 134 id. 372; 145 id. 190; 160 id. 558; 36 Supr. 278; 37 id. 151; 6 T. & C. 186.

LOWRY v INMAN (1871) 46 N. Y. 119.

To enforce a stockholder's liability. The plaintiff recovered a judgment against the N W Bank of Georgia on bills issued by it. The bills contained on their face the words, "Individual property of stockholders liable." Defendant was its president and principal stockholder. The execution was returned unsatisfied. The charter of the bank provided that the stock should be owned principally by citizens of Georgia; that the individual property of each stockholder should be liable for the redemption of bills of the bank, and for all its debts. Demurrer sustained. Appeal.

Allen, J. 1. The words "Individual property of stockholders liable" created no personal liability, for the effect and operation of the statute cannot be extended

by implication. 2. An independent action would not lie in Georgia against the stockholders of the corporation, as an adequate remedy is provided by this act. 2. The remedy is necessarily confined to the sovereignty of Georgia, and a foreign tribunal cannot enforce it. Judgment affirmed.

Cited: 9 Abb. N. C. 298; 41 App. Div. 20; 33 Hun 439; 37 id. 470; 51 id. 49; 84 id. 191; 13 Misc. 99; 21 id. 465; 80 N. Y. 456; 106 id. 103, 119 id. 402; 147 id. 281; 148 id. 27; 162 id. 187, 189.

HACKETTSTOWN NAT. BANK v REA (1872) 64 Barb. 175.

Foreclosure of mortgage, given to secure the payment of promissory notes made by the defendant and discounted by the plaintiff bank. Defenses, usury, and violation of the act against unauthorized banking. The notes were made payable in New York, where the makers and indorsers resided, and were discounted at the rate of 7 per cent per annum by the plaintiff, a New Jersey corporation. The law of the state of New York allowed 7 per cent, while the law of New Jersey allowed 6 per cent interest. The plaintiff's charter provided that it should not take more than the legal rate of interest. Judgment for plaintiff. Appeal.

Learned, J. 1. Isolated transactions like the present case are not necessarily violations of the act. 2. The clause in the plaintiff's charter does not alter the legal rate or make that illegal which would otherwise be legal. Judgment affirmed.

HAGEN v BOWERY NAT. BANK (1872) 64 Barb. 197.

On check. The defendant, a bank, certified the check. The plaintiff took it in the ordinary course of business for value and in good faith. The check was a forgery. Judgment for plaintiff. Appeal.

Gilbert, J. 1. The bank is liable to make good its certificate by paying the check. 2. It is immaterial whether the indorsement on the check is the genuine indorsement of the payee, as there can be no real payee of a forged instrument. 3. The advertisement of the forgery, not having been brought home to the plaintiff, can have no effect whatever upon his right to recover. Judgment affirmed.

HAGEN v BOWERY NAT. BANK (1872) 6 Lans. 490.

Where, in the due course of business, a person became the holder of a forged check, which was drawn upon and certified by a bank, Held, that the bank was liable on its certification, whether the indorsement was genuine or not; and that an advertisement of the forgery, not having been brought home to the holder, could have no effect on his right to recover.

STUYVESANT BANK v MECHANICS BANKING ASS'N (1872) 7 Lans. 197.

To recover money withheld by defendant bank. Plaintiff, the assignee of M Bank, received for deposit four checks drawn on different days on defendant. The checks and indorsements were forgeries. Plaintiff sent them to X Bank for clearance. At the clearing house, the checks were charged to the defendant and credited to X Bank. When the last check came in, the forgery was detected by defendant. Defendant demanded payment of X Bank, which referred it to plaintiff, but promised to pay the last check in case of refusal. Plaintiff refused payment on all four checks. X Bank paid the last check. Defendant sent this check and the three others back to X Bank, through the clearing house, which received and charged the checks to plaintiff according to clearing house rules. Plaintiff tendered the checks to defendant which refused them. Defendant paid and sent them back to X Bank, which paid and charged the checks to plaintiff. Plaintiff then took an assignment of X Bank's claim against defendant. The clearing house rules provided that disputes should be settled by parties to the paper, outside of the clearing house, and that bad checks should be returned the same day to the bank sending them. The last check was the only one returned in the time required by this rule. Judgment for defendant. Appeal.

Gilbert, J. 1. X Bank waived its right to insist upon the acts of the defendant as payment of a forged check by the drawee, and the waiver was not void for coercion. 2. X Bank was the owner of the checks and acted as principal as to the defendant. Judgment affirmed.

Cited: 25 Hun 106.

MERCHANTS EXCHANGE NAT. BANK v CARDOZO (1872) 3 Jones & S. 162.

On a draft. The defendant wrote to B, "We can only authorize you to draw at sight for \$5,000, at the outside," and informed B that the plaintiff bank would take such bills. B drew two sight drafts for \$385 which were purchased by the plaintiff. No acceptance other than the letter was shown. The plaintiff, to show its due incorporation, produced a certificate of the comptroller of the currency authorizing it to commence business, but did not show that the certificate had been published as directed by the act. Defendant moved to dismiss the complaint because there had been no acceptance and because the plaintiff had not proved its incorporation. Complaint dismissed. Appeal.

Sedgwick, J. 1. The letter of the defendants contained an unconditional authority to B to draw. 2. Publication of the notice was not a condition precedent to the right to commence business. Judgment reversed.

BELDEN, ADM'R v MEEKER (1872) 47 N. Y. 307.

Foreclosure of a mortgage. The defendants O and W executed a mortgage on their hotel property, to H, president of the O Bank, to secure the payment of a note made by them in favor of W. H assigned the note and mortgage to C, the plaintiff's intestate. A statute prohibited money corporations to transfer assets above \$1,000, without a previous resolution of the board of directors. O sold his interest to W, who gave back a mortgage, which came into the hands of H, and was by him foreclosed. The property was bid in at the sale by defendant. Before this sale, but after recording the assignment, K agreed in writing with O and W to resort first to other property than the hotel, for satisfaction of the unpaid part of the loan. The defendant set up the plaintiff's incapacity to sue, and the invalidity of the assignment by H. Judgment for plaintiff. Appeal.

Folger, J. 1. The letters of administration produced in evidence were prima facie sufficient to establish the representative character of the plaintiff. 2. 1 R. S., 591, sec. 8, relative to moneyed corporations, does not apply to banks. 3. The mere fact that the assignment to the plaintiff's intestate was in consideration of an individual debt due him by the president of the bank, is not sufficient to raise a presumption of fraud on the bank. 4. Defendant had notice of the assignment and H could no longer deal with the assignor, and the defendant was therefore precluded from using the instrument as a discharge of the mortgage. Judgment affirmed.

Cited: 4 Hun 719; 10 id. 180; 12 id. 164; 13 id. 481; 19 id. 161; 21 id. 244; 25 id. 176; 27 id. 215; 33 id. 617; 7 Misc. 682; 52 N. Y. 630; 59 id. 11; 60 id. 123; 63 id. 469; 69 id. 426; 82 id. 37; 89 id. 539; 1 T. & C. 485; 6 id. 295.

DICKERSON v WASON (1872) 47 N. Y. 439.

Money had and received. The plaintiffs, being the owners of a promissory note, deposited it with V for collection. V forwarded the note to the defendants indorsed "Pay Mason, Everett & Co., or order, for collection." The day the note was collected the defendants learned that V had stopped payment, and they never remitted the proceeds of the note, but credited it to an account of V. Judgment for defendant. Appeal.

Folger, J. Where persons in the banking business send business paper to their correspondents for collection, the agent acquires no better title to it, than was owned by one transmitting it, unless there is a bona fide purchase. Judgment reversed.

Cited: 31 App. Div. 9; 81 Hun 490, 493; 22 Misc. 725; 59 N. Y. 490; 114 id. 34; 116 id. 499; 117 id. 393, 394; 118 id. 450, 451; 42 Supr. 25.

AYRAULT v PACIFIC BANK (1872) 47 N. Y. 570.

Negligence, in protesting notes. A, the plaintiff's assignor, deposited notes with the defendant bank for collection. The names of all the parties thereto, were in the directory. The notes, being unpaid when due, were delivered to a notary for protest. It was the custom of some banks to give notes, not paid at maturity, to notaries for protest. Defendant contended that in so doing, it fulfilled its contract. The notary was unable to find the maker and indorsers of the note. Judgment for plaintiff. Appeal.

Allen, J. 1. By receiving a note for collection, a bank undertakes to take the

necessary means to charge the parties thereto; and it becomes liable for any neglect occurring in the collection. 2. A notary, employed for protesting a note for non-payment, is the agent of the bank, and not of the depositor or owner. Judgment affirmed.

Cited: 57 App. Div. 460; 8 Daly 413; 8 Hun 394, 427; 12 id. 102; 16 id. 201; 25 id. 296; 35 id. 598; 11 Misc. 286; 51 N. Y. 420; 57 id. 679; 116 id. 498; 118 id. 447; 128 id. 30; 133 id. 102; 35 Supr. 533; 53 id. 469.

NATIONAL BANK v SPEIGHT, EX'R (1872) 47 N. Y. 668.

Where the maker of a promissory note in favor of a bank deposits a sum of money in the bank for an indorser on the note, under an agreement with the bank, that the notes shall not be charged against the money so deposited, the deposit is deemed to be special, and the bank is regarded as a trustee of the fund; and in the absence of fraud, an indorser on the notes has no right to require the application of the deposit toward the payment of the note. Where an agreement to refer a claim against an estate is made in writing and both parties act thereon, but no referee is appointed, Held, the claim is sufficiently referred to avoid the short Statute of Limitations. (2 Edw. Stat., p. 91, sec. 38.)

Cited: 8 Hun 302; 79 N. Y. 136.

COMMERCIAL BANK OF ALBANY v TEN EYCK (1872) 48 N. Y. 305.

Damages for misconduct of a cashier. The defendant, cashier of the plaintiff, was instructed by S, its president, to loan money to W, and to accept a mortgage and bonds as security. There was no collusion between S and W. The mortgage thus pledged was delivered by the defendant to W, so that he might sell it, realize the money loaned thereon, and repay the bank. The bonds were also sent to brokers for the purpose of sale. The security in both cases was good, and the only evidence of neglect was in the fact that defendant, having received part payment on account of the bonds, did not require the broker to account at once for the balance. The brokers were ready, on demand, to pay the balance due. The plaintiff contended that the defendant had no right to transfer the mortgage. Judgment for defendant. Appeal.

Earl, C. J. 1. The defendant, as cashier, was bound to exercise reasonable skill and ordinary diligence in the discharge of his duties, and was liable for any damages caused by an omission of such care and diligence. 2. In the absence of collusion or fraud, the cashier was not responsible for acts done under the direction of the president, there being no evidence of neglect or want of diligence on his part. 3. The bank holding merely as pledgee, could dispose of the property pledged without a resolution of the board of directors. 4. The brokers being ready to pay the balance due, there can be no damage resulting to the plaintiff. Judgment affirmed.

Cited: 9 Misc. 34; 17 id. 202; 94 N. Y. 333.

HOTCHKISS v MOSHER (1872) 48 N. Y. 478.

Conversion. The plaintiff, having guaranteed the collection of notes, purchased the same of the defendants, holders in due course. As a balance was due the plaintiff on account with the defendants, bankers, he paid the money necessary to make the account equal the purchase price of the notes, and received from the defendants a certificate showing a deposit of this money with them. The notes were permitted to remain with the defendants for collection as they became due. The plaintiff thereafter demanded the note, but the defendant refused to deliver, claiming there had been no sale of the same. The defendant objected to the admission of parol evidence to show the intent in giving the certificate. Plaintiff was not allowed to state what he had received for guaranteeing the notes, but was allowed to tell what notes he had guaranteed, and testified from a memorandum made and furnished by defendant. Defendant was not allowed to state whether the notes, if left for collection, would have been placed to the collection account. Judgment for plaintiff. Appeal.

Leonard, C. J. 1. The certificate was simply an acknowledgment of money deposited, and had the force of a receipt only. Parol evidence was therefore admissible to explain it. 2. The defendants having proposed it as a voucher, they were estopped from claiming for it any other character. 3. The question in regard to commissions had no pertinency. 4. The inquiry as to what notes were guaran-

teed was proper as it merely called for a description, and the memorandum was an admission by defendant. 5. The question put to defendant was purely hypothetical and the evidence was properly excluded. Judgment affirmed.

Cited: 67 Barb. 408; 21 Hun 192; 22 id. 298; 60 N. Y. 269; 134 id. 372; 170 id. 160.

HILLS v PLACE (1872) 48 N. Y. 520.

On promissory note. The plaintiff presented a note payable at the H Bank, made by the defendant, for payment at the H Bank, about eleven o'clock on the day it was due, but payment was refused. One-half hour thereafter, the defendant deposited funds sufficient to meet the note. The plaintiff did not make a second demand. A witness testified that the maker had until three o'clock to make payment. Judgment for plaintiff. Appeal.

Lott, Ch. C. 1. The bank was in no sense the plaintiff's agent for collecting the note, or receiving the amount due. 2. The designation of a place of payment did not make it incumbent that presentment should be made at that particular place, before the obligation to pay, or right to recovery therein, was created; it only tended to relieve defendant from damages in case he was ready to pay, and there was no one to receive it. Judgment affirmed.

Cited: 17 App. Div. 496; 45 id. 92; 8 Daly 279; 31 Hun 581; 65 id. 46; 75 id. 387; 9 Misc. 45; 11 id. 428; 16 id. 503; 18 id. 225; 29 id. 665; 31 id. 91; 57 N. Y. 362; 51 Supr. 86; 52 id. 485.

FIRST NAT. BANK v FANCHER (1872) 48 N. Y. 524.

Trespass. The defendant, as collector of the village of S, received a warrant commanding him to collect from the plaintiff, a bank, an assessment on shares of stock, under sec. 10, ch. 97, Laws of 1865. In event of non-payment, he was authorized to levy on the goods of the stockholders named. The defendant called at the bank and demanded payment, which being refused, he levied on the money of the bank. Judgment for plaintiff. Appeal.

Hunt, C. 1. The authority of the collector was special and he could not enforce the assessment by a seizure of the property of the bank. 2. The statute is invalid, and a tax imposed thereunder cannot be enforced. Judgment affirmed.

Cited: 7 Hun 373.

TYLER v GOULD (1872) 48 N. Y. 682.

A draft on a bank holding funds of the drawer, does not operate as an assignment of such funds.

Cited: 51 N. Y. 273; 71 id. 331.

FIRST NAT. BANK v LAMB (1872) 50 N. Y. 95.

On promissory note. The plaintiff, a national bank organized under the Act of Congress of June 3, 1864, sued the defendants as makers and indorsers of the note. Plea, usury. Plaintiff took more than the lawful rate of interest prescribed by the state statute. The plaintiff set up immunity under sec. 30 of the National Banking Law of June 30, 1864, which provided that, where no rate of interest was fixed by any state or territory, a bank might receive interest not to exceed 7 per cent, and that the knowingly reserving a greater rate than aforesaid forfeited the entire interest. Judgment for plaintiff. Appeal.

Rapallo, J. 1. The act of Congress expressly limited the banks to the rates fixed by the states. 2. The defense of usury under the laws of the state of New York was available to the defendants. 3. The provision of sec. 30 relating to forfeiture of interest only, applied only to states and territories where no rate had been fixed. Judgment reversed.

Cited: 50 N. Y. 659; 59 id. 60, 63, 65, 66; 64 id. 214; 5 T. & C. 485.

BOOTH v FARMERS AND MECHANICS NAT. BANK (1872) 50 N. Y. 396.

To recover amount of judgment. The defendant, a bank, recovered a judgment against M, and assigned it to the plaintiff. Thereafter G, as president of the defendant, executed a satisfaction of the judgment, and the same was duly recorded. The plaintiff offered evidence that after the discharge of the judgment, M sold the

property to a bona fide purchaser. Excluded. The defendant contended that, in the absence of proof that the bank received any money upon the discharge of the judgment, it could not be held liable for G's action. Nonsuit. Judgment for defendant. Appeal.

Rapallo, J. 1. A party who assigns a judgment for value and afterward satisfies it, incurs a liability to the assignee. It is presumed that the satisfaction piece was given on payment of the judgment. 2. The president of the bank having authority to receive payment of the note, necessarily had power to give such satisfaction as the debtors required. 3. If it appears on the face of the instrument that it was executed by the president in his official capacity, and in the business of the bank, it is binding on the bank, even if the seal of the bank was not prefixed. Judgment reversed.

Cited: 74 N. Y. 229; 78 id. 135; 82 id. 27; 138 id. 479; 143 id. 436.

CONTINENTAL NAT. BANK v NATIONAL BANK (1872) 50 N. Y. 575.

To recover money paid on a check. R drew a check on the plaintiff, a bank, to the order of C & Co. The check purported to be certified by the plaintiff's teller, and was received by C & Co. from R, and deposited in the defendant, a bank. The certification was a forgery. A clerk of C & Co. went to the plaintiff's teller and asked him if the check was all right; the teller replied "Yes." The money was paid to R, who immediately left the country, and C & Co. made no effort to intercept him, relying solely on the conduct of the plaintiff for redress. The check was charged to plaintiff and credited to defendant through the clearing house. Judgment for defendant. Appeal.

Folger, J. 1. The admission of the teller was an adoption of the forged certification. 2. The teller is estopped from denying the certification, even though there was no intention that those relying upon his declaration should be misled. 3. The failure of C & Co. to take immediate steps to apprehend the forger and recover the money, does not operate to deprive them of their right of recovery. Judgment affirmed.

Cited: 6 App. Div. 50; 42 id. 262; 14 Hun 197, 604; 28 id. 51, 86; 50 id. 531; 69 id. 519; 87 id. 471; 22 Misc. 401, 727; 55 N. Y. 335; 56 id. 485; 64 id. 319, 321, 325; 66 id. 118; 69 id. 439; 72 id. 372; 80 id. 40; 89 id. 431; 90 id. 115; 118 id. 640, 641; 128 id. 289; 135 id. 305; 6 T. & C. 181.

SMITH v RATHBUN (1873) 66 Barb. 402.

To enforce the liability of bank directors. The plaintiff, a stockholder in the F National Bank, brought this action against the defendants, directors, for aiding the president of the bank in doing wrongful acts by which the stock was rendered of little or no value. Demurrer: 1, that the complaint does not state a cause of action; 2, that the bank and all the stockholders should be plaintiffs; 3, that the bank should be made a party defendant. Overruled. Judgment for plaintiff. Appeal.

P. Potter, J. 1. Fraudulent acts and injury to plaintiff constitute a cause of action. 2. A stockholder cannot sue the officers and directors of the associations, without making all the shareholders parties; or unless he commences the action in his own behalf, and for the benefit of all others standing in the same situation as himself. 3. An action cannot be maintained against a part or the whole of the directors, without making the corporation a party. Judgment reversed.

Cited: 15 Daly 33; 13 Hun 51; 22 id. 155.

NOLAN v BANK OF NEW YORK (1873) 67 Barb. 24.

On check, drawn by M, payable to his order, indorsed, certified and registered by the defendant, a bank. The check was stolen from M and came to the hands of plaintiff about four months after its date for value, in the course of business. Notice of the theft was given defendant. The check was designed for circulation. The court refused to submit to the jury the question, whether plaintiff was a bona fide holder, because the check was overdue, and taken subject to existing equities. A verdict was directed for defendant. Appeal.

Brady, J. 1. If the certification was genuine, plaintiff was not bound by anything appearing upon its face to exercise any other caution, vigilance, or diligence, so far as the defendant was concerned, for it had appropriated funds to pay it. The check could not be deemed dishonored by delay in presenting. 2. The check

having been stolen, it was the duty of plaintiff to establish that she was a bona fide holder for value, and upon that question she was entitled to go to the jury. Judgment reversed.

GRANT v TAYLOR (1873) 3 Jones & S. 338.

On bills of exchange. To meet payment for goods in which defendant and H were interested, defendant accepted eight bills of exchange of \$10,000 each. Defendant understood that the bills were to be used by H at C Bank. H had frequently dealt with the banking firm of which plaintiff was the surviving member and had an account with them. H discounted five of the bills with plaintiff's firm for \$45,000, one for \$5,000, and one for \$10,000. The eighth bill he left as part collateral for a loan of \$18,000. Plaintiff's firm was authorized to sell the paper or buy it themselves at value and apply the proceeds to H's account. Plaintiff's firm sold to T some of the paper at 12 per cent discount, and took for themselves five of the bills at the same rate of discount. H made payments sufficient to cover seven bills, but they were not so applied. Plaintiff contended that he could hold the bills to apply on H's general balance. There was no such agreement made and no such custom was proved. H was not made a party to the suit. Referee found that the five bills in the hands of plaintiff's firm were void for usury, and that the original loan of \$45,000 was not usurious. Both defendant and H failed. Judgment accordingly. Appeal.

Van Vorst, J. 1. The five acceptances in the hands of plaintiff's firm were void for usury. 2. There having been no application of the payments made by H, the law will apply them. 3. When there is no right to retain the possession of the collateral, after a specific loan has been paid, there can be no lien upon it after payment of the loan. 4. If there be a usage, giving to persons engaged in discounting notes a lien for a general balance against their customer, it must be proved. 5. If defendant was liable for such a balance, he was so jointly with H, and should be sued with H therefor. Judgment reversed.

Aff'd: 52 N. Y. 627.

HARRINGTON v FIRST NAT. BANK (1873) 1 T. & C. 361.

To recover wages as teller of defendant bank from September, 1870, to April, 1871, at \$70 per month. Plaintiff, claiming he was employed by the year, was discharged by the president of the bank for disobedience to orders. Judgment for plaintiff. Exceptions.

Potter, J. 1. That the discharge was illegal because not made when the cause of discharge was committed or because the ground of discharge was not stated, are both unsound hypotheses. 2. Under the National Banking Law the plaintiff was removable at the pleasure of the bank. 3. When a servant is hired for a time certain and dismissed for cause, he cannot recover pro rata. 4. The directors knowledge, without objection, that plaintiff was employed by the bank, does not ratify the details of the terms of his contract made with the president. New trial ordered.

Cited: 2 App. Div. 373; 60 Hun 520; 163 N. Y. 356.

MATTER OF THE FARMERS NAT. BANK (1873) 1 T. & C. 383.

To compel refunding of taxes. Motion to compel the board of supervisors to refund taxes. In 1870 and 1871, the stockholders of the petitioner, a bank, were assessed for their shares of stock. The shares were valued in 1870 at \$105, and in 1871, at \$115. The real estate of the same years was assessed at \$6,000. The petitioner contended that in the years 1870 and 1871 no deduction was made from the value of the stock of the assessed value of the real estate. The evidence did not support the contention. Motion granted. Appeal.

Boardman, J. In the absence of proof it will be presumed that the assessors deducted the value of the real estate from the gross value of the shares, since the law requires it, and officers are presumed to have done their duty. Order reversed.

Cited: 71 N. Y. 483, 484.

VAN ALLEN v AMERICAN NAT. BANK (1873) 52 N. Y. 1.

To recover a deposit. The plaintiff, an indorser on the paper of the firm of V & R, forwarded certain bonds to them for the purpose of paying the note, in event they could not meet it. The bonds were sold by V & R, and the amount,

though not the identical money received, deposited with some of their own, in their own name in the defendant, a bank. The plaintiff drew a check on the bank and it was accepted. The plaintiff contended the fund in the bank was a trust for his benefit. The proceeds received from the sale of the bonds were used by V & R, and the defendants contended, since the money deposited was not that received on the sale of the bonds, there was no trust. Judgment for the plaintiff. Appeal.

Church, C. J. 1. The defendant was ostensibly debtor to the depositor, but equitably to the real owner. 2. Where a trustee deposits money in the bank in his own name, the character of the trust is not lost. Judgment affirmed.

Cited: 16 Abb. N. C. 463; 21 id. 385; 27 id. 348; 37 App. Div. 18; 50 id. 37; 2 Cow. 169; 12 Daly 248; 16 id. 47; 2 Hun 134; 37 id. 590; 47 id. 472; 49 id. 549; 50 id. 12; 54 id. 275; 55 id. 156; 68 id. 505; 86 id. 296; 88 id. 85; 7 Misc. 512; 9 id. 81; 11 id. 252, 598; 56 N. Y. 480, 483; 66 id. 395; 84 id. 131, 150; 96 id. 37; 100 id. 34; 101 id. 568; 105 id. 263; 122 id. 384; 124 id. 332; 125 id. 199; 129 id. 103; 138 id. 369; 145 id. 186, 190; 147 id. 193; 150 id. 218; 167 id. 367; 2 Redf. 323; 4 T. & C. 682.

COOKE v STATE NAT. BANK (1873) 52 N. Y. 96.

On certified check. The defendant M, a resident of Massachusetts, drew a check payable to bearer on the defendant, a bank, at Boston, and the same was certified by the cashier. The check was indorsed to C & Co. in payment for gold certificates which were delivered to M. The defendant bank acted for C & Co. in the transaction, and thereafter indorsed the check to the plaintiff, a resident of New York. Payment on the check was refused for want of funds. At a meeting of the banks in Boston, a resolution was passed adopting a custom of receiving certified checks. The defendant bank voted against this resolution. The defendant bank applied to the court for an order removing the cause to the United States Circuit Court alleging want of jurisdiction. The Act of 1867 provided for removal on affidavit of defendant. Judgment for plaintiff. Appeal.

Church, C. J. 1. Under the National Currency Act, sec. 57, 13 Stat. at Large, 991, the jurisdiction of the state courts in actions against banking institutions, was not intended to be taken away, or restricted to particular courts. 2. The existence of the corporation is conceded by suing it as such. 3. National banks, for purposes of jurisdiction, are residents of the state in which they are located. 4. The bank, being unable to make the affidavit required by the Act of 1867, cannot have the cause removed. 5. The cashier of a bank has authority to certify a check. Where such a certificate is given in the absence of funds, only a bona fide holder can enforce the liability against the bank. 6. The liability of banks upon certified checks does not depend upon usage or custom, but upon principles of the common law. 7. The refusal of defendant bank to unite with other banks in a custom to receive from each other certified checks in payment of balances or collections, of which plaintiff had notice, did not operate as notice that the cashier had no authority to certify the check, and did not prevent plaintiff from being a bona fide holder. Judgment affirmed.

Cited: 9 Abb. N. C. 289; 1 Hun 203; 4 id. 628; 12 id. 540; 19 id. 479; 77 id. 159; 86 id. 194; 1 Misc. 288; 59 N. Y. 72; 74 id. 56; 81 id. 388; 88 id. 61; 91 id. 539; 4 T. & C. 15.

FIRST NAT. BANK v LEACH (1873) 52 N. Y. 350.

Assumpsit on check against drawer. The check was drawn on O Bank, payable December 12. It was discounted for the payee by plaintiff, and presented by plaintiff to the drawee for certification at 11 a. m. on December 12. It was then certified and charged to defendant's account, which was sufficient to pay it. An hour later, the drawee suspended. Payment of the check was refused, when it was presented for payment on the same day. Judgment for defendant. Affirmed at General Term. Appeal.

Peckham, J. 1. After a check, presented by a holder other than the drawer is certified by the drawee bank, the bank holds the money at the risk, not of the drawer, but of the holder of the check. 2. The certification operated as payment as between maker and payee. Affirmed.

Cited: 22 App. Div. 341; 10 Daly 181; 12 Hun 540; 34 id. 30; 77 id. 169; 56 N. Y. 480; 59 id. 72; 82 id. 7; 134 id. 108.

NATIONAL BANK OF CHEMUNG v CITY OF ELMIRA (1873) 53 N. Y. 49.

Conversion. The assessors of the defendant, a city, assessed for taxation the capital stock of plaintiff, a national bank; their affidavit was sworn to before a deputy county clerk instead of before a justice of the peace, as required by statute. A tax was imposed on plaintiff's capital stock, and under defendant's warrant the collector levied on and sold bank bills belonging to plaintiff. Ch. 761, Laws of 1866, exempted the capital of state and national banks from taxation, but provided for taxation on shares of stock in the hands of stockholders. A referee reported that the assessors had jurisdiction, and, having acted judicially, their decision could not be questioned in this action, but that, because of the defect in the affidavit, defendant had no jurisdiction to issue its warrant. Judgment for plaintiff. Reversed at General Term. Appeal.

Church, C. J. 1. This assessment was made and the tax levied in direct violation of ch. 761, Laws of 1866; it was therefore illegal and not merely erroneous. Judgment reversed.

Cited: 7 App. Div. 153; 11 id. 391; 22 id. 449, 450; 8 Daly 428; 4 Hun 451; 14 id. 310; 31 id. 118; 37 id. 622; 47 id. 475; 53 id. 124; 77 id. 186; 81 id. 310; 7 Misc. 202; 10 id. 332; 14 id. 149; 27 id. 565; 53 N. Y. 609; 57 id. 496; 58 id. 92; 61 id. 263; 62 id. 298; 65 id. 227, 269; 69 id. 247; 71 id. 488; 77 id. 343; 80 id. 311; 82 id. 357; 84 id. 541; 86 id. 348; 123 id. 149; 149 id. 297; 153 id. 339; 3 T. & C. 343; 4 id. 608.

COLEMAN v FIRST NAT. BANK (1873) 53 N. Y. 388.

To recover money deposited. Plaintiff had paid the money to defendant's teller, saying he wanted to deposit it in the bank at interest. The teller gave him a certificate of deposit which plaintiff, who could not read, supposed to be a regular bank certificate, and took without examination. It was in fact a certificate in which the bank was not named, signed by the bank's president individually, to the effect that plaintiff had made the deposit in his office, payable with interest on return of the certificate. Plaintiff, upon learning the truth returned the certificate, demanding one from the bank. Payment was refused. Verdict for plaintiff. New trial denied. Exceptions. Judgment for plaintiff at General Term. Appeal.

Andrews, J. 1. One who deals with an agent, is not concluded from resorting to the principal, unless it distinctly appears that, with full knowledge of the facts, he elected to take the sole responsibility of the agent. 2. The parol proof given was admissible, for it did not contradict the written contract but superadded a liability of the principal. Judgment affirmed.

Cited: 48 App. Div. 298; 2 Hun 487; 26 id. 146; 46 id. 162; 48 id. 391; 70 id. 597; 76 id. 556; 81 id. 478; 7 Misc. 634; 13 id. 625; 17 id. 648; 31 id. 724; 53 N. Y. 634; 64 id. 362; 77 id. 310; 110 id. 410; 151 id. 262; 152 id. 31; 157 id. 199; 42 Supr. 99; 54 id. 82; 55 id. 294; 5 T. & C. 26, 591.

SEYBEL v NATIONAL CURRENCY BANK (1873) 54 N. Y. 288.

To recover value of United States bonds stolen from plaintiff and purchased the day after the theft by defendant in the regular course of business. The bonds were transferable by delivery. Printed notices of the theft with descriptions of these bonds had been left on the desk of defendant's cashier, the morning after the theft. The cashier testified that he had not seen the notices. Defendant offered to prove by him that it dealt largely in such bonds; that they were dealt with by bankers and brokers as money; and, that defendant received so many notices of their loss and theft, that they could not be kept track of without stopping the business. This testimony was excluded. Judgment for plaintiff. Reversed at General Term. Appeal.

Lott, C. C. 1. The general object of the evidence excluded was to establish defendant's liability to regard such notices without stopping business. Had this been proved, all grounds for the imputation of bad faith would have been removed, and defendant would have been entitled to protection as an innocent holder for value. 2. Defendant was under no obligation to ask the person presenting the bonds as to his title. 3. Omission to do so was not evidence of bad faith. Judgment affirmed.

Cited: 28 App. Div. 89; 4 Hun 695; 10 id. 38; 51 id. 543; 56 N. Y. 140; 57 id. 270; 123 id. 202.

VAN LEUVEN v FIRST NAT. BANK OF KINGSTON (1873) 54 N. Y. 671.

To recover value of United States Treasury notes. Defendant was a national bank. Plaintiff deposited the notes with defendant. Later he informed H, defendant's president, that he desired to exchange the notes in question for other securities. H gave him a certificate written on the bank's printed form, and signed in H's individual name. H subsequently became insolvent, being largely indebted to defendant. Defendant contended that H had merely made himself personally liable by the receipt; that the bank was not liable, and that the transaction was ultra vires. Verdict directed. Judgment for plaintiff. Affirmed at General Term. Appeal.

Earl, C. 1. The receipt being given as a voucher in connection with the surrounding circumstances, imported simply a transaction with the bank. 2. The business of exchanging government securities was such as a national bank, through its officers, could properly engage in. Judgment affirmed.

Cited: 60 N. Y. 293; 69 id. 388; 77 id. 310.

NATIONAL BANK v NATIONAL BANKING ASS'N (1873) 55 N. Y. 211.

To recover money paid by mistake. G obtained from V his check on plaintiff, and had it certified on February 15. He fraudulently altered it, by changing the date to that of the following day and raised the amount. He then deposited it on February 16 with defendant. Later on the same day, he drew out most of his balance. The check was paid at the clearing house on February 17, and charged by plaintiff to V's account, which was written up a week later. After a few days, V discovered the alteration and notified plaintiff. Plaintiff then demanded the repayment of the money by the defendant. Refused. Judgment for plaintiff, for the increase in the amount of the check. Affirmed at General Term. Appeal.

Rapallo, J. 1. Money paid under a mistake of fact may be recovered, however negligent the party paying was in making the mistake, unless the payment has caused a change in the position of the other party. There was no such change here, for defendant had paid G his balance before plaintiff paid his check. 2. Plaintiff was legally concluded as to the genuineness of its certification and of the drawer's signature, but not as to the body of the check. Judgment affirmed.

Cited: 36 App. Div. 116, 125; 59 id. 107; 2 Hun 307; 76 id. 478; 22 Misc. 724, 725, 728; 31 id. 229; 59 N. Y. 19, 77; 63 id. 457; 64 id. 319; 114 id. 33; 49 Supr. 75; 4 T. & C. 490.

BUCHANAN FARM OIL CO. v WOODMAN (1874) 4 T. & C. 193.

To recover a deposit. Motion to vacate the order of arrest. The complaint alleged that defendants, bankers, were indebted to plaintiff on a deposit, and that they had failed to pay on demand. There were no averments that defendants held the money in a fiduciary capacity, or received it wrongfully, or that there was any fraud or conspiracy. The affidavits in support of the order of arrest contained statements of a fraudulent conspiracy on the part of defendants with plaintiff's treasurer. The code provided for the arrest of a trustee for using the trust fund. Motion denied. Appeal.

Davis, P. J. An arrest was not proper upon the facts alleged in the complaint. The relation between banker and depositor is that of creditor and debtor, not of trustee and cestui que trust. Order vacated.

HINTERMISTER v FIRST NAT. BANK (1874) 5 T. & C. 484.

To recover penalty for taking usurious interest, under National Banking Act of June 3, 1864. Defendant averred that the law of the state, 1 R. S. 772, sec. 3, provided for an action to recover back any excess of interest paid above the legal rate and that the federal statute did not apply. Plaintiff replied that the federal statute was then in force by virtue of the Laws of 1870, ch. 163. Judgment for plaintiff. Appeal.

Countryman, J. The federal statute regulating the rate of interest and prescribing the penalty for usury, has no application to private contracts of national banks, made in this state, and was not intended to have any force except in those states and territories where there was no local legislation on the subject. The Law of 1870 is limited to banks organized under local laws and has no application to national banks. Judgment reversed.

CHATHAM NAT. BANK v MERCHANTS NAT. BANK (1874) 1 Hun 702.

A national bank is a citizen of the state in which it is organized and located, within the meaning of the act of Congress providing for the removal of causes into the United States Circuit Court.

SECURITY BANK v NAT. BANK OF COMMONWEALTH (1874) 2 Hun 287.

To recover money. Defendant, a national bank, became insolvent, and a receiver was appointed and entered upon the discharge of his duties. Thereafter, this action was brought against the bank by its name, and the summons served on its president. Supposing that the appointment of the receiver superseded all power in the bank and its officers, the president took no notice of the papers, not even notifying the receiver, and a judgment by default was entered. Motion to set aside the judgment. Denied. Appeal.

Daniels, J. 1. Though the denial of the motion was discretionary, it was one affecting a substantial right and was appealable. 2. The insolvency of the bank and the appointment of a receiver did not terminate the bank's existence, and the suit was properly brought against it in its own name. 3. The default should be opened. Order reversed.

Cited: 3 Hun 379; 4 id. 54; 6 T. & C. 189, 245.

PEOPLE, EX REL. v BOARD OF ASSESSORS (1874) 2 Hun 583.

Certiorari, to review assessment. Relators were stockholders in a national bank. The stock was assessed at par, though worth more. A share was worth only 41 per cent of the market value of a share of stock in M State Bank, which was also assessed at par. All bank stock worth over par was assessed at par. The state statute required such property to be assessed at its full value. A reduction was asked in relators' assessment, based on its relative value compared with that of M Bank.

Bockes, J. 1. The basis of assessment was in manifest disregard of the plain direction of the statute. 2. Although the reduction of the assessment against the relators might produce equality as between them and the shareholders in the M Bank, it would produce inequality as between them and others on the roll, who must be presumed to be fairly represented thereon. Writ quashed.

Cited: 8 Hun 539; Aff'd: 67 N. Y. 521.

STEVENS v CORN EXCHANGE BANK (1874) 3 Hun 147.

On check. The check was drawn by J, by her husband as her attorney in fact, payable to her order. It was certified by defendant bank, but the amount thereof was not charged to the drawer. Thereafter it was indorsed by her and delivered to her husband for no consideration. Thereafter all of J's deposit was drawn out except a few cents. The check was forgotten until several years after, when the husband discovered it, and delivered it to plaintiff in consideration of his verbal agreement to pay the husband a certain proportion of any profits that might be realized on a patent right. None were ever realized or paid. The referee found for defendant on the ground that the drawer's account had been reduced to so small an amount with her consent and for her benefit; and also because of lapse of time. Judgment for defendant. Appeal.

Daniels, J. 1. As plaintiff parted with nothing for the check, he was not a bona fide holder and could not recover. 2. The fact that the referee gave a wrong reason for a right decision, is no ground for reversal. Judgment affirmed.

Cited: 8 Hun 512; 8 App. Div. 7.

HINTERMISTER v FIRST NAT. BANK (1874) 3 Hun 345.

To recover penalty for taking usurious interest. The action was brought under sec. 30 of the National Banking Act, to recover twice the amount of usurious interest paid by plaintiff to defendant, on a note made by him to the bank, and the renewals thereof. Judgment for plaintiff. Appeal.

Countryman, J. The provision of the Act of Congress has no relation to contracts made in this state between the bank and other citizens, relating merely to private concerns. These contracts are controlled and regulated by the state law in regard to usury. Judgment reserved.

Modified: 64 N. Y. 212. See 5 T. & C. 484, ante p. 963.

FRANK v CHEMICAL NAT. BANK (1874) 5 Jones & S. 26.

To recover the balance of deposit. Defendant produced checks signed with plaintiff's name for the amount. P qualified as a handwriting expert, and introduced magnified photographic copies of the signature and testified that from comparison of documents in evidence, in his opinion the signatures were forgeries. Judgment for plaintiff. Appeal.

Curtis, J. 1. Witnesses may describe all the facts in respect to the condition and appearance of the paper and handwriting and also as to those matters which require scientific research and special skill to discover; but a witness should not be permitted to give his opinion as to the genuineness of the writing in question, based solely upon comparison of the documents in evidence. 2. Magnified photographic copies may be used in evidence if relied upon as agencies for accurate mathematical results in mensuration and astronomy. 3. A depositor owes to the bank no duty which requires him to examine his passbooks or vouchers, with a view to detection of forgeries of his name. Judgment reversed.

OCEAN NAT. BANK v CARLL (1874) 55 N. Y. 440.

On promissory note, made by defendant payable to the order of H, and transferred to plaintiff. Defendant averred and proved that it was given as an accommodation note, without consideration, and was fraudulently put into circulation. Entries made by a discount clerk of plaintiff were testified to, to show that the bank was a bona fide holder for value. The clerk who made the entries was not present, although in the state. Judgment for plaintiff. Appeal.

Church, C. J. The entries could only be proved by the clerk making them, as he was alive and in the state. Judgment reversed.

SECOND NAT. BANK v POUCHER (1874) 56 N. Y. 348.

On promissory note against makers and indorsers. It was contended that the indorsers had been discharged by the act of A, plaintiff's president. One of the makers came to the bank at the maturity of the note in suit, with a check on another bank to pay it. A requested that he apply that payment on another indebtedness, since this note was good because of the indorsements. A said they would carry this note to the close of navigation. A's request was complied with. This note was dishonored. Protest and due notice were given to the indorsers. Judgment for plaintiff. Affirmed at General Term. Appeal.

Grover, J. 1. The request to pay upon the other demand did not preclude the maker from paying the note in suit, and, consequently, did not discharge the indorsers upon it. 2. By "carrying a note" bankers do not mean to extend the time of payment, but to accept in place of the maturing obligation another similarly indorsed together with payment of the discount. Judgment affirmed.

Cited: 30 Hun 268; 64 N. Y. 235.

JUSTH v NAT. BANK OF THE COMMONWEALTH (1874) 56 N. Y. 478.

To recover the amount of certified checks. The checks were drawn by plaintiffs and collected by defendant bank. In 1869, G procured of plaintiffs their certified checks on the S Bank for \$40,000, depositing bonds as collateral, which were apparently sufficient, but some of which were forged. G deposited the checks with defendant, which credited him with the amount and collected the checks. G checked out part of the amount and applied part in payment of a loan made him by defendant. G later absconded. Plaintiffs applied to defendant in 1870, for the amount of the certified checks in exchange for the bonds held by it. Judgment for defendant. Affirmed at General Term. Appeal.

Johnson, J. 1. The certified checks are to be treated as money. 2. In the absence of trust or agency, it is only to the extent of the interest remaining in the party committing the fraud that money can be followed, as against an innocent party having a lawful title founded upon consideration; and if paid in the usual course of business either upon a new consideration or for an existing debt, the right of the party to follow it is gone. 3. To allow a claim set up so long after the transaction would be inequitable. Judgment affirmed.

Cited: 11 App. Div. 83; 32 id. 270; 36 id. 483; 20 Hun 353; 34 id. 30; 37 id. 590; 50 id. 12; 82 id. 521; 7 Misc. 511; 9 id. 348; 14 id. 318; 79 N. Y. 188; 84 id. 434, 435, 436; 141 id. 385; 147 id. 191; 159 id. 460; 59 Supr. 66.

FIRST NAT. BANK v KELLY (1874) 57 N. Y. 34.

To recover possession of cotton. Plaintiff discounted for D, the consignor of the cotton, a sight draft on the consignees, to which the bill of lading was attached. Payment of the draft was refused. On demand, the consignees said they would give up the cotton on D's order. While this order was being procured, the consignees sued D on an alleged prior indebtedness, attached the cotton, and, having indemnified the sheriff, appropriated the cotton. This action was brought against the sheriff, to recover the amount of the draft. It was contended that plaintiff had no rights in the cotton, because of failure to file the papers as a chattel mortgage. Judgment for plaintiff. Affirmed at General Term. Appeal.

Reynolds, C. 1. The discount of a draft under these circumstances passed to plaintiff the legal title to the cotton. 2. The transfer of the bill of lading was an actual delivery and change of the possession. 3. Plaintiff was in the position of a mortgagee in possession, and no filing of the papers was necessary. Judgment affirmed.

Cited: 62 App. Div. 228; 8 Hun 250; 22 id. 335; 85 id. 165; 22 Misc. 120; 108 N. Y. 249; 132 id. 44; 142 id. 172.

POPE v BANK OF ALBION (1874) 57 N. Y. 126.

On check. Plaintiff was the holder of a check drawn on defendant, payable to G. Plaintiff did not know that the drawer had no funds and that the check had been negotiated before its date, but knew that in the ordinary course of mails the check if issued as purported, could not have been presented to him on the day following. The assistant cashier, contrary to authority and usage, had accepted the check before it was given to plaintiff. Judgment for defendant. Reversed at General Term. Appeal.

Reynolds, C. 1. The assistant cashier, having acted beyond his authority, did not bind the bank. 2. The receipt of the check on the day following its date, was sufficient to put plaintiff upon inquiry. 3. The plaintiff was not a bona fide holder. Judgment reversed.

PLITT v BEEBE (1874) 57 N. Y. 339.

Where a promissory note was delivered by the maker to the payee to be discounted for the benefit of the former, but the bank at the time refused to discount the same, agreeing, however, that it should be done thereafter, and the note was left with the bank upon the understanding that the payee might draw against it, in an action by the receiver of the bank against the maker, Held, that it was a discount of the note to the amount paid on the drafts against it; that the certificate of the comptroller of currency, required by the National Currency Act (Sec. 50, 13 U. S. Stat. at Large 99), is sufficient evidence of the validity of the appointment of the receiver.

SCHOENWALD v METROPOLITAN SAV. BANK (1874) 57 N. Y. 418.

To recover a deposit made by plaintiff with defendant bank. At the time of the deposit, plaintiff gave defendant her signature and received a passbook in which were printed the rules under which deposits were received. One of these rules was that all payments made to persons presenting the deposit book, should be deemed good and valid payments to depositors. Plaintiff's book was afterward presented to defendant, by a man who had obtained it without authority, and who also presented an order to which plaintiff's name was signed. Defendant paid him part of the balance shown by the book, entered the payment therein and subsequently refused to pay it to plaintiff. Judgment for plaintiff. Affirmed at General Term. Appeal.

Reynolds, C. The bank having exercised due diligence, must be discharged by the payment made on production of the passbook, and plaintiff, having agreed to such terms, must be held to the consequences. Judgment reversed.

Cited: 9 Daly 509; 38 Hun 258; 69 N. Y. 318, 319; 101 id. 62.

EAST RIVER NAT. BANK v GOVE (1874) 57 N. Y. 597.

To recover money paid on checks. C deposited money with plaintiff bank, and the same was, by mistake, credited to defendant, who drew it out before the

error was discovered. The defendant having promised to make good the amount thus drawn, went to the bank and paid the amount in full to the paying teller. Judgment for defendant. Reversed at General Term. Appeal.

Earl, C. While the paying teller had no authority to receive payment, nevertheless, the bank must be held responsible for the conduct of its officers, within the scope of their apparent authority. Judgment reversed.

SALT SPRINGS NAT. BANK v BURTON (1874) 58 N. Y. 430.

On promissory note. Plaintiff sued defendant, as indorser, on a note made by P and payable at W Bank. The regular hours of the bank were from 9 a. m. to 4 p. m. Between these hours, defendant repeatedly visited the bank to ascertain whether or not the note had been presented for payment. The note was presented after 4 o'clock, by the cashier of plaintiff, who, finding the cashier of W Bank in the office, demanded payment. Judgment for plaintiff. Affirmed at General Term. Appeal.

Rapallo, J. The facts are not sufficient to establish an exception to the general rule that, if the holder of paper payable at a bank obtains admission to the bank after the usual banking hours, and finds a person authorized to answer a demand, and makes a demand of him, such demand will be sufficient to hold the indorser. Judgment affirmed.

Cited: 31 Misc. 95; 51 Supr. 86.

DUTCHER v IMPORTERS AND TRADERS NAT. BANK (1874) 59 N. Y. 5.

To recover money paid in contemplation of insolvency. C Bank, having made collections for defendant bank, drew a check upon it for a balance. This check was sent to the clearing house, of which defendant was a member. C Bank, not being a member, was represented by M Bank, which gave its check in exchange for that of C Bank. C Bank thereafter became insolvent, and plaintiff was appointed assignee. Verdict for plaintiff. New trial denied. Exceptions. Judgment for plaintiff at General Term. Appeal.

Grover, J. 1. The act being done in the ordinary course of business, it cannot be presumed to have been done in contemplation of insolvency. 2. Money paid in the usual course of business is not within the provision of sec. 4, 1 R. S. 603, which provides that it shall not be lawful for any company to make a transfer in contemplation of insolvency. Judgment reversed.

Cited: 31 Hun 336; 59 id. 478; 79 id. 107; 94 N. Y. 338, 339, 340.

ALLEN v FOURTH NAT. BANK (1874) 59 N. Y. 12.

To recover amount of certificate of deposit. Plaintiffs received, from C Bank for collection, a certificate of deposit purporting to have been issued by O & Co., and deposited it with defendant bank. There was an agreement between O & Co. and defendant, that the latter should take up all commercial paper drawn upon the firm in New York, and they would remit a check to cover daily accounts; that if any portion of the paper taken up should prove not good, O & Co. would be entitled to credit for the amount by remitting it to defendant. The certificate was a forgery. The cashier and bookkeeper of O & Co., on discovering the forgery, notified plaintiffs and defendant, and on return of the certificate, credit was given O & Co. by defendant. Verdict directed for plaintiff. Exceptions. Sustained at General Term. Appeal.

Rapallo, J. 1. The agreement did not cover the certificate of deposit, but the payment by O & Co. did not preclude it from proclaiming on the certificates, and defendant was justified in giving O & Co. credit therefor. 2. In the case of commercial paper, paid without previous inspection, it is the duty of the party paying to make the inspection as soon as he has opportunity; and if by his failure to do so, the party receiving is prejudiced, such negligence would be an answer to a claim for restitution. O & Co. used the utmost diligence to notify the parties interested. Order affirmed.

PEOPLE, EX REL. v COMMISSIONERS OF TAXES (1874) 59 N. Y. 40.

Certiorari. Relator was a foreign banking corporation, having an agency in the city of New York. Defendants assessed relator, and an application was made

to vacate the assessment. The funds received by relator's agents were to meet maturing and unexpected liabilities and were employed only in making temporary loans. No permanent capital was invested. Relator claimed exemption under sec. 2, ch. 176, Laws of 1851, which provides that foreign capital transmitted to agents here shall be exempt from taxation. Defendants contended that this exemption was repealed by ch. 37, Laws of 1855, which subjected non-residents to taxation on moneys employed in business here. Judgment for defendants. Appeal.

Rapallo, J. 1. The Act of 1855 did not repeal the Act of 1851. 2. So long as the foreign corporation retains control of the funds and the transactions of the agents are confined to temporary loans, the funds cannot be regarded as invested in business within the meaning of the Act of 1855. Judgment reversed.

Cited: 59 N. Y. 628.

FARMERS BANK v HALE (1874) 59 N. Y. 53.

On note. Plaintiff, a state bank, discounted a note of which defendants were maker and indorser. Defense, usury. The state usury laws provided for forfeiture of principal and interest of usurious loans. Plaintiff contended that these laws were repealed as to state banks by sec. 2, ch. 163, Laws of 1870. This statute, stating that its object was to place state banks on an equality with national banks, restricted the penalty for taking usury by state banks to forfeiture of interest as under the National Banking Act. Judgment for plaintiff less deductions for forfeiture of interest. Affirmed at General Term. Appeal.

Church, C. J. 1. Where the legislative intent is expressly declared in a statute, to carry out that intent all other parts of the act must yield. 2. As national banks are, notwithstanding the National Banking Act, subject to the usury laws of the state, state banks remain so in accordance with the legislative intent expressed in ch. 163, Laws of 1870. 3. Where two constructions can be put upon an act, one of which will accomplish the purpose of the legislature, and the other render the act nugatory, the former should be adopted; but when the provisions of an act are such that to make it operative would violate the declared meaning of the legislature, courts should be astute in construing it inoperative. Judgment reversed.

Cited: 17 App. Div. 71; 3 Hun 348; 1 Sheld. 438; 5 T. & C. 487. Overruled: 64 N. Y. 214.

MARINE NAT. BANK v NATIONAL CITY BANK (1874) 59 N. Y. 67.

To recover money paid by mistake. L drew a check on plaintiff in favor of X, who, having changed the name of the payee and the amount, delivered it to D. D had it certified by plaintiff, and then deposited it to his credit with defendant. The check was certified and paid by the plaintiff, and received by the defendant, as a genuine check. Judgment for plaintiff. Reversed at General Term. Appeal.

Per curiam. 1. The purpose of certification of a check is to ascertain, with certainty, whether the drawers of the check have funds sufficient to meet it; and to obtain the engagement of the bank that those funds shall not be withdrawn. 2. Certification does not warrant the genuineness of the check in all its parts, including the amount to be paid, and the names and identity of the payees. Judgment reversed.

Cited: 8 App. Div. 611; 25 Abb. N. C. 141; 8 Daly 479; 12 Hun 540; 44 id. 54; 4 Misc. 521; 10 id. 114; 16 id. 364; 22 id. 725, 726; 59 N. Y. 628; 64 id. 319; 67 id. 461; 72 id. 259; 85 id. 213; 89 id. 422, 423, 428, 429, 432; 100 id. 54; 49 Supr. 75.

PATTERSON v BAKER (1875) 3 Hun 398.

To recover damages for the wrongful use of the property of M Bank, a Georgia corporation, by defendant and other directors. Plaintiff was the owner of bankbills issued by M Bank. The complaint alleged that plaintiff acquired the bills at various times after January, 1860, and that the wrongful acts were performed at various times after January 1, 1861. Demurrer. Sustained. Appeal.

Daniels, J. As the complaint does not allege that the bills were received before January 1, 1861, no cause of action is stated. Judgment affirmed.

Cited: 10 Misc. 654.

EVERTSEN v NATIONAL BANK (1875) 4 Hun 692.

To recover money due on coupons. The coupons, cut from railroad bonds, were payable to bearer, and belonged to defendant. They were sent through an express company for collection, were stolen in transit, and sold to plaintiff for value, in good faith, in the usual course of business. Payment being stopped by defendant, plaintiff sued the railroad company issuing the bonds. The money was paid into court, and the bank was substituted as defendant. Judgment for plaintiff. Appeal.

Boardman, J. Coupons separated from their bonds are in law considered as representatives of money, and subject to the same rules as bank bills and other bearer instruments. Judgment affirmed.

Rev'd: 66 N. Y. 14.

NATIONAL BANK v WASHINGTON COUNTY NAT. BANK (1875) 5 Hun 605.

On certificate of deposit. On April 4, 1863, defendant issued to S, its certificate of deposit for \$500 payable on its return properly indorsed. On September 20, 1864, a payment thereon of \$215 was made by defendant. On October 20, 1870, it was transferred in good faith for value, without notice of any payment thereon, to plaintiff, by which demand was thereafter made. Judgment for plaintiff. Appeal.

Learned, P. J. 1. Such a certificate is not dishonored until demand. 2. Any holder of the certificate properly indorsed, who takes without notice, in good faith and for value, may recover, notwithstanding a payment made to the original payee. Judgment affirmed.

Cited: 24 Hun 96; 38 id. 258; 53 id. 259; 72 N. Y. 606.

NATIONAL BANK OF FAIRHAVEN v PHCENIX W. CO. (1875) 6 Hun. 71.

On promissory notes, payee against maker. Plaintiff, a national bank, doing business in Massachusetts, to prove its incorporation, put in evidence a copy of the certificate of the comptroller of the currency. The signatures of the president and secretary of the corporation, making the notes in suit, were proved. The offer of defendant to show a total or partial failure of consideration was rejected, as it was not accompanied with an offer to show that plaintiff was not a bona fide holder, for value and in due course of business. Defendant's offer to show that when the notes in suit were discounted, plaintiff had an office in New York city for banking purposes, and that the notes were discounted there, was rejected. 1 R. S. (2d ed.), 708, secs. 6 and 7, required foreign banking corporations before doing business in New York, to obtain authority. Judgment for plaintiff. Appeal.

Davis P. J. 1. The incorporation of plaintiff was sufficiently proved. 2. Defendant was estopped from questioning plaintiff's incorporation, as it was accustomed to deal with plaintiff as a corporation. 3. Proof of the signatures of the president and secretary of the maker of the notes was prima facie evidence that they were properly made. 4. The offer to show failure of consideration was properly rejected. 5. The proof offered showing a discount of the notes by a foreign corporation in New York, would prima facie show an illegal discounting under the laws of this state, and the evidence should have been received. Judgment reversed.

JOHNSON v FIRST NAT. BANK OF HOBOKEN (1875) 6 Hun 124.

To recover money collected on stolen checks. The checks were owned by plaintiffs, payable to their order, and their indorsement thereon was forged by a clerk, who cashed them and embezzled the money. Defendant received and collected them for depositors, and paid over the proceeds in good faith without notice. Only five of the checks were produced at the trial, and defendant objected that there could be no recovery as to the others, as they could not be delivered to it. Judgment for plaintiffs. Appeal.

Daniels, J. 1. The fact that defendant had paid out the proceeds of the checks without notice of the forgery, did not protect it. 2. As the failure to produce the remaining checks was the result of defendant's wrongful act, it could not complain that they were not produced at the trial. Judgment affirmed.

Cited: 28 Misc. 325; 86 N. Y. 407. Aff'd: 68 Hun 616.

SHIELDS v NIAGARA COUNTY SAV. BANK (1875) 5 T. & C. 585.

On two certificates of deposit issued by M & Co. M of the firm of M & Co., was the managing officer and secretary of defendant bank, located at the same place with M & Co. On the door was defendant's name and on the window curtain was the business sign of M & Co. M & Co. having failed, plaintiff proved his claim and received a dividend. Plaintiff contended that the contract was with defendant. Some jurors were not drawn in the regular way, but were summoned by order of the court to serve for the term, after the term had commenced. Judgment for plaintiff. Appeal.

E. D. Smith, J. 1. After affirming the contract with M & Co. by proving the certificates in bankruptcy as a debt of M & Co. and receiving a dividend, it is too late to seek to charge the bank as the real debtor. 2. Talesmen can be summoned for a single trial only, not for a circuit. Judgment reversed.

Cited: 3 Hun 482; 5 T. & C. 590.

RICH v NIAGARA COUNTY SAV. BANK (1875) 5 T. & C. 589.

To recover a deposit. M, secretary and managing officer of defendant bank, carried on a banking business in his own name in the room occupied by defendant. Plaintiff deposited with M, receiving a bank book headed M & Co., with his deposit credited in it, and M paid his check drawn on the deposit. M failed. Two weeks before the failure, plaintiff applied for his deposit, and M promised to pay it. After M's failure plaintiff sued defendant. Judgment for plaintiff. Appeal.

Smith, J. If plaintiff was deceived when he made his deposit, he should have disaffirmed the contract with M promptly, on discovering that the passbook did not bind defendant. As he elected to treat M as a holder of the deposit, and drew checks upon him and demanded the money of him, it was too late to look to defendant for his deposit. Judgment reversed.

Cited: 9 Hun 8; 19 id. 598; 6 Misc. 160; 13 id. 579.

SHIPSEY v BOWERY NAT. BANK (1875) 59 N. Y. 485.

To recover amount of a check. Plaintiff, as holder of a check drawn by M on P Bank, deposited the same with defendant for collection for compensation. Defendant having credited the check to plaintiff's account, mailed it to P Bank for collection. The check was lost in transit, but defendant did not discover the loss, nor notify the parties, until two weeks thereafter. At the time the check was drawn, and for some time thereafter, M had sufficient funds on deposit to meet it. M became insolvent and defendant charged the check back to plaintiff. Just previous to the assignment, M placed in plaintiff's hands securities almost equal in amount to the check in suit, but did not at the time indicate how he wished the same applied. In a reasonable time thereafter plaintiff elected to apply the proceeds to other unpaid debts due him from M. Judgment for plaintiff. Reversed at General Term. Appeal.

Folger, J. 1. Defendant was negligent in not sooner notifying the plaintiff of the loss of the check; and the plaintiff having sustained damages from such negligence, the defendant is liable. 2. As plaintiff had distinct causes of indebtedness he was not obliged to designate how the security should be applied. A reasonable time is allowed in which to elect. Judgment reversed.

Cited: 80 N. Y. 104.

DUNCAN v BERLIN (1875) 60 N. Y. 151.

To recover money paid by mistake. Funds in the hands of plaintiff, to the credit of B & Co. were attached by defendants. In making up the balance, the clerk credited the account with \$1,000 too much. This sum was paid to the sheriff on an attachment, for a firm debt, issued against B alone. Plaintiff had charged in the account, a check of B & Co. for \$1,500 in favor of L, who, having presented it to the bank prior to the attachment, was advised that the check would be paid, though no written acceptance was given. It was not paid until the day after the attachment issued. Judgment for defendant. Affirmed at General Term. Appeal.

Church, C. J. 1. The check did not operate as an assignment of the money deposited, specified in it. 2. A parol acceptance is not valid under 1 R. S., 768. 3. As the drawee owes no duty to the holder until acceptance, the payment by

plaintiff was voluntary, and plaintiff is chargeable with knowledge of the contents of the attachment. Judgment affirmed.

Cited: 8 Hun 416; 11 id. 485; 32 id. 399; 45 id. 336; 12 Misc. 20; 71 N. Y. 331; 83 id. 325; 124 id. 331; 134 id. 372; 49 Supr. 431.

PARDEE v FISH (1875) 60 N. Y. 265.

On certificate of deposit. The defendant deposited money with P, a banking corporation receiving therefor a certificate of deposit, payable in current bank notes on its return. The bank's charter gave it power to receive money and give certificates therefor at lawful rates of interest. The defendant indorsed the certificate to the plaintiff. The corporation continued solvent, and paid all demands for three months after such transfer. The corporation becoming insolvent, the plaintiff presented the certificate for payment, which was refused. Notice was given to the defendant, and it was duly protested. Judgment for plaintiff. Affirmed at General Term. Appeal.

Miller, J. 1. This certificate of deposit possessed all the qualities of a negotiable promissory note. This action can be maintained. 2. Although a demand of payment was necessary, and it was payable in "current bank notes," the fact did not vary the negotiable character of the instrument. 3. The indorsement was a continuing security, and the holder is not chargeable with neglect, because the demand was not made within the time specified. 4. While the plaintiff was guilty of laches, yet there was no such laches as would prevent a recovery. 5. The corporation had authority under its charter to issue such a certificate. Judgment affirmed.

Cited: 45 App. Div. 322; 1 Cow. 184; 6 Denio 261; 24 Hun 97; 42 id. 19; 23 Misc. 209; 85 N. Y. 587; 88 id. 342; 98 id. 385; 166 id. 58.

FIRST NAT. BANK v OCEAN NAT. BANK (1875) 60 N. Y. 278.

On bonds deposited. The plaintiff and defendant were corporations organized under the National Currency Act of 1864. The plaintiff deposited bonds with the defendant, in consequence of a circular soliciting the accounts of banks. The defendant's vaults were broken open, and bonds deposited therein were stolen. The evidence tended to establish that the plaintiff, being a customer of the defendant, was in the habit of leaving the bonds stolen in the defendant's vaults over night. No charge was made for this, nor was any authority given permitting it to be done. The court admitted in evidence conversations tending to show that the president of the bank had knowledge of plans to rob the vaults. Judgment for plaintiff. Affirmed at General Term. Appeal.

Allen, J. 1. A corporation cannot be subjected to the liabilities of a bailee, except by the acts of its agents duly authorized, or within the scope of their general powers. 2. The circular issued was in no sense evidence of a consent to become a bailee. 3. The defendant was a gratuitous bailee, and liable only for gross negligence. The bank was not bound to resort to extraordinary measures to protect the property of the depositor. 4. As a mere declaration or admission, tending to prove the fact in issue, the evidence was not admissible. Judgment reversed.

[Ed. Note.—A majority of the judges did not concur in the opinion.]

Cited: 22 App. Div. 455, 456; 25 id. 360; 26 id. 537; 34 id. 361; 42 id. 269; 54 id. 370; 14 Daly 359; 11 Hun 229; 17 id. 423; 39 id. 502; 9 Misc. 458; 15 id. 427; 77 N. Y. 310; 80 id. 93; 82 id. 71; 103 id. 35; 119 id. 272; 139 id. 146; 141 id. 100; 49 Supr. 514; 50 id. 345.

APPLEBY v ERIE CO. SAV. BANK (1875) 62 N. Y. 12.

On deposit. The plaintiff, a depositor with the defendant, lost his passbook, and the money on deposit was drawn out by the finder, who forged the plaintiff's name. The by-laws of the defendant contained a provision, which was also printed upon the passbook, that possession of the passbook would warrant any payment; that all drafts must be made personally or by a duly authenticated writing. The evidence tended to show that the plaintiff had read these rules of the bank; and that the bank clerk had taken due precaution in comparing the forged signature with an original of the plaintiff, and that they appeared very similar. Verdict directed. Judgment for defendant. Appeal.

Church, C. J. 1. If the signatures were dissimilar and the discrepancy easily discoverable, and the clerk failed to discover it, then the question of negligence would be for the jury. 2. It would not be evidence of negligence if the difference was not marked and apparent, and the discrepancy was subject to an honest difference of opinion. 3. The bank officers were bound to use ordinary care and diligence. Judgment affirmed.

Cited: 9 Daly 509; 15 id. 527; 36 Hun 525; 40 id. 304; 62 id. 203, 349; 1 Misc. 172; 6 id. 110; 9 id. 164; 10 id. 180; 13 id. 115; 17 id. 57, 297, 574; 25 id. 719; 33 id. 94; 69 N. Y. 320, 321; 98 id. 663; 127 id. 491; 132 id. 437; 135 id. 557; 56 Supr. 471.

KNAPP, REC'R v ROCHE (1875) 62 N. Y. 614.

Where the charter of a savings bank prohibited its officers from borrowing its funds, directly or indirectly, and the president took checks on the bank, and used them for individual purposes, making payment on checks on other banks where the savings bank kept its funds on deposit, Held, that the taking amounted to an unlawful taking of the funds of the institution.

Cited: 2 App. Div. 476; 10 Misc. 157.

GREEN v WALKILL NAT. BANK (1876) 7 Hun 63.

Conversion. The bank became insolvent and a receiver was appointed by the comptroller of the currency. This action was brought against the bank and receiver to recover the value of a bond which the bank was alleged to have converted to its own use. The complaint was dismissed on the ground that no action would lie against the bank because of its insolvency. Judgment for defendant. Appeal.

Tappen, J. 1. The failure of the bank and the appointment of a receiver did not dissolve the bank. 2. The action is maintainable in this form. 3. The receiver is a proper party. Judgment reversed.

Cited: 88 N. Y. 61.

SOUTHWICK v FIRST NAT. BANK (1876) 7 Hun 96.

Attachment. Defendant was a national bank doing business in Memphis, Tennessee. An attachment was levied on money belonging to it in a bank in New York city. Motion to dissolve the attachment. Denied. Appeal.

Davis, P. J. The provisions of sec. 2 of the Act of Congress of 1873, amending sec. 57, of the National Bank Act, providing that no attachment, injunction, or execution against the bank or its property, shall issue before final judgment in any suit, action or proceeding, in any state, county, or municipal court, do not apply to a non-resident corporation. Order affirmed.

Cited: 14 Hun 126; 19 id. 480. Aff'd: 84 N. Y. 420.

PEOPLE v CONKLIN (1876) 7 Hun 188.

Quo warranto. The charter of the M Savings Bank provided that no director of any other bank was eligible to act as its trustee or officer. Defendant was, at the time of his election, a director in another bank. At the election of trustees for the M Savings Bank, twelve trustees, including defendant, were present and several ballots were taken for president, the by-laws requiring that he should be elected from the board of trustees. On the fifth ballot, at which relator claimed to have been elected president, six votes were given for him, four for defendant, one for another person, and one not voting. Relator claimed that the trustee not voting actually thus voted for him, and secured his election. On another ballot, defendant was elected as a trustee and president, he having resigned the office of trustee shortly before that time. This proceeding was brought to establish the right of the relator to the office of president of the M Savings Bank, and to remove defendant from the office of trustee and president thereof. Judgment for defendant. Appeal.

Daniels, J. 1. In order to constitute an election, a majority of the votes of the trustees present was necessary; and this the relator failed to secure. 2. Defendant's resignation as trustee of the M Savings Bank and his re-election as trustee and his election as president thereof, amounted to a renunciation of his office of director in the other bank. Judgment affirmed.

OCEAN NAT. BANK v CARLL (1876) 7 Hun 237.

After entry of judgment for costs against the plaintiff, a receiver was appointed by the comptroller of the currency, under sec. 50 of the National Banking Act. Held, that the court cannot order the receiver to pay the costs: 1, because the receiver was not a party to the record; 2, because he is not an officer of the court, and is bound to pay over all money collected into the United States Treasury.

PALM v WATT (1876) 7 Hun 317.

On check. R, then in Texas, represented to persons in Pennsylvania that he was G, a long absent relative, desiring to return home; and by means thereof induced them to procure defendants to send the check in suit, payable to G's order, in a letter addressed to him. This letter was received and opened by R. The check was removed, indorsed in the name of G, and purchased by plaintiff for value and without notice. Before the check was paid, the fraud was discovered and payment stopped. The referee held that defendants were estopped from setting up the fraud as against a bona fide purchaser. Judgment for plaintiff. Appeal.

Davis, P. J. Defendants were at liberty to assert the defense, because plaintiff acquired no title through the forgery, and because defendants remained responsible to the real payee of the check. Judgment reversed.

BANK OF CALIFORNIA v COLLINS (1876) 7 Hun 336.

The plaintiff alleged that it was a banking corporation organized under "an act to provide for the formation of corporations," which provided that "no corporation organized under this act shall be deemed to possess the power of issuing bills for circulation as money." Held, the attempt to create a banking corporation under the act was of no effect, and the plaintiff could not maintain an action based on a transaction which was an exercise of banking powers.

LAKE ONTARIO NAT. BANK v ONONDAGA NAT. BANK (1876) 7 Hun 549.

Dissolution of a corporation. The directors of the defendant passed a resolution, that the bank go into liquidation, that its franchise be surrendered, and notice of the resolution served upon the superintendent of the bank department; and that the securities be returned. Plaintiff, a judgment creditor, moved, under 2 R. S., 463, which provided for appointment of a receiver after judgment and execution returned unsatisfied, for sequestration of its property. Defendant contended that the proceedings of the directors, operated to dissolve the corporation, and no valid judgment could be had against the bank. Motion granted. Appeal.

Smith, J. 1. As a corporation can effect its voluntary dissolution only in the manner prescribed in the R. S., the proceedings of the directors were not taken in conformity therewith, such proceedings were ineffectual, rendering the dissolution abortive. 2. The discontinuance of the business under the resolution could work no dissolution of the corporation. Order affirmed.

PEOPLE v COMMISSIONER OF TAXES (1876) 8 Hun 536.

Certiorari to review assessment. The relator was a national bank. In assessing its capital stock, the commissioner included in the estimate of value, the surplus and reserve, deducting the assessed value of the real estate, and this gave each share a value of \$59, the par value being \$50.

Brady, J. The actual value of the shares of relator's stock is the proper standard in assessing the tax to be paid. The par value does not control. Writ dismissed.

HINTERMISTER v FIRST NAT. BANK (1876) 64 N. Y. 212.

To recover penalty for usury. Plaintiff sued under sec. 30 of the National Banking Act to recover twice the amount of interest and excess, paid on certain notes and renewals. The defendant contended that the penalty imposed by the statute could be recovered only for the first act committed; and that judgment should be for twice the amount of excess only. Judgment for plaintiff. Reversed at General Term. Appeal.

Allen, J. 1. The clause is penal and should be strictly construed. 2. The

plaintiff is entitled to recover, within the terms of the act, twice the amount paid in excess of the legal rate of interest as usury, within two years prior to the commencement of the action. Judgment of the General Term modified.

Cited: 20 App. Div. 203, 206; 15 Hun 360; 18 id. 42; 22 Misc. 101, 103; 75 N. Y. 521; 138 id. 415.

WHITE v CONTINENTAL NAT. BANK (1876) 64 N. Y. 316.

Money paid on an altered draft. X drew a draft on plaintiff in favor of H, who, having changed the amount of the draft, presented it to the plaintiff for acceptance. After acceptance, he delivered it to B for value, and it was deposited with the defendant to B's account. Two months after the plaintiff had paid the defendant, the drawee discovered the forgery, and at once notified all the parties. Judgment for defendant. Appeal.

Allen, J. 1. Plaintiff owed no duty to defendant in respect to the forgery, and there was no estoppel. 2. The holder of the bill was held to knowledge of his own title and the genuineness of the indorsements, and of every other part of the bill other than the signature of the drawer. 3. This is a case of a mutual mistake in which neither was at fault. Plaintiff was entitled to recover the money in an action for money had and received. Judgment reversed.

Cited: 35 App. Div. 44; 36 id. 115; 19 Hun 232; 44 id. 54; 76 id. 478; 10 Misc. 682; 22 id. 724; 85 N. Y. 211; 91 id. 79; 100 id. 54; 114 id. 33; 118 id. 476; 122 id. 371; 159 id. 435; 49 Supr. 75.

NATIONAL BANK v SMITH (1876) 66 N. Y. 271.

On promissory note. G made a note in favor of X. It was thereafter indorsed by the defendant, and discounted by the plaintiff. When the note fell due, there was not sufficient money to meet it. Subsequently, money sufficient to meet the note was deposited, but no direction as to its application was given. Another note falling due, this money was applied in payment. Judgment for plaintiff. Appeal.

Per curiam. The general deposit of money without regard to the note, did not operate as payment. In the absence of express directions, the bank was not bound to apply the money upon the note in suit. Judgment affirmed.

Cited: 122 N. Y. 383.

SECURITY BANK v BANK OF THE REPUBLIC (1876) 67 N. Y. 458.

Money paid by mistake. C drew a check on the plaintiff bank, in favor of J. The check was raised, and the name of the payee changed to D, who, in its altered condition, took it to the plaintiff for certification. The check was deposited with the defendant bank, which collected it from the plaintiff. The evidence tended to establish, that, at the time of certification, the teller was apprised of the suspicions of D as regards the check, and was asked to take special care in its certification; the teller replied: "You need not have the slightest doubt about that check, it is correct in every particular." The defendant was not allowed to show that the word "certified" was commonly understood to imply a promise on the part of the bank to pay the full amount indicated on the check. Judgment for plaintiff. Affirmed at General Term. Appeal.

Andrews, J. 1. The evidence was inadmissible. 2. It owes no duty to the drawer or holder of a check, except to make present payment out of the drawer's funds. 3. Certification of a check simply affirms the genuineness of the signature of the drawer, and that he has funds sufficient to meet it. 4. It is no part of a teller's duty to give assurance as to the genuineness of a check, except in respect to the drawer's signature, and any representation beyond this does not bind the bank. Judgment affirmed.

Cited: 22 Misc. 727; 89 N. Y. 422, 424, 428, 429, 433; 91 id. 83; 107 id. 183; 114 id. 79, 80.

PEOPLE, EX REL. v COMMISSIONER (1876) 67 N. Y. 516.

Certiorari, to review assessment of taxes. The relators, shareholders of the G Bank incorporated under ch. 97, Laws of 1865, were assessed for the value of their stock on a basis of the actual value of each share less a reduction for the value of real estate belonging to the bank. The relators contended that the repeal of the provisions of sec. 10, ch. 97, Laws of 1865, by ch. 761, Laws of 1866, was

unconstitutional; and that the assessment was illegal as a taxation of capital, and an improper computation. Judgment for commissioner. Affirmed at General Term. Appeal.

Earl, J. 1. The legislature did not interfere with any constitutional right. 2. The defendant assessed the shares in the bank at the value required by statute (1 R. S. 393, sec. 17). The system of taxing bank stock is in harmony with the taxation of personal property. 3. There was no unjust discrimination against the relators. Judgment affirmed.

Cited: 69 N. Y. 94, 95.

ROEBLING v DUNCAN (1876) 67 N. Y. 598.

Motion to vacate an order of arrest issued under sec. 179 of the code of civil procedure, subd. 4. The defendants were bankers and appeared to be responsible. The plaintiff, their customer for a number of years, purchased of them a draft on their London branch. At the time the defendants, to their own knowledge, were insolvent. The draft was presented and payment refused. The defendants contended that they had ample funds on deposit in London. Those funds had been exhausted by prior drafts. Motion denied. Appeal.

Per curiam. 1. The order of arrest was properly granted. 2. The fact of deposit did not relieve the defendants. 3. The defendants cannot take advantage of a credit induced by their apparent prosperity, and take money which they could not repay, for in so doing, an intent to cheat will be presumed. Judgment, affirmed.

Cited: 31 Abb. N. C. 400; 54 App. Div. 208; 21 Hun 465; 23 id. 62; 43 id. 431; 45 id. 97; 99 N. Y. 135; 123 id. 278; 1 Silv. S. C. 567.

PEOPLE v COMMISSIONERS OF TAXES (1877) 9 Hun 650.

Certiorari to review assessment. The real estate of the relator bank was assessed at \$200,000, and the par value of the stock was \$1,000,000. The assessment of the stock was made by deducting \$8 per share, from the market value for the proportionate value of the real estate. It was contended, that as the assessed value of the real estate was one-fifth of the par value of all the stock, there should be a deduction of one-fifth from the actual value. The statute provided that, in making the assessment, there should be deducted from the value of the shares, such sum as is in the same proportion to such value, as the assessed value of the real estate of the bank is to the whole amount of the capital stock thereof.

Daniels, J. The intention of the law was to deduct the investments in real estate from the par or nominal value of the stock. Judgment accordingly.

Rev'd: 69 N. Y. 91.

BUSHNELL v CHAUTAUQUA CO. NAT. BANK (1877) 10 Hun 378.

To recover deposit. A broker signed a memorandum of sale of oil on behalf of plaintiff to S, to be paid in cash and delivered on ten days' notice. If no notice was given the contract was to expire December 31. This was accepted by S, who deposited \$2,500 with defendant bank, which made the following indorsement on the contract: "T. A. Shaw has this day deposited in the Chautauqua County National Bank of Jamestown, N. Y., twenty-five hundred dollars (\$2,500) which is to be held by us as security for the faithful fulfillment of the within contract. D. N. Marvin, cashier." The oil was not delivered and this action was brought to recover the deposit. No notice was given by the buyer to the seller before he could require a delivery of the oil. The oil was tendered and refused within the time stipulated. Judgment for defendant. Appeal.

Smith, J. 1. The words "contract to expire" were not used in their literal sense, and the true meaning of the clause in question is that the right to call for the oil on ten days' notice and the subsequent obligation to deliver it, should terminate on December 31. The refusal to receive the oil when tendered, was a breach of the contract. 2. The contract by the bank was not ultra vires. 3. The contract with the bank was not illegal, and defendant is estopped from setting up that defense. Judgment reversed.

Cited: 18 Hun 295. Modified: 74 N. Y. 290.

RISLEY v PHENIX BANK (1877) 11 Hun 484.

On check. The plaintiff held a check for \$10,000 drawn to his order by the Bank of G upon the defendant bank, and presented it for payment, which was re-

fused for lack of identification. The plaintiff was then identified, and the check again presented and payment refused. The plaintiff alleged that the defendant was indebted to the Bank of G in the sum of \$10,000, and that the said indebtedness had been assigned to the plaintiff. The plaintiff proved an oral agreement whereby the Bank of G had sold to him the said indebtedness for which it had delivered the above check. Judgment for defendant. Appeal.

Brady, J. Such proof established an oral assignment of the defendant's indebtedness to the Bank of G, and this was not an equitable assignment springing out of the check, but an assignment in fact, valid in law, and creating a good cause of action. Judgment reversed.

Cited: 2 C. C. 277.

NEW YORK TRUST AND LOAN CO. v HELMER (1877) 12 Hun 35.

On promissory notes. The charter of the plaintiff bank authorized it to buy and sell real or personal property and to advance money thereon. The answer alleged that the plaintiff was created by a special act of the legislature, and was engaged in the business of banking, in violation of the laws of the state; that the notes sued on were given for the purpose of raising money, and that when they were transferred to plaintiff, it was agreed for a valuable consideration, that the defendant would retain the proceeds after maturity, giving renewal notes to cover the extension of time. At maturity, the new notes were tendered but the plaintiff refused to accept. Demurrer to answer. Sustained. Judgment for plaintiff. Appeal.

Daniels, J. 1. By the express terms of R. S., title 3, ch. 18, sec. 4, it has no power to discount notes or receive deposits. 2. The allegation of an agreement for a renewal for a good consideration, was equivalent to an allegation that it had been made in writing. Judgment reversed.

Cited: 18 Hun 295; 43 id. 550. Aff'd: 77 N. Y. 64.

WILLIAMSON v MASON (1877) 12 Hun 97.

To annul hypothecation of stock. The plaintiff placed stock with the A Bank, one of the defendants, to secure a sale thereof, and being informed by the cashier of the necessity of placing it in the cashier's name to facilitate the sale, the plaintiff consented. The cashier, after pledging the stock for his own speculation, absconded with the proceeds. Defendant M subsequently purchased the stock at public auction. Judgment for plaintiff against M. Judgment for defendant, A Bank. Appeal by plaintiff.

Daniels, J. The stock was received by the cashier, as the fiscal officer of the bank, within the line of his authority as its agent, and the bank became obligated to the plaintiff for the application of the stock to the purpose intended to be accomplished by its delivery. Judgment reversed.

MERCHANTS LOAN AND T. CO. v BANK METROPOLIS (1877) 7 Daly 137.

On certified check. S bought a piano from S & Co., and in payment gave them a draft, which had been fraudulently raised from \$10 to \$825. The draft was payable to F, whom S represented himself to be, and he indorsed the draft by that name. The amount being greater than the price of the piano, S & Co. drew their check on defendant in favor of F for the difference. The check was then certified by defendant and cashed by plaintiff bank on the identification of S as F, by a person known to plaintiff. Before the check reached defendant, the fraud was detected, and payment, when demanded, was refused. Judgment for plaintiff. Appeal.

Daly, C. J. Plaintiff being an innocent holder can recover. Judgment affirmed.

HOWELL v ADAMS (1877) 68 N. Y. 314.

On certificates of deposit. Plea: Statute of Limitations. The defendant filed a certificate pursuant to the Banking Act of 1854, sec. 6, ch. 242, in which he set forth that he was interested with W in conducting a banking business. The plaintiff, in 1863, deposited money with the firm, and received a certificate of deposit therefor. Subsequently, the defendant sold his interest in the business to W, and caused notices of the sale and dissolution of the co-partnership to be published in local papers. After such dissolution, the plaintiff having no knowledge of the dissolution or sale, continued to make deposits with W. The certificates of deposit,

issued after dissolution, provided for a reduced rate of interest. The action was commenced in 1871. Judgment for plaintiff. Affirmed at General Term. Appeal.

Andrews, J. 1. The discontinuance of the partnership did not relieve the defendant from liability without actual notice of dissolution. 2. The notice of dissolution was properly assumed not to have been given. 3. The Statute of Limitations does not begin to run against a certificate of deposit until a demand for payment is made. 4. The change of the rate of interest must be deemed to have been authorized by the defendant. Judgment affirmed.

Cited: 4 App. Div. 458; 9 id. 366; 27 id. 450; 52 id. 507; 6 Den. 260; 24 Hun 96; 20 Misc. 88; 21 id. 764; 23 id. 209; 33 id. 420; 85 N. Y. 587; 91 id. 111; 100 id. 265; 118 id. 233; 124 id. 286; 166 id. 58; 48 Supr. 5; 49 id. 135.

NASH v WHITE'S BANK (1877) 68 N. Y. 396.

To recover penalties incurred under Laws of 1870, ch. 163. The defendant bank discounted for the plaintiffs bills, deducting therefrom a rate of interest in excess of the legal rate, and crediting the proceeds upon his passbook. The defendant contended there was no evidence to show payment of such interest. Judgment for defendant. Affirmed at General Term. Appeal.

Rapallo, J. 1. The plaintiffs parted with their whole title to the paper, and this is equivalent to payment. 2. There is nothing in the statute which requires that the interest should be paid in money. Judgment reversed.

Cited: 37 Hun 58; 74 N. Y. 330.

PEOPLE, EX REL. v COMMISSIONERS (1877) 69 N. Y. 91.

Where an assessment is made under ch. 761, Laws of 1866, sec. 1, providing that the stockholders of a bank shall be assessed on the value of their stock by deducting therefrom "the proportion to such value of the real estate of the bank, as is the whole amount of the capital stock," held, that the words "whole amount of the capital stock" had reference to the actual value, and not the nominal value of such stock.

ALLEN v WILLIAMSBURGH SAV. BANK (1877) 69 N. Y. 314.

To recover the balance of a deposit. The plaintiff had given the defendant bank his signature and assented to its rules that money deposited should be withdrawn personally, or by the depositor's written order, or by letter of attorney, but that the bank book should be presented and that payments to persons producing it should be deemed valid payments to depositors, the defendant undertaking, however, to use its "best efforts" to prevent fraud. The plaintiff's wife wrongfully obtained possession of his bank book, and, being required by the defendant to present plaintiff's order, forged his signature. Although the forged signature was but somewhat like the genuine, the money was paid her. The court charged that the defendant's liability depended on whether it used its best efforts to procure payment to the proper person, and refused to charge that ordinary care and good faith would protect the defendant. Judgment for plaintiff. Appeal.

Folger, J. 1. Payment upon production of the bank book can be relied upon only if the defendant has used its best efforts to prevent fraud, and defendant's negligence in regard to the check was properly submitted to the jury. 2. The court properly refused to charge as requested. Judgment affirmed.

Cited: 9 Abb. N. C. 150; 22 App. Div. 209; 15 Daly 527; 36 Hun 525; 40 id. 303; 62 id. 350; 64 id. 251; 6 Misc. 112; 17 id. 59, 298, 578; 25 id. 719; 28 id. 253, 254; 84 N. Y. 87; 98 id. 663; 101 id. 63; 127 id. 491; 135 id. 558.

ROSENBAACK v MANUFACTURERS BANK (1877) 69 N. Y. 358.

Application by the receiver of a savings bank to be paid by the receiver of the defendant bank the amount of a deposit. Defense: that the amount mentioned was a loan and not a deposit. An act of 1875, relating to savings banks, provided for a preference in settling the affairs of an insolvent bank, in the payment of money deposited by a savings bank. The savings bank, having a large deposit, made defendant a call loan. In its cash book the amount was entered as a "deposit," but later entries referred to it as a loan. Motion denied. Appeal.

Allen, J. Though the officers of a savings bank had no authority to make such

a loan as this, yet it was a loan and not a deposit, and so not within the act. Judgment affirmed.

Cited: 18 Hun 224.

YERKES v NATIONAL BANK (1877) 69 N. Y. 382.

To recover the value of bonds. The defendant national bank having purchased and retained United States bonds for the plaintiff, a depositor, and collected interest thereon, its cashier agreed, for a consideration, to exchange them for registered bonds. This was not done, and six months later the bonds were stolen from the defendant. The defendant contended that it was without corporate power to make such an agreement, and its cashier without authority to bind it thereby. Judgment for plaintiff. Affirmed at General Term. Appeal.

Earl, J. The defendant, organized under the National Banking Act, had incidental powers, necessary to carry on the banking business, which warranted the making of the agreement sued upon; and the cashier, authorized to manage the bank's ordinary business, bound the bank by this agreement. Judgment affirmed.

Cited: 20 App. Div. 108; 17 Hun 422; 116 N. Y. 621.

CROCKER v WHITNEY (1877) 71 N. Y. 161.

Foreclosure of mortgage. On a sale of the property there was a surplus, claimed by the G National Bank, under a mortgage given it by defendant as collateral security for his notes or for any present or future indebtedness. The dealings were entered in a single account in which defendant was credited with deposits, notes discounted and drafts accepted and his indorsed notes were charged to his account as they matured without protest, and were then surrendered to him. All of his existing indebtedness to the bank was subsequently paid. Judgment that the bank's mortgage was thereby extinguished, and other claimants entitled. Affirmed at General Term. Appeal.

Andrews, J. 1. This amounted to a payment of the notes, and the mortgage securing them was discharged. 2. This mortgage to secure future advances is void under the provisions of the National Banking Act. Judgment affirmed.

Cited: 25 App. Div. 78; 29 id. 143, 144, 146; 56 id. 42; 19 Misc. 569; 79 N. Y. 443; 95 id. 122; 111 id. 105. Rev'd: 103 U. S. 99.

UPTON v NEW YORK AND ERIE BANK (1878) 13 Hun 269.

Insolvency proceedings. The defendant insolvent bank was organized under the General Banking Laws of 1849. It made an arrangement with the defendant savings bank, to receive its deposits on call, and to pay 6 per cent interest. In May, 1875, the legislature passed an act conforming the charters of all savings banks to a uniformity of powers, and authorizing them to deposit a portion of their money with any bank organized under the laws of the state. In case any bank should become insolvent, the claim of the savings banks should have a preference. At the time the bill was passed, the savings bank had large sums on deposit with the insolvent bank. When these deposits were made, the bank gave the savings bank passbooks similar to those given to other depositors. In September, 1875, the bank became insolvent, and defendant H was appointed the receiver. D & Co. having obtained a judgment against the bank, assigned it to the plaintiff. Judgment for the savings bank. Appeal.

Mullen, P. J. 1. The transactions between the bank and the savings banks were deposits and not loans. 2. It was within the power of the legislature to give savings banks a preference; it violated no contract, and disturbed no vested right. 3. The savings banks are also entitled to have a preference for the interest upon the deposits, as it is an incident of the debts. Judgment affirmed.

Cited: 18 Hun 224.

FISHER v MURDOCK (1878) 13 Hun 485.

On bills of exchange. The bills were drawn by the defendant E & Co. of New York, upon defendant C & Co. of Charleston, accepted by the latter firm, and delivered to P, who discounted the bills at the C Bank, which failed and plaintiff became its trustee. P was a member of both defendant firms, vice-president of the bank, and a holder of more than four shares of stock in the bank. The charter of the bank provided, that no director or officer should borrow or use any por-

tion of funds of the bank, and no loan of money should be made by the corporation to any stockholder owning more than four shares of stock therein. Defendant contended that the bank violated its charter and could not recover. Verdict for plaintiff. Appeal.

Ingalls, J. It is unnecessary to hold, in order to maintain the integrity of the charter, that, where an officer or stockholder of the bank is a partner in a firm, a loan to such partnership firm, by the bank, would be void as a violation of the charter, in consequence of interest of such stockholder or officer in the other firm. Judgment affirmed.

RHONER v FIRST NAT. BANK (1878) 14 Hun 126.

Attachment. The defendant, a Pennsylvania bank, was organized under the National Banking Act, and had property in this state which the plaintiff attached. The defendant moved to discharge the attachment under the Act of Congress of 1874, which prohibited the issuing of an attachment by state courts against the property of national banks before final judgment. Motion granted. Appeal.

Brady, J. The states can exercise no control over national banks, nor in any wise affect their operation, except in so far as Congress may see proper to permit. Order affirmed.

Cited: 19 Hun 480.

NAT. BANK OF GLOVERSVILLE v WELLS (1878) 15 Hun 51.

On promissory note. Defendant B made a note for \$2,400 payable to defendant W at the M National Bank. W indorsed the note for the accommodation of B. The note so indorsed was delivered to the plaintiff by B to take up another note indorsed by W. The note was indorsed by the cashier of the plaintiff, and sent by him to the F National Bank to be discounted. This bank discounted the note at 7 per cent and sent the balance to the plaintiff, which received from B compensation for the loan of its credit. Neither of the notes were given to the plaintiff for a loan of money. When the \$2,400 note became due, it was protested and the plaintiff took it up. Subsequently, B made three notes payable to W, which were indorsed by him for accommodation, for the purpose of taking up the \$2,400 note, and other notes held by the plaintiff. B applied the proceeds of the three notes to the payment of notes and liabilities other than the \$2,400 note. The plaintiff had no notice that defendant had indorsed the three notes for any special purpose or had placed any restriction upon their use. Judgment for plaintiff. Appeal.

Learned, P. J. 1. The bank should not be held liable for a misappropriation without clear evidence of notice to them of W's purpose. 2. If there was no loan in any way by the plaintiff to the defendants, for which these notes were evidence or security, the payment by the defendants of money to the plaintiff for any services, or for no services, did not render the notes usurious. 3. As the plaintiff gets title through the other bank, which is a bona fide holder for value, it must be held to be owner of the note. Judgment affirmed.

Cited: 27 Hun 110. Rev'd: 79 N. Y. 498.

CITY NAT. BANK v PHELPS (1878) 16 Hun 158.

On a guaranty. The plaintiff was formerly a state bank. In 1861, the firm of P & K gave the bank an instrument whereby they held themselves responsible for any money advanced to W, not to exceed \$5,000. Thereafter, plaintiff became a national bank. The firm was dissolved in 1863, and notice of it was given to the bank in 1875. After notice of dissolution, P wrote the cashier of the plaintiff regarding this guaranty in which he said: "I regarded the obligation good when given, and believe it to be just as good now, as it was then—so I do not see the slightest advantage of having it renewed. Please let the matter rest." The action was discontinued as to K. The court did not instruct that notice of the dissolution absolved defendants from subsequent liability. Verdict for plaintiff. Exceptions. Motion for new trial.

Gilbert, J. 1. The change of plaintiff from a state to a national bank did not destroy the existence of the identity of the corporation. 2. But the legal effect of the dissolution of the partnership, with notice thereof to the bank, was to absolve both guarantors from liability for advances made after such notice was given. 3. The letter of the defendant was not an assumption of any new or separate liability.

4. A discontinuance of the action against K without an actual release of his liability, would not discharge the defendant. New trial granted.

Cited: 14 Misc. 230; 21 id. 759. Same case: 22 Hun 142; 86 N. Y. 484; 97 id. 50.

FIRST NAT. BANK v FOURTH NAT. BANK (1878) 16 Hun 332.

On draft against the drawer. The C Bank drew on C, a banker, to the order of plaintiff and delivered the draft to plaintiff. Plaintiff indorsed it, and forwarded it to defendant for collection. C gave to defendant his check for the amount on the T Bank in the same place. Defendant did not present the check during the day, and on the next day payment was refused. Although C's account was overdrawn when the check was given to defendant, the T Bank paid or certified all of his checks which were presented that day, pursuant to an arrangement between the T Bank and C. Plaintiff had a deposit to his credit with C, in excess of its draft. Judgment for plaintiff. Appeal.

Davis, P. J. 1. It was defendant's duty to collect the draft, or take such steps as were necessary to charge the drawer, or enable the plaintiff to charge the drawer. 2. It was the duty of defendant to have presented the check of C for payment or certification during the business hours of the day on which it was made. Judgment affirmed.

Reversed for the error as to damages, which should have been nominal on the undisputed facts. 77 N. Y. 320.

HARLEY v ELEVENTH WARD BANK (1878) 7 Daly 476.

Money had and received. Plaintiff, a depositor in defendant bank, deposited a draft on B for collection. This, defendant forwarded to the C Bank for collection. The C Bank sent it to the D Bank for the same purpose. The C Bank, not hearing from it promptly, assumed that it had been paid, and, in its semi-monthly statement to defendant, credited defendant with the amount. This was in turn credited by defendant to plaintiff. Plaintiff, being notified on discovery that the draft had not been paid, insisted that the credit should stand, owing to the great delay. Defendant notified the C Bank that it would be charged for the amount. For three years thereafter, plaintiff's account with defendant was balanced, and the amount of the draft included as a credit in his favor, before defendant charged the amount to plaintiff. Judgment for plaintiff. Appeal.

Larremore, J. Defendant accepted and acted on plaintiff's theory of the case, with a full knowledge of all the facts, and cannot now question it. Judgment affirmed.

Aff'd: 76 N. Y. 618.

SEELEY v NEW YORK NAT. EXCHANGE BANK (1878) 8 Daly 400.

To compel a reissue of stock. Plaintiff owned twenty-five paid-up shares of stock in the defendant. The stockholders voted to reduce the capital stock by returning \$100,000 to the stockholders, and by requiring them to relinquish two-fifths of their stock pro rata. Plaintiff asked that so much of the resolution as required him to relinquish two-fifths of his stock on receiving one-fifth of the amount, be declared void; that the bank be directed, on surrender of plaintiff's certificate for twenty-five shares, to issue to him a new certificate for three-fifths thereof, and pay him \$100 per share for the other two-fifths, and damages. Judgment for plaintiff. Appeal.

Larremore, J. 1. A national bank has no right to retain, as surplus, the moneys received for stock which it subsequently retires. 2. Plaintiff had a right to recover damages. 3. He was entitled to damages for the five shares only, and the bank should, on demand, issue stock for the fifteen shares. Judgment modified.

Cited: 36 Hun 477; 87 id. 440; 9 Misc. 578; 93 N. Y. 435. Aff'd: 78 N. Y. 608, on opinion of court below.

AUBURN CITY NAT. BANK v HUNSIKER (1878) 72 N. Y. 252.

On promissory note against indorsers. Defense: discharge by substitution of a renewal note, not indorsed by defendants; and payment of the discount. Defendants indorsed the original note for the accommodation of the maker, a cor-

poration. At maturity the maker's treasurer presented, in renewal, a similar note without defendants' indorsement. On the plaintiff's refusal to take it, it was left with the amount of the discount, the treasurer saying he would procure defendants to call and indorse the new note as agreed. The plaintiff's bookkeeper entered the new note as discounted, and the old one was paid. Defendants did not indorse the renewal note, and, at its maturity, a third note was presented in the same way and the transaction repeated. The court found that the plaintiff had not discounted the second or third note, or taken them in renewal of the first. Judgment for plaintiff. Affirmed at General Term. Appeal.

Miller, J. If the new notes were received conditionally, and the entries on the bank books were made only in anticipation that the conditional arrangement would be fulfilled, there was no moment of time when plaintiff's right to sue prior indorsers was absolutely suspended, and the indorsers were not discharged. Judgment affirmed.

Cited: 9 App. Div. 337; 13 Daly 537; 16 Misc. 675.

HOLDEN v NEW YORK AND ERIE BANK (1878) 72 N. Y. 286.

To set aside fraudulent assignments of stock. G, the president and sole manager of the defendant, was an executor required by will to invest a trust fund. He sold to the estate stock in the defendant belonging to himself individually and transferred a cash balance in his account as executor to his individual account, which account was, at the time, overdrawn to one-third the amount thus credited. He was otherwise indebted to defendant for more than the balance of the amount. The bank was insolvent and its stock worthless, as G knew. No other officer of the bank took part in the transaction. Plaintiff was successor in the trust, after G's death. The plaintiff refused to receive the certificate of stock issued to G as executor. Judgment for plaintiff. Affirmed at General Term. Appeal.

Folger, J. 1. This bank was chargeable with G's knowledge when making these transfers, whether acquired by him as its agent, or as executor of the estate, or as an individual. 2. The bank was responsible for the fraud to the extent that it profited thereby, which was the full amount transferred from the one account to the other. 3. Plaintiff is the proper person to sue. 4. Defendant was not an innocent third person, and is liable. 5. The bank, being a wrongdoer, was properly charged with interest and costs. Judgment affirmed.

Cited: 31 Abb. N. C. 407; 11 App. Div. 145; 16 id. 600; 1 Den. 343; 19 Hun 357; 36 id. 630; 31 id. 109; 32 id. 110, 371; 50 id. 12; 77 id. 445; 86 id. 251; 8 Misc. 643; 80 N. Y. 168, 169, 170; 96 id. 558; 99 id. 134; 111 id. 457, 610; 139 id. 313; 49 Supr. 15.

THIRD NAT. BANK v BLAKE (1878) 73 N. Y. 260.

On promissory note, against maker and indorser. The indorser was the wife of the maker, and had indorsed in these words: "I hereby charge my separate and personal estate for the payment of the within note," followed by her signature. Defendants offered in evidence an instrument signed by the plaintiff's cashier, providing for surrender and extension. The plaintiff introduced an instrument executed by this indorser, reciting the provisions of the other as to extension of this note and waiving all defense by reason thereof. Judgment for plaintiff against both defendants. Affirmed at General Term. Appeal.

Earl, J. 1. This indorsement is not a mortgage in any sense, but personal security such as a bank may take under the Banking Act. 2. The extension of time was with the knowledge and acquiescence of the indorser, and she is bound by her waiver of any defense on account of it. Affirmed.

Cited: 20 Abb. N. C. 168; 6 Den. 373; 74 N. Y. 85.

WHITE'S BANK v MYLES (1878) 73 N. Y. 335.

On letter of credit authorizing the plaintiff to discount for C to the extent of \$4,000, and to hold the defendant responsible for the same. The letter stated that C would give customers' paper as collateral. It was given by defendant to assist C in a business which required continuous credit at bank. Plaintiff discounted six drafts drawn by C. Defendant alleged that there had been a change in C's business of which defendant had notice. Judgment for plaintiff. Affirmed at General Term. Appeal.

Earl, J. 1. In cases of such ambiguity in a written instrument, the situation of the parties and nature of the business may be considered; and they show this to have been intended as a continuing guaranty. 2. The request to discount included any paper presented, and the statement about collateral was not inserted as a condition or limitation. 3. The agreement being general in terms, a change in C's business did not affect it in the absence of adequate notice terminating the liability. Judgment affirmed.

Cited: 8 App. Div. 103; 36 Hun 59; 72 id. 28; 84 id. 600; 1 Misc. 335; 17 id. 211; 20 id. 683; 21 id. 630; 81 N. Y. 461; 83 id. 348; 100 id. 260; 107 id. 565; 109 id. 494; 142 id. 208; 1 Silv. S. C. 135.

WELSH v GERMAN AMERICAN BANK (1878) 73 N. Y. 424.

On deposit. The balance was conceded to be due unless twelve checks, drawn by the plaintiff at intervals during two years, were chargeable against his account. These checks were paid on forged indorsements, made by a clerk of the plaintiff, who had charge of drawing checks, and were returned to the plaintiff after payment, on the monthly balancing of his passbook. A comparison of the checks with the passbook would not have disclosed the fraud, though comparison with the account of the payee would have done so. Discovering the fraud two years later, the plaintiff promptly notified the defendant. The defendant's request to go to the jury on the question of plaintiff's negligence, and as to whether there was an account stated binding on plaintiff, was refused. Verdict directed for plaintiff. Judgment on verdict. Affirmed at General Term. Appeal.

Andrews, J. 1. The bank was bound to ascertain the genuineness of the indorsement before paying these checks. Payment on forged indorsements did not bind the plaintiff. 2. Plaintiff had a right to assume that the bank would make sure of the indorsements, and owed no duty to the bank requiring him to examine his passbook and vouchers to detect such forgeries. Judgment affirmed.

Cited: 32 App. Div. 320; 60 id. 245, 247; 44 Hun 83; 6 Misc. 63; 8 id. 282; 9 id. 365; 30 id. 383; 91 N. Y. 111; 111 id. 611; 126 id. 328, 330, 331; 144 id. 688; 151 id. 11.

BUSHNELL v CHAUTAUQUA CO. NAT. BANK (1878) 74 N. Y. 290.

On deposit. The complaint alleged that the defendant was a bank in which S made the deposit, and defendant agreed to pay the deposit to plaintiff, if S failed to perform his contract. S failed to perform. Demurrer. Sustained. Defendant contended that the agreement of the bank was ultra vires, and that it was not liable until all remedies against S had been exhausted. S was not a party and the bank had not given him notice of the suit. Judgment for plaintiff. Appeal.

Rapallo, J. 1. The agreement of the bank did not deprive the fund of its character of a deposit, and was not ultra vires. 2. The action was in the nature of a proceeding in rem, and was not based upon any default or breach of contract on its part. 3. The bank should be protected against costs which should be paid out of the fund. Judgment modified.

Cited: 36 Hun 306.

JOHNSON v NATIONAL BANK (1878) 74 N. Y. 329.

To recover a penalty for violation of the National Banking Act in respect to interest on loans and discounts. Defendant discounted for the plaintiff business and accommodation paper at the rate of 12 per cent, of which all the business paper had been paid to defendant. The National Banking Act allowed interest to be taken on loans and discounts, at the rate allowed by the laws of the state where the bank was located and when no rate was thus fixed, at seven per cent. The New York law limited the rate of interest to seven per cent, but fixed no limit to the rate for discount of existing business paper by individuals. Defendant contended that national banks were unrestricted as to the rate on similar discounts. Judgment for plaintiff. Affirmed at General Term. Appeal.

Rapallo, J. 1. The intent of the act of Congress was to limit the rate on discount of commercial paper to seven per cent where no rate was fixed. 2. The act applied to both business paper and accommodation paper. Judgment affirmed.

Cited: 27 Hun 110; 82 N. Y. 302. Aff'd: 104 U. S. 271.

JORDAN v NATIONAL SHOE & LEATHER BANK (1878) 74 N. Y. 467.

On deposit standing to the credit of the plaintiff's intestate P, at the time of his death, October 11, 1876. Answer: that the money originally credited to the intestate consisted entirely of the proceeds of his note, dated July 27, 1876, payable three months from date and discounted at his request by the defendant; that part of it had been paid out before his death; that the note was protested for non-payment at maturity and the balance in the account applied on it; and the defendant claimed to be entitled to set off that sum. The defendant contended that the failure to reply to this answer estopped the plaintiff from opposing this claim; also that late amendments to the code of civil procedure provided for such a setoff. The action was begun in January, 1877. Judgment for defendant. Reversed at General Term. Appeal.

Folger, J. 1. Failure to reply is an admission of the facts set up to support the counterclaim, but not of the legal effect of them as claimed by the defendant. 2. The law of setoff as it stood at commencement of the action governs, and a demand, to be set off against an administrator in an action brought by him, must have been due and payable from the decedent in his lifetime. 3. The defendant did not have a lien on the deposit for any indebtedness of the depositor not yet matured. 4. No equitable case is made or fact averred on which to found jurisdiction for allowing a setoff in equity. Judgment affirmed.

Cited: 14 App. Div. 435; 28 id. 490; 31 id. 9; 36 id. 484; 33 Hun 88; 39 id. 219; 53 id. 627; 71 id. 337; 87 id. 126; 8 Misc. 151; 18 id. 545; 26 id. 122; 80 N. Y. 563; 82 id. 17; 84 N. Y. 148; 85 id. 586; 89 id. 508; 119 id. 58, 59; 130 id. 521; 159 id. 449; 48 Supr. 55.

WILLIAMS v WEAVER (1878) 75 N. Y. 30.

To recover for an unlawful tax levy. The plaintiff, president of a national bank, in behalf of himself and other stockholders, sued defendants, city assessors, for levying on their property to collect a tax on shares of the bank stock. The bank's capital was invested in United States bonds, and the shares were assessed at par without reference to market value. Judgment for defendants. Affirmed at General Term. Appeal.

Miller, J. 1. Since these assessments were made on the par value of the shares instead of the real market value, they are clearly erroneous under the tax laws requiring assessments upon actual value. 2. The assessors are not personally liable even for an erroneous assessment unless they acted without jurisdiction. 3. The federal statute allows stock in national banks to be included in the valuation of personal property of the owners, and the state may tax the shares, though the bank's capital be invested in United States bonds. Judgment affirmed.

Cited: 35 App. Div. 210; 26 Hun 503; 102 N. Y. 185. Aff'd: 10 Otto (100 U. S.) 547.

NATIONAL BANK v LEWIS (1878) 75 N. Y. 516.

On note against accommodation indorser. Answer: that the note was discounted by the plaintiff for the sole benefit of the makers, the plaintiff knowingly and usuriously taking interest greater than 7 per cent; that there should be adjudged a forfeiture of the entire interest on the note, under the National Banking Act, prohibiting usury on the part of banks, and providing for such forfeiture, and a recovery back of twice the amount paid. It was contended that the answer set up no defense. Plaintiff's objection being sustained, the defendant was not allowed to prove the facts alleged. Judgment for plaintiff. Affirmed at General Term. Appeal.

Miller, J. 1. The facts stated established a case within the meaning of the act of Congress referred to. Where the excessive interest has been paid in advance the forfeiture provided for by the statute means a refunding, and in a suit on the obligation recovery may be limited to the actual sum loaned. 2. An accommodation indorser is entitled to the benefit of this provision in setoff when called on to pay the obligation. 3. It makes no difference that the note upon its face carries no interest with it. Judgment reversed.

Cited: 2 App. Div. 108; 23 id. 355; 24 id. 330; 29 id. 305; 83 Hun 420; 7 Misc. 430; 22 id. 103; 106 N. Y. 72; 165 id. 259.

SISTARE v BEST (1879) 16 Hun 611.

Breach of contract. The M Savings Institution, of which the defendant was receiver, made a loan on 1,750 shares of the A Co. The directors of the bank instructed its president to sell the stock and report his proceedings at the next meeting of the board. The president sold a part of the stock at \$10 per share. He instructed the plaintiff to sell 500 shares at \$25 per share. The plaintiff sold the stock to D, and at once notified the president. The president then informed the plaintiff that he had sold the stock, but through inadvertence, had neglected to inform him. D required the plaintiff to fulfill his contract. Plaintiff, being unable to deliver the stock, was compelled to pay D \$4,100. The Act of 1853 prohibited savings banks from loaning on securities. Complaint dismissed. Judgment for defendant. Appeal.

Ingalls, J. 1. The president was the general agent for this service. As he received no specific instructions which restricted his authority in regard to the plan or mode of sale, the bank was liable for his acts. 2. The corporation cannot assert its own wrong as a defense to the just claim of the plaintiff. Judgment reversed.

HURD v GREEN (1879) 17 Hun 327.

On bond. Defendant executed to T Savings Bank a bond under seal in consideration that the bank, at his request should continue business after January 19, 1874. The bond was given December 31, 1873, and defendant bound himself to pay the bank a sum of money on January 1, 1883, or six months after demand. Defendant set up a counterclaim for salary as president, but made no demand and could not state with certainty how much he had received. Defendant was a trustee of the bank from its organization until it was dissolved and plaintiff appointed receiver. Defendant knew that the bank was embarrassed and required support. Verdict directed. Judgment for plaintiff. Appeal.

Ingalls, J. 1. The seal imported a consideration, and it was at least presumptive evidence of sufficient consideration. The request of defendant in the bond constituted a sufficient consideration. There were reciprocal agreements and those of the party were a consideration for those of the other. 2. The defense of ultra vires will not be sustained, when the contract is not tainted with fraud, or expressly prohibited by statute, and has been fully or partly executed, so that it would be unjust to allow a repudiation by either party. 3. The intention was to make the bond payable on January 1, 1883, or at any time previous thereto, after the expiration of six months from a demand of payment. 4. Defendant failed to establish facts which entitle him to an allowance of his counterclaim. Judgment affirmed.

Cited: 11 Misc. 586. Aff'd: 78 N. Y. 588.

CUTTING, REC'R v MARLOR (1879) 17 Hun 573.

For money lent. The defendant borrowed money from the B Association, of which the plaintiff is receiver, depositing stocks and bonds with it to secure the loan. The president, while in charge of the association's business as general manager, converted the securities to his own use. The association had power to make the loan and to obligate itself to return the collaterals. The defendant contended that the negligence of the trustees of the association rendered it liable for the acts of the president. Judgment for defendant. Appeal.

Daniels, J. 1. The association's contract was broken because of the misconduct of its own officer and agent in the exercise of the authority which it had conferred upon him. 2. The corporation is not exonerated from liability for the misconduct of such an officer, when it has been so extended as to create a failure on its own part to perform a legal and binding obligation resting upon the corporation itself. Judgment affirmed.

Aff'd: 178 N. Y. 454.

ATLANTIC STATE BANK v SAVERY (1879) 18 Hun 36.

On promissory note. The note in question was made by C & Co. payable to their own order, and indorsed by them and defendants L, and J S's Sons. The firm of J S's Sons had no interest in the note, and L indorsed the firm name. Defendant L was a member of both firms, and, being indebted personally to L, S & Co., delivered the note to them; they sold it to the plaintiff at 9 per cent discount. L, S & Co. gave L credit for the amount of the note. L, S & Co. knew at the time

that S's Sons had no interest in the note, and that the proceeds were to be applied on the individual debt of L. S. of L, S & Co., was a director in the plaintiff bank, but his knowledge of the transaction was not received by him, as director or officer of the plaintiff, and he never acted upon the matter for the plaintiff in any official capacity. Verdict directed for plaintiff. Motion for new trial. Denied. Exceptions.

Dykman, J. 1. When a partner acts on his private account, the use of the partnership name is fraudulent and void, when so used with the knowledge of the creditor. 2. The good faith of L, S & Co. is impeached in the transaction, and no recovery could have been sustained in their favor against the defendants. 3. The unofficial knowledge or acts of a director are no more operative on the bank than are those of a stranger. 4. Plaintiff was a bona fide holder for value. The power to discount includes the power to purchase. Judgment for plaintiff.

Cited: 64 Hun 179. Aff'd: 82 N. Y. 291.

FIRST NAT. BANK v TISDALE (1879) 18 Hun 151.

On promissory note. Defendant made the note, payable to the order of the T Co., which indorsed it and had it discounted by the plaintiff, a bank. This note was given in renewal of a draft and another note. Defendant introduced evidence, under objection, that he was only an accommodation maker, and that the president of the plaintiff agreed orally with him that he should not be called on to pay the note. Judgment for defendant. Appeal.

Learned, P. J. 1. The bank was not an accommodation borrower as it parted with value for this note, by placing the avails to the credit of the company, and charging up the old note and draft, and surrendering them. 2. It is not within the authority of the president of a bank, when he discounts paper, to promise the maker that he need not pay it. 3. The evidence was inadmissible as it contradicted a written instrument. Judgment reversed.

Cited: 42 Hun 539; 48 id. 473; 22 Misc. 575. Aff'd: 84 N. Y. 655.

MATTER OF PATTERSON, REC'R (1879) 18 Hun 221.

Insolvency proceedings. In 1877, the T Savings Bank entered into an agreement with the M Bank to deposit with the M Bank one fourth of its money, to be payable at sight, the M Bank to pay 4 per cent interest on all balances. The other three fourths were to be deposited with three other banks. The M Bank agreed not to pay interest on small deposits of others. The Law of 1875 provided that savings banks could deposit a certain portion of their deposits with any bank in New York, organized under the laws of the state, and in case of the insolvency of the bank, the savings banks were to have a preference for the amount of their deposits. The M Bank failed and the savings bank applied to have its deposit paid in preference to the other creditors under the Law of 1875. The receiver contended that this money was lent to the bank, and not deposited with it. Motion granted. Appeal.

Learned, P. J. 1. The moneys are spoken of as deposits and they have all the characteristics of deposits. 2. The fact that interest was to be paid on them, does not change their character, or prevent them from being deposits in the ordinary meaning of the word. 3. The whole amount, therefore, of these deposits was entitled to a preference under the Law of 1875. 4. The agreement not to pay interest on small deposits of others, did not change the character of these deposits. Order affirmed.

Aff'd: 78 N. Y. 608.

HUMPHREY v THE PEOPLE (1879) 18 Hun 393.

Indictment for embezzlement, against the secretary of a savings bank. A book of the bank in the handwriting of the defendant and one kept by the treasurer, showing the amounts paid to the bank by defendant, were received in evidence. The latter was kept in the due course of business of the bank, and was admitted against objection of defendant. Defendant was not permitted to show that the officers of the bank were in complicity with him, and that false entries were made with their knowledge and approval, to deceive the bank department. Defendant convicted. Error.

Dykman, J. 1. By the records of the officers all the officers of the bank must be bound, whether made by them individually or by agents of the institution

whose duty it is to keep them. 2. The testimony offered by defendant comes to little more than a claim that others are implicated in guilt with him. Judgment affirmed.

CENTRAL NAT. BANK v VALENTINE. (1879) 18 Hun 417.

Where a bank discounted notes and gave the makers credit on the books of the bank, though no money was actually paid, Held, not sufficient to constitute the bank a bona fide holder for value.

Cited: 80 Hun 259.

FISHKILL SAV. INSTITUTE v BOSTWICK REC'R (1879) 19 Hun 354.

Conversion of government bonds. The plaintiff, a savings bank, occupied the same offices with the Bank of F, and its business with its depositors was all conducted through it. B, treasurer of plaintiff and cashier of the Bank of F, was the active manager of both institutions. The plaintiff had its board of trustees, and president; and the Bank of F had its board of directors and president. The president of the plaintiff signed the blank transfers making the bonds transferrable by delivery. B, without the knowledge of the trustees of the plaintiff, or of the directors of the Bank of F, pledged the bonds to W D & Co. for amount due them from the Bank of F. Subsequently the bonds were sold by W D & Co. and the proceeds applied on the account due from the Bank of F. The Bank of F failed and passed into the hands of the defendant as receiver. Judgment for plaintiff. Appeal.

Gilbert, J. 1. The act of the cashier was beyond the scope of his employment, but as the bank secured the money, it amounted to a ratification of the cashier's embezzlement. 2. The securing of the money was within the cashier's employment and his knowledge will be imputed to the bank. 3. The bank cannot retain the money and repudiate the agency by which such money was obtained. Judgment affirmed.

Aff'd: 80 N. Y. 162.

ZUGNER v BEST (1879) 12 Jones & S. 393.

Replevin. The plaintiff purchased a bond, and left it with the cashier of the G Savings Bank, of which the defendant was receiver. The cashier receipted for it in plaintiff's bank book. Plaintiff's husband attempted to transfer the same to the bank, he being one of its trustees, and wishing to avert its collapse. The defendant contended that the bank was the owner of the bond. Appeal.

Curtis, C. J. The bank having notice that the bond belonged to the plaintiff acquired no title. Judgment affirmed.

FREUND v IMPORTERS AND TRADERS BANK (1879) 76 N. Y. 352.

On deposit. Plaintiffs drew a check on defendant payable to O, or order, for his accommodation, without restriction. O transferred it to B, to whom he was indebted, without indorsement. B procured it to be certified. After certification, plaintiffs notified defendant not to pay, but defendant paid the check to B. Judgment for defendant. Appeal.

Foyler, J. 1. The check gave the lawful holder a right to demand and recover payment. 2. It was a chose in action and assignable by parol with manual delivery. 3. The check having been given without restriction to O, and by him used to pay a debt to B before it was recalled by plaintiffs, B became the owner with the right to enforce it against the drawers. 4. Before notice to stop payment, defendant had certified it, which had all the legal effect which certification would have had, had it been indorsed by the payee. 5. The effect was the same as though defendant had paid the money upon it. Judgment affirmed.

Cited: 59 Hun 581; 6 Misc. 81; 14 id. 174; 82 N. Y. 6; 89 id. 523; 104 id. 118; 107 id. 182, 183; 110 id. 92; 118 id. 355, 357.

LOAN & TRUST CO. v HELMER (1879) 77 N. Y. 64.

On promissory notes made by defendants to their own order, indorsed by them, and transferred before maturity to plaintiff, a trust company. Plaintiff's charter authorized it to buy and sell property, to hold the same in trust or otherwise, and

to advance money, securities, and credits on any property. Answer: that the plaintiffs discounted the notes while illegally carrying on a regular banking business, and that there was an agreement for value, made at the time of discount, to extend payment by giving renewals, and that plaintiff refused to accept the renewals when tendered. Demurrer to answer. Overruled. Judgment for plaintiff. Reversed at General Term. Appeal.

Miller, J. 1. Plaintiff exceeded its powers in discounting the notes, and violated its charter and the laws of the state passed to restrain illegal banking. 2. The other defense was sufficient. Judgment of General Term affirmed.

Cited: 58 Hun 330; 79 N. Y. 444; 82 id. 306; 102 id. 335; 156 id. 560; 162 id. 310; 56 Supr. 289.

PIERSON v ATLANTIC NAT. BANK (1879) 77 N. Y. 304.

To recover loans alleged to have been made by a life insurance company of which plaintiff was receiver, to defendant. Defense, that the loans were made to defendant's cashier, and not to it. Conversations between T and plaintiff, officers, prior to, at the time of, and after the transaction, and evidence as to entries of a former loan, were admitted as evidence. Evidence was also admitted to show that defendant's receiver had made contradictory statements. Judgment for plaintiff. Affirmed at General Term. Appeal.

Miller, J. 1. The papers and entries on the books of the plaintiff's company, on their face, establish that the loans were made to T individually, and not to the bank, but it was competent to show by parol testimony that the loan was to the bank. 2. The conversations between the officers at the time and after the transaction were competent. 3. The entries in defendant's books were properly admitted. 4. It was proper to receive evidence to contradict defendant's receiver. Judgment affirmed.

FIRST NAT. BANK v FOURTH NAT. BANK (1879) 77 N. Y. 320.

Damages for negligence of defendant as agent of plaintiff, in failing to collect a draft sent to it by plaintiff. Plaintiff sent defendant for collection, a sight draft on C & Co. of New York. The draft was presented by defendant on May 26, and the drawees gave a check on the T Bank which was presented the next day, when the T Bank refused to pay, C & Co. having failed. Defendant at once returned the check, received the draft, which was then presented, protested, and the next day notices of protest were mailed to the plaintiff and the drawer. The account of C & Co. at the bank was overdrawn, but the bank had honored checks under such circumstances, P & Co. making their account good the following day, and checks drawn subsequently to the ones in question were paid down to the time of failure. The check would have been paid, if promptly presented. Only nominal damages were proved. Judgment for plaintiff for full amount of draft. Affirmed at General Term.

Earl, J. 1. Sufficient was done to charge the drawer. 2. The defendant was bound to present the check and demand the money with reasonable diligence, and the delay was at its peril. 3. Defendant was chargeable with nominal damages only, as the presumption was that the drawer was solvent. 4. In the absence of proof it is assumed that the common law prevailing here, prevails in another state. Judgment reversed.

Cited: 22 Hun 358; 24 id. 242; 89 N. Y. 416; 128 id. 23; 138 id. 495.

Reversing: 16 Hun 332.

WHITING v CITY BANK (1879) 77 N. Y. 363.

Damages for negligence of defendant in omitting to charge an indorser of a note sent by plaintiff for collection. The note, payable at defendant, indorsed by payee to plaintiff, due Sunday, July 4, 1875, was marked "paid" July 3. The maker failing on July 6, defendant stopped payment of the draft it had forwarded, and at its request the plaintiff returned the draft. Defendant protested the note on the 6th, mailing notice of non-payment to the indorser, both dated July 3. The maker had insufficient funds in the bank to meet the note. The bank claimed the payment was by mistake. Judgment for defendant. Affirmed at General Term. Appeal.

Rapallo, J. 1. It was not necessary to make demand for payment at the same bank where the note was sent for collection. 2. The notice was in time. 3. There

was no presumption that the payment was made by mistake, but the payment was presumed to be voluntary. Judgment reversed.

Cited: 165 N. Y. 136.

PEOPLE v MERCHANTS & MECHANICS BANK (1879) 78 N. Y. 269.

Petition for a preference. The C Bank forwarded to defendant, a bank, a check drawn by T Bank thereon, for payment. The defendant charged the check to the T Bank's account, sent it to the T Bank as paid, and sent to the C Bank a draft on a New York bank in payment of the check. The draft was not paid, although the T Bank's deposit in defendant exceeded the amount of the draft. The defendant failing two days later, a receiver was appointed. The C Bank's application for an order directing the receiver to pay petitioner out of the assets the amount of the check forwarded was denied. Affirmed at General Term. Appeal.

Rapallo, J. 1. As there was no actual setting apart or appropriation of any specific fund or property of the bank or of the drawer for the payment of the check, the bank was simply a debtor to the depositor and no trust was created. 2. If the holder of the check trusted to the C Bank to remit, the result was to give credit to the bank, not to constitute an agency. Order affirmed.

Cited: 8 App. Div. 214; 50 id. 36; 10 Daly 180; 39 Hun 189; 43 id. 229; 77 id. 168; 91 id. 79; 80 N. Y. 106; 96 id. 36.

BARTOW v PEOPLE (1879) 78 N. Y. 377.

Indictment, for embezzlement. B was treasurer of a state savings institute, and was charged with having converted its bank notes to his own use. He was also cashier of the F Bank. These two corporations did business in the same room, and over the same counter. The money of the savings institute was deposited with the bank. A bond, the property of the institute, was placed, by it, for collection with F, its attorney, who collected the money and deposited it to his own credit at the F Bank. He afterward drew out part, and with the balance made a package which he addressed to B, whether individually or officially was not shown. B took it to New York and deposited it with the correspondent bank of the savings institute, to the credit of the F Bank. The amount in the package was not entered on the books of the F Bank or the savings institute, though B acknowledged receipt of it, as cashier. The money was afterward drawn out by the F Bank, which subsequently failed. Conviction. Error.

Danforth, J. The evidence was insufficient to establish that the money came into defendant's possession or under his care by virtue of his office as treasurer, and nothing short of this will sustain the indictment. Judgment reversed.

Cited: 92 N. Y. 568.

MATTER OF THE GUARDIAN SAV. INSTITUTION (1879) 78 N. Y. 408.

Receiver's account. Q was appointed receiver of an insolvent savings institution and O became his surety. R appointed Q trustee to dispose of his property, and apply the proceeds to pay creditors of the savings institution who should assign to R their claims. Q received the proceeds of R's property, and paid certain creditors of the savings institution, and the referee in settling Q's accounts as receiver, gave him credit for such. These items were disallowed at special term. The order permitted O to appeal on stipulating to be bound by the decision thereon. O gave the stipulation, and appealed to the General Term. Order affirmed. Appeal.

Danforth, J. 1. The surety is the party aggrieved, and he is entitled to be heard in this court. 2. The money paid to the creditors was not derived from the property of the bank, and the creditors of the bank were not entitled to it. The money derived from the trust estate and which was used to pay creditors, became a debt of the bank merely, for which the receiver is not entitled to credit until it is canceled. Order affirmed.

CUTTING v MARLOR (1879) 78 N. Y. 454.

To recover a loan made by the B Bank to defendant. Plaintiff was receiver of the B Bank. Defendant demanded a return of collateral security deposited with the B Bank, which had been converted by its president. The president had access to the vault containing securities. No examination of the securities was made by the trustees. Defendant counterclaimed their value. The trial court found that the

trustees of the B Bank had not exercised ordinary care, and that its system of management was grossly negligent toward its dealers. Judgment for defendant. Appeal.

Church, C. J. 1. The corporation is liable for the conversion of the securities in question. 2. The bank is not excused by the fact that the conversion might have taken place despite the utmost vigilance. Judgment affirmed.

Cited: 119 N. Y. 267, 273; 132 id. 46.

HURD v KELLY (1879) 78 N. Y. 588.

, On bond given by defendant and others to a savings bank, of which plaintiff was receiver. The obligors severally promised to pay certain sums on January 1, or six months after demand made. The consideration recited was the continuation of business by the bank. The bond recited that it was to aid the bank to make a better showing with the banking department. Defendant offered to prove that he signed the bond on the representation that other persons named would sign, and that it was only to take effect against him if the others did sign. Refused. Defendant contended: 1, that the bond became due on January 1; 2, that there was no consideration; and 3, that there was a fraudulent concealment of the bank's condition. Judgment for plaintiff. Affirmed at General Term. Appeal.

Andrews, J. 1. The bond was payable six months after demand of payment by the bank, made at any time after its execution. 2. The continuance of the bank's business and the incurring of new obligations incident thereto, constituted good consideration. 3. There was no fraudulent concealment of the bank's condition. 4. The allegations were insufficient to show that the bond was delivered in escrow, or upon condition that it should be executed by the other parties. Judgment affirmed.

Cited: 11 Misc. 587.

BEST v THIEL (1879) 79 N. Y. 15.

To foreclose a mortgage executed by defendant to H, and by him assigned to a savings bank, of which plaintiff became receiver. The defendant was a trustee of the savings bank, and executed the mortgage and had it assigned to the bank for the purpose of making up the deficit in the bank's assets, thus enabling the bank to continue its business. Defendant contended that there was no consideration and that the mortgage was illegal. Judgment for plaintiff. Appeal.

Earl, J. 1. Sec. 21, Laws of 1875, ch. 371, prohibiting a trustee of a savings bank from becoming a surety or an obligor for moneys loaned or borrowed of such corporation, does not apply, because defendant did not become a surety or obligor for any money loaned, as the deficiency was caused by a loss on a loan made long before the mortgage was given. 2. The seal was presumptive evidence of consideration. 3. Defendant was estopped from denying the legality of the mortgage. Judgment affirmed.

Cited: 37 App. Div. 170; 2 Misc. 375; 6 id. 578; 11 id. 587; 15 id. 119; 145 N. Y. 662.

VAN DYCK v McQUADE (1880) 20 Hun 262.

Debt. The defendant was a customer of the A Bank, and when it failed he owed it over \$5,000 for overdrafts. At the time of the failure, the bank had on deposit to the credit of Q and J over \$5,000, and by an agreement made with the bank some time before its failure, the defendant was to have these accounts credited to him. The bank made no such application before its insolvency. 2 R. S., 399, sec. 4, prohibits fraudulent transfers of the effects of insolvent corporations. Judgment for plaintiff. Appeal.

Gilbert, J. 1. The agreement imposed no obligation whatever on the bank, but merely gave the bank an option to resort to those accounts. An exercise of the option would have indirectly contravened the statute, and violated the principle of equality in the distribution of the assets of such corporation which the law enjoins. Judgment affirmed.

Cited: 36 Hun 609. Aff'd: 85 N. Y. 616.

GRAHAM v FIRST NAT. BANK (1880) 20 Hun 326.

To recover dividends. J purchased 196 shares of the capital stock of the defendant, and directed that the shares be issued in his wife's name. In 1865, J

delivered the certificate of stock to the plaintiff as security for a loan. During the time the plaintiff held the stock, the bank paid the dividends in question to J. In 1866, J's wife, without any consideration, assigned to the plaintiff all claims against the defendant. The law of Virginia, where the bank was located, allowed J to reduce these dividends into possession. By the law of Maryland, where J lived, these dividends were the separate property of the wife. Judgment for defendant. Appeal.

Barrett, J. 1. The declaration of the dividend imported a contract to pay the amount to the shareholders registered on its books. 2. The place of the contract was that of the corporative action. 3. Every consideration of public policy and business interest is opposed to the application of the *lex domicilii* to such payments. Judgment affirmed.

Aff'd: 84 N. Y. 393.

WEST v FIRST NAT. BANK (1880) 20 Hun 408.

To recover deposit. The plaintiff deposited the money in question with the teller of defendant, receiving from him a certificate of deposit signed by V, who was president of defendant. In issuing certificates, the defendant in some cases, issued them purporting to be issued by the bank itself, and in others by V, individually. V became insolvent, and defendant refused to redeem the certificate. Plaintiff testified, under objection, that he believed the certificate was defendant's certificate, otherwise he would not have accepted it. It was shown that the directors knew that V's certificates were given for money deposited at the bank. Judgment for plaintiff. Appeal.

Bockes, J. 1. The plaintiff was not bound, by his acceptance of the certificate, to notice that the deposit was taken and accepted by V and not by and for defendant. 2. Defendant is estopped from denying its liability. 3. It was not error to admit the testimony of the plaintiff as to his understanding about the certificate. 4. It was not error to admit the testimony as to the directors' knowledge of the V certificates. Judgment affirmed.

HIBERNIA NAT. BANK v LACOMBE (1880) 21 Hun 166.

Attachment. The M Bank of New Orleans gave a bill of exchange, dated March 17, to the plaintiff, located at New Orleans, drawn upon a New York banker. Payment having been refused on March 26, the bill was protested and notice thereof given. The M Bank failed on March 19, and on the same day a judgment was entered declaring its charter forfeited, and appointing the defendants commissioners in liquidation. The Louisiana statutes provide that every banking company established under the act shall, upon proof of insolvency, forfeit its corporate rights. The action was commenced by an attachment of the funds in the hands of the New York banker. Judgment for plaintiff. Appeal.

Barrett, J. 1. The corporation lives and exists, so far as to enable creditors to proceed against property here quasi in rem. 2. The cause of action was complete upon presentment, refusal, protest and notice, all the acts occurring here. 3. The plaintiff has a right, as against the liquidators, to take advantage of our laws and to proceed thereunder, as the liquidators are not vested, as assignees having an interest, with the property within our jurisdiction. They have no status to dissolve the attachment. Judgment affirmed.

Cited: 25 Hun 99; 37 id. 487; 43 Hun 578. Aff'd: 84 N. Y. 367.

MCLEAN, ASSIGNEE v EASTMAN, EX'R (1880) 21 Hun 312.

To recover a dividend illegally paid. The plaintiff, as assignee in bankruptcy of the F Bank, organized under the Law of 1838, brought this action to recover \$400, which was paid to defendant's testator, a stockholder of the bank, as a dividend upon his stock. The bank, at the time of paying the dividend, had earned no profits and was in fact insolvent. The testator received the dividend in good faith supposing that it had been earned. The officers were not then aware that the bank was insolvent. Judgment for defendant. Appeal.

Smith, J. 1. The lien of creditors of an insolvent corporation upon its assets in the hands of others, is a purely equitable lien, and can only be enforced in an equitable proceeding. 2. The stockholder acquired a valid title to the money against the bank. 3. The provisions of the R. S. relating to moneyed corporations, do not apply to banking associations organized under the General Banking Law of 1838. Judgment affirmed.

SMITH v RATHBUN, EX'R (1880) 22 Hun 150.

To enforce liability of bank directors. The action was brought by the bank and a stockholder against the directors, for negligently permitting the president of the bank to loan, use and waste the funds of the bank; for permitting him to defraud and injure it, and the stockholders, and for making untrue reports of the bank's condition. Demurrer: 1, to jurisdiction; 2, defect of parties; 3, causes of action improperly joined; 4, no cause of action was stated. Overruled. Appeal.

Learned, P. J. 1. The president was not a necessary party, for as long as he should remain indebted to the bank he could not share in the recovery. 2. The pleadings do not show that there were other directors, and if there were, such other directors may not have aided or countenanced the acts of the president. 3. The right of a stockholder to sue in such cases depends upon the refusal of the bank to sue, for the right of action is primarily in the corporation. 4. The demurrer did not put in issue the validity of the order making the bank a party plaintiff, and it must be treated as if the action had been commenced by both. 5. There was but one cause of action stated. Judgment affirmed.

Cited: 37 Hun 181.

MOTT v HAVANA NAT. BANK (1880) 22 Hun 354.

Negligence. A note was given by N to the E Co. in part payment of a steam engine and was indorsed by W, for the accommodation of N, and by E Co. and transferred to plaintiff before maturity. The note was left with the defendant for collection, and read "I promise to pay the E Co. \$450, being in part payment of an engine, which engine shall remain the property of the owner, until the amount herein secured is fully paid." The note was protested, but no notice given the indorser. Plaintiff proved the recovery of judgment against N, the sale under execution of the engine for \$68, and notice to defendant's cashier and notary, the indorser W's post office, which was six miles from where the bank was located. Defendant contended: 1, that the note was not negotiable; 2, that plaintiff had sustained no injury, as N was primarily liable. Evidence was excluded, showing that plaintiff held collateral security for the debt. Verdict for plaintiff. Appeal.

Talcot, P. J. 1. The note was an agreement to pay money to the payee on a certain day, and contained all the requisites of a negotiable note, and the statement that the engine was to remain the property of the owner did not render it non-negotiable. 2. In an action for negligence the plaintiff can recover no more than the amount which will fully compensate him for the injury sustained by the negligence. 3. The evidence should have been received. Judgment reversed.

Cited: 50 App. Div. 69; 54 Hun 120.

RYAN v MANUFACTURERS & MERCHANTS BANK (1880) 9 Daly 308.

False representations. Plaintiff left with defendant, for collection, a draft on a London bank. After the draft had been protested, defendant's president was directed by plaintiff to return the draft to London for suit, by a solicitor to be selected by the president. The latter without knowing his statements were untrue, informed plaintiff that the draft would not be paid without suit, but that it might be compromised for 50 per cent. Thereupon, plaintiff agreed to compromise and the president then gave the draft to a lawyer, telling him he might have half for collecting. The full amount was collected. The lawyer was given half and the balance paid plaintiff. Plaintiff then knew that the full amount had been collected. Plaintiff claimed misrepresentations were made by the president. Judgment for defendant. Appeal.

Larremore, J. 1. The bank is not liable, because the president is not shown to have known that the representations were untrue. 2. It was no part of the business of the bank to select an attorney for outside parties, or to engage in compromising claims for them. Judgment affirmed.

PRATT v SHORT (1880) 79 N. Y. 437.

On promissory note against indorser. P Savings Bank discounted a note, indorsed by defendants, the payees, who received the proceeds of the discount. The note was taken by defendants for a debt due them from the maker. The note was dishonored and protested. The bank became insolvent and plaintiffs were appointed assignees. Plaintiffs alleged: 1, the indorsement; 2, money lent and advanced to

defendants on the security of the note; 3, money had and received. Judgment for plaintiff. Reversed at General Term. Appeal.

Andrews, J. The bank being prohibited from discounting or loaning money on the security of commercial paper, the discount in question was unlawful, and the note was void, but the money loaned may be recovered. If the defendants avoid their indorsement, they should restore the money they received on account of it. Judgment of General Term reversed.

Cited: 8 App. Div. 433; 16 id. 437; 25 id. 77, 78; 56 id. 42; 32 Hun 276; 58 id. 330; 66 id. 541; 76 id. 173; 79 N. Y. 452; 84 id. 201; 95 id. 121; 102 id. 335; 151 id. 37; 156 id. 560; 162 id. 310; 49 Supr. 499.

PRATT v EATON (1880) 79 N. Y. 449.

To foreclose a mortgage, executed by defendant as collateral for any bill, note, check, etc., in transaction with a savings institution, of which the plaintiffs became assignees in bankruptcy. The institution held four notes of defendant discounted by it for him. Judgment for plaintiffs. Reversed at General Term. Appeal.

Andrews, J. The institution had no power under its charter to loan money on personal security, or to discount notes. But where a loan had been made by the institution by way of discount of a note, it can recover the money loaned, though the security was void. The mortgage was taken to secure the loan and not the notes, which at most were mere evidence of the loan. The mortgage is a valid security for the loan. Judgment reversed.

Cited: 8 App. Div. 433; 32 Hun 276; 84 N. Y. 201; 162 id. 310.

NATIONAL BANK v WELLS (1880) 79 N. Y. 498.

On promissory note against accommodation indorser. The note was given to the plaintiff's cashier to be discounted at another bank. He indorsed it and procured the discount, plaintiff receiving the proceeds and applying them to the payment of other notes of the makers which it held. When the note became due, it was protested and taken up by plaintiff. The makers then gave plaintiff another note, made by them and indorsed by defendant, to take up the note in suit, and plaintiff's cashier was directed so to apply the proceeds, which were credited to the makers. Subsequently the makers drew a check on plaintiff payable to "notes, etc. or bearer," and delivered it to plaintiff. No money was paid the drawers of the check. The proceeds of the note had not been drawn out. Judgment for plaintiff. Affirmed at General Term. Appeal.

Andrews, J. No money was paid the drawers, and the inference is that the check was given to pay the note in suit. Judgment reversed.

Cited: 51 App. Div. 331; 27 Hun 110; 80 id. 212; 88 N. Y. 60.

PATTISON v SYRACUSE NAT. BANK (1880) 80 N. Y. 83.

Trover, for the value of negotiable railroad bonds deposited for safe-keeping by plaintiff with defendant bank and which defendant refused to deliver upon demand. The answer alleged that the securities were left with a clerk, without defendant's knowledge and were stolen from defendant's vault. They were received by the teller, acting as cashier. The teller often received packages for safe-keeping and had no instructions to the contrary. No notice that the deposit should be at plaintiff's risk was given, though in many cases it was so. The bonds were taken during banking hours from an open safe, which was easily reached from the door and which the bank's clerks could not at all times see. Judgment for plaintiff. Affirmed at General Term. Appeal.

Rapallo, J. 1. National banks have power to receive special deposits gratuitously or otherwise, and when received gratuitously they are liable for their loss by gross negligence. 2. The evidence was sufficient to establish the teller's authority to receive property for safe-keeping. 3. The theft occurred through the gross negligence of the bank. The fact that property of the bank was stolen at the same time from the same place, is not conclusive against the allegation of gross negligence. Judgment affirmed.

Cited: 27 Hun 110; 52 id. 3.

INDIG v NATIONAL CITY BANK (1880) 80 N. Y. 100.

Negligence. Plaintiff deposited a promissory note with defendant bank for collection. The note was forwarded to the L Bank where it was payable. There were no indorsers on the note. On the day after its receipt the L Bank sent to defendant a New York draft and on the same day failed. The draft was received on Saturday, and forwarded to the clearing house on Monday, December 31. On January 2, it was returned marked "not good," and plaintiff was notified. There was no evidence that the maker was insolvent. Nonsuit. Reversed at General Term. Appeal.

Rapallo, J. Sending the note to the L Bank did not make that bank defendant's agent to receive payment of the note, for the defendant, by sending the note to the bank, requested that bank to pay it, not to receive the proceeds. Judgment affirmed.

Cited: 26 App. Div. 116, 118; 34 Hun 30; 38 id. 386; 41 id. 495; 47 id. 101; 75 id. 387; 76 id. 571; 22 Misc. 725; 89 N. Y. 184; 102 id. 483; 128 id. 31, 32; 51 Supr. 87.

FISHKILL SAV. INSTITUTION v NATIONAL BANK (1880) 80 N. Y. 162.

Conversion. B was cashier, managing officer and general agent of defendant bank. He was at the same time plaintiff's treasurer. B took bonds belonging to plaintiff, and, as cashier, pledged them as collateral for advances to defendant. The bonds were sold by the pledgees, and the proceeds credited to defendant. Judgment for plaintiff. Appeal.

Danforth, J. 1. A corporation is liable for the wrongs of its agent, committed in the course of his employment, and for the benefit of the principal, although no privity is proven, to the same extent as natural persons. 2. The absence of knowledge of the transaction on the part of the directors is no defense, as it was their duty to keep informed of the business of the bank. Judgment affirmed.

Cited: 33 Hun 596; 1 Misc. 148; 7 id. 499; 18 id. 221; 48 Supr. 172.

PEOPLE v DETY (1880) 80 N. Y. 225.

To recover penalties for putting forth the sign of a savings bank, and doing a banking business without being organized as a bank under the state banking laws. By the Laws of 1875, ch. 371, sec. 49, it is provided "it shall not be lawful for any bank, banking association, or individual banker, to put forth a sign as a savings bank, or in any way to solicit or receive deposits as a savings bank." Judgment for defendant. Appeal.

Folger, J. 1. The statute applied only to an individual banker, who has availed himself of the banking statutes and has become empowered to do banking thereunder. 2. The defendant was not an individual banker. Judgment affirmed.

Cited: 116 N. Y. 448.

NATIONAL BANK v LEWIS (1880) 81 N. Y. 15.

On a promissory note against indorser. Defendant counterclaimed the interest paid and averred that plaintiff, a national bank, charged him an usurious rate in discounting the note. Evidence constituting the defense was rejected. U. S. R. S., sec. 914, provided that the practice in the circuit and district courts should conform to that in the courts of record in the state where located. Sec. 30, of the National Currency Act, provided, where usury has been agreed upon but not paid, all interest is forfeited, and where it has been paid, twice that amount can be recovered in a penal action. Judgment for plaintiff. Affirmed at General Term. Appeal.

Per curiam. 1. In an action by a national bank on a note, it cannot be set up by way of counterclaim, that the bank took a greater rate of interest than the law allowed. 2. U. S. R. S., sec. 914, cannot annul or prevent the operation and enforcement of a statutory provision of a penal character and render it of no avail, and evidence of the usurious discount should have been allowed. Judgment reversed.

Cited: 30 Hun 630; 61 id. 341; 21 Misc. 512 22 id. 103: 106 N. Y. 72; 165 id. 259, 260.

PEOPLES BANK v BOGART (1880) 81 N. Y. 101.

Fraud. Defendants sold to plaintiff bills accepted by S & Co. Defendants knew that the bills were not drawn against funds, but were sold by the acceptors for their own benefit. Plaintiff made no inquiries, and defendants did not disclose their information. No representation was made that the paper was drawn against funds. Judgment for defendant. Appeal.

Andrews, J. There is no implied warranty by the vendor of a bill, valid in the hands of an indorser, that it was drawn against funds, or that it was not accommodation paper and the rule of caveat emptor applied to such a case.

Cited: 47 Hun 108; 33 Misc. 641; 96 N. Y. 107; 127 id. 344; 165 id. 124; 55 Supr. 244.

ROBINSON v NATIONAL BANK OF NEWBERNE (1880) 81 N. Y. 385.

Attachment. Plaintiff, a resident of New York and a creditor of defendant, a national bank, located in North Carolina, attached property of defendant in the state of New York. Defendant contended that the court did not have jurisdiction and had no power to grant the attachment. Motion to vacate attachment. Denied. Appeal.

Danforth, J. 1. The Supreme Court had jurisdiction. 2. It had power to grant the attachment. Order affirmed.

Cited: 30 Hun 53; 52 id. 147; 92 id. 301; 88 N. Y. 60; 89 id. 468; 91 id. 539; 93 id. 372; 101 id. 305; 49 Supr. 121.

THOMSON v BANK OF BRITISH NORTH AMERICA (1880) 82 N. Y. 1.

To recover deposit. Plaintiff's agent T falsely represented to plaintiff that H had executed a bond and mortgage. His signature was forged. In payment, plaintiff drew on defendant; and in exchange, defendant, at plaintiff's request, drew a check to H on the M Bank. M Bank certified the check and T deposited it in his bank and the M Bank paid it. The agent paid interest on the bond for six years. When the fraud was discovered, H had the bond and mortgages canceled. Judgment for plaintiff. Appeal.

Rapallo, J. 1. The loss of a check given by a debtor to a creditor and its subsequent forgery does not discharge the debtor from his obligation. 2. Equity requires that defendant should make good the payment for which it had received credit from plaintiff and seek its recovery from the M Bank. Judgment affirmed.

Cited: 7 App. Div. 174; 77 id. 169; 1 Misc. 140; 5 id. 223; 8 id. 258; 86 N. Y. 407; 91 id. 111; 96 id. 131; 122 id. 453; 130 id. 414; 132 id. 583; 148 id. 514; 48 Supr. 214.

HUN v CARY (1880) 82 N. Y. 65.

To recover for the misconduct of trustees of a savings bank. The bank had been incorporated in 1867, and for six years had a small and unprofitable business, the expenses exceeding the profits in each year, and the deposits averaging only \$70,000. While the bank was insolvent, the trustees purchased in its name, a plot of land under an agreement requiring the erection on it of a banking house to cost about \$27,000. Before the building was completed plaintiff was appointed receiver and the lot and building were taken by foreclosure. The defendants claimed to have done this in the hope of increasing the bank's business and bettering its condition. Two of the defendants obtained discharges in bankruptcy. Motion to dismiss the complaint because brought at law instead of in equity. Denied. Judgment for plaintiff. Affirmed at General Term. Appeal.

Earl, J. 1. The trustees failed in that measure of reasonable prudence, care and skill, which the law requires. 2. The action, being for a money judgment, was properly at law. 3. Being an action at law, the other trustees were not necessary parties. 4. The discharge in bankruptcy, being petitioned for and granted after this action was commenced, was no defense. Judgment affirmed.

Cited: 4 App. Div. 376; 6 id. 512; 44 id. 197; 81 Hun 123, 189; 11 Misc. 458; 17 id. 60, 184, 210; 35 id. 521; 86 N. Y. 45; 105 id. 571; 125 id. 80; 143 id. 381, 383; 152 id. 535.

ATLANTIC STATE BANK v SLAVERY (1880) 82 N. Y. 291.

On promissory note against indorsers. The note was made by P & Co., payable to their order, indorsed by them and placed in the hands of L, a member of their

firm and also of defendant's firm. L indorsed it in his name, and then fraudulently indorsed in the name of defendant's firm without their knowledge. S & Co., brokers, took the note in payment of L's personal indebtedness. Plaintiff bank purchased it from S & Co., receiving a memorandum directing them to draw upon plaintiff for the amount less nine per cent for the period before its maturity. The note was delivered without indorsement by S & Co. A member of S & Co. was a director in plaintiff, but did not act for it in this transaction. Defendants contended that plaintiff was chargeable with S & Co.'s knowledge; that this was a purchase of the note, while it was empowered merely to discount paper; and that the deduction was for more than the legal rate of interest. Judgment for plaintiff. Appeal.

Danforth, J. 1. The transaction in question was a discount of the note within Laws of 1838, ch. 160, sec. 18, authorizing the plaintiff to carry on its business. 2. Even if the plaintiff exceeded its powers in acquiring this paper, it would not be a defense to this action, nor would the fact of discount at a usurious rate. 3. The plaintiff is not chargeable with knowledge of a director, not acquired by him as such or communicated by him to the plaintiff. Judgment affirmed.

Cited: 25 App. Div. 77; 64 Hun 179; 77 id. 455; 97 N. Y. 382; 111 id. 106, 457, 617; 113 id. 335; 130 id. 228; 151 id. 46.

GETMAN v SECOND NAT. BANK (1881) 23 Hun 498.

To recover money paid in violation of the Bankruptcy Act. The action was brought by the plaintiff as assignee in bankruptcy of A. L, the president of the defendant, was a relative of A and knew his financial condition long before his actual insolvency on March 31, 1877, as he had been extending his notes. In March, 1877, L told T that the bankrupt would have to go under. A few days later the bankrupt sold lumber to M for \$3,000. This money was paid to the defendant and it was applied to the bankrupt debt to the bank, which was due, and also to another debt which was not due. U. S. R. S., sec. 5128, as amended, provided that if any person insolvent, or in contemplation of insolvency, should within two months of filing a petition in bankruptcy by or against him, with a view to give a preference, pay to any creditor having reasonable cause to believe such person insolvent, such payment should be void and the assignee might recover it. Judgment for plaintiff. Appeal.

Rumsey, J. 1. If an officer of a bank while he is engaged in the business, and for the interest of his principal, learns of a debtor's insolvency, such information concludes the principal. 2. It was the duty of the officer receiving such notice to advise all other employees of such fact, and the bank would be none the less concluded if he failed to do so. Judgment affirmed.

Cited: 57 Hun 75.

FIRST NAT. BANK v FOURTH NAT. BANK (1881) 24 Hun 241.

On draft. The C Bank of Pennsylvania, being indebted to plaintiff, delivered to it a draft upon C P & Co. of New York City. The draft was sent to defendant for collection, and received on the morning of March 26. It was presented for payment and surrendered to C P & Co. upon receiving their check on the T Bank. This check was presented to T Bank through the clearing house on the next day and payment refused, C P & Co. having failed. If the check had been presented on the day it was drawn, it would have been paid. Judgment for plaintiff. Appeal.

Davis, P. J. 1. The delivery of the draft by C Bank was a payment, sub modo, of its indebtedness to plaintiff to the amount of the draft. 2. The neglect of defendant is chargeable upon plaintiff as between it and the drawer. 3. Plaintiff sustained, by reason of the neglect of the defendant, a loss equal to the amount of the draft and was therefore entitled to a judgment for that amount. Judgment affirmed.

Cited: 34 Hun 391. Modified: 89 N. Y. 412.

NATIONAL MECHANICS BANKING ASS'N v CONKLIN (1881) 24 Hun 496.

On bond against principal and sureties. The bond was conditioned upon the faithful performance by defendant C of his duties as bookkeeper for plaintiff, or of any other office, duty or employment relating to the business thereof. Defendant C had been a bookkeeper for several years, when he was appointed receiving teller. After nine years, he resigned as teller. He was then found to have become a de-

faulter after he was appointed teller. Verdict directed. Judgment for plaintiff. Motion for new trial. Exceptions.

Barnard, P. J. 1. The bond should not be held to cover this default. It was given to secure fidelity in a bookkeeper and has no direct reference to fidelity in any other employment. 2. The general words referring to "the duties of any other office relating to the business" can be referred to the performance of any duty temporarily and occasionally imposed upon the bookkeeper or undertaken by him. Judgment reversed.

WINTRINGHAM v ROSENTHAL (1881) 25 Hun 580.

On unpaid subscription to shares of the capital stock of L Bank. B subscribed for five hundred shares and sold defendant fifty shares in payment of an old debt, defendant supposing they were fully paid. B had not then paid for the shares, but subsequently paid 40 per cent on them. Defendant received the dividends. The bank failed and plaintiff was appointed receiver. Judgment for plaintiff. Appeal.

Barnard, P. J. 1. Though defendant took the stock subject to all liabilities thereon, and got no better title than B had, these facts do not sustain the action, as there was no promise by defendant to pay the bank anything. 2. No contract to pay for stock can be implied from the mere purchase. The purchase merely makes the title conditional upon making the remaining payments. Judgment reversed.

Cited: 7 App. Div. 366.

BANK OF BRITISH NORTH AMERICA v MERCHANTS NAT. BANK (1881)
16 Jones & S. 1.

On check. Plaintiff, having an account with defendant, and sufficient funds, drew and delivered a check dated 1870 to the order of H. The check was certified by defendant, paid on the forged indorsement of H, and returned by defendant with plaintiff's account as voucher, the check being charged up. In 1877, discovering that the indorsement was a forgery, plaintiff tendered the check and demanded payment from the bank. Defendant contended that plaintiff's cause was barred by the statute providing that an action on a debt should be brought within six years after the cause of action accrued. Judgment for plaintiff. Appeal.

Speir, J. 1. Presentation of the check and demand of payment by any other person, through the forged indorsement of H, was not such a demand as would give plaintiff a cause of action upon which it could sue and recover. 2. Plaintiff was under no obligation to examine the passbook for the purpose of discovering forgeries in indorsements. Judgment affirmed.

Aff'd: 91 N. Y. 106.

COATES v DONNELL (1881) 16 Jones & S. 46.

On deposit. M, plaintiff's assignor, agreed with defendants, as a condition to defendants' accepting drafts, to keep on deposit an amount which would cover his drafts, on which defendants should have a lien. M was known to be insolvent at the time; but he made an assignment before the acceptances matured. Defendants protected themselves out of M's balances. Testimony showed that a small amount not demanded specifically was actually due plaintiff. Plaintiff moved to amend at the close of the case. Motion denied. Judgment for defendants. Appeal.

Freedman, J. 1. The agreement was not a transfer in contemplation of insolvency. 2. The fact that the lien was upon a shifting balance does not render it invalid, for by agreement, a lien may be given on property not in existence, to take effect when it comes into being. 3. Defendants should be allowed in equity to set off against plaintiff's claim, the amount due on the acceptances; for though the claims had not matured at the time of the assignments, they were due when this action was brought and the assignee has no greater right than the assignor. 4. The amendment should be allowed, but defendants' costs should be deducted from the amount due. Judgment modified.

ISRAEL v BOWERY SAV. BANK (1881) 9 Daly 507.

On deposit. Plaintiff, having a deposit with defendant, a savings bank, presented his passbook and demanded payment. He was told that it had been paid out to some other person who had presented the book, and had signed receipts therefor. On discovery, plaintiff published a letter, stating that some person had

obtained possession of his passbook and had drawn his money. The by-laws of defendant, printed in the passbook and of which plaintiff had notice, provided that drafts could be made personally; or by the depositor's written order, if the bank had his signature; or by letter of attorney duly authenticated, but no payments could be made without production of the passbook; and all payments made to a person producing the passbook should be deemed valid. Judgment for plaintiff. Affirmed at General Term. Appeal.

Beach, J. 1. Though the by-laws did not relieve the bank from the exercise of ordinary care, plaintiff cannot recover because he has failed to show negligence by the bank. Judgment reversed.

Cited: 17 Misc. 579.

RISLEY v PHENIX BANK (1881) 83 N. Y. 318.

On check by payee against drawee. The check was drawn on defendant by Bank of G in 1861. Plaintiff claimed that it was given to effect an assignment to plaintiff of an indebtedness due Bank of G from defendant. At the time it was drawn and presented, Bank of G's general deposit with defendant was sufficient to cover the check. When it was presented on January 4, 1865, defendant's president said it would be paid if presented by some one known to defendant. Plaintiff thereupon notified defendant of the assignment. Defense: that Bank of G's deposit was attached on January 5, 1865, by the United States in confiscation proceedings. The record of the U. S. District Court in those proceedings was excluded. The court charged that plaintiff could not recover on an oral acceptance of the check, but could recover if there was an oral assignment based on valid consideration concurrent with the giving of the check of Bank of G's claim against defendant to plaintiff. Judgment for plaintiff. Affirmed at General Term. Appeal.

Andrews, J. 1. The giving of the check was equally consistent with the purchase of a draft, or the assignment of the debt. 2. An assignment of an account may be made without writing, if there be valid consideration. 3. Part of a debt or claim may be assigned under the laws of this state. 4. Confiscation proceedings, while in the nature of proceedings in rem, operate only to divest the title of the alleged owner, and not that of the real owner not proceeded against; the record of the District Court was therefore properly excluded as constituting no defense. Judgment affirmed.

Cited: App. Div. 215; 19 id. 557; 41 id. 416; 56 id. 457, 613; 59 id. 129, 358; 2 Cow. 296; 12 Daly 179; 42 Hun 21; 49 id. 499; 58 id. 106; 61 id. 29; 72 id. 401; 4 Misc. 110; 12 id. 22; 14 id. 176; 16 id. 383; 17 id. 136; 19 id. 97; 20 id. 369; 26 id. 142; 33 id. 189; 86 N. Y. 631; 89 id. 521; 90 id. 530; 91 id. 26; 94 id. 187; 107 id. 183; 110 id. 88; 124 id. 331; 125 id. 252; 134 id. 372; 147 id. 573; 157 id. 276; 159 id. 98; 160 id. 348.

DUNCAN v BRENNAN (1881) 83 N. Y. 487.

To recover chattels. Plaintiffs, bankers in New York, made a loan to B & Co. on pledge of a bill of lading of whiskey en route to New York. On its arrival, the whiskey was stored and warehouse receipts given plaintiffs. It was levied on by defendant's testator, a sheriff, as the property of M. Plaintiffs' loan was subsequently paid, but B & Co. were indebted to plaintiffs for other advances to more than the value of the whiskey. Defendant's offer to prove M's ownership of the whiskey by admissions of B was excluded. Motion to dismiss complaint. Denied. Judgment for plaintiffs. Reversed at General Term. Appeal.

Per curiam. 1. The general lien of bankers on securities deposited with them for a balance due on general account does not apply to property pledged for a specific sum. 2. As plaintiffs had no lien, the admissions of B were admissible. Judgment of General Term affirmed.

Cited: 16 Daly 459; 88 Hun 235; 6 Misc. 82; 17 id. 530; 113 N. Y. 333; 153 id. 498; 158 id. 594.

BOONE v CITIZENS SAV. BANK (1881) 84 N. Y. 83.

On deposit. The money was deposited with defendant by S, to her own credit, "in trust for C." Defendant's rules printed in the passbook issued to S, provided that when money was withdrawn the passbook should be presented; that such presentation should authorize the bank to make payment to the bearer and be discharged thereby; that on decease of a depositor, his balance should be paid to his

legal representative, when legally demanded. S died, and F, her administrator, presenting the passbook with his letters of administration, demanded and received the amount on deposit. Plaintiff, as administratrix of C, sued to recover upon the same amount as a trust for C. The bank had received no notice from the beneficiary. Judgment for plaintiff. Affirmed at General Term. Appeal.

Finch, J. 1. No claim having been interposed by the beneficiary, the bank was bound to pay to the depositor or his representative having possession of the passbook, the agreed voucher and evidence of title. Such payment discharges the bank from all liability. 2. S's rights as trustee devolved upon her administrator at her death. Judgment reversed.

Cited: 2 App. Div. 570; 15 id. 69; 51 id. 333; 54 id. 106; 1 Denio 356, 455; 40 Hun 303; 45 id. 356; 55 id. 301; 62 id. 350; 2 Misc. 352; 24 id. 501; 26 id. 266; 88 N. Y. 72; 95 id. 212; 101 id. 63; 117 id. 129; 127 id. 491; 135 id. 558.

FALKLAND v ST. NICHOLAS NAT. BANK (1881) 84 N. Y. 145.

To recover a deposit. R Bros., shipping brokers, becoming financially embarrassed, opened an account with defendant bank through plaintiff's intestate, who was their bookkeeper. They deposited therein money received for the benefit of their clients, in order that such funds should not be attached by the firm's creditors. Defendant, having discounted a note of R Bros. in the regular course of business, at maturity charged it against this account of plaintiff's intestate, although it was not made payable at that bank and did not bear the name of plaintiff's intestate. Defendant claimed the right to deduct the amount of this note from a check drawn for the balance of the account. Judgment for defendant. Affirmed at General Term. Appeal.

Miller, J. Since the money was not deposited in the name of R Bros., and really belonged to neither plaintiff's intestate nor R Bros., defendant's demand on the note of R Bros. was not the subject of setoff or recoupment against such money thus set apart as a fund for the persons for whom it had been collected. Judgment reversed.

Cited: 63 App. Div. 179; 26 Hun 261.

FRANK v CHEMICAL NAT. BANK (1881) 84 N. Y. 209.

To recover a deposit. The amount was admitted, unless plaintiffs were chargeable with 37 forged checks purporting to have been drawn by them at various dates covering a period of over a year. Plaintiffs' passbook had been balanced four times during that period, but the clerk who made the forgeries received the book and vouchers from the bank, and turned over to plaintiffs only the genuine checks to compare with the memorandum in the check book, afterward reading off to plaintiffs only the corresponding entries in the passbook to be compared with the returned vouchers. Plaintiffs were prevented from discovering the forgeries until the clerk absconded. Judgment for plaintiffs for the entire balance. Affirmed at General Term. Appeal.

Andrews, J. 1. Plaintiffs did nothing to deceive defendant nor did they omit to do anything required by ordinary prudence. The depositor is required to use only ordinary care. 2. The bank, being bound to know the signatures of depositors, must bear the loss resulting from its failure to detect the forgeries. Judgment affirmed.

Cited: 23 Abb. N. C. 86; 32 App. Div. 319; 60 id. 245; 8 Misc. 282; 9 id. 362; 10 id. 683; 126 N. Y. 328, 330, 331.

HIBERNIA NAT. BANK v LACOMBE (1881) 84 N. Y. 367.

On a draft, drawn by M Bank, a Louisiana state bank, on bankers in New York City, payable to the order of plaintiff, a New Orleans Bank. Payment being refused, the draft was duly protested, and notice given to M Bank. After this action was commenced against M Bank, it went into liquidation, and defendants, commissioners, were substituted. Defendants contended that the court had no jurisdiction because the parties were non-residents, and the cause of action did not arise in this state. Judgment for plaintiff. Affirmed at General Term. Appeal.

Danforth, J. The cause of action arose when the draft was dishonored, and as this took place within the state, the court has jurisdiction. Judgment affirmed.

Cited: 12 Abb. N. C. 219; 19 id. 400; 28 id. 428, 434; 8 App. Div. 448; 52 id. 60; 58 id. 455; 29 Hun 363; 30 id. 330, 369; 32 id. 192; 49 id. 79; 65 id. 256; 8 Misc. 295; 12 id. 234; 32 id. 460; 96 N. Y. 255; 99 id. 448; 106 id. 487; 138 id. 496; 150 id. 323.

CHEMICAL NAT. BANK v KOHNER (1881) 85 N. Y. 189.

On promissory notes against the administrator of the indorser. Defense, a composition agreement. The parties to the notes were similarly indebted to two other banks. Defendant's intestate K, wishing to compromise his liability as indorser to all three banks, proposed to pay or secure one-fourth of all his indebtedness to them in exchange for a discharge from all liability. Plaintiff's cashier consulted with its president, and then wrote one of the other banks that plaintiff proposed to accept K's offer. When K offered a note indorsed by G, or a certified check, for the agreed amount, the cashier repudiated the compromise because he and the president had concluded that it might affect another claim. Meanwhile the other banks had settled on that basis. The president and cashier were the active managers of plaintiff. Such compromises were not unusual and it was not shown that the cashier acted without authority in making this one. Judgment for defendant. Reversed at General Term. Appeal.

Earl, J. 1. The authority of the cashier to make this agreement, is to be presumed. 2. The compromise agreement was valid, though not in writing, and after K and the other banks had acted upon it, it was too late for plaintiff to recede from it. 3. Until K was put in default upon the compromise agreement he could not be held liable on the original indebtedness, and his tender of performance of that agreement, is a defense to this action. 4. The action being based on the original agreement, plaintiff could not recover a percentage of its claim. Judgment reversed.

Cited: 86 N. Y. 199; 99 id. 394; 116 id. 200.

MUNGER v ALBANY CITY NAT. BANK (1881) 85 N. Y. 580.

To compel application of securities to satisfaction of a judgment. Plaintiff, in June, 1871, deposited \$3,000 with R Bank, and took a certificate payable with interest on return. Later he made a note to the same bank for \$1,500, which was discounted by defendant bank before maturity, in ignorance of the deposit. R Bank was then solvent and had securities on deposit with defendant, to secure the ultimate payment of paper indorsed to it. The note was protested for non-payment. R Bank became bankrupt and judgment was recovered against plaintiff on the note. Defendant refused to apply the securities of the R Bank on the note. Plaintiff contended that such application should be made because of his deposit. Judgment for plaintiff. Affirmed at General Term. Appeal.

Folger, C. J. 1. The plaintiff is not entitled to a setoff, at law because the debts were not mutually due and payable in the hands of the parties for and against whom the setoff is sought; plaintiff's note was not due, until returned to the R Bank, after its bankruptcy. 2. Plaintiff would not be entitled to set off inequity in any event, until by some act he made the certificate due and payable in his hands. 3. The debts were not mutual debts within the meaning of the Bankrupt Act, for that statute does not enlarge the doctrine of setoff beyond what the principles of legal and equitable setoff before that act, warranted. 4. Though defendant might have taken payment of this note from the collaterals deposited by the indorser and thus have given plaintiff a right of setoff, yet plaintiff, being the principal debtor, cannot compel such course. 5. The doctrine of marshaling securities does not apply. Judgment reversed.

Cited: 45 App. Div. 322; 6 Denio 260; 35 Hun 246; 36 id. 88; 48 id. 265; 53 id. 628; 119 N. Y. 58, 60; 166 id. 58.

VAN DYCK v McQUADE (1881) 85 N. Y. 616.

To recover for overdrafts. Plaintiff was the receiver of an insolvent bank. Defendant, a depositor, contended that the alleged overdrafts were balanced by checks, which he had procured other depositors in the insolvent bank to draw in his favor and had thereupon deposited. In the proceedings, in which plaintiff was appointed receiver, an injunction was obtained, restraining the officers of the bank from further action as such and from interference with its assets. The referee found that the checks relied upon by defendant were not delivered to the bank or credited

to defendant's account, until after the service of the injunction. It was contended that the receiver's retention of the checks which he did not offer to return, amounted to a ratification. Judgment for plaintiff. Affirmed at General Term. Appeal.

Folger, C. J. The receiver, as an officer of the court, having no power to allow a setoff, where no mutual debts subsisted at the time of his appointment, could not make a valid ratification of such an act. Judgment affirmed.

VAN DYCK v McQUADE (1881) 86 N. Y. 38.

To recover illegal dividends. Plaintiff was the receiver of a savings bank. The action was to recover from one of the trustees, under Laws of 1875, ch. 371, sec. 33, the amount of dividends paid depositors when there were no net profits. The act of incorporation required the bank to receive deposits and pay such interest thereon, as the trustees should prescribe. The trustees undertook to pay 6 per cent on deposits, and continued to do so when the bank's expenses were exceeding its income, although the interest actually received by it, exceeded the amount paid in dividends. No fraud was imputed to defendant. He actually participated in declaring only one such dividend. The statute provided that when dividends were declared in excess of interest or profits earned, the trustees voting for such dividend should be liable to the corporation for the excess. The trustees had jointly advanced money to be repaid at the end of one year, to assist the bank, and defendant claimed his share as setoff. Judgment for plaintiff. Affirmed at General Term. Appeal.

Danforth, J. 1. The statute is penal and must be strictly construed. 2. Under the provisions of the statute defendant is not liable because "profits earned" is not limited to "net profits." 3. Defendant in any event is liable only in the case of dividends in the declaring which he participated. 4. The money advanced being a joint loan, defendant cannot set off the amount against his individual liability. Judgment reversed.

Cited: 27 App. Div. 98; 137 N. Y. 344; 165 id. 7.

ROBINSON v CHEMICAL NAT. BANK (1881) 86 N. Y. 404.

Conversion. C and B, trustees, having control of certain property, appointed L their agent to collect rents. While acting in this capacity, L received a check, payable to B, trustee, and indorsed it, as attorney in fact for B payable to his individual order. This indorsement was followed by L's indorsement in blank. Defendant certified the indorsement, collected the check, and credited the proceeds to the individual account of L, who subsequently withdrew the money. Plaintiffs, as successors of C and B, brought this action. Judgment for plaintiffs. Affirmed at General Term. Appeal.

Earl, J. 1. Authority to an agent to make or transfer negotiable paper must be express, or necessarily implied, from the grant of some power. L, as agent to collect rent, had no authority. 2. The trustees were the real owners of the check, and plaintiffs, as their successors, may maintain this action. Judgment affirmed.

Cited: 28 Misc. 325; 30 id. 383.

HUN v VAN DYKE (1882) 26 Hun 567.

To enforce liability of bank trustees. The action was brought by plaintiff as receiver of the P Savings Bank to recover money lost by defendants by the illegal purchase of North Carolina bonds. The state banking department, in 1871, after purchase of the bonds, made an examination of the affairs of the bank, which showed an unsatisfactory condition, whereupon the superintendent of banking, as a condition precedent to not closing the bank, compelled those who were then trustees, to give a bond for the deficiency found, amounting to \$46,000. The obligors on the bond afterward paid the loss resulting from the purchase of these bonds. Some of them were not trustees when the bonds were purchased. Judgment for defendants. Appeal.

Brady, J. Payment of the deficit by the obligors was a payment of the demand herein urged and defendants, even if they themselves contributed nothing, could not thereafter be held responsible. Judgment affirmed.

Cited: 94 N. Y. 333. Aff'd: 92 N. Y. 660.

NATIONAL BANK v BURR (1882) 27 Hun 109.

On promissory note. Defendants were makers and indorsers of a note delivered to plaintiff. Plaintiff's cashier indorsed it and had it discounted by M Bank, and the proceeds were credited by the plaintiff to defendants. Plaintiff illegally charged for the indorsement. The note, not being paid when due, plaintiff took it up. Defendants contended that plaintiff had no title to the note, as it had acted ultra vires in the transaction. Judgment for defendants. Appeal.

Boardman, J. 1. Plaintiff's title to the note was not affected by the illegal and ultra vires charge for plaintiff's indorsement. Judgment reversed.

MARKET NAT. BANK v PACIFIC NAT. BANK (1882) 27 Hun 465.

Attachment. Plaintiff obtained the attachment on the ground that defendant was a foreign corporation. In the papers was an affidavit stating upon information and belief that defendant was in failing and embarrassed circumstances. Motion to vacate the attachment and order thereon. Granted. The order resettling such order recited that the insolvency of defendant was judicially known to the judge. Appeal.

Ingalls, J. Judicial notice cannot be taken by the court or by a judge thereof, that a bank located in a foreign state, is insolvent or in failing circumstances. Reversed.

PEOPLE v MECHANICS SAV. INSTITUTION (1882) 28 Hun 375.

Insolvency proceedings. S applied for a preference over the depositors in defendant, a savings bank incorporated under the Laws of 1852, ch. 368. Its only property was the proceeds of its deposits. The charter required that each depositor should receive his pro rata share after deducting necessary expenses. S recovered a judgment against the defendant after a receiver was appointed, for services rendered prior to the insolvency. His claim to a preference was disallowed at Special Term. Appeal.

Learned, P. J. Expenses, unless paid the moment incurred, create a debt; and such debt, by the terms of defendant's charter as to deduction of necessary expenses, must be paid before the depositors receive their money. Reversed.

McMAHON v PALMER (1882) 11 Daly 214.

To enforce payment of tax on personal property. Defendant failed to pay a tax on his stock in a national bank, located in New York City. U. S. R. S., sec. 5219, provided that such stock should be subjected by the state to no greater tax than other moneyed capital; and Laws of 1880, ch. 596, were to the same effect. Defendant claimed that the enactment of sec. 5219 was beyond the powers of Congress, and that Laws of 1880, ch. 596, was unconstitutional as discriminating. Act of 1843, ch. 230, made the refusal to pay a tax misconduct, when the party had property with which to pay it, and gave the remedy sought by this action. Defendant contended that it was unconstitutional as denying the right of trial by jury.

Van Brunt, J. 1. Congress is not limited in imposing obligations upon corporations of its own creation. 2. The claim that ch. 596, Laws of 1880, is unconstitutional as discriminating against owners of bank shares, is untenable, because the General Corporation Act exempts capital stock of other corporations from taxation; the exemption of the latter refers to the property of the corporation and not to shares in the hands of stockholders. 3. As it does not appear that the rights of one who failed to pay taxes were triable by a jury before the adoption of the Constitution, the Act of 1843, is not unconstitutional on that ground. Order punishing defendant.

CLARK v MECHANICS NAT. BANK (1882) 11 Daly 239.

To recover deposit. Plaintiff sought to recover from defendant the amount of checks drawn on the bank against his account and duly paid, the genuineness of which plaintiff disputed. After payment, they had been posted against him in his passbook, and with the book returned to him, and retained for seven months without objection, and the exact balance as stated in the book drawn out. Plaintiff admitted drawing checks but contended that the amounts were altered. There

was no evidence of such alteration other than plaintiff's statement. The jury allowed plaintiff for the return of some of the checks and found against him on the others. Judgment for plaintiff for part of the amount. Appeal.

J. F. Daly, J. 1. The retention of the checks and passbook for so long a time without objection establishes *prima facie*, the accuracy of the account so stated. 2. The jury, having rejected plaintiff's testimony as to some of the checks, was not at liberty to find for him on the same testimony as to others, as the burden was on plaintiff to show that the checks were altered. Judgment reversed.

Cited: 39 App. Div. 660; 74 Hun 441.

BRINCKERHOFF v BOSTWICK (1882) 88 N. Y. 52.

Damages, stockholder against receiver and directors of a national bank for losses through the negligence and misconduct of the directors. The action was by the plaintiff in his own behalf and on behalf of all the other stockholders of the bank, and the judgment demanded was that the directors should be adjudged to pay such damages. Demurrer: want of jurisdiction; improper joinder of parties; want of legal capacity to sue; and failure to show a cause of action. Sustained on the ground that the demand upon the receiver, and his refusal to bring an action against the delinquent directors was insufficient to authorize plaintiff to sue as a stockholder, and that the receiver had no authority to prosecute except under the direction of the comptroller of the currency. Defendants contended that the comptroller of the currency, and not the receiver, was the proper party to bring action. The receiver was one of the delinquent directors. Appeal.

Rapallo, J. 1. On a refusal by a bank or its receiver to prosecute guilty directors, or if the bank remains under the domination of these directors, the stockholders have a standing in a court of equity to sue in their own name, making the corporation or its receiver, a party defendant. 2. Where the stockholders are numerous, the suit may be brought by one or more in behalf of all. 3. The bank was a proper and even necessary party defendant. 4. The right of action given the comptroller of the currency by sec. 5239, U. S. R. S., to be prosecuted solely in the United States courts refers only to forfeiture of the franchise of a national bank, and does not affect plaintiff's right to bring this action. Judgment reversed.

Cited: 18 App. Div. 592; 21 id. 116; 41 id. 445; 48 id. 334; 24 Misc. 657; 33 id. 49; 99 N. Y. 193; 105 id. 570; 125 id. 272; 142 id. 193; 154 id. 490; 168 id. 165.

PEOPLE, EX REL. v RYAN (1882) 88 N. Y. 142.

Certiorari. Relator was owner of bank stock, on which he was assessed and taxed. He served an affidavit, claiming that he was not taxable for personal property, because after deducting all just debts and all exemptions, his personal property did not exceed \$1. An examination before the assessors disclosed debts greater than the value of his taxable personal property, including the bank stock. Part of his debt was on a note with the proceeds of which United States bonds had been purchased for relator, and which were held as collateral for the note. The assessors refused to deduct the amount of the note from the taxable property. Order vacating assessment and tax. Affirmed at General Term. Appeal.

Danforth, J. We are referred to no statute which prohibits a property owner from choosing between the embarrassment of a debt and submission to a burden of taxation. Order affirmed.

Cited: 22 App. Div. 120, 123; 31 Hun 35, 423; 76 id. 457; 7 Misc. 300; 161 N. Y. 204.

SISTARE v BEST (1882) 88 N. Y. 527.

To recover damages for the non-delivery of shares of stock sold by plaintiff for the account of M Savings Institution, of which plaintiff was receiver. The bank had authorized its president to sell the shares held by it as security for a loan to J & Co. in such form as would protect the bank. After selling part, the president authorized plaintiff to sell some on the stock exchange, with the privilege to deliver at any time within 60 days. Plaintiff sold the stock and notified the president, who had already sold it, without notice or revocation of plaintiff's authority. The president declined to complete the sale and the stock was bought in. The charter prohibited lending money on notes, drafts, or any personal security. De-

defendant claimed that the loan to J & Co. on security of the stock was in violation of the charter, and that the agreement with plaintiff was therefore void. Judgment for plaintiff. Affirmed at General Term. Appeal.

Andrews, C. J. 1. Plaintiff's employment was within the authority conferred upon the president of the bank. 2. Defendant's title to the stock was at most, voidable, not void; and plaintiff, in accepting his employment, was not bound to inquire as to the bank's title to the stock. 3. The illegality of the pledge and loan is no defense to this action, which is not founded on the illegal contract. Judgment affirmed.

Cited: 122 N. Y. 140; 127 id. 260.

BRIGGS v CENTRAL NAT. BANK (1882) 89 N. Y. 182.

On check drawn on F Bank and delivered by plaintiff to defendant bank for collection. F Bank was the collecting agent for defendant under an agreement, that all collections made should be credited to defendant in a collection account which was settled every Tuesday. Defendant forwarded the check in question by mail to F Bank. It was charged to the drawer, who was a customer, and credited to defendant in the collection account. The next day the drawee suspended payment. Judgment for plaintiff. Affirmed in Common Pleas. Appeal.

Rapallo, J. The drawee of the check had the right, under this arrangement, to discharge the drawer and substitute itself as debtor to defendant, which must be regarded as having accepted the responsibility of the drawee, upon its credit in the collection account, as payment of the check. Judgment affirmed.

Cited: 47 Hun 101; 26 App. Div. 119; 117 N. Y. 395; 128 id. 32.

BATES v FIRST NAT. BANK (1882) 89 N. Y. 286.

Where a husband deposited checks, payable to his wife, with a bank, and requested the deposit to be made in the name and to the credit of the wife, evidence of an agreement between the bank and the husband that he should be entitled to draw the money by executing checks in his wife's name, was properly excluded, as the circumstances were such as to charge the bank with knowledge of his real relation to the fund; the bank made the wife its depositor, whom it was bound to protect against vouchers not actually known to her.

Cited: 36 Hun 609.

FIRST NAT. BANK v FOURTH NAT. BANK (1882) 89 N. Y. 412.

To recover damages for defendant's neglect in performance of duties as plaintiff's agent. A sight draft on C & Co. was indorsed by plaintiff, the holder, and mailed to defendant for collection. On the morning of its receipt, it was presented to drawees, who gave their check for the amount, and the draft was surrendered. The check was not presented by defendant until the next day, when C & Co. had failed. Defendant thereupon returned the check, received the draft, made formal demand of payment and protested it for non-payment. Plaintiff, for the purpose of showing that it had sustained damages from defendant's negligence to the full amount of the draft, produced the record of a judgment rendered in a Pennsylvania court, in an action by the present plaintiff against the drawer to the effect that the transaction constituted, as between the drawer and plaintiff the payee, a payment of the draft. Judgment for plaintiff. Affirmed at General Term. Appeal.

Andrews, C. J. 1. The record was competent evidence upon the question of damages, and plaintiff was therefore entitled to recover the full amount of the draft as damages for the defendant's negligence. 2. It was not incumbent upon plaintiff to tender the draft to defendant as a condition of recovery. Judgment affirmed.

Cited: 15 Daly 73; 94 N. Y. 642; 129 id. 95.

CLEWS v BANK OF NEW YORK (1882) 89 N. Y. 418.

On draft drawn by C Bank on defendant bank and payable to D. The draft was presented to and certified by defendant's paying teller. Later C's cashier notified the defendant's cashier that the draft had not been received by the indorsee, and that the indorser requested that payment be stopped and a duplicate issued. M tendered to plaintiff the certified draft with amount, name of payee and date altered. Before accepting the draft, plaintiff sent it by messenger to defendant, whose paying teller stated that it was good, and thereupon plaintiff accepted it in pay-

ment of bonds. The court charged, that if the draft was presented to the teller, and he answered the query as testified by the messenger, plaintiff was entitled to recover. Judgment for plaintiff. Affirmed at General Term. Appeal.

Earl, J. 1. The defendant by its certification guaranteed the genuineness of the drawer's signature and represented that it had funds of the drawer in its possession sufficient to meet the check, and it engaged that those funds should not be withdrawn from it by the drawer to the prejudice of any bona fide holder of the check. 2. If at the time, the acceptor did not know that the draft had been raised and was not aware of any effect in or defense to the draft, his reply that his acceptance was good would not of itself estop him, when called upon for payment, from asserting that the draft had been raised or otherwise altered after his acceptance. Judgment reversed.

Cited: 107 N. Y. 183; 134 id. 107; 22 Misc. 725, 726; 36 App. Div. 117.

MULCAHEY v EMIGRANT INDUSTRIAL SAV. BANK (1882) 89 N. Y. 436.

Where an account was opened with a bank in the joint name of two persons, and it was agreed that either could draw the money, Held, that upon the death of either, the bank had a right to pay the personal representative of such deceased, the money upon the production of the passbook, and that the survivor was entitled to recover the amount of her beneficial interest in the debt, owing by the bank from such representative, or, in event of non-payment, from the bank after notice.

Cited: 41 App. Div. 418; 2 C. C. 219; 4 Dem. 226; 5 id. 329; 41 Hun 448; 1 Misc. 269.

NATIONAL SHOE AND LEATHER BANK v MECHANICS NAT. BANK (1882) 89 N. Y. 467.

An attachment against the property of an insolvent national bank, is prohibited by the United States R. S., sec. 5242. As a corporation can act only within the limitations prescribed by law, such a restriction may properly be enacted.

Cited: 11 Misc. 294.

JENNERY v OLMSTEAD (1882) 90 N. Y. 363.

On bond of actuary of the S Bank, given by O, who served as such five years. O was to receive for services such sum as the net profits would warrant, not exceeding \$1,000 per annum. He resigned in January and remained in the bank as a clerk up to February 10, on which day he drew a sum of money from the bank alleged to be a wrongful appropriation of its funds. S Bank assigned its claim to plaintiff. Defendants averred that the amount drawn was due O as balance of salary; that the bank had charged against the profits of some years losses of a succeeding year, in an attempt to reduce the amount to which he was entitled. Part of the defalcations occurred after O had resigned as actuary and while he remained in the bank as bookkeeper. Judgment for plaintiff. Appeal.

Andrews, C. J. 1. The actuary was entitled to a salary of \$1,000 a year, out of the net profits of that year. If profits were not earned, he could get no compensation. If earned, the bank could not charge against the profits of one year, those of a succeeding year. 2. The bond only bound O and his surety for his conduct while he was actuary of the bank. Judgment reversed.

Cited: 36 Hun 542.

METROPOLITAN NAT. BANK v LOYD (1882) 90 N. Y. 530.

On a check indorsee against drawer. Defendant drew a check on C Bank, payable to the order of M, and by him indorsed in blank and delivered to the T Bank, which transferred it to plaintiff bank. M kept an account with T Bank, which received the check as a deposit, and entered the amount as cash in M's passbook. On the same day, T Bank mailed the check to plaintiff, its correspondent, and it was credited on account. M stopped payment of the check, and payment by the drawee was refused. Notice of protest was given to defendant who subsequently paid the amount to M. There was no allegation of fraud in the answer and defendant's offer to prove that the officers of the bank knew it was insolvent, was refused. Judgment for plaintiff. Affirmed at General Term. Appeal.

Danforth, J. 1. When the check was, by M's direction credited to his account, the title passed to the bank, and the check was not again subject to his control.

The bank gave a perfect title to its transferee and plaintiff was entitled to recover. 2. The evidence of knowledge of insolvency was properly rejected. Judgment affirmed.

Cited: 50 App. Div. 36; 43 Hun 171; 77 id. 178; 81 id. 451; 25 Misc. 721; 99 N. Y. 133; 114 id. 34; 177 id. 395; 145 id. 506.

MARKET NAT. BANK v PACIFIC NAT. BANK (1883) 30 Hun 50.

Attachment to recover the amount of five certificates of deposit on which the defendant had refused payment. The attachment was issued and served on November 19, 1881. The day before the bank closed its doors, and it was placed in the hands of the bank examiner and continued so until March 12, 1882, when by permission of the comptroller it resumed business. On May 22, 1882, it was placed in the hands of a receiver. U. S. R. S., sec. 5242, provided, that upon the commission of an act of insolvency or in contemplation thereof, no attachment should be issued against such associations or their property before final judgment. The defendant moved to set aside the attachment under this statute. Motion denied. Appeal.

Daniels, J. The fact that the certificates of deposit were not paid when presented, together with the fact that it had closed its doors and was in the hands of examiner, were evidence of its inability to pay its legal obligations in the ordinary course of its business, and make the above statute applicable. Order reversed.

Aff'd: 93 N. Y. 648.

PRODUCE BANK v BACHE (1883) 30 Hun 351.

On draft. Defendant A drew a draft on B payable to the drawer. It was indorsed by defendant M, and by the terms of indorsement she declared it to be a lien on her real and personal estate. The indebtedness for which the draft was given originated in discounts made by the plaintiff bank, for which defendant M was not liable. Language in terms charging her real and personal estate was placed upon the draft at the instance of the president of the plaintiff for the sole purpose of having the paper appear in form to be proper evidence of an existing indebtedness. Judgment for defendant M. Appeal.

Daniels, J. 1. The contract of indorsement like all others, requires a consideration to render it legal and binding. 2. The bank was not a bona fide holder of the paper for value, although it surrendered preceding obligations upon receiving it, for the reason that knowledge of the president that the indorsement had no consideration to support it was notice to the bank of this infirmity. Judgment affirmed.

Cited: 38 Hun 114; 75 id. 112; 81 id. 303.

KIMBALL v IVES (1883) 30 Hun 568.

Where an application was made to have stockholders brought in as parties, plaintiff in an action by the receiver of a bank, Held, that under sec. 452 of the code, it was not compulsory on the court to make the stockholders parties; that stockholders have no absolute right to be made parties to an action brought by the receiver.

DAVIS SEWING MACHINE CO. v BEST (1883) 30 Hun 638.

Replevin. Defendant was the receiver of a trust company which had received notes of plaintiff, a manufacturing concern, together with notes of the S Bank as collateral security for a loan. No note or obligation was taken by the trust company. The plaintiff's president was also the president of the S Bank, and took the plaintiff's notes, blank as to the payee, to negotiate a loan. S Bank paid its part of the loan and received the notes deposited by it. Without repaying the loan, plaintiff contended that the notes should be surrendered because the president had no authority to pledge them and because the trust company had no power to make the loan. By its charter, the trust company could not invest or loan its funds on notes of corporations. Defendant contended that the security could be enforced, though the loan was invalid. There was no evidence that the notes were not complete when delivered to the president or that the trust company had knowledge that the president's act was wrongful. Judgment for plaintiff. Appeal.

Barker, J. 1. The borrower cannot withdraw his security without paying the

loan. 2. The trust company had power to make the loan. 3. The trust company could enforce the security though the loan was invalid. 4. The trust company did not have knowledge of lack of title in the president. 5. The notes were ready for sale when delivered to the president. Judgment reversed.

Cited: 44 Hun 146.

RAYNOR v PACIFIC NAT. BANK (1883) 17 Jones & S. 119.

On certificates of deposit, issued by defendant bank, payable to H and assigned to plaintiff. When they were presented, payment was refused. An attachment was issued, and levied on a balance in the N Bank, to the credit of defendant. At that time defendant had closed its doors, and was in charge of the bank examiner. U. S. R. S., sec. 5242, provided that a national bank is to be considered insolvent, when it allows its notes to go to protest; when it allows a judgment against it to remain unpaid for thirty days, and also by determination of the comptroller after examination. Defendant contended that the attachment was contrary to the statute. Motion to vacate attachment. Granted. Appeal.

Sedgwick, C. J. 1. The construction of the statute is, that no attachment shall be issued against a national bank or its property, after it has committed an act of insolvency. 2. Failing to do business for several weeks before the attachment issued, raised the presumption of insolvency. Order affirmed.

Aff'd: 93 N. Y. 371.

CORN EXCHANGE BANK v NASSAU BANK (1883) 91 N. Y. 74.

To recover amount of check. K's check on the plaintiff bank to I's order was presented, with the payee's purported indorsement, paid to the defendant, and charged to the drawer's account. Two years later, K notified plaintiff that the indorsement was forged and obtained judgment, with costs, for money withheld. Notice of the suit was given to the defendant. After payment of the judgment, plaintiff demanded such amount, tendered the check, and on refusal, brought this action. Defendant's offer to prove a local custom to be satisfied with the genuineness of the signature of the drawer and payee of a check or return it immediately if not good, was refused. Judgment for plaintiff for amount of judgment recovered by K, interest, and plaintiff's expenses in defending that action. Appeal.

Danforth, J. 1. Plaintiff was entitled to recover, but his recovery should have been limited to the amount received by defendant from plaintiff, with simple interest. 2. The court did not err in excluding evidence offered to show that by local usage among banks it was plaintiff's duty to examine and satisfy itself as to the genuineness of the signatures of the drawer and payee of the check and return the same immediately if not good. Judgment modified.

Cited: 60 App. Div. 245; 22 Misc. 724, 728; 118 N. Y. 473; 119 id. 200; 126 id. 327; 134 id. 44.

BANK OF BRITISH NORTH AMERICA v MERCHANTS NAT. BANK (1883)
91 N. Y. 106.

On check, drawn by plaintiff bank on defendant bank to the order of H and certified by defendant's teller. The check was paid by defendant on a forged indorsement of H's name and the amount charged to plaintiff. Plaintiff did not know that H's signature was claimed to have been forged until seven years later, when it notified defendant, tendered the check and demanded payment. Defense, Statute of Limitations. Judgment for plaintiff. Appeal.

Earl, J. 1. There having been no demand until the forgery was discovered, the plaintiff's cause of action was not barred by the statute of limitations. 2. The certification did not make the check due without demand. The drawing of the check was not a demand. 3. The plaintiff lost none of his rights by receiving under a mistake as to the facts, the check as one properly paid and charged to its account by defendant. Judgment affirmed.

Cited: 31 Hun 489; 101 N. Y. 572; 119 id. 201; 126 N. Y. 327.

BOSTWICK, REC'R v VAN VOORHIS (1883) 91 N. Y. 353.

On bond, by receiver of F Bank against the executor of V who was one of the sureties on the official bond of B, cashier of the bank. The bond was conditioned that B should well, honestly and faithfully discharge his duties, rendering at all times his undivided care and services to said bank, and should at all times

account for and pay over all moneys belonging to said bank, and keep true and accurate books. The complaint alleged non-performance of each of these conditions, and that B paid out the moneys fraudulently, without sufficient vouchers or security, fraudulently permitted overdrafts without security, altered the books and refused to account for and pay over large sums. Defendant contended that the complaint was insufficient under 2 R. S. 378, sec. 5, providing that in an action for a breach of condition of a bond, other than for the payment of money, the declaration should assign the specific breaches; that it should have been dismissed because there was no evidence that the bond was ever delivered to, or accepted by the bank, or in its possession; that the directors, before B's appointment as cashier, were aware of his misconduct and concealed it from the sureties; that a cosurety had resigned, and that there was knowledge on the directors' part of former embezzlements by B which was concealed from the sureties. Judgment for plaintiff. Affirmed at General Term. Appeal.

Earl, J. 1. The allegations of breaches of the bond were a sufficient compliance with the statute. 2. It is to be inferred that the bond was at or about the time of its date actually delivered to and accepted by the bank. 3. Mere irregularities or omissions of duty on B's part prior to the giving of the bond, which did not affect his moral character or his official integrity and fidelity, even if known to the directors, would not enable the sureties to defend upon the ground that they had been deceived. 4. A notice of resignation as surety does not operate to discharge the cosureties until a reasonable time has elapsed. If the directors were guilty of any negligence in not learning of B's misconduct, defendant's testator, as one of them, was equally guilty with the others. Judgment affirmed.

Cited: 91 Hun 537; 131 N. Y. 159.

TALMADGE v THIRD NAT. BANK (1883) 91 N. Y. 531.

Conversion for stocks originally pledged as collateral security for a loan, made by defendant bank to M & Co. for the benefit of H, the plaintiff's assignor. M & Co. were the brokers and agents of H. Plaintiff, before suit brought, on demanding the securities, tendered a sum of money, and this being refused, tendered a larger sum, which was also refused. Defendant claimed the right to hold the stock as security for other loans made by it to M & Co., and that the tender was an admission that that sum was due. The suit was in the county of plaintiff's residence and not in the county in which defendant was located. Judgment for plaintiff. Affirmed at General Term. Appeal.

Miller, J. 1. Defendant had no right to assume that M & Co. had authority to make other loans, in the absence of any statement that the subsequent loans were made for the benefit of H, even though M & Co. had a power of attorney from H, absolute on its face. 2. The tender was not conclusive upon the plaintiff as admitting that the defendant had a lien upon the stocks for that amount. 3. An action against a national bank may be brought in any county where the plaintiff resides. Judgment affirmed.

Cited: 17 Misc. 529.

PEOPLE v MECHANICS SAV. INSTITUTION (1883) 92 N. Y. 7.

Motion for preference over defendant's depositors, in payment of judgment. S commenced an action against the defendant savings bank, but did not obtain judgment until after the corporation had been dissolved and a receiver had been substituted as defendant. Motion granted as to costs and disbursements, but denied as to claim. On appeal, the General Term held that S was entitled to a preference for the full amount of his judgment. Appeal.

Andrews, J. The primary relation of a depositor in a savings bank to the corporation is that of creditor, and not that of beneficiary of a trust and the claimant is not entitled to the preference claimed. Order of General Term reversed.

Cited: 36 Hun 461; 64 id. 440; 1 Misc. 266; 17 id. 181; 22 id. 483; 113 N. Y. 453; 122 id. 140; 154 id. 131; 50 Supr. 454; 35 App. Div. 31; 59 id. 167; 2 Silv. C. A. 282.

FISHKILL SAV. INSTITUTE v BOSTWICK (1883) 92 N. Y. 564.

On deposit and interest payable under a special contract. Plaintiff, a savings bank, and the F Bank, of which defendant was receiver, under an agreement, transacted all their business in one office, and by the same agents. Their books alone

were kept separate. All of plaintiff's funds were deposited in the F Bank by the common agents, plaintiff having no cash drawer or safe. C delivered money which she wished deposited in the plaintiff to her credit, to B, who was both treasurer of plaintiff and cashier of the F Bank. The money was placed in the F Bank's cash box and disappeared. A check, received by B, payable to him as treasurer, to pay money due plaintiff, was indorsed by him in both official capacities and remitted for collection, but he gave the plaintiff no credit therefor. Another check, drawn on the F Bank to B's order as treasurer, indorsed by him as treasurer, was charged to the drawer on the books of the F Bank, but was not credited to plaintiff. Judgment for plaintiff. Reversed at General Term. Appeal.

Finch, J. 1. Under the agreement, money received by the plaintiff at the same moment became a deposit in the F Bank. 2. A check received by B as treasurer but held, indorsed and remitted by him as cashier, became at once a deposit in the F Bank for which the institute was entitled to credit. Order reversed.

SECOND NAT. BANK v BURT (1883) 93 N. Y. 233.

Damages for negligence and to compel defendant to pay over profits made by unlawful use of plaintiff's funds. Defendant, cashier of plaintiff bank, with the knowledge of the president and directors, discounted drafts made by two firms on each other. The firms were composed of the same persons, but their business was separate. Both firms failed after the discount of the drafts. An exchange committee to purchase and report on commercial paper, was never appointed, as provided by plaintiff's by-laws. A discount committee was appointed, but never met. A resolution that no officer should have power to make any loan or discount without the written consent of the advisory or executive committee, the president, and D, or any two of them, was rescinded, and thereafter, the president retiring a committee was appointed to examine the financial condition of the bank at such times as it deemed best. Plaintiff alleged that the discount of the drafts of the two firms was in excess of one-tenth of the plaintiff's capital stock. Defendant speculated in wheat with funds obtained by the discount of his own notes with plaintiff. This was contrary to a resolution of plaintiff's board of directors, who, on discovering the transaction, removed defendant. Thereafter plaintiff received from defendant a deposit more than sufficient to pay his notes, but refused to give them up or to refund the deposit, and demanded the profits on the wheat. Judgment for plaintiff. Modified at General Term. Appeal.

Ruger, C. J. 1. The appointment of a committee to make occasional investigations, and the withdrawal of the president, was particularly an abrogation of the restrictions theretofore existing upon the power of the cashier to discount paper. 2. The drafts of the two firms came within the meaning of the National Currency Act, providing that bona fide bills of exchange drawn upon actual existing values shall not be subject to the prohibition against banks lending money to a single person or firm in excess of one-tenth part of their capital. 3. It was error to charge the defendant with the amount of the profits realized from the speculation in wheat. 4. Plaintiff had the right to require defendant to return the funds taken or to take the proceeds of those funds, and having accepted the funds it could not claim the wheat. Judgment reversed.

Cited: 59 App. Div. 520; 124 N. Y. 449.

RAYNOR v PACIFIC NAT. BANK (1883) 93 N. Y. 371.

Attachment, issued when the property and affairs of the defendant bank were in a national bank examiner's charge under the direction of the comptroller of the currency. The bank, after resuming business for a short period, ultimately failed. Under U. S. R. S., sec. 5242, if at the time of attachment the defendant was insolvent or in contemplation of insolvency, the attachment was prohibited. Motion to vacate the attachment granted. Affirmed at General Term. Appeal.

Rapallo, J. 1. The attachment was illegally issued and could not be made valid by the subsequent acquisition of further capital by the bank. 2. The resuscitation of the bank and the payment of a large amount of its debts, did not estop it from setting up its insolvency to avoid the attachment. Sec. 4 of the Act of Congress of July 12, 1883, providing that thereafter jurisdiction of suits against national banks should be the same as against state banks, did not operate as a repeal of U. S. R. S., sec. 5242. Order affirmed.

Cited: 37 Hun 474; 93 N. Y. 648.

PEOPLE v CITY BANK OF ROCHESTER (1883) 93 N. Y. 582.

Insolvency. Motion for order directing the receiver of defendant, a bank, to pay money to the petitioner, also a bank. The petitioner and defendant acted as collecting agents for each other. Petitioner averred that it had sent defendant, prior to defendant's failure, paper for collection, the proceeds of which had been placed in a fund belonging to petitioner which remained separate at the time of the appointment of defendant's receiver. Defendant contended that there was no separate fund, but a running account on which remittances were made weekly. Motion denied. Affirmed at General Term. Appeal.

Rapallo, J. The creditor bank failed to establish any lien or impress any trust on any specific money of the debtor bank which would enable it to follow its property or funds, which went into the hands of the receiver, and to obtain payment in preference to other creditors. Order affirmed.

Cited: 117 N. Y. 396.

COATS v DONNELL (1883) 94 N. Y. 168.

To recover balance standing to plaintiff's credit with D & Co., of which firm defendants were the individual members. Plaintiff was assignee of the M Bank, the cashier of which made an oral agreement that if D & Co. would accept drafts, M Bank would deposit with D & Co., until their maturity, an amount equal thereto, and that the drawees should have a lien thereon as security for their acceptance, and should have the right at any time to charge the account with the acceptances and appropriate the deposit to their payment. D & Co. accepted the drafts, and the proceeds were deposited. Before maturity D & Co., receiving a notice of the failure of the M Bank, charged the acceptances to the bank, and on maturity paid the drafts. The bank assigned to the plaintiff after D & Co. had charged the acceptances to it and before the maturity of the drafts. Judgment for defendant. Affirmed at General Term. Appeal.

Andrews, J. 1. The cashier had authority to bind the bank. 2. The agreement was effectual to create a lien on the deposit according to its terms, and was not invalid as against public policy. 3. The plaintiff, as the assignee of the bank, cannot repudiate the agreement without paying the drafts or indemnifying D & Co. for the money expended in discharging their liability as acceptors. Judgment affirmed.

Cited: 36 App. Div. 25; 38 id. 327; 56 id. 48; 16 Daly 303; 66 Hun 586; 69 id. 512; 81 id. 275; 3 Misc. 420; 7 id. 111; 120 N. Y. 524; 132 id. 64; 138 id. 501; 140 id. 571, 574; 142 id. 579; 145 id. 445; 166 id. 390.

CITY NAT. BANK v NATIONAL PARK BANK (1884) 32 Hun 105.

On deposit. H was president of the plaintiff, and became indebted to it for \$70,000. For some time he had entire control of its affairs. H came to New York to raise money to pay this indebtedness, bringing with him paper and securities. He borrowed \$15,000 from C, \$10,000 of which he deposited with the defendant for the plaintiff, and left his and the vice-president's signatures. The vice-president wrote the defendant ratifying H's action. At the same time H obtained money from defendant, on worthless securities, which the defendant seeks to counterclaim. A good part of the money obtained by H was used toward paying off H's indebtedness to the plaintiff. Judgment for plaintiff. Appeal.

Davis, P. J. 1. The court should have charged the jury that the defendant, if the fraud were found to have been committed by the president of the plaintiff, was entitled to protection to the extent of the fruits which reached the hands of the plaintiff. 2. The defendant could waive the tort and proceed upon the implied contract to repay the money obtained by fraud. 3. As plaintiff and H were jointly and severally liable for the tort, they were jointly and severally liable on the implied contract. Judgment reversed.

Cited: 115 N. Y. 8.

ROME SAV. BANK v KRAMER (1884) 32 Hun 270.

On promissory note. The defendant made the note in payment of two other notes held by the plaintiff, a bank, as security for money loaned by the plaintiff for the benefit of a church. The defense was, that the note was taken as security, in violation of the plaintiff's charter, and of the general laws prohibiting unauthorized banking, and that it was, therefore, void. The charter allowed plaintiff to

lend to an individual on real estate security, and directed that the reserve or available fund should be kept on deposit or at interest as the trustees directed. Judgment for plaintiff. Appeal.

Smith, P. J. 1. The notes that were canceled were given for a loan of money, and even if they were ultra vires and void, the plaintiff had a good cause of action against the makers for the money loaned. 2. The surrender and extinguishment of that cause of action was a good consideration for the note in suit, and avoids the defense set up. 3. The legislature intended to authorize the trustees of plaintiff to make loans from the available funds on personal securities. Judgment affirmed.

Cited: 44 Hun 145; 66 id. 541. Aff'd: 102 N. Y. 331.

UNDERHILL v POUGHKEEPSIE SAV. BANK (1884) 32 Hun 432

Where money was drawn from a depositor's account by forged orders, and a deposit, smaller in amount than that drawn out by the forger, was thereafter made by him to the credit of the depositor, which sum was subsequently drawn out by the depositor, Held, that the bank was not entitled to credit for the subsequent deposit, in an action by the depositor to recover the amount paid out on the forged order.

MATTER OF BANK OF SING SING (1884) 32 Hun 462.

Where a bank had been insolvent and in the hands of a receiver for over twenty years, Held, that proceedings, under ch. 226, Laws of 1849, to enforce the liability of stockholders, were barred by lapse of time.

Aff'd: 96 N. Y. 672.

CROSBY v BOWERY SAV. BANK (1884) 18 Jones & S. 453.

On deposit. The complaint alleged that H deposited a sum of money with defendant, a bank, in his own name; that part of this sum was still in the possession of defendant; that plaintiff is and was the owner of this money when the deposit was made; and that it was left for the benefit of, and in trust for, the plaintiff. Sec. 259 of the General Savings Bank Act provided for bringing the depositor into the action when such deposit is claimed by another person. The depositor was not made a party. Demurrer. Overruled. Judgment for plaintiff. Appeal.

Per curiam. 1. There was no obligation on the part of defendant to return to plaintiff the money deposited with it. 2. Defendant is, therefore, under no obligation to bring in the depositor as provided by the General Savings Bank Act. 3. The deposit became the property of defendant and the defendant became the debtor to the depositor. Judgment reversed.

CHARLOTTE IRON WORKS v AMERICAN NAT. BANK (1884) 34 Hun 26.

On draft deposited for collection. The plaintiff sent a draft to the C Bank for collection and credit to its account. The C Bank sent the draft to the A Bank where it was payable, with directions to remit to the defendant bank for the credit of the C Bank. In payment the A Bank sent its own draft to the defendant. That day the C Bank failed. The defendant's offer to show that it received the A Bank's draft in the usual course of business, and that this draft was paid and credited to the C Bank, which owed defendant a large balance, in good faith, and without notice of the plaintiff's interest of the C Bank's failure, was refused. Judgment for plaintiff. Appeal.

Barker, J. Where the agent has converted the subject of his agency into money and pays the same in the due course of business, in discharge of his own indebtedness, to one ignorant of the nature of his title, the payee acquires a perfect title. Judgment reversed.

NASSAU BANK v JONES (1884) 95 N. Y. 115.

On railroad bonds and stock. Defendant's testator undertook, by the authority and for the benefit of plaintiff, a bank, to contract for a loan in plaintiff's name to the extent of one-half of the amount or bonds which should be allotted to him in a railroad company. Plaintiff, organized under ch. 260 of the Laws of 1838, was authorized to carry on the business of banking. Plaintiff contended,

that defendant's testator in making the subscription was the plaintiff's agent, and that the plaintiff became the equitable owner of the bonds and stock and the profits thereon. Judgment for defendant. Affirmed at General Term. Appeal.

Ruger, C. J. 1. The plaintiff could not enter into any engagement as a stockholder in a railroad corporation. 2. This being an executory contract, defendant could set it up as a defense. 3. The defendant cannot be treated as trustee or for the benefit of plaintiff. Judgment affirmed.

Cited: 56 App. Div. 42; 122 N. Y. 141.

PEOPLE v D'ARGENCOUR (1884) 95 N. Y. 624.

Indictment for forgery. The first count charged, that the defendant engraved a plate in the form of a promissory note, issued by a bank at Havana, for fifty centavos, said bank being incorporated under the laws of the Kingdom of Spain, without the authority of said bank and in violation of the state statutes. Defendant contended: 1, There was not sufficient evidence of incorporation of the bank; 2, that the indictment did not set forth an instrument purporting to be a pecuniary obligation of the bank, since no definition of the word "centavos" was given; 3, that there was no evidence showing want of authority to make the plate; 4, that the indictment was defective in not charging an intent to defraud some individual or corporation; 5, that there was no proof of an intent to defraud. An agent in New York testified that X alone had been authorized to make the bank notes. The unfinished engraved plate was found in defendant's possession. Defendant was convicted. Affirmed at General Term. Appeal.

Miller, J. 1. On an indictment for forgery of bank notes to prove the incorporation of the bank, evidence of the most general character is sufficient. 2. The indictment was good without attempting to define the word "centavos." 3. The people were not bound to show a negative, and the evidence introduced by the defendant, for the purpose of establishing authority, was not of itself, sufficient. 4. There is nothing in the provisions of the R. S., secs. 30 and 31, under which the indictment was made, which requires an intent to defraud. Judgment affirmed.

Cited: 34 Hun 262; 100 N. Y. 508; 168 id. 52.

ROBINSON v NATIONAL BANK (1884) 95 N. Y. 637.

To recover dividends declared and unpaid on stock in defendant bank, owned by plaintiff's assignor, H. The stock belonged to and stood in the name of S, who assigned it to H and transferred to him the certificates. Defendant refused to transfer the stock on its books and thereafter sued S, and on an attachment seized and sold S's stock to the R Bank. The National Banking Act provided that the capital stock of a bank should be transferable on the books of the association in the manner prescribed by the by-laws or articles of association. Defendant's by-laws provided, that the stock should be assignable only on the books of the bank, subject to the restrictions and provisions of the act, and that a transfer book should be kept in which all assignment and transfers of stock should be made. Defendant contended that the plaintiff's remedy was in equity instead of at law. Judgment for plaintiff. Affirmed at General Term. Appeal.

Finch, J. 1. By the assignment and transfer of the certificates, H obtained the entire legal and equitable title, and the transfer was complete as to the bank, unless it had some valid reason for refusing to register the transfer. 2. No demand on the part of plaintiff was necessary, as the bank had refused to honor the demand of plaintiff's assignor. 3. That plaintiff had an equitable remedy did not prevent him from pursuing his action at law. Judgment affirmed.

Cited: 17 App. Div. 240; 36 Hun 384; 24 Misc. 587; 132 N. Y. 256.

PEOPLE v MUTUAL TRUST CO. (1884) 96 N. Y. 10.

To dissolve a trust company for failure to make semi-annual reports under ch. 324 of Laws of 1874. The defendant contended that it was not one of the corporations within that act. The act provided: "Every trust, loan, mortgage security, and every corporation and association having the power and receiving money on deposit," should report semi-annually on its condition. Defendant was authorized by its charter to establish a public exchange for receiving deposits and transferring earnest moneys, stocks, bonds and other securities and for the procurement and making of loans on the same, guaranteeing the payment of bonds and other obligations. Judgment for plaintiff. Affirmed at General Term. Appeal.

Earl, J. The defendant was bound to make the report, since it was, within the meaning of the act, a company authorized to receive deposits of money and the fact that it was also a guarantee, loan, and mortgage security company cannot take it out of the operation of the act. Judgment affirmed.

Cited: 109 N. Y. 649.

PEOPLE v CITY BANK (1884) 96 N. Y. 32.

Petition to require the receiver of defendant bank to pay notes of petitioner, a firm depositing with it. Defendant discounted the firm's notes with the understanding that they should in fact be paid at the bank. The firm, wishing to anticipate payment on two notes, gave the bank their checks therefor, less rebate of interest. The defendant sold the notes without the firm's knowledge and received payment. Thereafter, the bank was declared insolvent, and its receiver refused to pay the notes without an order of court. Petition denied. Reversed at General Term. Appeal.

Danforth, J. 1. The object of the firm being to provide a fund for the payment of specific notes, and the engagement of the bank being to apply the fund to such payment, a trust was created, the violation of which constituted a fraud by which the bank could not profit, and to the benefit of which the receiver is not entitled. 2. The application of petitioners was a special proceeding for the enforcement or protection of a right under sec. 3334 of the code, and costs might, therefore, be awarded in the discretion of the court. Order affirmed.

Cited: 27 Abb. N. C. 147; 37 App. Div. 629, 630; 36 Hun 453; 39 id. 190; 40 id. 113; 43 id. 171; 77 id. 167; 81 id. 491; 91 id. 81; 122 id. 384; 150 id. 124, 125.

BURNAP v NATIONAL BANK (1884) 96 N. Y. 125.

Conversion. D the maker of a promissory note to his order, payable at the defendant bank, indorsed it to B, for value. On B's application, the defendant discounted the note, upon his depositing as security a government bond. Thereafter D, without the knowledge of B, made a similar note which contained the statement "U. S. bond collateral security." This he indorsed and delivered to the defendant, whereupon the defendant canceled the first note, the bond referred to being the same one left by B, as collateral to the first note. D afterward absconded without paying the note, and defendant, without notice to B or to the plaintiff, sold the bond. The bond belonged to the plaintiff, the wife of B, by whose consent he pledged it as security for the payment of the first note. She knew nothing about the second transaction. Judgment for plaintiff. Affirmed at General Term. Appeal.

Danforth, J. The defendant failed in its duty of diligence and it, rather than the plaintiff, must suffer from D's deceit. Judgment affirmed.

Cited: 5 Misc. 220; 8 id. 256; 122 N. Y. 436, 453; 124 id. 233; 130 id. 414; 132 id. 583; 148 id. 515; 55 Supr. 554.

CITY NAT. BANK v PHELPS (1884) 97 N. Y. 44.

On guaranty. Defendant gave a continuing guaranty of W's commercial paper to plaintiff, then a state bank. Thereafter plaintiff became a national bank under ch. 97, Laws of 1865, and the National Banking Act. Subsequently, further loans and discounts were made and this action was brought on the guaranty. Judgment for plaintiff. Appeal.

Rapallo, J. State banks may avail themselves of the privileges of the National Banking Act and subject themselves to its liabilities without abandoning their corporate existence, and without interruption of their pending business contracts. Judgment affirmed.

Cited: 28 App. Div. 268; 27 Misc. 328; 117 N. Y. 203.

BANK OF ATTICA v METROPOLITAN NAT. BANK (1884) 97 N. Y. 639.

On drafts. The plaintiff sent to the defendant for collection, five drafts, which were secured by bills of lading. To each of the bills was attached a notice to the consignee that certain freight charges were payable by check to defendant's order. The acceptors of the draft delivered to defendant the consignee's check. The defendant indorsed and collected said check and appropriated the same by the direc-

tion of the acceptor, but contrary to plaintiff's instruction, to the payment of other drafts accepted by him, which belonged to plaintiff and were also in the hands of defendant for collection. Judgment for plaintiff. Appeal.

Per curiam. The defendant, having failed to apply the proceeds of the drafts as directed, is liable. Judgment affirmed.

FLOUR CITY NAT. BANK v TRADERS NAT. BANK (1885) 35 Hun 241.

For a daily balance. The C Bank presented a draft payable at the plaintiff bank. The plaintiff certified it, expecting the C Bank to use it, as was customary among the banks of that city, in settling up balances. The C Bank gave the draft to the defendant to settle up their daily balances. The defendant presented it the next day to the plaintiff in settlement of balances, but as the C Bank had then failed, the plaintiff refused to accept it. Judgment for plaintiff. Appeal.

Barker, J. 1. The law places upon the plaintiff's obligation, the features of negotiability, and treats it as not due until after demand. 2. The certification of a draft imports the same obligation on the part of the bank as a like certification of a check drawn on it. 3. That the plaintiff relied on a custom can in no way affect the legal rights of the defendant without notice. Judgment reversed.

SIMS, EX'R v UNITED STATES TRUST CO. (1885) 35 Hun 533.

On deposit made by check to order of defendant and received in trust for S, plaintiff's testator. It was made by C and a certificate issued to him for the amount in trust. C drew the money and converted it to his own use. Defendant offered to prove a custom, existing for many years throughout the United States, whereby banks and trust companies and other financial institutions, in the absence of a restrictive indorsement, accepted as cash, checks drawn to their order, and deposit or apply the same as directed by the person presenting such checks. The evidence was excluded. Judgment for plaintiff. Motion for new trial.

Brady, J. A usage, when reasonable, uniform, well settled, not in opposition to fixed rules of law, and not in contradiction of the express terms of the contract, is deemed to form a part of the contract, and to enter into the intention of the parties. Defendant should have been allowed to prove the usage. Judgment reversed.

Cited: 2 Misc. 356.

DAVENPORT v BANK FOR SAVINGS (1885) 36 Hun 303.

In an action by an executor to recover money deposited with the bank by his testatrix, the defendant was charged with costs in the action, Held, that Laws of 1882, ch. 409, sec. 259, making it discretionary with the court, in cases of this nature, to charge such costs upon the fund affected, applied only in actions by a husband to recover money deposited by his wife in her own name, or where there were other claimants to the same fund who were not parties to the action.

NASHER v FIRST NAT. BANK (1885) 36 Hun 343.

To reduce attached funds to possession of a sheriff, to be applied on a judgment. D, of London, drew on plaintiff, in New York, gave the draft to M, who had no interest in it, for transmission. Before maturity plaintiff commenced an action against D, and after payment of the draft attached the money in the hands of defendant. Defendant averred that it was the debtor of M, and not of D. Verdict directed for defendant. Motion for new trial.

Brady, J. 1. M's only interest in the draft was by reason of his employment to transmit it for collection. 2. The title to it and its proceeds remained absolutely in D. 3. As soon as the money was paid to defendant, it became subject to attachment by plaintiff in his suit against D. New trial ordered.

STRAUS v TRADESMENS NAT. BANK (1885) 36 Hun 451.

For misappropriating a check. The plaintiff deposited a certified check to D's credit with the defendant bank, for the express purpose of meeting D's accommodation check and of paying D a small debt. The defendant, knowing this, applied the check to D's indebtedness to it and dishonored the accommodation check.

Complaint dismissed on the ground that it failed to present a cause of action against the defendant, and that D should have been made a party. Judgment for defendant. Appeal.

Daniels, J. 1. A trust was created in the plaintiff's favor, and the bank had no right to use any part of the proceeds of the check for a different purpose. 2. The objection to the omission of D, not having been taken by demurrer, was waived. Judgment reversed.

WHITLOCK, ADM'R v BOWERY SAV. BANK (1885) 36 Hun 460.

On deposit. The money was deposited in the names of J and E McC. J died in 1877 leaving his widow E surviving him. In 1878, E drew out the balance and gave up the bank book. Before the money was drawn out, C, a creditor of J, notified the bank not to pay the money to any one except by an order of the court. E was appointed administratrix of J's estate after she had drawn the money from the bank. C sued E, and during the pendency of this suit E died, and the plaintiff was appointed administratrix de bonis non. Judgment for the amount sufficient to pay C. Appeal.

Daniels, J. 1. The bank's liability consisted in its obligation to pay the debt so created on the demand of the party entitled to receive it. 2. The appointment related back to the time of the intestate's death and confirmed and legalized her act in demanding and receiving payment of this debt. Judgment reversed.

Cited: 41 App. Div. 417; 5 Dem. 373; 1 Misc. 266.

RILEY v ALBANY SAV. BANK (1885) 36 Hun 513.

On deposit. In 1882, F, accompanied by R and S, deposited in the defendant bank money belonging to M. The money was deposited in M's name, and F received a passbook. The parties informed the bank that M was an old woman and could not write. Subsequently F presented an order on the bank signed by M's mark, and witnessed by J, for the amount of the deposit, and the money was paid to him. There was an agreement that the money should not be withdrawn unless the three were present, and T, the defendant's clerk assented to it. The president of the bank told the administrator that the money had been paid out, hence he did not give the notice of withdrawal required by the by-laws of the bank. The plaintiff, M's administrator, charged F with corruptly procuring this money, and an adjudication to that effect was made. F was imprisoned to compel delivery. Judgment for plaintiff. Appeal.

Learned, P. J. 1. The agreement between the defendant's clerk and the persons who brought the money, did not bind the bank as the clerk had no authority to make such a contract. 2. The old age of a depositor or want of education, does not require a bank, before paying a check, to ascertain affirmatively that the drawer was sane. Payment on the genuine check of an insane person without notice of insanity is a valid payment. 3. Where there exists an election between inconsistent remedies, the party is confined to the remedy which he first prefers and adopts. 4. The bank waived the matter of notice. Judgment reversed.

Cited: 40 App. Div. 423; 46 Hun 131; 59 id. 26; 88 id. 120; 113 N. Y. 460; 2 Silv. App. 289. Aff'd: 103 N. Y. 669.

JENNERY v OLMSTEAD (1885) 36 Hun 536.

On bond. The defendants were the principal and sureties on the bond given by the principal as president of a savings bank. The bank agreed to pay the president from the net profits of the bank. In estimating the profits for the year, when the alleged breach occurred, the defendants called profits the difference between the purchase price and the market value of government bonds held by the bank. The plaintiff took the actual cost of the bonds together with the accrued interest on the unpaid coupons, and called the total the value of the bonds. The bonds were unsold. Judgment for the plaintiff. Appeal.

Peckham, J. 1. Neither method of estimating the profit was correct. 2. Profits of a bank cannot be estimated on the value of unsold bonds. Judgment reversed.

Cited: 2 Con. 564. Aff'd: 105 N. Y. 654.

PEOPLE v STATE BANK (1885) 36 Hun 607.

Insolvency proceedings. The petitioner deposited \$900 to the credit of his wife in the defendant bank and gave her the passbook. Subsequently she drew checks against this account, and when the receiver took possession of the bank, there remained to her credit \$856. The petitioner's account at the bank was overdrawn, and after the death of his wife, he and the cashier of the bank agreed that the checks drawn by him should be paid out of the wife's account, but the bank charged his checks to his account. The bank became insolvent, and the petitioner asked the court that the overdraft of his account be offset against the amount standing in his wife's name, and that the balance be transferred to his credit. Application granted. Appeal.

Learned, P. J. 1. As the interests of other creditors are affected, the agreement between the cashier and the petitioner could not be binding on the bank. There was no consideration, and the cashier had no authority. 2. There was a complete gift to the wife and the bank could not deny its liability to her. 3. The receiver cannot give up a valid claim against the petitioner by setting off against it a part of the claim of the administrator, which will be entitled only to its pro rata of the assets. Order reversed.

Cited: 27 App. Div. 444; 43 Hun 528. Aff'd: 102 N. Y. 740.

CORN EXCHANGE BANK v BLYE (1885) 37 Hun 473.

Replevin. Defendant was receiver of an insolvent national bank. Plaintiff claimed to be the owner of the property. Sec. 5242 of the U. S. R. S. provided that no attachment, injunction, or execution should issue against any such association or its property before final judgment. An order was made for a requisition directing the sheriff to take possession of the bonds and certificates in question. Order vacated. Appeal.

Daniels, J. An action brought to recover possession of property, alleged not to be the property of the bank and therefore not subject to the custody or administration of its receiver, is not included within the object or language of this enactment. Order reversed.

Aff'd: 101 N. Y. 303.

MITCHELL v HOME SAV. BANK (1885) 38 Hun 255.

On deposit. Plaintiff lost her passbook in defendant bank, the by-laws of which required that it be produced when any payment was demanded. Plaintiff informed defendant of her loss, with an affidavit that she had not transferred it. She made several demands for money, but payment was refused unless she could produce the book, which also contained the by-laws, or give bonds. Judgment for plaintiff. Appeal.

Learned, P. J. The by-laws formed a part of the contract. They were reasonable and valid and the depositor should comply with them. Proof of no transfer of the passbook or assignment of account, was not sufficient to relieve the depositor from giving the indemnity required. Judgment reversed.

ANDERSON v THOMPSON (1885) 38 Hun 394.

Where money was deposited in a savings bank by one person "in trust for" another, Held, that the title was vested in the beneficiary who might recover the same from an executor of the trustee, in an action against him, individually.

Cited: 61 Hun 512.

GIBSON v NATIONAL BANK (1885) 98 N. Y. 87.

Attachment of the indebtedness of the defendant bank to a railroad company, upon a deposit. On April 27, 1875, the defendant owed a railroad company \$6,600 upon a deposit, and at the request of R, the financial agent of the company in New York, certified a check of the company, signed by R, as assistant treasurer, to his order, for the amount. On April 30, the attachment was levied. On the same day, after the levy, R opened an individual account with the bank and deposited the check and other checks and drafts belonging to the company indorsed by him as treasurer, to his own credit. This deposit was afterward paid out

on R's checks and used by him to pay debts of the company. Judgment for plaintiff. Cross appeals.

Ruger, C. J. 1. A certified check on a bank by the owner of the fund deposited, outstanding in the hands of the drawer, constituted no such change in the ownership of the fund as exempted it from the lien of an attachment levied thereon against the owner. 2. The bank can escape liability of holding the deposit subject to the lien of the attachment only by showing payment to a bona fide holder of the check, or that it is outstanding in the hands of such a holder. 3. Where a negotiable security, representing the amount of a debt, has been delivered by a debtor to his creditor, it is essential to a recovery of an attaching creditor of such debt that he return the security to its maker on or before trial, or show that it has been paid in bad faith and is then in possession of the maker. 4. The bank had reason to believe, when the deposit was made by R to his individual credit, that the funds composing it were the property of the railroad corporation. 5. On service of the attachment, it was the duty of the bank to impound the funds in their hands, and present their payment by any of its agents, except to a bona fide holder of its obligations. Judgment affirmed.

Cited: 7 App. Div. 471; 44 Hun 60; 92 id. 450; 8 Misc. 450; 12 id. 521; 20 id. 63; 110 N. Y. 87.

GANLEY v TROY CITY NAT. BANK (1885) 98 N. Y. 487.

Conversion. M, plaintiff's intestate, deposited with defendant for safe-keeping two treasury notes, to be delivered up on surrender of the receipt. At maturity, August 15, 1866, defendant sold the notes and paid the proceeds to M's husband. Plaintiff's demand for the notes in 1879, was refused, both M and her husband being then dead. Defendant pleaded the Statute of Limitations; and answered that the husband, if living, would inherit a portion of the deposit, under the Laws of 1867, ch. 282, sec. 11; and that the proceeds were invested in real estate which descended to the children of M and her husband. Judgment for plaintiff. Appeal.

Earl, J. 1. It must be inferred that the notes were, under the laws in force after 1848, the separate property of M, which defendant could not lawfully pay to the husband. 2. That the husband was heir to a portion of M's estate was no defense. M was entitled to the bonds at the time of her death, and the action being for damages on a contract, the Statute of Limitation did not begin to run until demand. 3. Defendant cannot allege his own wrong to defeat an action on contract. Judgment affirmed.

Cited: 170 N. Y. 265.

PEOPLE v THIRD AVENUE SAV. BANK (1885) 98 N. Y. 661.

Proceedings by administrator of V for an order that the receiver of the defendant bank pay a deposit. In April, 1869, a person giving his name as S, a nurseryman, of Yorktown, New York, made a deposit and was given a passbook. At that time, V, a farmer, lived at the same place. The ages of the two were about the same. V died. A deposit book of the above description was found on his farm. In June, 1881, a person, presenting a deposit book apparently the same as that issued to S, answered all questions, and his signature appearing to be sufficient, was paid the deposit. The book was really a copy of V's, who had given a fictitious name in making the deposit. Judgment for defendant. Affirmed at General Term. Appeal.

Per curiam. The burden rested on the plaintiff to show that the deposit was made by V and the evidence failed to establish this conclusion. Judgment affirmed.

Cited: 40 Hun 303; 13 N. Y. 562.

CRAGIE v HADLEY (1885) 99 N. Y. 131.

On drafts deposited by plaintiffs with the F bank of Buffalo, sent by it to B & Co. for collection, and collected by that firm. The money was deposited in court, and the receiver of F Bank was made defendant. The drafts were deposited between two and three o'clock p. m., and the bank closed at three o'clock. Judgment for plaintiff. Appeal.

Andrews, J. 1. The acceptance of the deposit was a fraud on the plaintiffs, who are entitled to reclaim the drafts or their proceeds. 2. The plaintiffs are not seeking to enforce any right as creditors of the bank, but to reclaim their own property obtained by fraud. Secs. 5234 and 5242 U. S. R. S. providing that

preferential payments or transfers shall not be made by an insolvent bank, and providing for a ratable distribution of assets, do not apply. Judgment affirmed.

Cited: 43 Hun 171; 45 id. 97; 55 id. 555; 77 id. 159, 443; 79 id. 250; 81 id. 551; 21 Misc. 95; 111 N. Y. 457, 610, 618; 114 id. 175; 123 id. 278; 145 id. 506.

BRINCKERHOFF v BOSTWICK (1885) 99 N. Y. 185.

To recover for mismanagement by defendants, directors of a bank. The original plaintiff brought the action on behalf of the stockholders of the bank of which one of the directors had been appointed receiver. The bank became insolvent in 1877, through acts of the defendants extending from 1871 to 1876. This action was commenced in 1880. Other stockholders joined as plaintiffs in 1883. The plaintiff was not allowed to prove acts of misconduct on the part of the defendants prior to 1877. The code provided that an action against a director of a bank to recover a penalty or forfeiture imposed, or to enforce a liability created, by law, should be commenced within three years after the cause of action accrued. Judgment for defendants. Appeal.

Earl, J. The action is to be deemed commenced as to all the plaintiffs from the date of filing the first complaint, and the statute commenced at that time. Judgment reversed.

Cited: 6 App. Div. 512; 18 id. 592; 25 id. 306; 45 id. 350; 62 id. 130; 21 id. 116; 81 Hun 123, 189; 83 id. 549; 85 id. 103; 18 Misc. 160; 22 id. 490; 26 id. 342; 35 id. 519, 523; 152 N. Y. 535; 157 id. 180; 159 id. 122.

COYKENDALL v CONSTABLE (1885) 99 N. Y. 309.

On a joint and several promissory note made by defendants, payable to P or bearer. The note was made by D, as principal, the other makers being sureties, and was delivered to the payee. D told the payee's attorney, who had it for collection, that if he would send the note to the F Bank of R, it would be paid. The attorney gave the note to the H Bank of E, to be forwarded to the F Bank at R for collection. D had no funds in the latter bank, and asked plaintiff to take and hold the note. Plaintiff ordered the cashier to charge the amount to him, which was done, and the proceeds were sent to the H Bank and paid to the payee. Plaintiff intended to buy the note and to pay it. Judgment for defendants. Affirmed at General Term. Appeal.

Finch, J. The transaction between plaintiff and collecting agent was a sale and plaintiff was entitled to the note. Judgment reversed.

BAKER v NEW YORK NAT. EXCHANGE BANK (1885) 100 N. Y. 31.

On check. W opened an account with defendant as agent, to protect his principals, including plaintiff. W drew a check on this account payable to plaintiff, which defendant refused to pay. Defendant offered to show that W authorized it to charge his individual indebtedness to the account, which was done, and that it exhausted the agency account. The evidence was excluded. It did not appear clearly that the deposit was the direct proceeds of plaintiff's property. W was insolvent. Judgment for plaintiff. Appeal.

Andrews, J. 1. The agent held the goods and the proceeds upon an implied trust. Defendant had no right to charge against this fund individual debts of the agent. 2. The check operated as a setting apart of so much of the deposit to satisfy plaintiff's claim. 3. In the absence of conflict between plaintiff and others, for whom W was agent, the presumption is that the fund was ample to protect all the principals. Judgment affirmed.

Cited: 21 Abb. N. C. 154; 3 App. Div. 569; 11 id. 393; 17 id. 343; 37 id. 18; 44 id. 50; 46 id. 372; 55 id. 4; 15 Daly 76; 16 id. 324; 44 Hun 500; 49 id. 549; 54 id. 275; 62 id. 61; 70 id. 93; 86 id. 296; 88 id. 85; 91 id. 80; 7 Misc. 583; 11 id. 251, 599; 108 N. Y. 443; 123 id. 279; 125 id. 526; 130 id. 267; 58 Supr. 565.

CRAWFORD v WEST SIDE BANK (1885) 100 N. Y. 50.

On deposit. Plaintiff drew a check on defendant April 20, dated April 22, payable to M, a clerk, to obtain funds to disburse on the 22. M altered the date to

21, drew the money on that day and absconded. Defendant charged it to plaintiff's account. Judgment for plaintiff. Appeal.

Ruger, C. J. 1. The defendant had the same right as any other person to purchase a postdated check, and enforce it against the drawer in case of his liability thereon. 2. The check was never valid, because it was fraudulently altered as to the date of payment before it had any inception. 3. When a negotiable instrument constitutes in itself the only obligation existing against its maker, all remedies thereon are lost by fraudulent alteration, and the law refuses to create a new contract to supply the place of the one destroyed. Judgment affirmed.

Cited: 60 App. Div. 245; 59 Hun 498; 62 id. 204; 75 id. 303; 7 Misc. 102; 101 N. Y. 60; 102 id. 482; 107 id. 184; 114 id. 286; 126 id. 327.

SMILEY v FRY (1885) 100 N. Y. 262.

On certificate of deposit. The plaintiff's assignor deposited with the defendant a sum of money, and received a receipt as follows: "Due \$4,000 returnable on demand. It is understood that this sum is especially deposited with us and is distinct from the other transactions with said A." The defendant set up the Statute of Limitations, because demand was not made within six years prior to commencing suit. Judgment for plaintiff. Affirmed at General Term. Appeal.

Miller, J. The instrument being a certificate of deposit, no indebtedness arose until a demand was made; the statute, therefore, was no defense. Judgment affirmed.

Cited: 27 Abb. N. C. 89; 4 App. Div. 462; 45 id. 322; 6 Dem. 260; 42 Hun 19; 88 id. 537; 23 Misc. 209; 166 N. Y. 58.

SMITH v BROOKLYN SAV. BANK (1885) 101 N. Y. 58.

On deposit. The bank paid the money to a person presenting the passbook of depositor. A by-law, printed in the passbook, provided that all payments made by the bank upon presentation of the passbook should be regarded as binding on the depositor. Judgment for defendants. Appeal.

Ruger, C. J. 1. The passbook is not negotiable paper, and its possession constitutes in itself no evidence of a right to draw money thereon. 2. The word "payments," used in the by-law cannot be construed to mean any sums which the bank might choose to disburse, regardless of the person to whom they were paid. Judgment reversed.

Cited: 15 Daly 484, 527; 43 Hun 530; 53 id. 259; 62 id. 204, 349; 6 Misc. 112; 17 id. 574; 28 id. 253; 127 N. Y. 491; 135 id. 558.

HOTCHKISS v ARTISANS BANK (1886) 2 Keyes 564.

On deposit. Plaintiff sent a package of money, according to his custom, addressed to the cashier of defendant, a bank in which he had an account. The acting teller, while behind the counter during banking hours, received and receipted for it on the express company's book, but did not credit the plaintiff, and the cashier never received it. No claim was made by the defendant that it had repaid the money. Judgment for plaintiff. Appeal.

Hunt, J. The delivery to the defendant was complete and it is liable for the amount with interest. Judgment affirmed.

PEOPLE v BANK OF DANSVILLE (1886) 39 Hun 187.

Money had and received. E and Co., doing business in Cincinnati, sent to defendant, at Dansville, for collection, a draft on H at Dansville. This was collected, and the bank drew its own draft on a New York bank for the proceeds in favor of E and Co., who at once forwarded it to New York for collection; but defendant, the Dansville bank, having meanwhile failed, it was dishonored. This was a summary proceeding to require the receiver of the defendant to pay the money. Order granted. Appeal.

Barker, J. The bank was merely the agent for E and Co. in making the collection, and bailee of the money when collected. The receiver had no higher claim than the bank had. Order affirmed.

Cited: 37 App. Div. 18; 40 Hun 114; 91 id. 81.

PEOPLE v WALL STREET BANK (1886) 39 Hun 525.

Petition for reduction of taxes. When the tax in controversy was assessed on the bank's stock, the bank was in full operation. No steps were taken to review the assessment. The bank failed and a receiver was appointed, who petitioned the Special Term for a reduction of the assessment. Petition granted. Appeal.

Davis, P. J. Neither the bank nor the receiver is aggrieved or injured by the assessment. Application should have been made, first to the commissioners of taxes, and from their decision a writ of certiorari should have been applied for. Order reversed.

Cited: 57 App. Div. 111; 41 Hun 344; 55 id. 525; 81 id. 24; 27 Misc. 41; 34 id. 318; 123 N. Y. 380.

WILCOX v ONONDAGA COUNTY SAV. BANK (1886) 40 Hun 297.

On deposits. The deposits were made in the name of "Olive A. Wilcox, David J. Wilcox, agent." Some of the money was drawn by plaintiff, Olive A. Wilcox, and some by the agent, and part of it was used by plaintiff. The passbook was balanced from time to time and had been frequently in plaintiff's possession. When the last balance was written up, the agent presented the passbook, drew the remaining funds, and deposited the same in his own name. The original answer alleged that all the money deposited had been paid to plaintiff or her agent. On the second day of the hearing before the referee, defendant was allowed to amend by alleging a general denial. The bank books were produced to show the manner in which the account was kept. Judgment for defendant. Appeal.

Hardin, P. J. 1. It was proper to allow the amendment to the answer. 2. The bank books were competent evidence. 3. Plaintiff by her acts, ratified the acts of her agent in drawing the money. Judgment affirmed

STARK v UNITED STATES NAT. BANK (1886) 41 Hun 506.

On promissory note and draft. Plaintiff was the assignee of M, who owned the note and draft. M indorsed the note and draft for collection, and sent them to the W Bank with such instruction to collect. W Bank, with the same instructions, sent them to defendant. W Bank failed without having drawn on the proceeds. Defendant, refusing to deliver the instruments to plaintiff on demand after the W Bank's failure, collected them. Defendant contended that it could apply the proceeds to W Bank's overdrawn account, and that the W Bank was the proper party to bring the action. Judgment for plaintiff. Appeal.

Daniels, J. 1. The action was properly brought by the plaintiff. 2. The defendant was liable for its conversion of the note and draft. Judgment affirmed.

FIRST NAT. BANK v CLARK (1886) 42 Hun 16.

On certificate of deposit and a check. Defendant, a private banker, discounted a note for S, the payee, and issued a certificate of deposit for the amount less the exchange. The certificate recited only that the amount had been deposited, and was not made payable in any way. Plaintiff cashed the certificate. S, intending to give plaintiff bank all his rights, gave it the certificate without indorsement, and a check for the amount on defendant. S and the maker of the note having become insolvent, defendant refused to honor the certificate or draft. Defendant contended that the certificate was merely a receipt. Motion for a nonsuit, on the ground that the claim had not been transferred to the plaintiff. Motion granted. Judgment for defendant. Appeal.

Bradley, J. 1. The evidence in regard to the transfer of the instruments should have been submitted to the jury. 2. The certificate was prima facie evidence of a deposit for which defendant was liable. Judgment reversed.

PEOPLE v CLEMENTS (1886) 42 Hun 286.

Indictment for a misdemeanor. Defendant, the cashier of a state bank, was indicted for knowingly overdrawing his account on September 9, and thereby obtaining \$600 in money. There was no allegation or evidence that the money was wrongfully obtained. Prior to September 9, when the bank failed, the defendant's account was overdrawn and defendant knew it. Defendant produced at plaintiff's request, a check for \$600 dated July 25. By direction of the receiver, a check for

\$600 was charged to defendant's account on September 9. There was no evidence that the money was obtained on the check. Plaintiff contended that possession of the check by the bank was sufficient to show defendant obtained the money. The statute made it a misdemeanor for a bank officer to knowingly overdraw his account and thereby wrongfully obtain money from the bank. Verdict guilty. Appeal.

Learned, P. J. 1. It was for the prosecution to prove that the account was wrongfully overdrawn by means of the check. 2. There was no misdemeanor unless the money was wrongfully obtained. 3. Possession of the check by the bank was not sufficient to sustain the conviction. Judgment reversed.

Modified: 107 N. Y. 205.

ROOT v OLCOTT (1886) 42 Hun 536.

For counsel fees. Defendant was the receiver of an insolvent bank and plaintiffs were attorneys employed by the bank's cashier to collect claims assigned to the bank. There was no formal authority given the cashier and his action was not ratified by the bank. The referee allowed fees for work done on the claims before the assignment. Judgment for plaintiffs. Appeal.

Brady, J. 1. A bank cashier has implied authority to employ attorneys to collect claims due a bank. 2. The amount charged for work done before the claims were assigned to the bank, was not proper. Judgment modified.

Cited: 44 Hun 369. Aff'd: 115 N. Y. 635.

CORN EXCHANGE BANK v BLUE (1886) 101 N. Y. 303.

To recover securities pledged to M. National Bank, of which defendant was appointed receiver under the federal law. Sec. 5242, U. S. R. S., prohibited the issuing of an execution, or attachment against an insolvent national bank before final judgment. A requisition issued directing the sheriff to take the property. Defendant contended that the property could not be taken. Requisition vacated. Order reversed at General Term. Appeal.

Finch, J. The defendant acquired no right to property in the bank's custody, which it did not own, as against the real owner. Order affirmed.

Cited: 142 N. Y. 595; 143 id. 347.

VIETS v UNION NAT. BANK (1886) 101 N. Y. 563.

On deposit, to recover a balance in defendant bank. Plaintiff cashed a check given him by B, at the defendant bank, paid a note on which B was indorser, gave B some money, deposited balance in his own name, and drew and delivered his checks payable to B. On February 22, B indorsed these checks and delivered them to H as part consideration for her promise of marriage. B's son instituted proceedings to examine B's sanity, and on March 10, B was adjudged insane. On April 14, in compliance with an order made March 31, the defendant paid the money to D, the committee of B. On March 6 payment of one check had been refused, and two years later payment of the other check was also refused. On March 8, B married H. After both checks had been refused payment, B's wife recovered judgment against the plaintiff for their amounts. After B's death, Sept. 14, an action was brought to set aside the marriage because of B's lunacy, but on the trial it was found that he was of sound mind when married, that he recognized the marriage, but was not of sound mind at the time of his death. Judgment for plaintiff. Appeal.

Miller, J. 1. Whatever rights existed in favor of B's wife, or the plaintiff, could only be vindicated by an action to obtain the money from the committee. 2. The order appointing the committee was binding upon B and his privies, and was sufficient to authorize the payment by the bank to the committee. 3. The court erred in holding the defendant liable to the plaintiff for the amount of two checks deposited with it by the plaintiff. 4. Plaintiff's right to recover in this action is barred by the Statute of Limitations. Judgment reversed.

Cited: 39 App. Div. 94; 54 Hun 275; 55 id. 156; 83 id. 546; 11 Misc. 249; 18 id. 285; 22 id. 490; 119 N. Y. 202; 124 id. 331, 332.

NATIONAL CITY BANK v EXCHANGE BANK (1886) 101 N. Y. 595.

Where two statements were presented for clearance, contrary to a custom to allow but one, the first containing a transaction with a firm that had failed, and

the bank paid on account of the second, but refused to pay the first, stating that their accounts were too greatly confused, Held, that the state mentsshould be taken together; that there was no such balance struck or clearance made as entitled the plaintiff to recover as on an account stated; that it was unnecessary that the clearing bank should notify plaintiff of the firm's insolvency since it had notice.

MATTER OF McMAHON v PALMER (1886) 102 N. Y. 176.

To enforce payment of a tax by commitment. Defendant was taxed upon national bank shares, a statement of the value of which he furnished the assessors, and the amount of which was placed in the lists provided for the enrollment of such property. Sec. 7, ch. 302, Laws of 1859, required the commissioners to personally examine property, and furnish, under oath, a statement of it, with other information relative to personal property. The oath was sworn to January 8, and a statement filed, January 10. The tax was assessed according to the Laws of 1880, providing that bank stock should be included in the valuation of property in the place where the bank was located. The appellant had notice of the proceedings and did not take steps to review their correctness. The Laws of 1843 permitted the commitment of a person until he paid the personal tax imposed upon him. Judgment for plaintiff. Affirmed at General Term. Appeal.

Ruger, C. J. 1. There were no irregularities in the proceedings for the assessment of the property which rendered the assessment void. 2. The object of the statute, requiring the oath to be made to the statement directed to be returned by the deputy to the commissioner, is complied with, provided it be taken after the examination of the property and before the statement is filed with the commissioner. 3. There is no provision of law requiring the assessments of individuals for bank shares to be made otherwise than in the mode adopted. 4. The proceedings under the Laws of 1843, would not deprive appellant of his liberty, without due process of law. 5. The defendant, not having questioned the correctness of the proceedings by reviewing the action of the tax officers, is estopped from raising any question affecting the regularity of the proceedings. Order affirmed.

Cited: 45 App. Div 411; 44 Hun 48; 53 id. 201; 27 Misc. 35.

ROME SAV. BANK v KRUG (1886) 102 N. Y. 331.

On notes, against indorser. Plaintiff was organized under the Laws of 1851, which forbade the investment of money in any but certain specified ways, except by vote of the trustees, and except in certain amounts to be kept "in such available" form as they might direct. Plaintiff loaned \$3,000 on a note signed by 21 persons, and \$2,000 on a note signed by 13 persons, which were made for the benefit of the S church, on credit of the makers, to one of whom the money was delivered. Later the bank holding the notes, on which \$3,500 was then due took the note in suit for \$3,500 to pay the sum due on the old notes. On suit being brought on the note, defendant set up that the note was not one of the securities the bank was authorized to invest in, and was void. Judgment for plaintiff. Affirmed at General Term. Appeal.

Earl, J. 1. As between the bank and the makers of the note, the latter were the borrowers, and became liable to the bank for the money obtained from it, and the illegal action of the officers did not work a forfeiture of the money loaned. Judgment affirmed.

Cited: 76 Hun 173.

SIMS v UNITED STATES TRUST CO. (1886) 103 N. Y. 472.

On deposit. Plaintiff's testator, S, delivered to C his check payable to the order of the defendant, with directions to deposit it to his credit with defendant. C received from defendant, a certificate of deposit payable to himself as trustee for S and subsequently converted the money. The defendant collected the money from P Bank on S's check. C had a power of attorney from S, of which the defendant knew nothing, and which gave C power to collect moneys due for rents "or otherwise," and to transact all S's ordinary bank business at P Bank. This power was at the P Bank, and was to remain in effect till that bank was notified. It was not allowed in evidence. Judgment for plaintiff. Affirmed at General Term. Appeal.

Ruger, C. J. 1. Having accepted the deposit, the defendant was bound to keep the money, until it received his direction to pay it out. 2. The power of attorney did not authorize C to withdraw the deposit, as it cannot be held to extend to the

collection of money already deposited, and the clause conferring authority to do business with the P Bank impliedly prohibited such transactions with other banks. Its exclusion was therefore proper. Judgment affirmed.

Cited: 7 Misc. 325; 149 N. Y. 519.

AUBURN SAV. BANK v BRINKERHOFF (1887) 44 Hun 142.

On bond. Defendant executed a note and bond, secured by a mortgage on incumbered real estate, to B and G, who, in turn, assigned them to the plaintiff bank as security for the repayment of a loan. Defendant set up: that they were for the accommodation of B and G; that the notes were discounted by the bank in violation of the provisions of the restraining act (1 R. S. 600), and contrary to the statute allowing loans by such bank on unincumbered real estate; and, that defendant was a mere surety, and plaintiff had neglected to collect from the principal while solvent. It was orally stipulated, prior to the trial, that one of the payees was insolvent. G was dead. Defendant objected under sec. 829 of the Code to the competency of the following question: "At the time you indorsed that note, did you receive anything for it?" Objection overruled. Defendant also contended the plaintiff was not an assignee within the meaning of the section. Verdict for defendant. Motion for new trial.

Smith, P. J. 1. The notes were not discounted by plaintiff. 2. The notes, the bond, and the mortgage, were lawful securities for the loan by plaintiff. 3. The fact that the loan was made on incumbered real estate does not afford a defense in this action; the statute is for the protection of depositors. 4. There was no evidence that defendant was merely a surety. 5. The questions put, related to transactions with the deceased and were incompetent. 6. The plaintiff was an assignee within the meaning of the code. 7. The defendant was bound by the stipulation. Motion granted.

ROCHESTER PRINTING COMPANY v LOOMIS (1887) 45 Hun 93.

On draft. Defendants drew the draft in favor of M, their banker, by whom it was forwarded to the C Bank of Rochester. The bank was a creditor of M to an amount in excess of the draft, and passed it to M's credit. After the C Bank failed, it delivered the draft, with other securities, to plaintiff, in settlement of a debt due from it to plaintiff. M was insolvent at the time, to his own knowledge. The defense was that M had obtained the draft by false and fraudulent representations, that the transfer of the draft was in violation of the statute (1 R. S., 591, secs. 8, 9). The court instructed the jury on the single question as to the good faith of M in the transaction, but refused to charge that the representations must have been made to defendants in order to constitute a defense. A schedule of M's assignee was introduced in evidence to show M's financial condition at the time. Defendants called M as a witness, and then sought to impeach his credibility. Judgment for defendant. Appeal.

Bradley, J. 1. Neither M nor plaintiff was a bona fide holder of the draft. 2. The instructions given were correct; and those refused were improper. 3. The schedule made by M's assignee was competent evidence for the purpose for which it was introduced. 4. The violation of the statute is not available as a defense to the defendants. 5. The question of M's credibility was properly for the jury. Judgment affirmed.

Cited: 61 Hun 317; 21 Misc. 95, 96.

FRICKE v GERMAN SAV. BANK (1887) 24 Jones and S. 468.

On deposit. Plaintiff deposited money with defendant. A thief stole his pass-book and drew the money by forging the plaintiff's signature. A clerk of the defendant, whose duty it was to compare signatures, testified that he paid the money after comparing the signature on the book with that on the check. The genuine and forged signatures were exhibits in the case. The court left it to the jury whether the dissimilarities were such as would lead a person of reasonable prudence to refuse to act upon the check as genuine, and whether ordinary observation would detect them. Verdict for plaintiff. Motion for a new trial. Appeal.

Sedgwick, C. J. 1. The question would be not as to the degree of significance that would be attributed to the differences by a common person, but by a skilled person. 2. The clerk being an expert, the jury could judge not only of the effect on

his mind caused by comparing the signatures, but the effect if he had given due attention to what the dissimilarities indicated. Judgment affirmed.

Cited: 15 Daly 387.

PROSSER v FIRST NAT. BANK (1887) 1 Silv. 484.

For damages sustained in the purchase of stock. L, as president of the defendant bank, induced the plaintiff to purchase shares of defendant's stock, representing that the bank was solvent, which was untrue. The stock sold to the plaintiff, was purchased by L from other stockholders, with funds borrowed from the bank. Defendant having failed, the plaintiff contended that he was a preferred creditor for the amount of his claim. The defendant contended that the stock sold by L to the plaintiff, was never the property of the defendant. Judgment for defendant. Appeal.

Earl, J. 1. The president had no implied authority to buy the stock, and he did not, in fact, buy it for the bank. 2. The president committed a breach of trust in taking the bank's funds to make the purchases and the bank was entitled to follow its funds into the stock before a sale. Judgment reversed.

ERIE COUNTY SAV. BANK v COIT (1887) 104 N. Y. 532.

On guaranty. The F Bank executed a bond in consideration of deposits made, or to be made by plaintiff bank, and in which the obligor undertook to repay the plaintiff, on demand, all deposits with interest. At the same time, the guarantors indorsed on the bond that, in consideration of the making of the deposits mentioned, they severally guaranteed performance by the F Bank. Prior to 1882, three of the four guarantors on the bond of 1865 had died, and the bond in question was made as a substitute, at the request of the finance committee of plaintiff. Subsequently the F Bank failed, owing plaintiff for deposits. It was contended that the arrangement was in effect an agreement by the savings bank to loan money contrary to statute. Judgment for plaintiff. Affirmed at General Term. Appeal.

Andrews, J. 1. The surrender of the bond of 1865, was a good consideration for the guaranty, for, where a contract of guaranty is entered into concurrently with the principal obligation, a consideration which supports the principal contract, supports the subsidiary one also. 2. The savings bank was expressly authorized by statute to make loans not in excess of 10 per cent of their deposits. Paying interest on the deposit with the F Bank did not make an unauthorized loan. Judgment affirmed.

Cited: 40 App. Div. 556; 48 id. 471; 74 Hun 606; 81 id. 206; 86 id. 122; 19 Misc. 659; 21 id. 619, 620, 622; 148 N. Y. 246.

NASH v WHITE'S BANK (1887) 105 N. Y. 243.

For penalty incurred under ch. 163 of the Laws of 1870. The action was brought in 1873 against defendant bank for discounting paper at a greater rate of interest than 7 per cent. The Act of 1870 was amended by ch. 567 of the Laws of 1880. Judgment for plaintiff was entered in 1884. Affirmed at General Term. Appeal.

Per curiam. The law of 1880 in effect repealed the law of 1870, under which this action is brought, and since there was no provision saving pending actions or existing rights of actions, the action could no longer be maintained. Judgment reversed.

Cited: 6 Denio 173; 49 Hun 603; 105 N. Y. 640; 128 id. 251; 136 id. 354; 150 id. 205.

CLEWS v BANK OF NEW YORK NAT. BANKING ASS'N (1887) 105 N. Y. 398.

On draft. Plaintiff sued defendant bank as drawee. The draft indorsed by the payee and mailed to the indorsee, did not reach its destination. Thereafter it was certified by the defendant. Subsequently it was altered and offered to the plaintiff in payment for bonds. Plaintiff's messenger asked if the certification was good. The teller, after examining the draft, answered "Yes." Defendant had been notified to stop payment and had entered it in the book of stopped checks. The plaintiff's offer to prove that, according to the New York banks' usage, it was the teller's duty, before answering, to compare the draft with the entry in the certification book, and the book of stopped checks, and that he was guilty of gross negligence

in omitting to do this, and that, according to usage, the question to the teller related not merely to the marks of certification, but to the draft as certified, was refused. Plaintiff's request to go to the jury upon the question whether the teller's answer referred to the draft as certified or to the marks of certification was refused. Judgment for defendant. Affirmed at General Term. Appeal.

Rapallo, J. 1. Without regard to the admissibility of evidence of usage, the plaintiff had a right, under the circumstances, to go to the jury on the question whether the inquiry made of the teller was understood by the parties as referring to the validity of the certification at the time it was exhibited to the teller, or only to the genuineness of the marks of certification, and also on whether he was culpably negligent in answering the question without referring to the certification book, and the book of stopped payments. 2. Where a complaint is dismissed on opening of counsel, all facts referred to in the offer of proof and facts not stated in the complaint, unless specifically objected to, should be considered. Judgment reversed.

Cited: 11 App. Div. 436; 27 id. 241; 36 id. 117; 57 id. 268; 82 Hun 126; 7 Misc. 646; 114 N. Y. 76; 127 id. 559; 148 id. 659.

FLOUR CITY NAT. BANK *v* TRADERS NAT. BANK (1887) 105 N. Y. 550.

To recover balance on exchange account. Plaintiff bank and defendant bank had mutual exchange accounts with C Bank. On December 19, a draft for \$800 drawn upon G and accepted on December 15, one day's sight, to the order of the C Bank's cashier, payable at plaintiff, was presented. Plaintiff, according to the custom, marked it "certified" and returned it to the C Bank, to be used next day in the settlement of its exchanges, and charged it to G as paid. On the same day, plaintiff received and charged like certificates from the C Bank amounting to \$1,900, leaving a balance in favor of the plaintiff against the C Bank. Defendant in settlement of its exchange account sent plaintiff cash and items including the \$800 G acceptance, which, contrary to custom, defendant had forced C Bank to deliver in settlement of their account for the day. C Bank failed on the 19th, and on the 20th, the plaintiff refused to allow the G acceptance, and returned it. The defendant never paid the \$800. Judgment for defendant. Affirmed at General Term. Appeal.

Rapallo, J. The defendant purchased what it knew to be a mere voucher for an item in an account to be settled, and necessarily took it subject to the result of the settlement of that account. Judgment reversed.

LYNCH *v* FIRST NAT. BANK (1887) 107 N. Y. 179.

On certified check. W gave plaintiff a check payable to himself or order, which he signed but never indorsed. It was certified by the defendant bank, payable at A Bank, and indorsed by plaintiff. Judgment for plaintiff. Affirmed at General Term. Appeal.

Ruger, C. J. The bank was not liable to pay to a third person W's funds by any transfer of the check except one evidenced by the indorsement thereon, and plaintiff was not entitled to the deposit. Judgment reversed.

Cited: 77 Hun 169; 14 Misc. 176; 20 id. 92; 24 id. 390; 118 N. Y. 357; 124 id. 331.

McINTOSH *v* TYLER (1888) 47 Hun 99.

Where a check was deposited by the payee for collection, and the same was forwarded by the collecting bank to the drawee for payment, and the latter charged the check to the drawer's account, marked "paid" and made out a draft payable to the collecting bank but the same was destroyed before signature, and the drawee thereafter failed, Held, in an action by the payee against the drawer, that delivery to the drawee and the entry "paid" on the drawer's books did not discharge the drawer.

THOMPSON *v* ST. NICHOLAS NAT. BANK (1888) 47 Hun 621.

Conversion for bonds. The bonds in question were the property of plaintiff's testator, T, who had transferred them to C & M, his brokers, to hold as security for margins needed by T in stock transactions carried on for him by them. The bonds were payable to bearer and in the usual form of railway securities. C & M

had deposited them with the bank as security for overdraft, and for checks which the bank might certify for them. The bank took the bonds in good faith without notice. When C & M failed, they were indebted to the bank. A demand was made by T for the bonds after the failure, and was refused. Verdict for defendant. Motion for new trial on exceptions.

Daniels, J. 1. As the bank had received the bonds in good faith for value, without notice, it could retain them as against the owner. 2. Even though the action of a national bank in certifying checks for a person who did not have the money on deposit, was illegal, it would not prevent the bank from realizing on collateral pledged as security for such overdrafts. Judgment for defendant on the verdict.

Aff'd: 113 N. Y. 325.

SCOTT v HARBECK (1888) 49 Hun 292.

To recover trust fund. E deposited the money in a savings bank, to the credit of H, in trust for plaintiff. H drew the money and died without having accounted for it. This action was to recover the money from his administrators. It was not shown that plaintiff knew of the trust at the time it was made. Judgment for plaintiff. Appeal.

Dykman, J. It was immaterial that plaintiff had no knowledge of the deposit in her favor; such deposit was an executed trust, depending on no act of plaintiff to make it valid. Judgment affirmed.

Cited: 54 App. Div. 104, 107; 53 Hun 259; 62 id. 201.

PEOPLE v SMITH (1888) 50 Hun 39.

Where the assessors omitted to serve on the bank, within ten days after the completion of the assessment, the notice required by sec. 312 of ch. 409 of the Laws of 1882, relating to the taxation of the capital stock of banks, Held, that a legal and valid assessment was made without serving such notice.

MACK v MECHANICS AND FARMERS SAV. BANK (1888) 50 Hun 477.

On deposit. M, since deceased, had a deposit in the bank in his own name. He went with his mother, the defendant, to the bank, and had it changed so as to read "in account with" himself and his mother. Thereafter, on one occasion, he said that it was his mother's, and the day before he died he sent the passbook to his mother with a request that she keep it for him. His administrator claimed the deposit. Judgment for defendant. Appeal.

Learned, P. J. The son and mother were joint tenants of the fund, and on the son's death it went to the survivor. Judgment affirmed.

Cited: 8 App. Div. 49; 39 id. 102; 3 Misc. 269.

APGAR v HAYWARD (1888) 110 N. Y. 225.

To recover taxes illegally imposed. Defendants, commissioners, taxed plaintiffs at the rate of \$23 per share on stock in N Bank, which amount, by statute, was determined by reducing the real value of shares, in the same proportion as the assessed valuation of the bank's real estate bore to the whole amount of capital stock. Subsequently, the valuation of the real estate was reduced, and the \$23 per share was increased to \$28. By law of 1866, the valuation of stock depends upon the valuation of the real estate, and by the Act of 1859 the valuation of the real estate may be changed, but the valuation of neither real nor personal estate may be changed without twenty days notice, which was impossible in this case. Judgment for plaintiffs. Reversed at General Term. Appeal.

Danforth, J. 1. The commissioners had jurisdiction over the shareholder and the subject of taxation. 2. In dealing with the question they exercised a judicial function, and if in error, no action lies against them, unless that error was perpetrated maliciously. Judgment reversed.

Cited: 15 App. Div. 12; 111 N. Y. 623.

MAYOR v TENTH NAT. BANK (1888) 111 N. Y. 446.

To recover interest on deposits. The issue was upon a counterclaim. Defendant averred that it advanced to the commissioners of the county courthouse of New York, the sums specified; that, by chs. 9 and 29, Laws of 1872, the comptroller of

the city was required to pay defendant those advances, and that the debt was made a city liability. Plaintiff, in reply, alleged unauthorized payments by defendant. A fraudulent conspiracy was formed between the comptroller, some of the commissioners, and others, to raise some of the construction bills 40 per cent and to divide the excess. A portion of the payment was upon bills so raised. Defendant's president was sole representative of the bank in the transactions, and he had no knowledge of the conspiracy. Three of the conspirators were directors of defendant, but neither of them were present at any meeting when action was taken respecting the advances. Judgment for defendant on counterclaim for \$258,849.23. Appeal.

Earl, J. 1. The commissioners had no power to borrow money on the credit of the county. 2. Without legislation, the city, succeeding to the liability, would be under no obligation to pay the claim of defendant. Defendant was chargeable with notice of this. 3. The advances were ratified by the Act of 1872, and the city was made liable for them by that act. 4. The fact that a portion of the advances were misappropriated, without the knowledge of defendant, did not deprive it of a right to recover. 5. The knowledge of the three directors, who were among the conspirators, could not be imputed to the bank as bad faith, as none of them acted for the bank in the transactions. Their knowledge while engaged in their fraud was not the knowledge of defendant. 6. The legislature may determine what moneys municipal corporations may raise and expend, and it does not exceed its constitutional authority when it compels one to pay a debt which had some meritorious basis. Judgment affirmed.

Cited: 139 N. Y. 313; 166 id. 31, 493; 168 id. 85; 170 id. 109.

OUDEKIRK v CENTRAL NAT. BANK (1889) 52 Hun 1.

To recover bonds deposited with defendant as collateral security for loans. Plaintiff repaid the loans and demanded a return of the bonds. Defendant's cashier kept the bonds, and gave plaintiff a receipt that the bonds were deposited for safe-keeping or for future "like use." The defendant had the right to collect coupons and make returns which was of slight benefit to it. Defendant set up that it did not have the bonds; that the cashier converted them; but it gave no proof as to the time when, or manner in which the bonds passed from its possession. Judgment for plaintiff. Appeal.

Learned, P. J. 1. The bonds must be considered to have been deposited with the bank, and not with the cashier individually. 2. If a creditor holding a pledge, assent, after payment of the debt, to hold the pledge for the benefit of the debtor, it becomes a deposit; but this is a contract quite different from a deposit strictly so called. 3. The defendant, as it derived some benefit from the bailment, is liable for any neglect. Judgment affirmed.

Aff'd: 119 N. Y. 263.

BRADNER v WOODRUFF (1889) 52 Hun 214.

Where a bank, while insolvent, assigned certain securities to the plaintiff, but the same were not transferred when the bank was placed in the hands of a receiver, Held, that the assignment was invalid under secs. 186 and 187, ch. 402, Laws of 1882, which apply to banks, and repealed sec. 4, title 4, of ch. 18, par. 1, of the Revised Statutes.

LYNCH v FIRST NAT. BANK (1889) 53 Hun 430.

On certified check, drawn on defendant bank by A, payable to his own order, but not indorsed. The check was delivered by A to the plaintiff with the assurance that "all you have to do is to take the check and go and get the money. It is all right." The drawer of the check never otherwise assigned the balance owing him by the defendant to the plaintiff. Judgment for defendant. Appeal.

Van Brunt, P. J. 1. An assignment of an account need not be in express words. It may be by parol, and requires no writing. 2. The question of whether there is an assignment depends upon intent as evidenced by the acts and expressions of the alleged assignor. 3. What inference is to be drawn from certain conduct and accompanying representations, must be determined by the jury. Judgment reversed.

Aff'd: 119 N. Y. 635.

READ v BANK OF ATTICA (1889) 55 Hun 154.

On deposit. Defendant issued to plaintiff a certificate in this form: "Buffalo, March 25, 1879, J. J. P. Read has deposited in this bank \$4,252.64, payable to the order of J. J. P. Read on return of this certificate." Plaintiff based his action on the bank's promise to refund the money and made no reference to the certificate. The court, because defendant failed to set up the defense in its answer, refused to allow defendant to prove that the money was money of A and was received by plaintiff as A's agent and deposited in plaintiff's own name; and that the certificate of deposit in fact belonged to A, and that A's representatives demanded payment of the certificate. The certificate did not bear interest; and plaintiff was allowed to prove that defendant's cashier had orally agreed that it should draw interest at rate of 3 per cent if it remained on deposit any length of time. Judgment for plaintiff. Appeal.

Barker, P. J. 1. The money being payable on demand and the promise being based on an executory contract having good consideration, no rule of evidence was violated in receiving proof of the defendant's parol promise to pay interest after it had received the money and delivered the certificate into hands of the plaintiff. 2. The defendant did not set up in its answer as a defense the facts which it offered to prove, therefore they cannot be considered. Judgment modified.

Cited: 59 Hun 582. S. c.: 124 N. Y. 671; 4 Silv. 403.

FOX v ONONDAGA SAV. BANK (1889) 3 Silv. 397.

On deposit. The plaintiff, a depositor with the defendant bank, was provided with a passbook on which was printed a by-law providing that "the treasurer will endeavor to prevent frauds; but all payments made to persons producing the passbook, shall be deemed valid payments." A considerable amount of the money deposited had been checked out on presentation of the passbook; but the plaintiff contended that she did not receive it. The defendant showed that it had used all reasonable diligence in making the payment to prevent fraud. Nonsuit. Judgment for defendant. Appeal.

Hardin, P. J. 1. The plaintiff's credibility, and whether or not the passbook was obtained surreptitiously from her possession, were questions that should have been submitted to the jury. 2. It was the duty of the defendant to obtain proper information of the identity of the party presenting the passbook in order to carry out the provision of the by-law; and whether or not this had been done, was for the jury to determine. Judgment reversed.

READ v BANK OF ATTICA (1889) 4 Silv. 403.

In an action on a certificate of deposit, which contained no provision for the payment of interest, parol evidence of an agreement to pay interest, made by the bank at the time of deposit, is incompetent.

SALING v GERMAN SAV. BANK (1889) 15 Daly 386.

On deposit. The plaintiff was a depositor in the defendant bank. S surreptitiously procured plaintiff's bank book, personated the plaintiff, forged his signature, and collected sums which defendant charged to plaintiff's account. An officer of the bank, whose duty it was to examine the signatures of checks, testified that when S presented himself at the bank, he was not questioned as to his identity; and that if the signature presented was a fairly good signature, it was the custom of the bank to pay without questioning it. Defendant contended that its by-laws relieved it from frauds committed on its officers by producing the passbook and drawing money without the consent of the owner. Verdict directed for defendant. Reversed at General Term. Appeal.

Larremore, C. J. 1. It was error for the trial judge to refuse to allow the jury to pass upon the question whether or not the defendant was guilty of negligence in making the payments. 2. A savings bank cannot, by its by-laws, discharge itself from the obligation of exercising ordinary care as to the identity of persons presenting passbooks. Judgment of General Term affirmed.

Cited: 6 Misc. 111; 17 id. 578.

WALSH v BOWERY SAV. BANK (1889) 15 Daly 403.

On deposit. D, a depositor in the defendant bank, made a gift of the deposit to the plaintiff, in expectation of death, and accompanied the gift with delivery of the

passbook. D died a day or two afterward. The defendant although it had been notified by the plaintiff that she claimed the money as hers by gift, paid the money to D's administrator. Judgment for plaintiff. Affirmed at General Term. Appeal.

Van Hoesen, J. 1. There was a good *donatio causa mortis*. 2. The payment to the administrator, after notice of the plaintiff's right, leaves the bank in no position to call on the plaintiff to look to the administrator. Judgment affirmed.

Cited: 3 Misc. 283.

THOMPSON v ST. NICHOLAS NAT. BANK (1889) 113 N. Y. 325.

To recover possession of railroad bonds. The plaintiff's testator, T, transferred the bonds to C & M, stock brokers, to be held by them as collateral on transactions. C & M deposited them with defendant bank as security for any indebtedness from them to the bank, and the bank, relying on the security, promised to pay checks of the firm. The bank certified checks for \$236,000, and paid the holders, C & M failed, owing defendant a large balance. Plaintiff's testator, T, served on defendant written notice of his ownership of the bonds, and demanded an account showing the extent of the lien which defendant claimed. The account was not furnished. Defendant sold the bonds to satisfy the lien. Judgment for defendant. Affirmed at General Term. Appeal.

Ruger, C. J. 1. The plaintiff failed to show, that no title passed to defendant by transfer of the bonds, or that before suit, he became entitled to possession. 2. The U. S. R. S., secs. 5 and 208, prohibiting the certification of checks unless funds are on deposit, do not make the contract of certification void and illegal, but expressly affirm its validity. Judgment affirmed.

Cited: 16 Daly 459; 69 Hun 315; 88 id. 235; 5 Misc. 218; 127 N. Y. 359; 130 id. 228; 139 id. 125; 141 id. 316.

FOWLER v BOWERY SAV. BANK (1889) 113 N. Y. 450.

On deposit. W deposited the amount in defendant bank in trust for his wife, and a passbook was given him, the deposit being entered "Bowery Savings Bank in account with John White for Elizabeth White." W died leaving F his executor. Afterward the wife died, leaving plaintiff her executor. The plaintiff demanded the deposit, and was told to bring the passbook, then in possession of F. F, as executor, presented the book, demanded, and received the deposit. Plaintiff thereupon brought an action against F. The defense was that plaintiff had, by suing F, ratified the bank's payment to F. Plaintiff objected that this was not set up in the answer. No such objection was made on the trial. Judgment for plaintiff. Affirmed at General Term. Appeal.

Earl, J. 1. After the notice and demand, plaintiff could sue defendant as a debtor for the deposit, or he could bring an action against F for money had and received, and having sued F, he lost his remedy against the bank. 2. That the answer is defective is unavailing. Judgment reversed.

Cited: 10 App. Div. 428; 15 id. 69; 35 id. 31; 40 id. 422; 54 id. 106; 59 id. 167; 64 id. 112; 54 Hun 42; 62 id. 364; 68 id. 44; 87 id. 117; 2 Misc. 361; 9 id. 107; 17 id. 26, 381; 19 id. 641, 643; 20 id. 365; 26 id. 374; 34 id. 661; 121 N. Y. 170; 122 id. 436; 127 id. 38; 141 id. 437; 159 id. 172; 163 id. 470.

CUTLER v AMERICAN EXCHANGE NAT. BANK (1889) 113 N. Y. 593.

On deposit, made by plaintiff in defendant bank. The plaintiffs desired to forward the amount to H, at Leadville, Colorado, and deposited it with defendant, who gave him a "letter of advice" signed by the cashier, and directed to a Leadville bank, which stated: "Your account is credited this day \$500 received from Cutler, Hall & Co., for the use of J S H." This letter was forwarded to H, but before its receipt, the Leadville bank failed, and its receiver refused to pay. The letter was returned, and plaintiffs demanded that defendant transmit the money to H or refund it. Judgment for plaintiffs. Affirmed at General Term. Appeal.

Gray, J. The defendant became the depository of a fund devoted to one particular purpose and no other, and at no time did the moneys become merged with the general fund of defendant. Affirmed.

Cited: 55 Hun 557.

NATIONAL PARK BANK v SEABOARD BANK (1889) 114 N. Y. 28.

Money paid by mistake. A draft drawn on plaintiff by the Bank of W in favor of S was raised by him and given to the E Bank for collection. The E Bank indorsed it to the order of defendant's cashier "for collection on account of the E Bank," and forwarded it to defendant for collection. Its amount was placed to the E Bank's credit. It was presented to plaintiff and paid. The entire amount to the E Bank's credit was withdrawn from defendant by the E Bank before the forgery was discovered. When defendant was notified thereof by plaintiff, defendant had credits of the E Bank in excess of the amount paid on the forged draft, arising out of transactions subsequent to the date when the draft was paid by plaintiff. Judgment for defendant. Affirmed at General Term. Appeal.

Vann, J. 1. Defendant, not being the owner of the draft, but merely presenting it for payment as the agent of another bank, could not be required to repay, provided it had paid over to its principal before notice of the mistake. 2. It had so paid it under the rule, that where a payment is made on a general account with no direction as to its application the law applies it to the oldest items. Judgment affirmed.

Cited: 31 App. Div. 9; 50 id. 36; 55 Hun 556; 58 id. 84; 59 id. 498; 81 id. 493; 22 Misc. 725; 118 N. Y. 474; 139 id. 111.

CLEWS v BANK OF NEW YORK NAT. BANKING ASS'N (1889) 114 N. Y. 70.

On bill altered after certification. A bill, certified by defendant bank, was altered by raising the amount and making plaintiffs the payees. It was presented to plaintiffs in payment for bonds. Plaintiffs sent it to defendant, which, without examining the register, and a letter stopping payment, replied that it was good. Plaintiffs then received the bill, and subsequently defendant refused payment on the ground that it was a forgery. The court refused to charge, that the teller was not the bank's agent for the purpose of giving information other than as to the genuineness of the signature. A witness was not allowed to state his understanding of a contract of certification of a draft. Judgment for plaintiffs. Affirmed at General Term. Appeal.

Follett, C. J. 1. The finding by the jury in favor of the plaintiff in respect to defendant's negligence, in not examining the blotter and register, is sufficient to sustain the judgment. 2. The question put to the witness, not being relevant, was properly excluded. 3. The charge was properly refused. Judgment affirmed.

Cited: 36 App. Div. 117; 59 id. 106.

ATKINSON v ROCHESTER PRINTING CO. (1889) 114 N. Y. 168.

Accounting against a preferred creditor. Plaintiff was receiver of an insolvent bank, known to be such by the cashier and president on December 16. It continued business through December 19, when the directors determined to have a receiver appointed, and stopped payment. The morning of December 20, defendant's secretary received from the bank's cashier six bills aggregating over \$3,000 in payment of its indebtedness to defendant, for which amount defendant's secretary drew a check, though the transactions were dated the day before. Subsequently defendant was notified that it owed the bank for an overdraft which it paid the receiver, he being ignorant of the preceding transactions. Sec. 187, of ch. 409, Laws of 1882, forbade any transfer by a bank exceeding \$1,000, unless authorized by a previous resolution of the directors, and forbade any transfer by an insolvent bank to prefer a creditor. Plaintiff sued to recover the amount of the bills. Judgment for plaintiff. Affirmed at General Term. Appeal.

Follett, C. J. 1. The transfer was illegal without regard to defendant's intent. 2. The fact that defendant became a creditor of the insolvent bank through the fraud of its officers, gave defendant no right to a preference. 3. The paying of the overdraft by defendant did not release the latter from liability to account for the unlawful preference received by it. Judgment affirmed.

Cited: 37 App. Div. 19; 55 Hun 557; 11 Misc. 500; 21 id. 94, 96.

PERKINS v SMITH (1889) 116 N. Y. 441.

Foreclosure of mortgage security for notes. Plaintiffs were bankers to whom defendant gave \$4,000 in notes. Plaintiffs discounted the notes at a greater rate of interest than was allowed by the laws of the state. The notes remained unpaid.

A mortgage was given plaintiffs as security for debts up to \$10,000. Defendant claimed that the notes and mortgage were void for usury. The avails of the notes were credited to defendant and paid on his check. Sec. 68, ch. 409, Laws of 1882, allowed private bankers to loan at 6 per cent, and charge interest in advance and a reasonable discount. Sec. 69 placed individual bankers on an equality with national banks as to the penalties for usury. Judgment for plaintiffs. Affirmed at General Term. Appeal.

Follett, C. J. Plaintiffs are protected by secs. 68 and 69 of ch. 409, Laws of 1882, from the consequences imposed by the general statutes on citizens not engaged in banking, who receive more than the legal rate of interest for loans. Judgment affirmed.

Cited: 29 App. Div. 305; 35 id. 172; 37 id. 274; 83 Hun 73; 16 Misc. 250; 21 id. 510, 512.

SCHLUTER, ADM'R'X v BOWERY SAV. BANK (1889) 117 N. Y. 125.

On deposit. K, a married woman, while a resident of New York, made a deposit in defendant bank, in trust for an infant. K moved to New Jersey and died. Her husband, a resident of New Jersey, administered her estate under administration granted there, and received the deposit from the bank. K, in fact, left a will, and letters testamentary were subsequently issued to C S, the executor named in the will. His demand for payment was refused. Plaintiff, at his death, became his administratrix. In New Jersey a married woman could not be a trustee. The answer alleged: that K died in New Jersey; that her husband was there appointed her administrator; and that the surrogate was authorized by the laws of that state to issue letters of administration. Judgment for defendant. Affirmed at General Term. Appeal.

Earl, J. 1. There being no notice to the bank from the beneficiary, and the payment to the administrator of the depositor being made in entire good faith the bank is discharged. 2. The letters of administration were effective until revoked. 3. The allegations were sufficient to allow the laws of New Jersey to be read in evidence. 4. K became a trustee for the fund, and her removal from the state did not divest her title. Judgment affirmed.

Cited: 29 Abb. N. C. 473; 29 App. Div. 399; 61 Hun 511; 62 id. 608; 74 id. 526; 88 id. 15; 3 Misc. 269; 24 id. 501, 588; 35 id. 194; 159 N. Y. 172; 160 id. 95.

NATIONAL BUTCHERS & DROVERS BANK v HUBBELL (1889) 117 N. Y. 384.

Money had and received. Plaintiff bank forwarded checks, notes and drafts to defendants, private bankers, for collection. The defendant bankers failed and made a general assignment to defendant H, who received the proceeds of the paper collected without any notice of plaintiff's claim. H paid a dividend on preferred debts by order of court, and in good faith included therein the moneys received. Plaintiff knew nothing of the order until after payment of the dividend. Defendant contended that plaintiff was guilty of laches. Plaintiff gave notice of its claim within sixteen days after learning of the assignment, but made no demand. Meanwhile, under an ex parte order of the county court, the assignee paid out a large part of the money. Judgment for defendants. Affirmed at General Term. Appeal.

Peckham, J. 1. The indorsement by plaintiff to the firm was for collection simply, and no title passed. 2. The assignee had no better title than his assignor, and neither had any right to apply the money collected, after failure, to the payment of firm debts. 3. The order of the county court for the payment of the dividend was no protection to the assignee. 4. Plaintiffs could not be concluded as to title to their property by any ex parte decision of the county judge. 5. Demand before suit was not necessary. 6. Plaintiffs were not guilty of laches. Judgment reversed.

Cited: 50 App. Div. 35; 117 N. Y. 283; 124 id. 561; 147 id. 594; 155 Hun 556; 77 id. 533; 81 id. 490; 7 Misc. 584; 31 id. 257.

JONES, ASSIGNEE v MERCHANTS NAT. BANK (1890) 55 Hun 290.

Where a bank, holding securities, stated in writing that they were held subject to the order of the plaintiff's assignor, another bank, Held, that it was error to reject evidence of an assignment existing prior to the writing, under which the

securities were held, unless the defendant bank refrained from doing some act upon the faith of this writing; and that, as the defendant bank was in no way injured, there was no estoppel.

ARNOT v BINGHAM (1890) 55 Hun 553.

To recover a trust fund. Plaintiffs sent a note to a national bank in this state for collection. The maker paid it by check on the bank. His account, an ordinary and open one, and the cash on hand in bank were each greater than the amount of the note, and the latter continued greater for several days. The bank continued its ordinary business until its failure four or five days after the note was paid, and defendant was made receiver. Plaintiffs asserted title to part of the bank's funds at the time of payment by a right springing from another transaction. Judgment for plaintiff. Appeal.

Martin, J. 1. Though defendant's insolvent is a national bank, this court, nevertheless, has jurisdiction, because the relation between the plaintiff and the bank was that of bailor and bailee, or cestui que trust and trustee. 2. The transaction between the maker and the bank was in effect a collection of the amount of the note from the general funds in the bank's hands, and a special appropriation of it to the payment of the note. 3. The amount belonged to plaintiffs, although mingled with other money owned by the bank. 4. If the plaintiffs had title to a part of the funds in the hands of the bank, the amount paid out should be held to have been paid from the portion belonging to the bank, and the remainder of the fund which came into the hands of the receiver should be treated as belonging to the plaintiffs. Judgment affirmed.

Cited: 58 Hun 583; 81 id. 493; 92 id. 160.

SEACORD v PENDLETON (1890) 55 Hun 579.

To enforce liability of stockholders of an unincorporated insolvent bank, as partners. The plaintiffs alleged that they were depositors, that they demanded payment of their deposits; that it had been refused by the bank; and that defendants held certificates of stock and had received dividends. But it was not alleged that the defendants had taken any part in the organization, or in any business transacted by the bank, as partners, agents, directors or otherwise, or had any knowledge thereof, or that they had made any partnership agreement. Demurrer. Overruled. Judgment for plaintiffs. Appeal.

Martin, J. The bare allegations that defendants were holders of what appeared to be stock in a corporation not properly organized, and that they received dividends thereon, were insufficient to constitute a cause of action against the defendants as partners or as members of a joint stock association. Judgment reversed.

CLAGGETT v METROPOLITAN NAT. BANK (1890) 56 Hun 578.

On bank notes, issued by a state bank. Laws of 1859, ch. 239, provided that where a state bank desired to retire its circulating notes, it might do so by publishing a notice of its willingness to redeem the notes, and by paying them if presented within six years; that any surplus remaining after the redemption of notes and payment of debts, should be divided among the stockholders. In 1865 defendant became a national bank under the provisions of the Act of 1865, which provided that if a bank continued in another form, all the assets should be transferred to the new formation. Defendant alleged that it had complied with all the requirements of the Act of 1859, and that the notes in suit were not presented for payment until after the lapse of seven years from the publication of notice. Judgment for plaintiff. Appeal.

Brady, J. 1. The Act of 1859 applies only to banks intending to close their business absolutely, and not to those intending to continue it under any other form. 2. The provision of the Act of 1859, that the surplus shall be divided among the stockholders, is inconsistent with the provision of the Act of 1865. Judgment affirmed.

Cited: 28 Misc. 328. Aff'd: 125 N. Y. 729; Aff'd: 141 U. S. 520.

PETERS v FOSTER (1890) 56 Hun 607.

For assessment against stockholders. The plaintiff was appointed by the controller of the currency of the United States receiver of a national bank situated

in Virginia. The comptroller duly levied the assessment. Demurrer on the grounds: 1, that the plaintiff, as a foreign receiver, had no standing in the state courts; and 2, that he was not the real party in interest. Overruled. Judgment for plaintiff. Appeal.

Barrett, J. 1. A receiver appointed under the laws of the United States is not to be regarded as a foreign receiver; nor have the federal courts exclusive jurisdiction over this class of cases; he may, therefore, proceed in our courts. 2. The receiver, being expressly authorized by statute to sue, is excepted from the provision of the code requiring the action to be prosecuted in the name of the real party in interest. Judgment affirmed.

Cited: 39 App. Div. 158; 28 Misc. 754.

SMITH v ANDERSON (1890) 57 Hun 72.

On deposit, for funds delivered to the president of a bank, and deposited by him in his own name, as attorney of the plaintiff. The president drew out and misappropriated part of the funds. Plaintiff was ignorant of the foregoing facts until after the failure of the bank. Defendant was its receiver. Judgment for plaintiff. Appeal.

Corlett, J. Where the president receives money which is deposited in the bank, his knowledge will be treated as that of the bank, and it is liable to the depositor, even though the president misappropriated the money. Judgment affirmed.

NATIONAL PARK BANK v STEELE M'F'G CO. (1890) 58 Hun 81.

Money paid, by mistake. M, V & Co. made and delivered their note to defendant, a corporation, for value. Defendant presented it to plaintiff's assistant teller, who without direct authority, but acting solely on the mistaken supposition that the makers' account was sufficient to justify the act, certified the note. Defendant deposited it in the T Bank to his credit. The following day it was paid to the T Bank through the clearing house. Notice of the mistake was given defendant four days after the note was delivered to him and two days after it was certified. No change in defendant's position or in its ability to insure payment, arose out of the delay occasioned by the certification of the note. Judgment for plaintiff. Appeal.

Daniels, J. The act of the teller in certifying the note without consulting the account of the makers with the bank may be characterized as careless, but that circumstance was not sufficient to prevent the recovery of the money. Judgment affirmed.

Cited: 59 App. Div. 108; 60 id. 206.

NEW YORK NAT. BANK v COYKENDALL (1890) 58 Hun 205.

On note against indorsers. Plaintiff, a national bank, took the note as collateral security for a past-due check on which one of defendants was liable. The note was payable at six months and was indorsed by the several defendants, including C. The name of one of the indorsers prior to C was crossed out, after C indorsed and without C's knowledge. C had indorsed the note for the accommodation and for a purpose other than that for which it was used. Judgment for C, and against other defendants. Appeal as to C.

Learned, J. 1. Where an accommodation note is diverted from the purpose for which it was intrusted to the payee, an antecedent debt is not a sufficient consideration to make a person a bona fide holder for value as against the party whose indorsement has been thus wrongfully diverted. 2. The mere taking of security as collateral does not extend the time of the principal debt. 3. If an intentional alteration is made in an instrument affecting the rights of a signer thereto without his consent, he cannot be bound by the instrument. Judgment affirmed.

Aff'd: 132 N. Y. 597.

GAMMOND v BOWERY SAV. BANK (1890) 15 Daly 483.

On deposit. G had a deposit with the defendant, a savings bank. He assigned the same to the plaintiff, and delivered to him his passbook. The gift was *inter vivos*. After G's death, the defendant refused to pay the deposit to plaintiff, on demand made by her attorney. As ground for refusal to pay, defendant relied on its rules, which provided that drafts sent by mail or otherwise would not be

entitled to payment, unless the passbook was produced and the depositor answered questions; that on the decease of the depositor the money should be paid to his legal representatives; and that drafts might be made personally or by order if the bank had the depositor's signature on the signature book, or by letters of attorney. It also contended, that plaintiff should have made the demand through the administrator. Judgment for plaintiff. Affirmed at General Term. Appeal.

Bookstaver, J. 1. The rules clearly relate to dealings between the bank and the original depositor, and do not contemplate the case of an assignment or gift inter vivos. The relation of the defendant and G was that of debtor and creditor, and the plaintiff succeeded to all the title and rights of G. 2. The gift having been made before the death of G, the title was from that time in the plaintiff, and an administrator would have had no title to the fund. Judgment affirmed.

KELLY v FOSTER (1890) 5 Silv. 476.

The liquidator of a bank, in the absence of proof of collection by him, will not be held liable on a note as to which there is nothing to prove that the note was ever paid to the bank or to connect the bank therewith, except that it is entered in the bills receivable book; and the fact that ten years have elapsed since the last payment to stockholders, is favorable to the liquidator.

GOSHEN NAT. BANK v BINGHAM }
BINGHAM v GOSHEN NAT. BANK } (1890) 118 N. Y. 349.

1. To recover check. 2. On check. The G Bank was induced by false representations of B, to cash a draft for him. The proceeds were deposited by B, and the bank gave him a certified check, payable to his order for the amount. B presented the check, without indorsement or agreement to indorse, to B & Co., bankers, parties in these suits, who cashed it. While they held the check, the G Bank notified them of the fraud and demanded the check. They refused, and suit was brought by the G Bank for its recovery. B & Co. obtained the indorsement of B, presented the check, were refused payment, and brought suit against the G Bank for the amount. Judgment for defendants in first action. Judgment for plaintiffs in the second action. Affirmed at General Term. Appeal.

Parker, J. 1. A purchaser of a draft, or check, who obtains title without an indorsement by the payee, holds it subject to all equities and defenses existing between the original parties, even though he paid full consideration, without notice of the existence of such equities. 2. The indorsement subsequent to the time of notice of the fraud did not relate back to the time of the transfer. It had no effect. 3. The G Bank was not estopped to deny the validity of its check. 4. The action of the bank to recover the check cannot be maintained. Judgment in first suit affirmed. Judgment in second suit reversed.

Cited: 77 Hun 159; 2 Misc. 252; 14 id. 174; 22 id. 536; 169 N. Y. 428.

CORN EXCHANGE BANK v FARMERS NAT. BANK (1890) 118 N. Y. 443.

On draft against drawee. M drew a check on the defendant, a national bank, payable to C, who indorsed it in blank, and delivered it to the H Bank for collection. The H Bank indorsed it "for collection," and sent it to plaintiff, its correspondent, "for credit." Plaintiff credited it as directed, reserving the right to charge it back to the H Bank, if it should be dishonored. Plaintiff did not know that the H Bank was acting only as collector. The check was forwarded to defendant "for collection and remittance" to plaintiff. Defendant charged it to M, canceled it, and sent plaintiff its own draft for the amount less a charge for collecting the check, payable to plaintiff's order on a bank in New York, where plaintiff was located. The H Bank failed, and M and C, after the draft had been sent to plaintiff, but before it was presented, induced defendant to stop payment. Judgment for defendant. Appeal.

Follett, C. J. 1. The relation of principal and agent was established between plaintiff and defendant and, in discharge of the liability, the agent sent its draft to, and it was accepted by, the principal. 2. The agent cannot assert, as against its principal, the rights or equities of a third person. 3. Neither plaintiff nor defendant was C's agent. Judgment reversed.

Cited: 17 App. Div. 496; 75 Hun 89; 81 id. 486; 148 N. Y. 128.

NATIONAL CITY BANK v WESTCOTT (1890) 118 N. Y. 468.

Money had and received, to recover overpayment on a check. N gave defendant for collection, a check drawn on plaintiff, a bank, indorsed in blank by the payee and subsequently indorsed by N, in blank, "for collection." The check had been fraudulently raised. None of the parties had notice of this. Defendant's agent, D, indorsed his own name on the check, presented it, received the proceeds from plaintiff and remitted them to N. There was no evidence of any authority in D to indorse paper for defendant. The answer admitted that the altered check properly indorsed was presented by defendant's agent and plaintiff contended that this was an admission that defendant indorsed it. Verdict directed. Judgment for plaintiff. Affirmed at General Term. Appeal.

Bradley, J. 1. The payment having been made to defendant as agent, as plaintiff knew by the indorsement, and defendant in good faith having paid it over to its principal, it is not liable for the money paid under a mistake of fact. 2. The answer did not admit that the check was indorsed by defendant, and defendant was not bound to indorse or guarantee the check. 3. Defendant is not bound by D's indorsement since he had no authority to that effect. Judgment reversed.

Cited: 45 App. Div. 444; 9 Misc. 59.

CITIZENS NAT. BANK v IMPORTERS BANK (1890) 119 N. Y. 195.

For non-payment of drafts. W & Co. purchased the drafts from plaintiff, a national bank, indorsed, and gave them to their bookkeeper with instructions to send them to creditors. The bookkeeper erased the indorsements, forged others, and used the paper for his own purposes. The drafts were presented through another bank and paid by defendant, a bank with which the plaintiff had deposited funds for the payment of its drafts. Upon return to plaintiffs, the forgeries were discovered, and W & Co. demanded, obtained, and indorsed the drafts to X, for collection. Defendant refused payment on the ground of the previous payment. The plaintiffs repaid W & Co. and brought this action. Defendant's offer to prove by W that W & Co. had compelled the bookkeeper to reimburse them for the loss, was refused. Judgment for plaintiff. Affirmed at General Term. Appeal.

Gray, J. 1. A forged indorsement does not pass title to commercial paper, negotiable only by indorsement, and payment by the drawee, although in good faith, of a draft so affected, is no payment as to the true owner. 2. Breach of contract was the proper remedy. 3. The evidence was not admissible. Judgment affirmed.

Cited: 87 Hun 7; 126 N. Y. 327.

OUDERKIRK v CENTRAL NAT. BANK (1890) 119 N. Y. 263.

Conversion of United States bonds. The plaintiff left his bonds with defendant, a national bank, as collateral for discounts on notes. Upon demanding the bonds, there being no indebtedness on his part to the bank, he was informed they could not be found. The committee did not investigate the bank's affairs as often as required by the by-laws. No record was kept or inspection made of such securities. After the loans had been paid, defendant's cashier gave plaintiff a receipt stating that the bonds were held for further loans. Judgment for plaintiff. Affirmed at General Term. Appeal.

Ruger, C. J. The bank was not a gratuitous bailee and was liable for the want of ordinary and reasonable care. Judgment affirmed.

Cited: 39 App. Div. 412; 55 id. 211; 1 Misc. 4; 6 id. 232; 19 id. 639; 20 id. 601, 602; 26 id. 25; 29 id. 294; 123 N. Y. 65; 141 id. 106.

JEMISON v CITIZENS SAV. BANK (1890) 122 N. Y. 135.

To recover commissions and money expended. Defense: ultra vires. P, the cashier of the defendant bank, ordered the plaintiffs to purchase cotton futures, stating that it was for one of the defendant's customers who had deposited a margin. The result of the speculations was a loss. P possessed the powers incidental to the office and had general charge of the business of the defendant. The charter of the defendant authorized it to receive deposits, to be repaid on demand with interest. Defendant had received no cotton, and had made no contracts therefor in its name. The plaintiff contended that the defense of ultra vires was not avail-

able, because the plaintiffs had executed the contract. Judgment for defendant. Appeal.

Haight, J. 1. Plaintiff was chargeable with notice of the powers and purposes for which defendant was formed and was bound to know the extent of authority of its agent and officers. 2. The transactions were ultra vires. 3. If the defendant neglected to disclose its principal, it must be regarded as a principal, then the question of ultra vires was still available to the defendant. Judgment affirmed.

NATIONAL BANK v MANUFACTURERS BANK (1890) 122 N. Y. 367.

Money had and received. The plaintiff, a bank, made a draft on the M Bank for \$17 in favor of W. The draft was thereafter altered and raised and deposited with the defendant bank, to W's credit. After the draft was paid by the M Bank, and charged to the plaintiff's account, the forgery was discovered. The defendant thereupon induced the plaintiff to procure the draft, send it to defendant, and make an affidavit as to the correct amount, promising that it would remit the difference. The defendant having failed to carry out its agreement, the plaintiff demanded a return of the draft and affidavit, and notified the M Bank that it would not recognize payment for more than \$17. Judgment for plaintiff. Reversed at General Term. Appeal.

Parker, J. 1. Plaintiff's acceptance of and subsequent compliance with the defendant's proposition, bound the defendant to pay the face of the raised draft less \$17. 2. But the subsequent transactions were, in effect, a rescission of the contract, and the plaintiff parted with its right of recovery. 3. The action cannot be maintained as one for money had and received, as it does not appear that the defendant received the plaintiff's money. Judgment affirmed.

STRAUS v TRADESMEN NAT. BANK (1890) 122 N. Y. 379.

Money had and received. The plaintiffs deposited their check with defendant, a bank, for the accommodation and credit of D, who at the time was indebted to defendant. Defendant applied part of the proceeds of the check in payment of the claim. The teller of defendant had notice that the plaintiffs' check was deposited for the purpose of meeting an outstanding debt of D, though the deposit slip contained no reference to such purpose. Defendant's offer to prove by its president the time when he first heard of plaintiff's claim of having notice of the purpose of the deposit, was refused. Judgment for plaintiffs. Affirmed at General Term. Appeal.

Bradley, J. 1. When the defendant received the fund with notice that the deposit was made to pay D's check, it was denied the right to treat the fund as a general deposit to D's account; and it must be deemed to have been placed to D's credit subject to the trust for which the deposit was made. 2. The testimony of defendant's president was properly excluded. 3. The deposit slip was not conclusive on the question of intent. Judgment affirmed.

Cited: 41 App. Div. 324.

CANAJOHARIE NAT. BANK v DEIFENDORF (1890) 123 N. Y. 191.

On notes against maker. H, the payee procured the notes from defendant by fraud under circumstances that would have rendered them unenforceable in a suit by H. Plaintiff bank, through its cashier, purchased them. Defendant lived within six miles of plaintiff's place of business. He was not in any business that required the discount of paper to any extent. This was well known to the cashier. H was a perfect stranger, introduced by V, who refused to indorse the notes. They were purchased for cash at a discount of more than 15 per cent. H indorsed the notes but left no address in case of a protest. The cashier made no inquiry as to the consideration, or as to the circumstances under which they were given. They were large in amount for one in the known condition of defendant. H disappeared. The cashier's testimony was uncontradicted. Judgment for defendant. Reversed at General Term. Appeal.

Ruger, C. J. 1. Promissory notes purchased at an usurious and illegal rate of interest, being void in the hands of their transferor, under circumstances so strange and unusual as accompanied this transaction, cannot be said, as matter of law, to have been acquired in good faith, in the usual course of business. There

was sufficient in the facts, known to the cashier, to put plaintiff on inquiry. 2. The cashier's credibility was a question for the jury. Reversed. Judgment for defendant affirmed.

Cited: 1 App. Div. 3; 2 id. 108; 8 id. 92; 15 id. 58; 25 id. 417; 32 id. 5; 49 id. 462, 464; 53 id. 635, 636; 61 Hun 316; 64 id. 462; 68 id. 592; 74 id. 447; 75 id. 50, 51; 77 id. 454; 78 id. 185; 79 id. 132; 83 id. 419; 90 id. 116; 1 Misc. 133, 164, 170, 173, 363; 2 id. 310, 426; 3 id. 244, 453; 5 id. 547; 6 id. 112, 543; 7 id. 174, 178; 11 id. 616; 14 id. 320, 565; 16 id. 550; 24 id. 738; 26 id. 802; 130 N. Y. 9; 145 id. 506; 148 id. 706; 150 id. 66, 73; 159 id. 199; 162 id. 118.

IMPORTERS NAT. BANK v PETERS (1890) 123 N. Y. 272.

Interpleader. The plaintiff had money on deposit to the credit of the E Bank, on the day the E Bank became insolvent and suspended payment. Defendant, as receiver, brought an action against the plaintiff, claiming that he was entitled to the money. The defendant E also brought an action against the plaintiff alleging that the money was the proceeds of paper collected by the E Bank for them, but to which that bank had no title. E deposited with the E Bank for collection a sight draft drawn by him on M & Co. At the time, the E Bank was insolvent, but of this fact E was not aware. The draft so deposited was mingled with other paper held by the E Bank, and sent to the plaintiff for collection. The E Bank withdrew part of its balance with plaintiff subsequent to the collection of the draft. In the administration of the assets of the E Bank, E received certain dividends, in ignorance of the fraud practiced on him. Having become acquainted with the true facts, E tendered back the dividends already received, and refused to receive any more. Judgment for defendant E. Affirmed at General Term. Appeal.

O'Brien, J. 1. The receipt of the draft was a fraud on the parties depositing it, which precluded the E Bank from acquiring any title to the proceeds. 2. The E Bank became the trustee of the drawer and he can follow the fund, which is a charge on any balance in the plaintiffs' hands. The E Bank will be presumed to have drawn out its own, in preference to the trust money. 3. There was a sufficient rescission. E was not bound to return the identical money received as dividends. Judgment affirmed.

Cited: 1 App. Div. 396; 3 id. 569; 33 id. 88; 37 id. 17; 49 id. 290; 50 id. 36; 58 id. 312; 62 Hun 61; 79 id. 251; 81 id. 62; 83 id. 80; 87 id. 124; 91 id. 80; 13 Misc. 5; 32 id. 566; 35 id. 109; 127 N. Y. 562; 129 id. 103; 145 id. 186; 150 id. 218.

MAYER v HEIDELBACH (1890) 123 N. Y. 332.

On bills of exchange from drawers. It was plaintiffs' custom, when they wished foreign bills of exchange, to give the H Bank a written statement of what they required. This the H Bank would forward to defendants, who were New York bankers, with instructions to send the bills and with a promise to "remit as usual." Defendants would send the bills, payable to plaintiffs' order, to the H Bank, which would deliver them to plaintiffs on receipt of plaintiffs' check for the amount. Thereupon the H Bank would send defendants its check on a New York bank for the amount. This had been the course of dealing for seven years. In accordance therewith plaintiffs obtained the bills herein involved, indorsed them, and sent them to creditors. The H Bank, however, failed to reimburse defendants for the bill and soon afterward went into a receiver's hands. Defendants stopped payment on the bills. Plaintiffs took them up. Plaintiffs had no knowledge that the H Bank had no title or had not paid for them on delivery. When plaintiffs delivered their check to the H Bank their balance with it was greater than the amount of the check. Judgment for plaintiffs. Affirmed at General Term. Appeal.

Finch, J. 1. Where a pre-existing debt is extinguished in consideration of the transfer of negotiable paper, the transferee is protected against prior equities. 2. Where a depositor has sufficient funds and tenders his check in payment of negotiable paper, and the check is accepted and the paper delivered, the holder of the paper is a holder for value, because the antecedent debt is pro tanto extinguished. Affirmed.

Cited: 16 App. Div. 134; 26 id. 224; 37 id. 358; 39 id. 131; 40 id. 610; 48 id. 179; 6 Misc. 55; 12 id. 71; 14 id. 318; 17 id. 383; 126 N. Y. 192; 137 id. 118.

FRANK v BINGHAM (1891) 58 Hun 580.

To recover a trust fund. The defendant was a receiver of an insolvent bank, which had received a note and checks from plaintiffs, for collection. On receipt of the checks, they were charged to the drawer's account, which was good for the amount, and a New York draft was sent to the plaintiffs for their amount. The note was paid in cash, which was mingled with the other funds. A draft was sent for its amount. The bank failed. The drafts were never paid. The receiver found less cash than the amount of the note. The plaintiffs contended that a trust was impressed upon the proceeds of the collections, and that they were entitled to a preference. Plaintiffs did not prove that the defendant actually received the proceeds of the collections. Judgment for defendant for the proceeds of the checks. Judgment for plaintiffs, for the amount of the note. Cross appeals.

Dwight, P. J. The plaintiffs were not entitled to a preference. The trust theory fails of application to any portion of the plaintiffs' demand, for the reason that it is not shown that any portion of the funds collected came into defendant's hands. Judgment for defendant, affirmed. Judgment for plaintiffs, reversed.

UNITED STATES NAT. BANK v NATIONAL PARK BANK (1891) 59 Hun 495.

On draft. Defenses: 1, that defendant was a collecting agent and had remitted to its principal; 2, forgery. Plaintiff was the drawee in a draft issued by the N Bank and sent to defendant for collection. Defendant collected it from plaintiff and credited the account of its principal with the amount, but did not actually send the money. The amount and the name of the payee had been changed and the signature of the issuing bank had been touched up with ink before plaintiff paid it. On learning of the raising of the amount, plaintiff demanded of defendant, all money paid above the original sum named. Judgment for plaintiff. Appeal.

Van Brunt, P. J. 1. The defendant not having actually paid over the money to its principal, was liable. 2. The mere touching up of the signature, was not such an alteration as destroyed the validity of the instrument. Judgment affirmed.

Aff'd: 129 N. Y. 647.

CRAIG MEDICINE CO. v MERCHANTS BANK (1891) 59 Hun 561.

On checks. Defendant collected and paid to the plaintiff's manager, checks payable to the plaintiff. The manager, who conducted most of the business, instructed a director to indorse the checks in plaintiff's name. The manager failed to fully account for the proceeds. Defendant had no knowledge that the manager, who often collected and paid bills, did not have authority to sign checks. The plaintiff bore the manager's name. The president and treasurer were elected at a meeting attended by but one director, who voted stock other than his own by proxy. The defendant contended that the plaintiff was not a corporation. The court refused to charge that if the manager had received and paid out money for the plaintiff and was ostensibly in charge of the business, then he had authority to indorse the checks, and that actual authority was unnecessary. Judgment for plaintiff. Appeal.

Macomber, J. 1. The defendant was estopped to question plaintiff's corporate existence. 2. The charge should have been given. The manager or any director had power to indorse the checks. 3. Plaintiff had no legally elected treasurer. Judgment reversed.

MATTER OF NORTH RIVER BANK (1891) 60 Hun 91.

Where a depositor in an insolvent bank sought to obtain an order directing the receiver to repay moneys deposited a few hours before the bank's failure, upon the representation by the president that the bank was solvent, Held, that the depositor must identify the funds in the hands of the receiver, and unless the money can be traced, there can be no preference.

FARMER v MANHATTAN SAV. INSTITUTION (1891) 60 Hun 462.

On deposit, for money wrongfully paid to A who presented the passbook. Plaintiff was the administratrix of the depositor. Defendant's rules provided that it would not be responsible for money paid upon presentation of passbooks, and also that upon the death of a depositor, the money would be paid only to his legal representatives. A obtained possession of the passbook during the depositor's lifetime,

and demanded payment of deposit. Payment refused. Subsequently the depositor died. A sued defendant for the amount of the deposit. A collusive judgment was obtained, and defendant paid the amount of deposit to A, who thereupon surrendered the passbooks. Defendant had notice that depositor died, and that A was not his legal representative. Plaintiff asked to have the question of defendant's negligence in paying to A under these circumstances, submitted to the jury. Refused. Judgment for defendant.

Van Brunt, P. J. 1. If defendant pay to any one but the legal representatives of a deceased depositor, it necessarily pays at its peril, and must prove that the person who received the money was legally entitled to it. 2. On the death of the depositor, the rule protecting the bank in making payments to persons presenting passbook becomes inapplicable, because of the subsequent rule providing for payment to legal representatives. 3. A bank is bound by its own rule and cannot act in violation of its provisions. 4. The question of negligence was for the jury. Judgment reversed.

Cited: 48 App. Div. 221.

NATIONAL STATE BANK v BRAINARD (1891) 61 Hun 339.

On drafts against drawers. The drafts were drawn by defendants to their own order and accepted by B. Plaintiff discounted the drafts in New Jersey at more than the legal rate of interest in that state. After the notes were discounted by the bank, the executor of B made a payment on the drafts without directing how the money should be applied. Plaintiff applied it to payment of accrued interest. The U. S. R. S., secs. 5197 and 5198, provide that national banks may charge interest at the legal rate in the state where the bank is located, and declare that where illegal interest had been knowingly stipulated for, but not paid, then only the sum loaned, without interest, can be recovered. Where illegal interest has been paid, twice the amount so paid may be recovered from the bank in a penal action for debt or a suit in the nature of such action. Judgment for plaintiff. Appeal.

Per curiam. 1. The interest prior to maturity reserved on the draft was merely reserved, but not paid, and was therefore forfeited. 2. Under the federal statute the acceptance of usury by a national bank destroys the further interest bearing capacity of the paper. 3. Even after maturity, drafts discounted at a usurious rate cannot draw interest, and plaintiff's judgment must be reduced by deducting the amount allowed for interest accruing since maturity of drafts, together with sum paid by B's executor, which must be applied to payment of the principal. Judgment affirmed as modified.

PEOPLE v PRESTON (1891) 62 Hun 185.

Mandamus to direct the superintendent of banking to certify the amount of compensation he believes relator entitled to receive for making a special examination of the X Bank. Laws of 1875, ch. 371, sec. 43, directs that where an examination is made of the affairs of a bank by a special examiner appointed by the banking department, he shall be paid by the bank examiner whatever amount the superintendent shall certify to be just and reasonable. The relator finished examining the X Bank in 1877, but did not apply to the superintendent of banking for a certificate until 1887. The application was denied by the then superintendent on the ground that lapse of ten years since the work was completed had barred the right to obtain certificate. In 1890 relator applied for a certificate to the superintendent of banking at that time. Certificate was refused on ground that claim was stale and that decision of former superintendent was *res adjudicata* and a bar to reopening the matter. Order entered denying motion. Appeal.

Learned, P. J. 1. The granting of a certificate by the superintendent of banking is a judicial act, and therefore mandamus will not lie. 2. The claim is against the bank for which the examination was made. The superintendent of banking is only the judicial authority to determine the amount. 3. Mandamus should not be granted after the period fixed by statute as a bar to an action has expired, and may be refused for laches before that period. 4. A state officer cannot reverse the decisions of his predecessor, as they are *res adjudicata*. 5. Where a right exists, but a demand is necessary to entitle a person to maintain an action, the time begins to run under the Statute of Limitations from the time when the right to make the demand was complete. Order affirmed.

Aff'd: 131 N. Y. 644.

CLARK v SAUGERTIES SAV. BANK (1891) 62 Hun 346.

On deposit paid out by defendant, a savings bank, to an alleged agent of plaintiff. Defendant's by-laws stated that although it would endeavor to guard against frauds, it would not be responsible for payments made to persons presenting passbooks. At the time plaintiff made the deposit she directed defendant to make payments only to her, and defendant agreed to do so. Subsequently plaintiff's husband presented her passbook and demanded \$500 as plaintiff's agent. Defendant gave him a check to plaintiff's order, and, as he could not write, defendant's cashier assisted him in indorsing it as plaintiff's agent. Defendant offered to prove that plaintiff's husband owned the money deposited by her. Excluded. Judgment for plaintiff. Appeal.

Putnam, J. 1. Where a bank is sued for money deposited with it, it cannot set up as a defense that depositor was not the owner, unless it also offers to show that the true owner has asserted his legal title. 2. A savings bank owes to its depositors the duty of active diligence in detecting fraud and forgery, and pays to an alleged agent at its peril. Judgment affirmed.

ADAMS v McCANN (1891) 27 Jones & S. 59.

Injunction. Defendant M assigned to plaintiff his share in a partnership, including a deposit in defendant bank. The day before the transfer M gave defendant C his check for the amount for a valuable consideration. C deposited the check with defendant. Defendant charged it to M's account. Plaintiff subsequently notified the bank of the assignment. Plaintiff sought to have the bank restrained from paying the money to either M or C; and to have M and C restrained from drawing it out. Judgment for defendants. Appeal.

Per curiam. 1. The bank can charge the check against M's account. C is a bona fide holder and not a trustee for plaintiff. 2. Plaintiff cannot obtain a personal judgment for the amount against M, in a suit in equity, as M is entitled to a trial by jury. Judgment affirmed.

O'CONNOR v MERCHANTS BANK (1891) 124 N. Y. 324.

Supplementary proceedings to recover money alleged to belong to a judgment debtor. Plaintiff was a receiver in supplementary proceedings. B died testate, leaving his residuary estate to executors, in trust, to be distributed in their discretion to legatees, among whom was the judgment debtor, F. The executors deposited money with defendant, and drew a check payable to F, for a balance due him. F indorsed the check and it passed through several banks and was paid by defendant. It was not certified. Prior to payment, notice by the judgment creditor of these proceedings was served on defendant. Plaintiff brought this action to recover the portion of the deposit alleged to belong to F. Judgment for plaintiff. Appeal.

Vann, J. 1. The title to the money deposited by the executors passed to defendant, and the relation of the defendant to the executors was that of debtor and creditor only. 2. There was no transfer of the debt or any part of it by the execution and delivery of the check to F. An ordinary, uncertified check upon a general account is neither a legal nor equitable assignment of any part of the sum standing to the credit of the depositor. The holder of the check had no claim that he could enforce against the bank. Judgment reversed.

Cited: 77 Hun 159; 11 Misc. 249; 13 id. 3; 127 N. Y. 322.

READ v BANK OF ATTICA (1891) 124 N. Y. 671.

Where a certificate of deposit issued by a bank contained no provision for the payment of interest, oral evidence of an agreement made by the bank at the time of deposit to pay interest, was inadmissible and incompetent.

Cited: 64 Hun 148; 88 id. 539; 136 N. Y. 462, 463, 464, 465.

SHIPMAN v BANK OF THE STATE OF NEW YORK (1891) 126 N. Y. 318.

On deposit. B, a clerk of the plaintiff, forged checks on plaintiff's account with defendant, some of the checks being payable to real, and others to fictitious payees. The checks thus forged were paid by the defendant. Defendant balanced and returned the passbook to the plaintiff's cashier, together with all vouchers.

1 R. S., 768, sec. 5, providing that paper payable to a fictitious person negotiated by the maker was as against him payable to bearer. Defendant contended: that under the statute the checks were payable to bearer; that the plaintiff had notice that the payees were fictitious; that the plaintiff was estopped to claim that payment on the checks was unauthorized. Judgment for plaintiff. Appeal.

O'Brien, J. 1. The relationship between the parties was that of debtor and creditor, and the defendant impliedly contracted to pay the plaintiff's money on his order. 2. Payments made upon forged instruments are at the peril of the bank. 3. An account stated may always be opened upon proof of fraud. 4. B did not act as the plaintiff's agent, and his acts were not binding on the plaintiff, and plaintiff is not affected by B's knowledge. 5. The paper could not be treated as payable to bearer, and the knowledge of B, that the payees were fictitious, would not be imputed to his principal. Judgment affirmed.

Cited: 67 Hun 382; 32 App. Div. 319; 60 id. 245, 247; 82 id. 561; 6 Misc. 63; 9 id. 365; 10 id. 682; 30 id. 383; 33 id. 595; 140 N. Y. 556; 151 id. 11.

MAYOR v NATIONAL BROADWAY BANK (1891) 126 N. Y. 665.

In an action to recover interest on money deposited by the chamberlain of the City of New York with the bank as depository, under an agreement that the bank should pay interest on all balances, Held, that the chamberlain was not prohibited by ch. 623, Laws of 1866, from making such agreement; and that such agreement was not against public policy.

KUMMELL v GERMANIA SAV. BANK (1891) 127 N. Y. 488.

On deposit. Plaintiff, a depositor with the defendant, held a passbook on which was printed part of the by-laws of the defendant, stating, in effect, that the bank would not be responsible for any fraud committed in producing the passbook; but that payments should only be made to the depositor in person or by attorney. The plaintiff's passbook was stolen, and the money drawn out on forged signatures. Judgment for plaintiff. Appeal.

Haight, J. 1. The officers of the bank must exercise care in order that the depositors may be protected from fraud, notwithstanding the by-laws. They owe the depositor active vigilance in order to detect fraud and forgery. 2. A passbook is not negotiable and its possession does not constitute proof of a right to draw money thereon. Judgment affirmed.

Cited: 64 Hun 250; 6 Misc. 112; 17 id. 298, 578; 28 id. 253; 135 N. Y. 559.

ST. NICHOLAS BANK v STATE NAT. BANK (1891) 128 N. Y. 26.

On contract, to collect check. Plaintiff indorsed a check, in which the original payee was a resident of Tennessee, to the defendant for collection. The defendant forwarded the check to its correspondent A, at Dallas, Texas, who presented it to the drawee and received payment. A remitted to defendant a sight-draft on J. A and J having become insolvent, the defendant duly protested the draft, and sent it to the plaintiff, which refused to accept it. The defendant contended that the contract was a Tennessee contract, and that under the law of that state, it was not liable. Judgment for plaintiff. Reversed at General Term. Appeal.

Earl, J. 1. A bank receiving commercial paper for collection, is liable for a loss occasioned by its agents. The collecting agent was the defendant's agent, and not the agent of the plaintiff. 2. The insolvency of a sub-agent does not shield the collecting agent from responsibility. 3. The interpretation of the common law by courts of one state is not binding on the courts of other states. The draft was to be collected in Texas and sent to New York, so the contract was to be performed in Texas and New York. Judgment reversed.

Cited: 26 App. Div. 116, 119; 128 N. Y. 370; 138 id. 497; 160 id. 196; 165 id. 137.

WALDEN NAT. BANK v BIRCH (1891) 130 N. Y. 221.

On bond, against sureties. R, cashier of plaintiff, was under a bond, signed by defendants, for faithful performance of his duties. T, owing plaintiff \$9,000 on notes, assigned to R individually, 30 shares of stock in plaintiff, par value \$100 per share, which was transferred to R on the books, and three certificates were issued to him for 10 shares each. R was to hold the stock as collateral security for T's

notes. T did not intend to deal with R personally, but wished to evade the provision of the Banking Act which prohibited a bank from making loans on its own stock. R informed plaintiff's president that the stock belonged to T. T made other notes payable to R and indorsed by him, which plaintiff discounted. R borrowed money from G and C on his own notes, giving as collateral security 20 shares of T's stock, and the notes not being paid, the stock was sold. Neither of the notes so held by plaintiff was ever paid, and the stock was never returned to plaintiff, though demanded from R. Plaintiff recovered judgment against T and R on the notes, but it was not paid. Judgment for plaintiff. Appeal.

Vann, J. 1. Even if the transaction with R was a mere evasion, and hence a violation of the National Banking Act, the fact is not available as defense to this action. 2. R's indorsement was no contract, but plaintiff became the equitable owner of the stock. 3. By misappropriating the property of the bank, R violated the bond. The remedies of plaintiff against R were not inconsistent. Judgment affirmed.

Cited: 27 Misc. 321.

WALL v EMIGRANT INDUSTRIAL SAV. BANK (1892) 64 Hun 249.

On deposit. Plaintiff was a depositor in defendant. It appeared that plaintiff furnished a stranger with information which enabled him to answer test questions asked by defendant. The stranger subsequently, by fraud, procured a portion of the deposit from defendant. On the trial no claim for the balance of the deposit was made by the plaintiff. Judgment for defendant. Appeal.

O'Brien, J. 1. The plaintiff's own testimony having shown him to have been negligent, this alone was sufficient to bar his right to recovery. 2. A new trial will not be ordered for the reason that the court below failed to consider a question which could have been resolved in the plaintiff's favor, but which was never raised or suggested to the court. Judgment affirmed.

Cited: 17 Misc. 580.

SCHMIDT v GARFIELD NAT. BANK (1892) 64 Hun 298.

Conversion. The plaintiff was engaged in business in New York, and kept a bank account at the C National Bank. In making deposits he was accustomed to use a stamp which read "For deposit in the C National Bank to the credit of—," after which he placed his signature. While plaintiff was absent on business, L, an employee, was authorized to make deposits by indorsing plaintiff's name as usual after the stamp and then writing his own name. L, in plaintiff's absence, indorsed a large amount of paper without the use of the stamps, by indorsing first plaintiff's name and then his own, and made deposits to his own credit in defendant bank, from which he afterward drew the proceeds and converted them to his own use. Defendant moved to dismiss the complaint, averring that it did not state a course of action since it did not allege a demand, and the allegation, that the defendant, "without the authority of the plaintiff," obtained possession of checks and drafts, did not permit proof of the forgery of plaintiff's indorsement of said checks and drafts. Motion denied. Verdict for plaintiff. Motion for new trial. Denied. Appeal.

Andrews, J. 1. The complaint states a good cause of action and evidence of the forgery was admissible. 2. No allegation of demand was necessary. 3. The checks in question were not indorsed with the authority of the plaintiff. 4. L was not the authorized recipient of the checks and the proceeds thereof. 5. The plaintiff is not estopped to deny either L's authority to indorse the checks or to receive the proceeds. 6. There was no occasion to submit the question of the plaintiff's credibility to the jury. Judgment affirmed.

Cited: 68 Hun 216; 30 Misc. 383. Aff'd: 138 N. Y. 631.

PEOPLE v OSTRANDER (1892) 64 Hun 335.

Indictment for perjury. Defendant was treasurer of a savings bank and as such was indicted for making false verification of the bank's report to the superintendent of banking. Sec. 273, ch. 409, Laws of 1882, requires the report to be verified by the oath of the two principal officers, and the statement of assets to be verified by the oath of a majority of the trustees, as required by sec. 279, of the same act. By sec. 279, the trustees of every savings bank must make an examination, and the above statement of assets shall be based thereon. It was contended that

the verification of the officers is based on the finding of the trustees. The verification in question was annexed to the report. The indictment did not specify the exact amount in which the liabilities were in excess of the sum named in the report, but alleged that defendant swore they were a certain sum knowing them to be a different amount. Defendant demurred. Sustained. Judgment for defendant. Appeal.

Putnam, J. 1. The defendant was one of the principal officers of the bank within the meaning of the statute. The principal officers of the bank are required to verify the entire report. If the allegations of the indictment are true, the defendant can be held for perjury. It is not necessary in an affidavit of verification itself to state the facts sworn to. 2. The statement in the indictment that the liabilities were a much larger sum than the amount mentioned in the report is sufficient. Judgment reversed.

THE PEOPLE v TRUMBOUR (1892) 64 Hun 346.

Indictment, against assistant treasurer of a savings bank for verifying a false report. Sec. 273 of ch. 409 of the Laws of 1882 provides that the report required by the act as to the condition of a savings bank "shall be verified by the oath of the two principal officers of the institution." Defendant demurred on the ground that he was not one of the principal officers within the meaning of the act. Sustained. Appeal.

Herrick, J. Having verified the report, the defendant cannot now claim that he was incompetent to do so. Judgment reversed.

Aff'd: 135 N. Y. 638.

PEOPLE v ULSTER CO. SAV. INSTITUTION (1892) 64 Hun 434.

To dissolve a savings bank. In 1891, the treasurer and assistant treasurer of the defendant abstracted funds to the extent of 15 per cent of the liabilities of the bank. Laws of 1882, ch. 409, sec. 278, authorized the institution of actions by the attorney-general for the dissolution of savings banks, and provide that the court, before which such proceedings shall be instituted, shall have power in their discretion to grant such relief as the facts or evidence in the case or the situation of the parties seem to require. This was an application on the part of the trustees, receivers, and depositors of the bank for permission to resume business as a solvent institution upon the basis of 85 per cent of its liabilities, and to stay commencement of actions by objecting depositors. Application granted. Appeal.

Fursman, J. The power of the court is clear to grant the application, and this is a proper case for its exercise. Order affirmed at General Term.

Cited: 80 Hun 420. Aff'd: 133 N. Y. 689.

FIRST NAT. BANK v HAULENBEEK (1892) 65 Hun 54.

On promissory notes against maker. Defendant gave one note to M for goods which he promised to deliver, and three others to M for the purpose of borrowing money from him. M took the notes at an usurious rate of interest. Plaintiff bank discounted the note for M, who kept the proceeds and did not deliver the goods. Of these facts plaintiff had no knowledge. Defendant set up as defense, the diversion of the notes, and that they were originally discounted at usurious rates. Evidence tending to prove the defenses was excluded on the trial. Judgment for plaintiff. Appeal.

Patterson, J. 1. All that a bona fide holder could recover, if there was a diversion, would be the amount actually advanced on the notes. 2. If the notes were originally discounted at an usurious rate, the plaintiff would not be entitled to recover any interest under the statutes of the United States. 3. Evidence was admissible as to the amount actually paid by plaintiff for the notes. Judgment reversed.

BROOKLYN TRUST CO. v TOLER (1892) 65 Hun 187.

To recover amount of a check. The plaintiff certified a check of W, given to the president of the Consolidated Exchange as a margin to secure C, a member. The check was deposited with other money of the exchange. The certification was made by mistake and plaintiff, offering to pay C's losses, demanded the check. On the same day W suffered other losses to other members who, by the defendant, demanded the balance of the check after the payment of C's losses. The check was

paid through the clearing house in compliance with the rule that the certifying bank must pay the check and settle all questions of validity with the parties to the paper. Agreed facts.

Barnard, P. J. The exchange cannot keep the money except to answer for C's loss. Judgment for plaintiff.

Aff'd: 138 N. Y. 675.

PEOPLE v BINGHAMPTON TRUST CO. (1892) 65 Hun 384.

To recover a penalty. Defendant a trust company, advertised that it would receive deposits, pay interest thereon, and issue passbooks to depositors under rules similar to those prevailing in savings banks. Sec. 283, ch. 409, Laws of 1882, provides that "it shall not be lawful for any bank to advertise or put forth a sign as a savings bank or in any way to solicit or receive deposits as a savings bank," and imposes a fine for any violation of the act. Plaintiffs also sought to enjoin the defendant from continuing the acts complained of. Agreed facts.

Martin, J. 1. No relief by injunction can be granted in a proceeding like this. 2. The manifest purpose of the statute was to render it unlawful to advertise, solicit or receive deposits, claiming or pretending to be a savings bank. It does not appear that the defendant has done any of those acts. Judgment for defendant.

Aff'd: 139 N. Y. 185.

WHEATLAND v PRYOR (1892) 133 N. Y. 97.

On account. Plaintiff was a broker in Boston and defendants, P & A, were a firm of brokers in New York. Defendants' firm dissolved in 1889. Plaintiff sought to recover \$11,000 due from defendants. Defendant A claimed that whatever sum owed, was due from P individually. Plaintiff claimed that it was due from the firm. The indebtedness was created by drafts drawn by defendants in the firm name on plaintiff, and paid by him. As to one item, P individually drew a draft on plaintiff for \$1,700, which plaintiff paid as a loan to him individually. He then drew on P individually for \$1,700, payable on demand to the order of himself. He indorsed and deposited it to his credit in the B Bank, which then indorsed it, and sent it for deposit to its credit to the M Bank, which presented it to defendant and received a firm check. The M Bank then surrendered the draft drawn by plaintiff, and obtained payment of the check. Judgment for plaintiff. Appeal.

Earl, C. J. 1. The B Bank became the owner of the draft, and plaintiff cannot be made to account to the defendants for the money he received from the bank in good faith. Judgment affirmed.

Cited: 12 Misc. 23.

FIRST NAT. BANK v CLARK (1892) 134 N. Y. 368.

On deposit. S, of the firm of S & W, gave the plaintiff a deposit slip as follows: "Deposited by S & W with C, Banker, discount \$3,412.50," and signed by B, cashier of C, the defendant. At the time S made in the firm name a check instructing defendant to pay to the order of S & W, ten days after date, \$3,412.50, and delivered it to plaintiff, which thereupon paid S that amount. Plaintiff then sent the check and slip to defendant, who, on the day the check was payable, returned them to plaintiff, saying there were no funds to meet the check. Plaintiff demanded payment, which was refused. Plaintiff proved that on the day of giving the check, defendant discounted a note for \$3,500 made by K and indorsed by S & W, with the understanding that the deposit should not be drawn against for ten days, and the slip given to S represented the amount of the note, less the discount agreed upon. Judgment for defendant. Appeal.

Parker, J. 1. The money, after deposit, belonged to defendant. 2. There being no acceptance by defendant, the check did not operate as an assignment, nor did the delivery of the deposit slip have that effect. Judgment affirmed.

Cited: 12 Misc. 22.

MCLEAN v MYERS (1892) 134 N. Y. 480.

To recover tax, assessed on bank stock. Plaintiff was receiver of taxes of New York. Defendant was a non-resident, and was assessed for 1882 and 1883, on bank stock in New York. The taxes were not paid. No warrant had been issued by plaintiff to levy for their collection, as provided for in sec. 853 of the Consoli-

dation Act. The taxes were valid. Sec. 863 of the act permits the receiver of taxes to recover "any taxes duly imposed for personal property upon any person or corporation in New York, which shall remain unpaid." Sec. 853 makes it lawful for the receiver to issue his warrant to the sheriff to collect taxes unpaid, at a certain time, by levy. Judgment for plaintiff. Reversed at General Term. Appeal.

Vann, J. 1. Sec. 863 does not exclude assessments on bank stocks taxed in New York, owned by a non-resident, from the remedy therein provided, and the language used confers a general right of action in personam to collect taxes imposed for personal property. The Banking Act did not create any new right of taxation. 2. There is no provision which makes the issue or return of a warrant a condition precedent to the commencement of an action. Order reversed.

Cited: 57 App. Div. 603, 605; 77 Hun 190; 26 Misc. 566.

PEOPLE, EX REL. v COLEMAN (1892) 135 N. Y. 231.

Certiorari, to review assessment. The relator, a Connecticut corporation, owned stock in banks in New York. A statute provided that all personal property within the state, is liable to taxation, except as afterward specified. Laws of 1857 exempted banks from taxation on deposits on which they were liable, but not on surplus. Other statutes provided that stockholders shall be assessed and taxed on the value of their shares of stock, at the place where the bank is located. The assessors took the total value of assets of the relator, and from it deducted all liabilities, ascertaining the surplus to be \$900,000 from which they deducted all its property not taxable, all its property taxable elsewhere, all real estate and cash held by it, and thus reached a final surplus, largely in excess of the assessment made against it. Writ dismissed. Appeal.

Earl, C. J. 1. The assessment complained of was properly made, as the shares assessed, being part of the bank's surplus, were liable to taxation. 2. The legislative purpose to impose double taxation can never be inferred. Taxation cannot, at the same time, be imposed on a trustee and beneficiary, in respect to the same property. Order affirmed.

Cited: 154 N. Y. 124, 132; 157 id. 57.

GEARNS v BOWERY SAV. BANK (1892) 135 N. Y. 557.

On deposit. G died, leaving to her credit in defendant \$1,500, evidenced by a passbook. Plaintiff, administrator of G, had the deposit transferred to his account as administrator, on presentation of the passbook and a surrogate's certificate. A new passbook was issued to him as administrator. The money was paid to K, who presented the passbook to defendant, together with a power of attorney, purporting to bear plaintiff's signature. Plaintiff was also executor of estate of P. The power of attorney stated that K was thereby made plaintiff's attorney to draw out funds in defendant credited to plaintiff as executor of estate of P, and mentioned the passbook, but said nothing about the money in question credited to plaintiff as administrator of estate of G. The court refused to submit to the jury the question whether defendant used due care in making the payment to K. Judgment for defendant. Affirmed at General Term. Appeal.

O'Brien, J. 1. The power of attorney conferred no power upon K to demand payment of the deposit in question, nor any authority upon the defendant to make payment to him. 2. The effect of the circumstances brought to the attention of defendant officers by the presence of the person to whom payment was made, with the book and power of attorney, and the inferences to be drawn thereby, should have been submitted to the jury. Judgment reversed.

Cited: 17 Misc. 60, 578.

HAYES v BEARDSLEY (1892) 136 N. Y. 299.

Money paid by fraud of an insolvent bank. In 1883, defendant, a director of the F National Bank, deposited \$15,000 with it, taking therefor two certificates of deposit; and in 1884, \$10,000, taking a similar certificate bearing six per cent interest. In 1887, the bank, through its cashier, paid the first two certificates, by giving defendant short-time negotiable paper and cash, because the directors did not like to pay so large a rate of interest. The third certificate was paid to the C Bank, to which defendant had transferred it, and which had credited him with the amount, on the same day it was presented to and paid by the F Bank. All this time the F Bank was insolvent, which fact was known to the cashier alone;

but it continued to do business till 1888, when the cashier absconded. Plaintiff was appointed receiver, and brought this action under sec. 5242, U. S. R. S., on the ground that the payments were made in contemplation of insolvency, or to prevent the application of its assets to creditors generally, or to prefer a creditor. Judgment for defendant. Appeal.

Earl, C. J. 1. The bank had not committed any act of insolvency. The payments were not made to prevent the application of its assets to creditors generally, or to prefer a creditor. 2. The fact that the defendant, entirely ignorant of the bank's insolvency, was a director, does not, as matter of law, charge him with liability for the payments made to him. Judgment affirmed.

TAYLOR v EMPIRE STATE SAV. BANK (1893) 66 Hun 538.

Debt. Between the years 1882 and 1892, the plaintiff deposited with the defendant more than \$3,000. This sum he claimed with interest. Defendant contended that it was only liable to the extent of \$3,000. The Banking Law of 1882 declared it to be unlawful for a savings bank to receive more than \$3,000 from any individual. An amendment to that law in 1885, provided that when accounts reached the maximum limit, no interest should be allowed on the increase. Submitted on agreed facts.

Macomber, J. 1. The act of leaving the money in the bank, is not declared to be unlawful, and consequently the plaintiff may recover the full amount of his deposits. The language in which the offense is defined, evidently does not include the customer making the deposit, and was not intended to render a contract void which was entered into between the depositor and the bank in contravention of the statute. 2. The depositor, however, cannot benefit himself by receiving any increase of his deposits by way of interest. Judgment for plaintiff.

ANDERSON v DUNDEE STATE BANK (1893) 66 Hun 613.

On draft. A stranger presented himself to the defendant with a check, supposed to be indorsed by J, and received from the defendant a draft payable to P. The stranger gave his name as P, and indorsed that name on the check. The stranger indorsed the name of P on the draft. He was introduced to the plaintiff as B, and plaintiff purchased the draft from him. Defendant ordered payment on the draft stopped because it learned that the indorsement of J on the check was a forgery. Defendant contended that there had not been such an indorsement of the draft as to give title to the plaintiff. Judgment for defendant. Appeal.

Lewis, J. 1. If a payee adopts an assumed name and indorses such assumed name upon a draft, it is not a writing purporting to be the act of another within the meaning of the provisions of the penal code. In order to become negotiable, the indorsement of the name designated as payee was requisite; but it was not essential that the name was the one by which the payee was commonly known. 2. By presenting the check, with his name on it, and stating to the cashier that his name was P, he conceded it to be his genuine signature, and was thereby estopped from thereafter claiming it was a forgery. Judgment reversed.

BROOKE v TRADESMENS NAT. BANK (1893) 69 Hun 202.

On contract. R agreed with creditors that if notes given by him should not be paid at maturity, they might enter judgment to the extent of \$8,000. One of these notes fell due and the defendant refused to pay it, although there was a sufficient amount to the credit of R on deposit with defendant to meet it. Judgment was entered by R's creditors, and execution was issued. By reason of this R was obliged to suspend business. Plaintiff was appointed receiver for R and claimed \$50,000 damages. Complaint dismissed. Motion for new trial.

Van Brunt, P. J. The relation between the bank and its depositor is that of debtor and creditor, and that only. The ordinary liability to which a debtor subjects himself for non-payment of a debt in an action for damages for the breach of his contract to pay, is the liability to be mulcted in damages to the amount of his debt, with interest and costs, and these are the only damages which in such cases might fairly and reasonably be considered as naturally arising from the breach of the contract. Motion denied.

EWART v BANK OF MONROE (1893) 70 Hun 90.

Money had and received. The plaintiff shipped goods to F to sell on commission. When the goods arrived, F being sick, his agent received and sold them and deposited the proceeds with the defendant to the credit of F. F died and his estate was found to be insolvent. Plaintiff demanded a return of the money from the defendant, which was refused. The defendant held an unmatured note of F for a sum exceeding the balance on deposit to the credit of F. Defendant contended that it had a lien on the balance for the amount of the note. Judgment for plaintiff. Appeal.

Lewis, J. 1. The relation between a commission agent for the sale of goods and his principal is fiduciary. 2. The title to the goods, until sold, remains in the principal, and when sold the proceeds, whether in the form of money or notes or other securities, belong to him, subject to the lien of the commission agent for advances and other charges. 3. The relation between the parties with respect to the proceeds of sale is not that of debtor and creditor simply. The money and securities are specifically the property of the principal, and he may follow and reclaim them so long as their identity is not lost, subject to the rights of a bona fide purchaser for value. 4. The insolvency of F's estate gave the defendant no lien upon the money. Judgment reversed.

Cited: 8 Misc. 150.

TRUMBOUR v TRUMBOUR (1893) 70 Hun 571.

Partition. Application for distribution. In 1871, a judgment in partition was entered in Columbia County. Pursuant to the will of P, deceased, \$500; a part of the proceeds of the sale in partition, was brought into court to be held for the benefit of the heirs of T. The referee deposited the \$500 in the F National Bank. Subsequently an order was made directing the F Bank to pay the money to the order of the N Trust Co. and that the N Trust Co. retain it and the accumulated interest until further ordered, for the benefit of the petitioners. A copy of the order was served on the N Trust Co. and it agreed to accept the money subject to further orders of the court. T died in 1892. The N Trust Co. neglected to demand the money from the bank and never received it. The petitioners applied to the court for an order distributing this fund, and directing the N Trust Co. to pay the same to them or their attorneys. Motion granted.

Herrick, J. 1. There was a complete acceptance of the trust by the N Trust Co., and it was authorized to receive and execute the trust under its charter. 2. It must be held to possess the money mentioned in the order, subject to an order of this court. 3. If it does not in fact possess the money, it is by reason of its own omission and neglect; and it is responsible to this court for the money and for the increase. 4. It is also responsible to those for whom it was to hold the money in trust, just the same as if it had drawn the money from the bank. Order affirmed.

Aff'd: 144 N. Y. 652.

JONES v MERCHANTS NAT. BANK (1893) 72 Hun 344.

Replevin. The defendant held bonds belonging to the Bank of M. The Bank of M, in its dealings with the defendant, at times overdrew its account, and it was mutually understood that the defendant held the bonds as security, although the bonds had not been expressly given as collateral. The Bank of M had overdrawn its account with the defendant when it failed, and plaintiff was made its assignee. The defendant refused to surrender the bonds without a payment of the overdraft. There was also a separate account which the plaintiff sought to recover and defendant refused to pay over. Judgment for defendant. Appeal.

Follett, J. 1. The plaintiff now insists that he was entitled to a judgment declaring him to be the general owner of the bonds. 2. The joinder of the causes of action was irregular, and accounts for the irregular form of judgment. 3. It is too late for the plaintiff to move to set aside the judgment as irregular. Judgment affirmed.

ELMIRA SAV. BANK v DAVIS (1893) 73 Hun 357.

To obtain a preference. The defendant was receiver for an insolvent national bank, in which plaintiff bank had on deposit \$42,000 at the time it became insolvent. All the circulating notes of the national bank were paid, and there remained

in defendant's hands a greater amount than plaintiff's deposit. Plaintiff bank claimed a preference under sec. 130 of the Banking Law of 1892, which gave a preference for debts due a savings bank from insolvent banks. Submitted on agreed facts.

Merwin, J. 1. The provision applies to national banks. 2. National banks are subject to state legislation, except where such legislation is in conflict with some act of Congress, or where it tends to impair or destroy the utility of such banks as instrumentalities of the United States. 3. By virtue of the state act and the conduct of the parties, the savings bank had at least an equitable lien which is effective and is not antagonistic to the pro rata distribution provided for in sec. 5236, U. S. R. S. Judgment for plaintiff.

MECHANICS & TRADERS BANK v LIVINGSTON (1893) 4 Misc. 255.

On promisory note against makers. Defense, accommodation makers. The note was made by defendants to H & P and indorsed to plaintiff. The evidence was conflicting as to whether the note was collateral security for H & P's general account or for a particular note. H & P failed, and the particular note was paid out of other collateral. Defendants' offer to prove that they were merely accommodation makers was rejected. The court charged that if the note was given as collateral security for a particular note, the plaintiff could not recover, and that the burden of the proof was upon the plaintiff to prove that it was given as collateral security for the general account. Judgment for plaintiff. Appeal.

Van Wyck, J. 1. The evidence being conflicting, the questions were properly left to the jury. The plaintiff could not recover, if the note was given as collateral security for a particular note. 2. The burden was upon the plaintiff to prove the note was given as collateral security for the general account. 2. Defendants' evidence as to being accommodation makers was properly rejected. Judgment affirmed.

GORDON v RASINES (1893) 5 Misc. 192.

On a motion to compel the receiver to pay over the proceeds of notes deposited with the bank for collection by a regular customer the day before it failed, Held, that the transaction created the relation of debtor and creditor; that the bank had a right to commingle the funds with its own; and that the motion must be denied.

WACHSMANN v COLUMBIA BANK (1893) 6 Misc. 62.

On check, paid by defendant and charged to plaintiff, a depositor. The check purported to be signed by plaintiff, but was in reality forged by his bookkeeper. Thereafter plaintiff received his passbook and returned checks without examination and made no objection. There was no evidence of negligence on the plaintiff's part in employing the bookkeeper. Defendant did not request specific charges in regard to negligence. Judgment for plaintiff. Appeal.

McCarthy, J. 1. A depositor owes no duty to a bank requiring him to examine his passbook or returned checks, with a view to the detection of forgeries, and as he has a right to assume that the bank, before paying his checks, will ascertain the genuineness of the indorsements, he is not estopped by accepting them without objection. 2. Notice to an agent is not notice to a principal, unless the agent is acting within the course of his employment. 3. Questions of negligence can be presented only by requesting them in clear and specific charges. Judgment affirmed.

Aff'd: 8 Misc. 280.

TOBIN v MANHATTAN SAV. INSTITUTION (1893) 6 Misc. 110.

On deposit. Defendant, a savings bank, filed out a withdrawal slip and paid money to a person presenting plaintiff's passbook, without making an examination with regard to the genuineness of the signature. Printed in the book was a notice that all payments to the person presenting the book should be valid. Plaintiff did not present the book or sign the slip. Judgment for plaintiff. Affirmed at General Term of the City Court. Appeal.

Bischoff, J. 1. The bank, having failed to use ordinary care, is liable, notwithstanding the printed agreement. 2. Whether the signature to the withdrawal

slip was genuine, and whether the bank used ordinary care, were questions for the jury. Judgment affirmed.

Cited: 17 Misc. 574. Aff'd: 7 Misc. 744.

BEAVER v BEAVER (1893) 137 N. Y. 59.

On deposit. The action was originally brought against a bank, but defendant was substituted as rival claimant. Plaintiff was executrix of A, son of defendant's intestate, J, who made a deposit, in 1866, of money belonging to himself with a savings bank, which was credited to A, then a minor. J kept the passbook until his death in 1888. In 1870, A opened an account in the same bank in his own name, married, drew out his money and died, two years before the death of J, leaving everything to plaintiff, his widow. J had spoken of having made a deposit for A. The jury found that J made the deposit with the intention of passing the title to A. Judgment for defendant. Reversed at General Term. Appeal.

Gray, J. 1. A trust cannot be inferred unless there is an explicit declaration, or evidence showing beyond a reasonable doubt that a trust was intended; the finding of an intent to give is consistent only with the theory of a gift, and not with that of a trust. 2. As the transaction must be regarded as a gift, if anything, plaintiff's case was defective for failure to prove completion by delivery or its equivalent. Judgment reversed.

Cited: 8 App. Div. 48; 32 id. 485; 46 id. 448; 80 Hun 146; 88 id. 14; 92 id. 456; 7 Misc. 369; 29 id. 700; 137 N. Y. 219.

CROUSE v FIRST NAT. BANK (1893) 137 N. Y. 383.

Negligence in collection of a draft. To collect a debt owing from D, plaintiff made a sight draft "protest waived," to order of L, cashier of defendant bank, on D, who lived in the country some distance from defendant. The draft was mailed to defendant for collection, and upon its receipt, defendant notified D by mail, according to custom. Six days later D came to defendant and said, the draft being presented to him, that he would pay it "next week," accepting it, and making it payable to defendant. L then wrote plaintiff the facts. Plaintiff left the draft with defendant with no further instructions. Two weeks later, D made an assignment for the benefit of creditors. Judgment for plaintiff. Reversed at General Term. Appeal.

Gray, J. 1. Defendant was not negligent, as it used ordinary care, and used the customary method of collection in the absence of special instructions. 2. Plaintiff's conduct after notice amounted to ratification of defendant's course. 3. There is no evidence from which to presume damage to plaintiff due to defendant's conduct. Judgment affirmed.

PEOPLE v BINGHAMTON TRUST CO. (1893) 139 N. Y. 185.

For penalty. Defendant, a trust company, issued passbooks containing "rules governing deposits," a circular and advertisement, setting forth the advantages to depositors. The passbooks were like those issued by savings banks, containing interest rules. Nowhere did defendant claim to be a savings bank, but pointed out in what respect it was superior to one. Its mode of doing business was similar to that of savings banks. Its charter authorized it to receive deposits and make loans. Sec. 283, ch. 409, Laws of 1882, of the Banking Law, makes it unlawful for any corporation, association, or person to advertise or solicit deposits as a savings bank, and makes every such act punishable by a fine of \$100. On agreed facts. Judgment for defendant. Appeal.

Gray, J. 1. There is no principle of law, which, as to commercial transactions within the chartered powers of corporations, and involving the receipt and borrowing of, and obligation to repay, money, denies the entire freedom to regulate them by such a contract as the parties are willing to enter into. 2. Trust companies may lawfully adopt the same method as savings bank in the conduct of their authorized business. 3. As the advertisement or circular does not hold the company out as a savings bank, it does not violate the Banking Law. Judgment affirmed.

CASCO NAT. BANK v CLARK (1893) 139 N. Y. 307.

On note against makers. Plaintiff bank discounted a note signed by defendants C and D individually, their names being followed respectively by the abbreviations

"Pres." and "Treas." Across the end of the note was written "R Co." This note was in payment of a debt of R Co. W was a director in R Co. and also in plaintiff, and knew why the note was given. Plaintiff sued defendants individually. Defendants claimed that the note was not their note, but that of R Co. Judgment for plaintiff. Affirmed at General Term. Appeal.

Gray, J. 1. Where a negotiable promissory note has been given for the payment of a debt contracted by a corporation, and the language of the promise does not disclose the corporate obligation, and the signatures to the paper are the names of individuals, a holder, taking bona fide and without notice of the circumstances of its making, is entitled to hold the note as a personal undertaking of its signers, notwithstanding they affix to their names the title of an office. 2. As W did not receive his information while acting for plaintiff he was not bound to communicate his knowledge to plaintiff, and such knowledge is not imputable to plaintiff. Judgment affirmed.

Cited: 13 App. Div. 564; 45 id. 91; 48 id. 608; 77 Hun 455; 80 id. 436; 82 id. 176; 84 id. 378; 85 id. 496; 34 Misc. 458; 35 id. 301; 139 N. Y. 318; 150 id. 458; 151 id. 9; 154 id. 728, 729.

MERCHANTS NAT. BANK v CLARK (1893) 139 N. Y. 314.

On note against makers. Plaintiff discounted a note across the end of which was written the name of the R Co., and which was signed by defendants with the abbreviations Prest. and Treas. affixed to their names. They were at the time president and treasurer of the R Co., and the note was given in payment of a debt of that company. Defendants were sued individually. They sought to prove that D, president of plaintiff, and also director in payee, for whom the note was discounted by plaintiff, saw the note in payee's office; that he knew it was the note of the R Co. and that, therefore, plaintiff was charged with knowledge of its real nature. Excluded. Evidence was also excluded tending to show that one of defendants had been told by one of plaintiff's officers, after the discount, that plaintiff knew the note was that of the R Co. Verdict directed. Judgment for plaintiff. Affirmed at General Term. Appeal.

Gray, J. 1. D's knowledge was not attributable to plaintiff, as such knowledge was not acquired in his official capacity as president of plaintiff. 2. Statements of an agent are not admissible to affect the principal when made as to bygone transactions. 3. Defendants are liable on the note for the reasons given in 139 N. Y. 307. Judgment affirmed.

Cited: 77 Hun 443; 80 id. 207, 435; 34 Misc. 458; 150 N. Y. 458.

McLOUGHLIN v NATIONAL MOHAWK VALLEY BANK (1893) 139 N. Y. 514.

On deposit, and for interest thereon. In 1853, plaintiff's testator opened an account with defendant, drawing checks until 1865, when the amount now claimed was due him, and from which time till his death in 1888, there was no entry of debit or credit to his account. Plaintiff demanded principal and interest from 1865 to date. Defendant offered the principal but refused to pay the interest. In the testator's books were credits of interest at 5, 3¼ and 2¼ per cent in 1867, and subsequently the testator had several conversations with the officers of defendant, being informed that no interest would be allowed him. Evidence admitted to show that the testator received interest from other banks. The referee allowed plaintiff to recover principal and interest from 1865 at 3 per cent. Judgment for plaintiff. Affirmed at General Term. Appeal.

Earl, J. 1. Even if some arrangement to pay interest was in force prior to the conversations, it was then abrogated. 2. Testator's transactions with other banks had no relation with his transactions with defendant, and evidence thereof was inadmissible. Judgment reversed.

Cited: 140 N. Y. 311; 164 id. 333.

CASTLE v CORN EXCHANGE BANK (1894) 75 Hun 89.

Conversion. C received a check from M on F Bank which he deposited indorsed in blank with H Bank for collection. H Bank indorsed it "for collection" to defendant. Defendant forwarded it to F Bank, which returned to defendant its draft for the amount, which was subsequently paid. H Bank failed and defendant applied the proceeds of the draft to the settlement of an indebtedness of H Bank.

C and M assigned their interest to plaintiff. No proof was given of any demand on defendant by plaintiff or his assignors. Judgment for defendant. Appeal.

O'Brien, J. 1. A bank receiving from another, notes, checks or drafts for collection, obtains no better title to them or their proceeds than the remitting bank had. 2. The bank having come rightfully into possession of the draft, is not liable for conversion until after demand and refusal; such demand by plaintiff or his assignor has not been proved. Judgment affirmed.

Cited: 19 App. Div. 519, 522; 22 id. 389, 392; 50 id. 579.

THIRD NAT. BANK v MERCHANTS NAT. BANK (1894) 76 Hun 475.

Money paid by mistake. Plaintiff was drawee of a check payable to D, and sent to D by mail. It was delivered by mistake to a man of the same name, who delivered it to defendant for collection. It was paid by plaintiff on the 7th, and defendant on the 14th gave the proceeds to the wrongful holder. Prior to its original delivery to defendant, D called and notified defendant that the check had been lost, and warned the bank to pay to no one but himself. On the 18th, plaintiff was notified of the loss and paid a duplicate check issued later. There was no evidence that defendant was damaged by plaintiff's delay in notifying defendant of its claim. Plaintiff learned that it had paid both checks on January 17, and notified defendant on February 8. Judgment for plaintiff. Appeal.

O'Brien, J. 1. Defendant, as indorser, warranted the genuineness of all prior indorsements. 2. Only the signature of the genuine person is sufficient to transfer title. 3. Money paid by mistake can be recovered, except where the one seeking recovery has by his negligence prejudiced the one from whom recovery is sought. 4. As there was no negligence on the part of plaintiff, prior to payment of the check by defendant, the latter was not prejudiced. Judgment affirmed.

Cited: 10 Misc. 681; 22 id. 724, 728.

PEOPLE v ST. NICHOLAS BANK (1894) 76 Hun 522.

Dissolution of a corporation. Application of a temporary receiver for instructions. K was indebted to the defendant bank on a demand note for \$3,000, secured by collateral. K had a deposit in the defendant of \$1,100. The attorney-general brought this action to wind up the defendant, on account of insolvency, and the applicant was appointed temporary receiver. K notified the receiver that he was ready to take up the note and collateral if the amount of his deposit would be set off against the note. The court refused to give instructions. Appeal.

O'Brien, J. 1. The temporary receiver, without the instructions and order of the court, would have no power to surrender the collateral, which was pledged as security for the loan, and permit the setoff of the amount on deposit. 2. Such receiver is an officer and representative of the court, and is at all times entitled to, and must receive the advice and protection of the court. 3. The right of setoff exists between the bank and its depositors upon cross-demands only where both are due; it is only in a case of proved or admitted insolvency that the depositor may set off his deposit without having made a demand therefor. Order reversed.

CENTRAL BANK v THEIN (1894) 76 Hun 571.

On promissory note payable at plaintiff's banking house and transferred to plaintiff. Defendants, the indorsers, alleged in their verified answer that plaintiff at the time the note fell due held money of the maker on deposit, sufficient to pay it. Plaintiff's cashier made an affidavit that there was not sufficient money of the maker on deposit at the maturity of the note to pay it. The answer was ordered stricken out as sham. Judgment for plaintiff. Appeal.

Bradley, J. 1. If plaintiff, at maturity of the note had in its possession funds deposited by the maker sufficient to pay the note, it was bound to charge up the amount of the note to the maker, and thus satisfy it, and the allegations of the answer, therefore, set up matter of affirmative defense. 2. A verified answer containing matter of affirmative defense will not be stricken out as sham. Judgment reversed.

PEOPLE v ST. NICHOLAS BANK (1894) 77 Hun 159.

Insolvency proceedings. Petition for allowance of a claim. Petitioner, having a deposit account with defendant bank deposited, on December 20, a large amount

in checks and on the same day he drew checks of approximately equal amount, some of which he had certified. At the close of the day, the superintendent of banks closed defendant's doors. Defendant's officers had no knowledge of its insolvency. On December 21, defendant and banks, holding checks drawn on defendant, sent all checks deposited on December 20 to the clearing house. Defendant's receiver interfered, and the clearing house did not make the usual exchanges. Such exchanges would have resulted in a credit to defendant. Petitioner regained possession of the certified checks and contended that either all checks drawn by him on December 20 should be paid, or all checks deposited by him on that day should be returned. Order decreeing payment of the certified checks. Cross appeals.

O'Brien, J. 1. Petitioner's deposit became the property of the bank, and in the absence of fraud, was not subject to reclamation. 2. The mere closing of the bank by the superintendent of banking was not evidence of fraud or knowledge of the insolvency on the part of defendant's officers. 3. As there was no arrangement that the deposit should be specifically appropriated to the payment of any particular check or claim, no trust relation was created. 4. Payees of the certified checks acquired no special lien upon or equitable assignment of any special fund or particular portion of the bank's assets. 5. Mere transmission of any part of the deposit to the clearing house for collection does not amount to an appropriation for payment of checks certified the day before. 6. The relation between payees of the checks and the bank is governed by rules of law, and not by any clearing house custom to which such payees are strangers. Reversed in so far as it directed payment by the receiver.

Cited: 77 Hun 611; 81 id. 451; 8 App. Div. 213; 21 Misc. 95.

MERCHANTS NAT. BANK v TRACY (1894) 77 Hun 443.

On check. Defendant was fraudulently induced by R, plaintiff's cashier and others, to purchase shares of stock in an insolvent company of which R was the principal stockholder. Plaintiff was interested in the transaction by hopes of the company's procuring money to pay its debt to plaintiff. Defendant gave, to an officer of the company, his check for the shares. This check was indorsed to another of the parties joined in perpetrating the fraud, and by him indorsed to plaintiff. It was returned to defendant before he discovered the fraud, and another substituted payable direct to plaintiff. Plaintiff claimed to be a bona fide holder and contended that a sufficient consideration passed when it gave up the indorsed check. Defendant tendered the stock and plaintiff contended that defendant should also have tendered the first check. Judgment for defendant. Appeal.

Hardin, P. J. 1. Plaintiff did not acquire ownership of the first check in good faith and it therefore had no valid claim against defendant by reason of the check given in renewal thereof. 2. As R received, for plaintiff, defendant's first check, while he was acting as plaintiff's cashier, the bank is affected with his knowledge. 3. In repudiating the contract on the second check, defendant sufficiently tendered the subject of the matter of the contract in tendering the certificate of stock; he was not bound to tender to a party not entitled to enforce it, the first check, which was tainted with fraud. Judgment affirmed.

MOHAWK NAT. BANK v SCHENECTADY BANK (1894) 78 Hun 90.

To compel transfer of stock. Defendant was incorporated under sec. 19, ch. 260, Laws of 1838, which provides that stock shall be transferred on the books of the association in such manner as may be agreed on in the articles of association. Defendant's articles of association provided that every transfer, to be valid, should be made on the books of the association, and also that shares of the capital stock should be deemed pledged to the association for the payment of all debts of the owners to the association. P owned 37 shares of stock, which he transferred and assigned to plaintiff as collateral security for his note. Defendant refused to transfer the stock on its book to the name of plaintiff, because P was indebted to it to an amount exceeding the value of the stock. Judgment for defendant. Appeal.

Mayham, P. J. 1. By defendant's charter, the stock issued by the association became impressed with all debts due to the bank from a stockholder, and that characteristic passed with it, and bound not only the stock, but each holder of the same. Judgment affirmed.

NEW YORK BREWERIES CO. v HIGGINS (1894) 79 Hun 250.

On deposit. Defendant was the receiver of an insolvent bank. Plaintiff made deposits shortly before the bank ceased to do business and seeks to recover, alleging that the officers acted fraudulently in accepting them. The trial court refused to allow the case to go to the jury, inasmuch as plaintiff failed to show actual knowledge by the officers of the insolvent condition of the bank, when the deposits were received. Complaint dismissed. Motion for new trial on case containing exceptions.

Parker, J. In the absence of affirmative proof that the officers of the bank had actual knowledge of its insolvent condition, the jury will not be permitted to find that fact. Judgment affirmed.

Cited: 21 Misc. 95; 12 App. Div. 365.

DYKMAN v NORTHBRIDGE (1894) 80 Hun 258.

On promissory note. Plaintiff was receiver of a bank. The note was drawn on the bank by its cashier to the order of defendant, who indorsed it for the cashier's accommodation. To prove that the bank was a bona fide holder for value, plaintiff introduced entries of a ledger to show payment of the amount of the note to the cashier individually, and not as cashier. The clerk who made the entries had no actual knowledge of the transactions, and made the entries from the checks taken from the paying teller's desk. Judgment for plaintiff. Appeal.

Brown, P. J. The entries were not admissible as proof of payment, as the person making them had no knowledge of the actual payment. Judgment reversed.

Cited: 1 App. Div. 27; 33 id. 87.

BANK OF CLARKE COUNTY v GILMAN (1894) 81 Hun 486.

To recover the proceeds of a check indorsed "for collection and credit" by plaintiff and sent to N & Son, plaintiff's correspondents, for collection. N & Son indorsed to defendant, who collected the note. According to an agreement and course of business, defendant credited N & Son with the amount of the note immediately on its receipt, and before making the collection. According to this custom, if, on presentment, such checks were not paid they were charged against the account of N & Son by defendant. N & Son became insolvent the day before the drawee paid the check; of this insolvency defendant had notice, before the collection was made. Facts agreed.

Parker, J. 1. An indorsement "for collection" is restrictive, and is notice to every subsequent custodian of the check, that it remains the property of him who indorses, and an indorsement "for collection and credit" is equally restrictive until the proceeds actually come into the hands of the collecting agent, when the agent is authorized to credit the owner with the proceeds. 2. The transaction between defendant and N & Son was in effect an advancement on general account, and did not operate to divest plaintiff and invest defendant with title to the check. 3. The insolvency of N & Son operated to revoke their authority as agents of plaintiff. Judgment for plaintiff.

Cited: 11 Misc. 286; Aff'd: 152 N. Y. 634.

LUMSDON v GILMAN (1894) 81 Hun 526.

To recover the amount of a draft. N & Son drew on defendant in favor of plaintiff. Before presentment of the draft, N & Son failed. Defendant agreed to credit plaintiff's account with the amount of the draft, upon plaintiff's agreement that it should be charged back to him if N & Son's account with defendant was insufficient. N & Son's account was insufficient to cover the draft, and the amount was charged to plaintiff. The draft was not returned to plaintiff, but forwarded to the assignee of N & Son. Plaintiff did not demand its return. Judgment for plaintiff. Appeal.

Follett, J. The fact that defendant did not return the draft, but forwarded it to the assignee, did not give plaintiff the right to recover the amount for which it was drawn. Judgment affirmed.

HAUPTMAN, EX'R v FIRST NAT. BANK (1894) 83 Hun 78.

Money had and received. H, plaintiff's testator, owned deposits in several banks. He had acquired title to some of them by will. All were in his own name

or that of his testatrix, who made him sole executor and legatee. H directed E to draw these deposits. After the funds were drawn, H told E to deposit them to the credit of C. H died while in possession of the funds, and E deposited them, as directed, with defendant bank. C made other deposits with defendant, which paid C's checks. Plaintiff, after nearly a year, demanded the deposits made by E, claiming them as executor of H. Judgment for plaintiff. Appeal.

Brown, P. J. 1. This action is equitable in character, and the law applies the payments made by defendant of checks drawn on the account, to the reduction of that part which is made up of deposits not in dispute. 2. As H died in possession of the funds, his executor is *prima facie* entitled thereto. 3. This presumption of ownership is not weakened by the fact that the fund was left on deposit in the name of C for more than a year. 4. There could be no valid gift to C without delivery to some one for C's benefit prior to H's death. Judgment affirmed.

WACHSMAN v COLUMBIA BANK (1894) 8 Misc. 280.

On checks. Defendant paid checks purporting to be signed by plaintiff, but forged by plaintiffs' bookkeeper. Defendant contended that plaintiffs were estopped, by allowing the bookkeeper to have possession of the check book, and by failing to object to the passbook and checks when they were returned. The delay in objecting was caused by the fact that the delinquent bookkeeper examined the voucher. Plaintiffs proved that they had no dealing with the person to whom the checks were made payable. Judgment for plaintiff. Appeal.

Daly, C. J. 1. If the depositor, in the ordinary course of business, commits the examination of the bank account and vouchers to a clerk who fails to disclose forged checks, the duty of the depositor to the bank is discharged. 2. It was negligence *per se* for plaintiffs to put it in the power of their bookkeeper to commit the forgeries by allowing him to write out the body of checks, and examine the bank account. 3. The plaintiffs properly proved that they had no dealings with the person to whom the checks were made payable. Judgment affirmed.

Cited: 32 App. Div. 319; 10 Misc. 682.

MOLLONER v STATE BANK (1894) 8 Misc. 512.

Where, in an action against a bank to recover a deposit, plaintiff's evidence tended to show the deposit of a third person's check, but defendant's tended to establish a return of the check because of the inability of the drawer to pay the same, Held, that an issue of the fact was raised that should have been submitted to the jury.

WILSON v BLUMENTHAL (1894) 8 Misc. 528.

Where the evidence tended to establish that a husband gave his wife a passbook in his name showing a deposit in a bank, but that he continued to draw upon such fund, and no notice was ever given the bank, nor a change in account made, it was deemed sufficient to sustain a finding that the fund belonged to the husband.

BOARD OF UNDERWRITERS v NATIONAL BANK (1894) 9 Misc. 362.

On checks, paid by defendant and charged to plaintiff. Defense, payment and account stated. Plaintiff's clerk wrongfully collected money on checks. It did not appear that plaintiff's name was forged. There was no evidence as to who were the payees in 31 of the checks, or as to whether they were payable to bearer. With one exception they were destroyed by the clerk. Defendant paid them all and returned them with plaintiff's passbook to the delinquent clerk, who had charge of plaintiff's accounts. The one check which was not destroyed was shown not to have been paid to the proper payee. Plaintiff had no knowledge of the matter until after learning of the clerk's dishonesty. Defendant contended that plaintiff was barred by long silence. Judgment for plaintiff on the recent checks only. Cross appeals.

McAdam, J. 1. There was no account stated without plaintiff's assent; and while the burden was on plaintiff to overcome the inference of assent raised by plaintiff's silence, that inference was overcome by proving that plaintiff had no knowledge in reference to the matters. 2. Defendant is liable for the amount of the check shown not to have been paid to the proper payee. 3. As there was no proof that the other checks were not payable to bearer, defendant was not re-

quired to prove the genuineness of indorsements; there was no presumption that the checks were drawn in such a form as to make indorsement necessary. Affirmed as to plaintiff's appeal. Reversed as to defendant's appeal.

HISCOCK v LACY (1894) 9 Misc. 578.

To compel declaration of dividend. Plaintiffs, as stockholders, commenced the action against a national bank, and its directors claiming that failure to declare dividends was without reasonable cause and due to bad faith. Plaintiffs did not assume to sue for all the stockholders, and defendant's directors took no notice of this irregularity either by demurrer or answer. U. S. Statute made a national bank a resident of the state where it was located, and the jurisdiction for suits against national banks the same as that for state banks.

Vann, J. 1. Where the surplus of a corporation properly applicable to a dividend is ample for the purpose, and the directors, acting in bad faith, and without reasonable cause, fail to declare a dividend, the courts will interpose in favor of the stockholders. 2. The objection to plaintiff's failing to sue in behalf of all the stockholders was waived by failure to raise the point by demurrer or answer. 3. A state court has jurisdiction to interfere in the internal affairs of a national bank. Decree for plaintiff.

Cited: 6 App. Div. 67.

MOUNT MORRIS BANK v LAWSON (1894) 10 Misc. 359.

On note. Defendant gave a note for value. After it left his possession and before it came into the possession of plaintiff, a bona fide purchaser, the words "with interest" were added. Judgment for plaintiff for the amount of the note and interest. Affirmed at General Term, but without interest. Appeal.

Pryor, J. The unauthorized alteration of the note rendered the whole note void and unenforceable, for the note with the alteration is not the obligation by which the defendant agreed to be bound. Judgment reversed.

HAGER v BUFFALO SAV. BANK (1894) 10 Misc. 455.

Where a depositor's bank book was stolen and presented at the bank by the thief, who signed a check in the depositor's name, which signature was so manifestly irregular as to cause doubt on the part of the cashier, who nevertheless paid the check, the bank was deemed guilty of negligence, and liable to the depositor.

PEOPLE, EX REL. v PRESTON (1894) 140 N. Y. 549.

Mandamus, to compel superintendent of banks to approve and file certificate of incorporation. Plaintiff and others attempted to form a corporation under ch. 689, Laws of 1892, and made and acknowledged a certificate, which they presented to the superintendent of banks to be approved and filed by him. He declined to do so, on the ground that it should have provided only for stock to be paid for in instalments. The certificate under sec. 170 provided that capital stock should be of three kinds, instalment, prepaid, and income. Sec. 170 also provides that certain matters shall be inscribed in a certificate, and that such other provisions not inconsistent with law may be inscribed. Order denying application. Affirmed at General Term. Appeal.

Earl, J. 1. Persons seeking to form a corporation under any general law must have a reasonable latitude as to what they may insert in their certificate of incorporation. 2. Corporations organized under ch. 689, Laws of 1892 may provide for prepaid and income stock. Order reversed.

Cited: 54 App. Div. 560, 563; 92 Hun 572; 23 Misc. 491; 142 N. Y. 182.

PHILLIPS v MERCANTILE NAT. BANK (1894) 140 N. Y. 556.

On deposit, paid out on fraudulent checks. Plaintiff was the receiver of the S Bank. The cashier of the S Bank drew checks, payable to the bank's customers, whose names he indorsed thereon, without their knowledge. These checks were payable to brokers in New York, who collected them from defendant, on whose books they were charged to the S Bank. Judgment for defendant. Affirmed at General Term. Appeal.

Gray, J. 1. The fictitiousness of a maker's direction to pay, does not depend upon identification of the name of the payee with some existent person, but upon the maker's intention. Here the use of the payee's names was merely as an instrumentality in the execution of the cashier's scheme to defraud the bank. 2. B was authorized to draw upon the bank's funds, and the bank must bear the loss, for, in transmitting the checks made out and indorsed as they were, the bank was so far concluded by his acts, as to be stopped from now denying their validity. Judgment affirmed.

Cited: 20 App. Div. 108; 82 Hun 559; 141 N. Y. 382; 159 id. 459.

ISHAM, TRUSTEE v POST (1894) 141 N. Y. 100.

Conversion. P, defendant's intestate, was a private banker, dealing in "choice stock." He promised his customers "careful attention." Plaintiff, without disclosing to P that he was a trustee, loaned certain trust moneys through him on securities, which proved to be fraudulently raised. P's services were rendered gratuitously. Plaintiff claimed that P was negligent, in not obtaining a verification of the certificate of stock. Plaintiff proved delivery of the money to the testator, and refusal to return it on demand. Defendant, to show that the figures were not easily discovered, offered to prove that he had personally loaned a large sum of money on similarly raised collateral, and that for several years the identical securities had been received on the market without question. Objection. Sustained. Judgment for plaintiff. Affirmed at General Term. Appeal.

Finch, J. 1. Though no compensation was paid, P was responsible for losses due to want of exercise of the skill and knowledge of a banker engaged in loaning money for himself and customers. 2. It is matter of affirmative defense, and therefore the burden is on defendant to show that the money was lost through no fault of P. 3. Where there was nothing about the stock to awaken suspicion, the fact that the stock was taken without verification was not negligence per se. Judgment reversed.

Cited: 37 App. Div. 607; 11 Misc. 75; 167 N. Y. 532.

GOSHEN NAT. BANK v STATE (1894) 141 N. Y. 379.

To recover money paid for taxes. M, cashier of the claimant, a bank, was also a collector of state taxes. For the purpose of paying taxes collected, M, as cashier, made a draft on the T Bank in favor of the state comptroller. At the time the draft was drawn, M had no money on deposit with claimant. The draft was paid on presentation. M thereafter absconded. The comptroller had no knowledge of the fraud practiced by M. Claim rejected by Court of Claims. Appeal.

Peckham, J. 1. The draft having been paid, and the original debt to the state having been satisfied, the transaction is closed, and cannot be opened on the ground that the state was not a bona fide holder. 2. It is part of the ordinary duties of a cashier to sign drafts; M's act, therefore, was within the scope of his general powers and apparent authority. 3. The mere making of a draft directly payable to the cashier's creditor was not in itself ground for suspicion. The presumption would be that M performed his duty and paid for the draft, and that it was therefore his property. Judgment affirmed.

Cited: 11 App. Div. 83; 32 id. 270; 82 Hun 521; 87 id. 519; 9 Misc. 347; 22 id. 536; 143 N. Y. 564; 147 id. 192.

ELMIRA SAV. BANK v DAVIS (1894) 142 N. Y. 590.

Claim for preference. Plaintiff, a domestic savings bank, deposited moneys with the N National Bank, under sec. 130, ch. 689, Laws of 1892, providing for such deposits by savings banks with state or national banks, and making such depositor a preferred creditor in case of insolvency after payment of the circulating notes of the insolvent bank. The N National Bank became insolvent, having more than enough assets to meet its circulating notes. Defendant was appointed receiver. Plaintiff claimed a preference as to the balance of the assets. Defendant contended that sec. 130 was in conflict with U. S. R. S., secs. 5236 and 5242, forbidding preferences made in contemplation of insolvency by a national bank, and providing for equal distribution of the assets of an insolvent national bank. Judgment for plaintiff. Appeal.

Gray, J. The provision of U. S. R. S., secs. 5236 and 5242, does not intend

that rights lawfully acquired and superior equities should be disregarded and annulled. It is the voluntary act of a national bank in contemplation of insolvency with a view of preventing the ratable application of its property, which is avoided by those sections. Judgment affirmed.

Cited: 92 Hun 301; 23 Misc. 408; 146 N. Y. 176.

MATTER OF UNITED STATES MORTGAGE CO. (1895) 83 Hun 572.

Application to change name of "United States Mortgage Co." to "United States Mortgage and Trust Co." The petition was approved by the superintendent of banks as required by statute. "United States Trust Co. of New York" opposed the change, under sec. 2412, code of civil procedure, which provides that the name assumed must not so nearly resemble that of another corporation as to be calculated to deceive. The objecting corporation was commonly known as "United States Trust Co." Both companies had been in business for over 20 years. Order denying petition. Appeal.

O'Brien, J. 1. The true legal name of petitioner is the name to be considered and compared with the real legal name of the objecting company. 2. It cannot, with reason, be asserted that there is a probability of confusion ensuing, or of the identity of the two corporations being destroyed. 3. A trust company should be permitted to use the word "Trust" in its corporate name, unless there is a reasonable ground to believe that deception or confusion would result. Reversed.

Cited: 19 App. Div. 626.

PEOPLE v HILMER (1895) 85 Hun 530.

Indictment for knowingly exhibiting false books to the bank examiner. A, the cashier of the M Bank, had made false entries in the cash book, discount book and draft register. These books were shown by the defendant, the president, to the bank examiner. It did not appear that defendant actually knew or suspected that the entries were false. It was not part of his duties to examine the bank accounts in detail. A had been a trusted officer for a number of years. Defendant, after the forgeries by A were suspected, refused to permit the bank examiner to remove the discount book from the bank, and induced A to make good the loss to the bank. Defendant's request to charge that there was no evidence that defendant knew of the forged entries in the books, was refused. Judgment for plaintiff. Appeal.

Lewis, J. 1. To justify a conviction upon circumstantial evidence, not only must the facts proved be consistent with, and point to, defendant's guilt beyond a reasonable doubt, but they must be inconsistent with his innocence. 2. Defendant's refusal to deliver the books to the bank examiner and his successful endeavor to compel restitution to the bank are not inconsistent with his innocence. Judgment reversed.

Cited: 13 App. Div. 426.

BURROUGHS v TRADESMENS NAT. BANK (1895) 87 Hun 6.

Damages for non-payment of check. By an error in defendant's accounts, a check drawn by plaintiff, a depositor with defendant, was refused payment when there was sufficient cash in defendant's hands to meet it. The error was found and the check paid. There was no allegation of any willful or wrongful act on the part of defendant, or of special damages. Nominal verdict, and judgment thereon, for plaintiff. Appeal.

Dykman, J. 1. The contract which the law implies between a bank and its depositor, is that the bank will hold the funds and pay them out according to the order of the depositor. Failure to do so renders the bank legally liable. 2. Plaintiff is entitled to nominal damages only, as the check was paid and no actual damage was alleged. Judgment affirmed.

Aff'd: 156 N. Y. 663.

HEIDELBACH v NATIONAL PARK BANK (1895) 87 Hun 117.

To recover the proceeds of a draft as a trust fund. The draft was deposited by W, with defendant, attached to a bill of lading properly indorsed to W. Defendant discounted the draft and credited W with the proceeds from the date of deposit until September 2. W's daily balance was in excess of the face value of the draft, but on September 2, it was about \$1,000 less than that amount, though later

again increased. On September 7 W failed, and plaintiff notified defendant that he claimed the proceeds under a trust receipt signed by W, providing that plaintiff should remain the owner of the goods until full payment by W of moneys advanced thereon by plaintiff. Thereafter plaintiff sued W to recover a large amount of goods, including those represented by the bill of lading, and proved a claim against W's estate for the money advanced, accepting dividends thereon. Defendant claimed to be entitled to apply W's balance on September 7, to payment of unmatured claims held by it against W. Judgment for plaintiff for the amount of W's deposit on September 2, less the amount of dividends received. Appeal.

Parker, J. 1. The fact that plaintiff delivered to W the bill of lading was sufficient to protect defendant in dealing with W as owner, if it had paid the full amount without notice of the trust. 2. The real owner may follow trust property so long as it can be identified until it comes into the possession of one who in good faith parted with value for it; and in the case of moneys deposited to the trustee's general account, it is sufficient identification to show the trust, to trace the money into the bank, and to show that it was there when notice of the plaintiff's rights was given to the bank. 3. The trustee must be taken to have drawn out his own money in preference to the trust money; the balance on September 2, must, therefore, be regarded as part of the plaintiff's funds. 4. In the absence of contract, a banker has no right to apply the balance of a customer's deposit upon an indebtedness not yet matured. 5. As the trust receipt both left the title to the goods in the plaintiff and made W plaintiff's debtor to the extent of moneys advanced, the acceptance of dividends was not an election to follow one of two inconsistent remedies. Judgment affirmed.

Cited: 1 App. Div. 396.

PEOPLE, EX REL. v PARKER (1895) 87 Hun 194.

Certiorari, to review an assessment. S was the owner of 70 shares of stock in G Bank. S died, and his executors sold and transferred the stock to the relator. The commissioners, after S's death and the transfer to relator, assessed the shares in S's name according to the list of stockholders furnished by G Bank before the transfer. By the Banking Law of 1892, a lien was thereby created on the shares, regardless of the incorrectness of the name of the owner. Relator made affidavit stating the foregoing facts and alleging that the total value of all his personal property was less than the amount of his debts; and asked to have the assessment vacated. The commissioner refused. A writ was issued. Quashed. Appeal.

Follett, J. 1. Under the statute, an error in the name of the stockholder does not invalidate the assessment of the shares as against the true owner, whoever he may be. 2. A person is not deprived of the right to review an assessment on his property under ch. 269, Laws of 1880, because, without his fault, the name of a person not the owner is entered against it. Reversed.

Cited: 57 App. Div. 104. Aff'd: 148 N. Y. 731.

VAN WAGENEN v GENESEE FALLS SAV. ASS'N (1895) 88 Hun 43.

Money had and received. The plaintiff gave money to B, defendant's secretary, to be paid to the defendant, and received from the secretary a passbook crediting the amount. The articles of association required all payments to be made to its treasurer at its regular meeting. These deposits were not solicited by B, but were voluntary on the plaintiff's part, and he had notice of the rules. B had received money from other members, and caused the same to be deposited with the defendant, but the defendant received no part of plaintiff's money. Judgment for plaintiff. Appeal.

Bradley, J. 1. The handing of the money to the person who was secretary cannot be treated as a payment to the association. He had no authority to represent the association in receiving the money. Such power cannot be implied from the fact that he had on other occasions received money from members and paid it at the weekly meetings. 2. The agency assumed by B, to take the money to the defendant, was for the plaintiff. 3. The fact that the plaintiff had a passbook does not, nor do the entries made upon it, furnish any aid to bring as against the association. Judgment reversed.

NAT. PARK BANK v ELDRED BANK (1895) 90 Hun 285.

Money had and received. S obtained a draft from the W Bank, on the plaintiff, for \$8. He raised the draft to \$1,800, indorsed it in blank and deposited it with

the defendant. Defendant indorsed it and sent it to the S Bank for collection. Plaintiff paid the draft, and the money was sent to defendant and by it turned over to S. Thereafter the plaintiff learned from the W Bank of the forgery and notified defendant. Verdict for plaintiff. Motion for new trial.

Van Brunt, P. J. 1. An agency was not disclosed to the plaintiff at the time of the transaction, and it had the right to rely on the responsibility of the defendant as the owner of the draft in paying the same. 2. Where money is paid upon a raised draft without any negligence on the part of the person paying the same, it can be recovered from the party to whom it was paid. Motion denied.

Cited: 154 N. Y. 769.

HIGGINS v WORTHINGTON (1895) 90 Hun 436.

On promissory note. The plaintiff was the receiver of an insolvent bank, holding notes made by the defendant. Subsequent to the suspension of the bank and prior to the commencement of proceedings for its dissolution, the defendant became the assignee of a number of deposits in the bank. There was no evidence that the bank was insolvent at the time the deposits were assigned, except that it had suspended. Defendant contended that the deposits should be set off against the notes. Verdict for plaintiff. Motion for new trial.

Parker, J. The defendant was entitled to have the deposits set off against the notes. Motion granted.

Same case: 12 App. Div. 362.

BANK OF PORT JEFFERSON v DARLING (1895) 91 Hun 236.

On promissory note. G executed his note to the plaintiff bank for \$2,900, and before delivery, obtained the indorsement of D, defendant's testator. Prior to the time that the note fell due, D died. Notice of protest was mailed, addressed to the estate of D, where D had last resided. Such notice was not received by defendant. The plaintiff, when the note fell due, had in its possession \$123 on a general deposit of G, which it applied on other unmatured notes. Defendant denied that the plaintiff was a corporation and entitled to sue, it having failed to file, in the office of the county clerk, an affidavit of the payment of its capital stock. The sum of \$123 was deducted from the amount of the note. Judgment for plaintiff. Appeal.

Dykman, J. 1. The bank was a de facto corporation, and cannot be attacked because of any defect in its organization. 2. The demand of payment was sufficient and no personal notice of non-payment was necessary, because the indorser was dead. 3. The sum of \$123 was improperly deducted from the amount due. Judgment modified.

Cited: 7 App. Div. 416; 26 Misc. 486.

PEOPLE v MERCHANTS BANK (1895) 92 Hun 159.

To recover trust funds. The petitioner sent three notes to the defendant, a bank, for collection only. The petitioner had no account with the defendant. One of the notes was collected and the proceeds remitted; another fell due and the bank held sufficient money of the maker to pay it. It charged the maker's account with the amount of it, and sent the petitioner a draft on the A Bank. That day the defendant passed into the hands of a receiver. The A Bank refused to honor the draft. The petition sought to have the receiver pay over the amount of the note. Order for petitioner. Appeal.

Per curiam. 1. The owners of the note were entitled to collect the proceeds thereof from the receiver of the bank to the extent of the funds received from the bank that were in its possession when the bank failed. 2. The relation between the owners of the note and the bank was that of bailor and bailee or trustee and cestui que trust. Order affirmed.

DAVIS v KNIPP (1895) 92 Hun 297.

On promissory note. The defendant was indebted to the E Bank on a note prior to the time of its insolvency. The bank failed on May 28, and the plaintiff was appointed receiver June 2. Between these dates, the defendant was given a check on the bank, the amount of which he sought to set off against the note. Judgment for plaintiff. Appeal.

Merwin, J. A debtor of a bank cannot use as a setoff, a claim of a depositor

purchased after the bank, being insolvent, closed its doors and before the appointment of a receiver. The rights of the parties became fixed at the time of the act of insolvency. Judgment affirmed.

Cited: 32 Misc. 375.

DANIELS v EMPIRE STATE SAV. BANK (1895) 92 Hun 450.

To compel credit of a deposit. The plaintiff, in 1876, when about to go abroad left with D, the treasurer of the defendant, a check signed by her in blank, with instructions to use it under certain circumstances. The check was not used during her absence, and failing to obtain it on her return, it was left in the possession of D. In 1892, the plaintiff left \$10,000 for deposit, but, not having her book with her, it was not entered therein. The money was not entered upon the books of the bank but was placed in its vaults and later appropriated by D. The books of the bank showed that D appropriated the money. The check left with D in 1876, was found in the bank dated 1879, and drawn up for four thousand dollars, and the amount charged to the plaintiff's account in D's writing. The defendant sought to offset this amount. Judgment for plaintiff. Appeal.

Adams, J. D had the general charge of the affairs of the bank, and was in fact himself the bank, and bearing this intimate relation to the bank, it would be strange to hold that he might perpetrate a fraud like the one in question and yet the bank itself be permitted to profit thereby. Judgment affirmed.

HARLEM BUILDING ASS'N v MERCANTILE TRUST CO. (1895) 10 Misc. 680.

On checks. Upon applications of members, the plaintiff, a building association, issued the checks on defendant, a trust company. The applications and the indorsements were forged by plaintiff's treasurer. The checks were deposited in the treasurer's bank, collected of defendant, and returned to the plaintiff. Plaintiff waited an unreasonable time before notifying defendant that the checks were forged. There was no evidence that defendant would be damaged. Plaintiff's treasurer examined the checks when they were returned. Defendant contended that plaintiff was negligent in issuing checks upon the forged application and in not sooner discovering the forgery. Judgment for plaintiff. Appeal.

Bischoff, J. 1. The plaintiff's unreasonable neglect to give the defendant notice of the forgery of the checks did not discharge the defendant, as no damage resulted to it. 2. The defendant cannot question plaintiff's right to issue the checks upon forged applications. 3. When checks are returned, the maker is not required to examine the indorsements of the payee. Judgment affirmed.

Cited: 32 App. Div. 319.

BURKE v SLATTERY (1895) 10 Misc. 754.

Where a deposit was made to the credit of "B or wife A," and the bank book was thereafter pledged by A, Held, that the deposit in the husband's name was for convenience and did not create ownership in him, and the wife could therefore pledge it.

WALSH v NAT. BROADWAY BANK (1895) 11 Misc. 249.

To recover the proceeds of a trust fund. Plaintiff's attorney deposited to his own credit with defendant bank, a check given by plaintiff for a particular purpose. Part of the money was drawn out. The attorney was not made party to the suit. Demurrer: 1, that there was misjoinder of parties; and 2, no cause of action stated.

Giegerich, J. 1. The attorney was not a necessary party to this action at law. 2. The money, being the proceeds of a trust fund, can be followed and the bank required to pay it to plaintiff. Demurrer overruled.

Aff'd: 13 Misc. 3.

SICKLES v HEROLD (1895) 11 Misc. 583.

On note. Defendant was a stockholder in a bank; he gave a demand note to the bank on the bank examiner's promise to permit it to remain open. The bank continued operations for some months, when plaintiff was appointed receiver and commenced suit on the note, as one of the assets of the bank. Defendant contended: that there was no consideration for the note; that the bank could not

sue on it; that it was ultra vires, and that the receiver should first have exhausted the other assets of the bank.

Pryor, J. 1. The promise by the banking department to forbear closing the bank, was a good consideration for defendant's promise to pay the note given the bank. 2. The promise being for the benefit of the bank, the receiver can sue. 3. The promise was not ultra vires. 4. Defendant is estopped to set up the defense of ultra vires. 5. The note was enforceable before the other assets of the bank had been exhausted. 6. The receiver is not required to forego access to any resource of the bank. Judgment for plaintiff.

Cited: 36 App. Div. 513.

GRANT v MACNUTT (1895) 12 Misc. 20.

On check. Defendant drew a check on M Bank without having sufficient funds to meet it. On the following day the S Bank, the clearing house agent of the M Bank, presented the check and payment was refused. The M Bank failed and plaintiff was appointed receiver of the S Bank, which also failed. Three weeks later defendant was notified of the failure to honor the check. Defendant contended that there was no allegation or proof that the presentment for payment and notice of dishonor had been promptly made, and that the S Bank stood in the same relation as the M Bank. Verdict directed for plaintiff. Motion for a new trial.

Bischoff, J. 1. The allegation and proof of presentment for payment and notice were not necessary to charge the drawer. 2. The clearing house agent did not assume the same relation that existed between the M Bank and its depositors. Motion overruled. Judgment for plaintiff.

Cited: 23 Misc. 149.

STATE BANK v POSTAL (1895) 12 Misc. 546.

On note, protested as a four months' note. The indorsers averred that it was a two months' note. Defendants offered checks drawn by the maker of the note on plaintiff, on some of which the word "two" was written and in some the word "four." The word "two" was similar to the word in the note, and the word "four" dissimilar. Plaintiff objected, on the ground that they passed only the paying teller and bookkeeper and were not before the directors as in case of notes discounted, and therefore not notice to plaintiff. Objection overruled. Judgment for defendants. Appeal.

Conlan, J. 1. If the plaintiff has established channels through which business papers must go, that do not bring knowledge to its officers, it is the fault of the system and cannot be urged to the prejudice of innocent parties dealing with it, without either knowledge or control over its operations. 2. The checks were admissible to show that plaintiff recognized and acted on a similar written word to the one on the note in suit, as meaning two and not four. Judgment affirmed.

SICKELS v HEROLD (1895) 15 Misc. 116.

On note. Defendant was director of a bank, of which the plaintiff was made receiver. To keep the bank open, the defendant and the other directors gave their notes to the bank. By sec. 17, ch. 689, Laws of 1892, the superintendent of banking could require security, when he believed that the capital of the bank was impaired. Defendant was allowed to counterclaim the amount of his deposit and contended that he should have been allowed interest on it. The deposit did not draw interest. Defendant contended further that there was no consideration for the note; that there was an agreement that the note was not to be paid until the deficiency of the doubtful assets had been ascertained; and that he should be subrogated to the receiver's rights to the assets, to secure which the note was given. Judgment for plaintiff. Appeal.

Daly, C. J. 1. The maker of the note was estopped from alleging want of consideration. 2. The maker of the note cannot be subrogated to the questionable assets for which the note was given, until the sum guaranteed by the sureties is paid. 3. It was proper to refuse to allow interest on the deposit. Judgment affirmed.

HIRSCHFIELD v BOPP (1895) 145 N. Y. 84.

To enforce liability of a stockholder. The plaintiff was a depositor and defendant was a stockholder in the M Bank, which became insolvent. Only part of the

plaintiff's claim was paid. The assets of the bank were insufficient to pay the amount due its depositors. Sec. 52 of the Banking Law of 1892 provides that stockholders in banking corporations shall be individually responsible for all debts of the corporation to the amount of their stock. Sec. 55 of the Stock Corporation Law provides that stockholders shall not be liable for the corporation debts, unless: 1, a judgment has been recovered against the corporation on the debt, and execution thereon returned partly unsatisfied; 2, the debt was payable within two years after contraction; 3, the action against the corporation was brought within two years after the debt became due. Demurrer to the complaint. Sustained. Judgment for defendant. Affirmed at General Term. Appeal.

Andrews, C. J. 1. The statute does not operate to make the stockholders' liability primary, but merely secondary. 2. The liability imposed by sec. 52 of the Banking Law is limited by sec. 55 of the Stock Corporation Law. 3. The complaint should have stated when the debt was contracted, when it was due, the term of credit, and why a suit against the corporation was prevented. Judgment affirmed.

Affirming: 81 Hun 555.

Cited: 27 App. Div. 183; 45 id. 317; 60 id. 99, 102; 23 Misc. 200, 201, 204, 208; 25 id. 552; 26 id. 666, 667, 669; 32 id. 507; 146 N. Y. 58; 147 id. 612; 157 id. 185; 162 id. 190.

GRANT, REC'R v WALSH (1895) 145 N. Y. 502.

On check. The defendant drew a check on the F Co. payable to himself, indorsed it for deposit and deposited it with the M Bank at 2.30 p. m. The M Bank failed the day the check was received and plaintiff was appointed receiver. The next morning the check was sent to S Bank, the clearing house agent of M Bank, which presented it to F Co. for payment. Payment was refused. Defendant was not allowed to ask the teller of M Bank, whether any of the officers had told him of the financial condition of the bank. Judgment for plaintiff. Appeal.

Haight, J. 1. No action could have been maintained on the check by the M Bank if the check was received after the officers knew of the bank's condition and of their inability to continue business, and the question was proper. 2. If the bank fraudulently procured possession of the check, it could not recover without showing that the S Bank was a bona fide holder and this the plaintiff has failed to do. Judgment reversed.

Cited: 39 App. Div. 131, 132; 50 id. 38; 27 Misc. 643; 148 N. Y. 705.

O'BRIEN v GRANT (1895) 146 N. Y. 163.

To recover the value of securities. Plaintiff was receiver of the M Bank. Defendant was receiver of N Bank. These banks entered into an agreement by which the N Bank was to act as the clearing house representative of the former. The M Bank was to keep on deposit with the N Bank, securities and cash as collateral, which security might be used in the payment of the M Bank's debts. The M Bank sent a copy of the agreement to the clearing house association, the constitution of which provided that, under such an arrangement, the receiving bank should in no case discontinue the arrangement without giving notice, to take effect after the exchanges of the following mornings should have been completed. The N Bank, desirous of discontinuing the agreement and acting in good faith, sent the required notices to all banks on August 8. At this time the M Bank was insolvent. The N Bank having been informed of the M Bank's insolvency, paid all checks on August 9, drawn on that bank and the same were cleared through the clearing house. Among the checks thus paid were the checks of the state treasurer, drawn on the M Bank and presented on August 9. The plaintiff contended that the relationship between the banks was one of agency; that the insolvency operated to sever it; and that under ch. 687, Laws of 1892, forbidding preferences by corporations, the application of the proceeds of the securities by the N Bank, for the purpose of reimbursing itself for the payment of the M Bank's checks, was an illegal preference. Judgment for defendant. Affirmed at General Term. Appeal.

Gray, J. 1. The arrangement constituted a tripartite agreement. 2. The agreement was not made in contemplation of insolvency, and the plaintiffs therefore held the property of the M Bank subject to the superior equities of the N Bank. 3. The relationship was not that of principal and agent, and insolvency did not excuse the N Bank from the performance of its obligations under the agreement. 4. There being no evidence that the representatives had notice of the bank's in-

solvency, the presumption was that the checks of the state treasurer were held for value, and the N Bank was justified in paying the same. Judgment affirmed. Cited: 149 N. Y. 427.

HATCH v FOURTH NAT. BANK (1895) 147 N. Y. 184.

On negotiable stock certificate. The plaintiff's testator deposited with M, a certificate of stock. M, without the owner's consent, pledged the stock with F, receiving therefore a check by way of loan, which he deposited with the defendant. Defendant had previously loaned M a large amount of money, accepting securities fraudulently obtained, as collateral. There was an agreement made that, in the event M should fail to pay when requested, defendant could sell the security thus pledged, and reimburse itself out of the proceeds. Defendant had no knowledge of the fraud practiced in procuring the check and securities. M, having on deposit with the defendant funds almost sufficient to cover the check, made an assignment. The bank sold the collateral security, and the cash in bank was appropriated to pay the balance due. Judgment for defendant. Affirmed at General Term. Appeal.

Finch, J. 1. The check, having been appropriated in discharge of M's debts to the bank, and the bank having accepted the payment in ignorance of the source from which the money had been derived, plaintiff has no right of recovery against the defendant. 2. The application of the deposit account upon the debt, resting on a continuing consent, had the same effect as if M had directed application, and so paid the debt. Judgment affirmed.

Cited: 11 App. Div. 83; 32 id 270; 36 id. 483, 484; 50 id. 37; 150 N. Y. 258; 155 id. 61; 159 id. 460.

CASTLE v CORN EXCHANGE BANK (1895) 148 N. Y. 122.

Conversion. M drew a check on the F Bank in favor of C, who indorsed it in blank and sent it to H for collection. H indorsed the check for collection, and sent it to the defendant's cashier, stating it was for credit. The defendant then sent it to the F Bank, indorsed "for collection." Thereupon the F Bank drew the draft in question and sent it to the defendant in payment of the check. The next day C telegraphed M, that H had suspended. M telegraphed the defendant to hold the money on the F draft, and the F Bank also telegraphed B Bank, on which the draft was drawn, to refuse payment, and payment was refused. The F Bank thereupon sued the B Bank on the draft, and recovered a judgment. The sheriff collected the money due and absconded. C thereafter assigned his rights against the defendant to plaintiff. No demand was made upon the defendant. Judgment for defendant. Affirmed at General Term. Appeal.

Gray, J. 1. A demand by C, and a refusal by the defendant, were essential to make out a case of conversion. 2. M, not being entitled to the draft, was not authorized to make a demand for C. 3. The defendant, having received the check for collection, and not being informed of the facts of its ownership, was merely the agent of the forwarders and not of the payee. Judgment affirmed.

Cited: 54 App. Div. 131; 25 Misc. 694.

DYKMAN v NORTHRIDGE (1896) 1 App. Div. 26.

On note. The cashier of a bank borrowed money from his bank on a note. He gave a new note, payable at the bank, for the amount, less a small payment, with defendant as indorser. The old note was surrendered on delivery of the new one, with a cashier's check for the amount. When the new note fell due, it was not presented for payment but was protested by the maker, the cashier, who was a notary. The bank failed and plaintiff became its receiver. The defense was lack of consideration, and invalidity of the protest. Judgment for plaintiff. Appeal.

Hatch, J. 1. There was a sufficient consideration for the note. 2. The cashier, who was a notary, could make protest of a note signed by himself. 3. When a note held by a bank is payable there, it need not be presented for payment. Judgment affirmed.

Aff'd: 153 N. Y. 662.

GRAFING, EX'RS v HEILMANN (1896) 1 App. Div. 260.

On deposit. G deposited the money in a savings bank in his own name, "in trust for" defendant, and about the same time, made a similar deposit in another bank. He regularly drew the interest until his death. Prior to that event defend-

ant had withdrawn part of one deposit with the consent of G, who made no demand for its return. A letter was found among G's effects directing defendant to make a certain disposition of the money. Plaintiffs, G's executors, originally sued the bank, and defendant was substituted. Judgment for defendant. Appeal.

Cullen, J. Such a deposit created a trust, and the receipt of the interest by the depositor during his life was not inconsistent with this condition. Judgment affirmed. Cited: 11 App. Div. 555.

HAUX, EX'R v DRY DOCK SAV. INSTITUTION (1896) 2 App. Div. 165.

On deposits. H, prior to his death, deposited \$10 in defendant bank, "in trust for" three of his children, whom he named, all of whom died before him. The latter continued to use this account, making deposits of his own money, and that of the children, as well as of two others not named, until the amount equaled \$3,000. He also deposited in another bank in his own name, and later made a deposit in trust for his son, W, delivering the passbook to him. The children worked for and with the father, but received no stated compensation. The children contended that a trust, in their favor, was created in the balance. Plaintiff was H's executor, and claimed the fund as such. Judgment for plaintiff. Appeal.

Per curiam. Whether or not a trust was created depended on the intention of the party. No trust was intended as to the balance. Judgment affirmed.

Cited: 51 App. Div. 337; 25 Misc. 142, 143; 29 id. 700. Aff'd: 154 N. Y. 736.

HIGGINS, REC'R v TEFFT (1896) 4 App. Div. 62.

Negligence against directors. Defendants were the directors of a bank, of which plaintiff was appointed receiver. Plaintiff demanded judgment for a definite sum of money; there was no application for discovery, or for accounting; the amount of damages was not alleged; the defendants were not alleged ever to have received any of the bank's property or to have interfered with it. Demurrer by a defendant, who was not a director when the other defendants committed the wrongful acts on the ground that the causes of action had been improperly united, and that the complaint did not state facts sufficient to constitute a cause of action. Demurrer overruled. Judgment for plaintiff. Appeal.

Ingraham, J. The action is a demand for damages, and calling it an action in behalf of stockholders and creditors does not change its nature. There is a misjoinder of causes of action, there being joined a cause of action against this demurring defendant for negligent and wrongful acts committed by him as a director, together with an action for damages against the other defendants for damages sustained by reason of the acts of such other directors, while this demurring defendant was not a director of the bank. Judgment reversed.

Cited: 6 App. Div. 514; 18 id. 594; 28 id. 115, 117; 30 id. 482; 154 N. Y. 491; 25 Misc. 249.

REYNOLDS v BANK OF MT. VERNON (1896) 6 App. Div. 62.

Accounting. Plaintiff brought the action on behalf of all stockholders, against a national bank and its president, to investigate the affairs of the bank. Without authority of its charter or by-laws, the bank put on each certificate of stock a restriction as to its transfer. On the day plaintiff commenced his suit, the legislature gave banks the power to make such restrictions. The directors refused to declare dividends. Plaintiff and the directors acquiesced in the president's unlawfully making call loans of the bank's funds to himself and other directors. All the loans made in excess of the amount allowed by statute, had been repaid. Judgment for defendants. Appeal.

Cullen, J. 1. The plaintiff cannot have the restriction placed on the transfer of stock removed. 2. A court will not compel a bank to declare dividends. 3. The acquiescence of the plaintiff to the call loans, made to the president of the bank with the director's consent, estops him from objecting, since all loans in excess of one third of the capital stock had been paid and there was no cause for complaint. Judgment affirmed.

COMMERCIAL BANK v MACDOUGALL & SOUTHWICK CO. (1896)
8 App. Div. 1.

Money paid on promissory note. Plaintiff, a national bank, held the note of T, transferred to it by H. Defendants assumed the indebtedness of T. Just before

such assumption, T sent H a renewal note, and plaintiff advanced money on it. Plaintiff knew it was a renewal note but claimed to act in good faith. Defendants, by mistake, paid the renewal note, and plaintiff sued on the original. Defendants did not know of the notes until they became due. Plaintiff contended that defendants were liable for H's fraud. Judgment for plaintiff. Motion for a new trial.

Green, J. 1. The two notes represented one indebtedness, and payment of either discharged the indebtedness. 2. Defendants not being parties to either note, plaintiff's alleged good faith was immaterial. 3. Plaintiff can be compelled to refund the money paid by defendant under a mistake of facts. 4. Defendants were not responsible for H's fraud. Motion granted.

CLUTE v WARNER (1896) 8 App. Div. 40.

To set off deposit. A note, given by W to plaintiff, for his accommodation, was discounted by the N Bank, and the amount passed to plaintiff's credit. Shortly thereafter the N Bank gave its own note to the B Bank and gave W's note as collateral. The N Bank's note was paid, and returned to the bank with the collateral. N Bank failed before its note was paid and defendant was its receiver. At the time of the failure, plaintiff had a deposit which he contended should be offset against W's note, which was not due at the time of the failure. Judgment for plaintiff. Appeal.

Herrick, J. Though not due, when the bank became insolvent, plaintiff had a right to waive the additional time, and elect to have the note become due immediately and to make payment by applying the deposit thereon. Judgment affirmed.

Cited: 12 App. Div. 598; 32 Misc. 375.

McELROY v ALBANY SAV. BANK (1896) 8 App. Div. 46.

On deposit. The deposit, made by B in defendant, a savings bank, was expressed to be in account with Mrs. B, or B, her husband, or the survivor of them. The deposit book was retained by B, whose executors were plaintiffs. The bank and the administrator of the wife, who died after her husband, were defendants. Case agreed.

Putnam, J. 1. The deposit made the husband and wife joint tenants of the fund, and as the wife survived the husband, it became her property. 2. It is not necessary to the validity of the gift that the wife should have possession of the passbook during the life time of her husband. Judgment for defendant.

Cited: 59 App. Div. 158.

WARREN-SCHARF CO. v DUNN, REC'R (1896) 8 App. Div. 205.

To recover the amount of city warrants drawn by B in favor of plaintiff, and received by M Bank for collection. The bank surrendered the warrants to B's treasurer, and took a check on N Bank, for the larger part. M Bank presented the check, with others, to N Bank, and received a check on P Bank, for the balance of settlement between the two banks, which it deposited in A Bank. Subsequently the M Bank failed, and defendant was appointed receiver. Up to that date the deposit remained in the A Bank. The M Bank also received checks drawn upon R's private bank, in the settlement with the N Bank, which it held at the time of insolvency. Plaintiff demanded payment in full of the city warrants. The amount of checks in the A Bank and on R made about one-third of the amount of the warrants. Agreed case.

Parker, P. J. 1. So far as the proceeds of the collection of the warrants passed to the defendant, a trust in favor of the plaintiff may be impressed upon them; and so far as their avails can be identified they belong to the plaintiff. No money was received from the check on the N Bank. There was a settlement between the two banks, and the only things that could be traced were the checks deposited in the A Bank, and these held against R. 2. The plaintiff is entitled to the amount of the checks deposited in A Bank and those held by R, as a preference, and to share with other creditors in the balance. Judgment accordingly.

MATTER OF MURRAY HILL BANK (1896) 9 App. Div. 546.

Petition, for dissolution of bank filed by a majority of the directors of the bank. The petition gave the names and residences of the creditors. It alleged that the books and papers of the bank were in possession of the superintendent of bank-

ing; and that the annexed schedule stated that it was a full and true account of all the bank's creditors, with the name and place of residence; the sum owing to each, the nature of the debt, and the aggregate claims of all depositors amounting to about \$1,031,000. A schedule was annexed, containing information "as far as the petitioner or petitioners know or have means of knowing the same." The attorney-general claimed that the petition and schedule were insufficient to give the court jurisdiction, and that the possession by the superintendent of banking of the bank's property, took away the right of its directors to proceed for its voluntary dissolution. Petition for a referee. Granted. Appeal.

Ingraham, J. 1. The petition and schedule were sufficient to give the court jurisdiction. 2. The mere possession of the property and business of the bank by the superintendent of banking did not divest the directors of the management, except so far as prevented them from disposing of the property pending an application for the appointment of a receiver. Order affirmed.

Cited: 9 App. Div. 554; 14 id. 318; 153 N. Y. 207.

MATTER OF MURRAY HILL BANK (1896) 9 App. Div. 554.

Petition, by bank receiver to secure possession of the bank's assets. The superintendent of banking had taken possession of the bank's property. Thereafter the directors petitioned for its voluntary dissolution. Temporary receiver and a referee were appointed in that proceeding. The receiver petitioned for an order requiring the superintendent of banking to turn over the bank's property to him. Before this petition was argued, the superintendent of banking turned over the property to receivers appointed in a proceeding by the attorney general in behalf of the state for involuntary dissolution of the bank. Petition denied. Appeal.

Ingraham, J. When the petition was heard, the superintendent of banking did not have in his possession any of the property of the bank, and the petition was properly denied. Order affirmed.

COMMERCIAL NAT. BANK v HAND (1896) 9 App. Div. 614.

On judgment. The answer set up a counterclaim for damages resulting to the credit and reputation of defendant by reason of the refusal of plaintiff, a bank, to honor and pay checks drawn by defendant on it. Motion, that defendant furnish a bill of particulars. The court ordered defendant to show: 1, the items and particulars of the damages to credit; 2, expenses incurred by reason of the alleged dishonor of the checks; and 3, the amounts claimed as lost by reason of persons refusing to do business with defendant, in consequence of the dishonor of the checks. The answer contained a list of such persons, but did not specify the amount lost through each. Appeal.

O'Brien, J. 1. As to the first, the items of damage to credit are general and need not be specified. 2. As to the second and third, plaintiff has misconceived the claims in the answer, which were not for amounts lost, but for profits of which defendant was deprived, by the dishonor of the check. Order reversed.

Cited: 58 App. Div. 532.

PEOPLE v MURRAY HILL BANK (1896) 10 App. Div. 328.

For dissolution of corporation. The directors of defendant bank had instituted proceedings in the first judicial district for voluntary dissolution; temporary receivers were appointed, and the assets of the bank were taken possession of by the superintendent of banking. The attorney general afterward commenced proceedings in the second district, under the State Banking Act, Laws of 1892, ch. 689, for involuntary dissolution. In this latter proceeding an order was made appointing receivers, to whom the superintendent of banking turned over the assets. The answer of the depositors did not deny the insolvency, but set up the prior proceedings in defense. The answer was overruled as frivolous. Appeal.

Brown, P. J. 1. The institution of the first proceeding did not prevent the commencement of the second, as they were concurrent remedies. 2. Receivers having been appointed in the first proceeding, the order appointing them in the second proceeding should be set aside. 3. The court in the first district had jurisdiction of the subject matter, and had authority to appoint temporary receivers. Order affirmed.

See 14 App. Div. 318; 153 N. Y. 199.

DYKMAN v KEENEY (1896) 10 App. Div. 610.

To recover dividends unlawfully paid. Plaintiff, receiver of the C Bank, sued to recover from defendants, its directors, a dividend declared and paid, and alleged not to have been derived from the surplus profits of the bank, but as a dividend on withdrawal or reduction of the capital stock thereof. By statute, dividends could only be paid from, surplus profits. Included in the surplus profits were notes made within the year by various persons, indorsed by H, and discounted at the bank. Also notes given by the directors in favor of the bank to insure its solvency. Evidence offered to show that the latter notes had been subsequently paid, and to show payment of other notes included in the statement of assets, was excluded. Verdict for plaintiff. Motion for new trial.

Brown, P. J. 1. The notes discounted by H were properly included in the assets of the bank. 2. The liability imposed by the statute upon the directors for declaring an illegal dividend, is not a penalty, but is one of indemnity to the depositors, and therefore the evidence to show payment to the bank or its receiver of the other notes included in the statement of assets was competent and should have been admitted. 3. The notes made by the directors were properly counted as assets of the bank. New trial granted.

Cited: 34 App. Div. 46; 160 N. Y. 680.

HIGGINS v NORTHINGTON (1896) 12 App. Div. 361.

Where a check presented to a bank for payment, could not be paid, and for this reason the bank closed its doors, though at the time the bank had a large sum on deposit in its vaults, and a few days thereafter an action was commenced to procure the dissolution of the bank on the ground of insolvency, Held, that insolvency in respect to a banking association means an insufficiency of property and assets to pay all its debts; that closing its doors and refusing to meet its demands, was a notorious act of insolvency; and that the jury might infer that the bank was insolvent at that time.

GEITELSOHN v CITIZENS SAV. BANK (1896) 17 Misc. 57.

Money paid. Defendant, a savings bank, paid the money to a person who presented plaintiff's passbook. Defendant's by-laws provided that payments to persons presenting the passbook, should discharge the bank from liability. Plaintiff could neither read nor write. The bank paid over the entire amount on presentation of passbook by third party, although one of its by-laws required ninety days notice to be given by a depositor of his intention to close the account. Judgment for plaintiff. Appeal.

Schuchman, J. 1. The rule prescribed by a savings bank for its protection in the payment of deposits does not dispense with the exercise of ordinary care on part of its officers. 2. Defendant did not exercise ordinary care in making the payment. Judgment affirmed.

Reversed: 17 Misc. 574.

ABRAMOWITZ v CITIZENS SAV. BANK (1896) 17 Misc. 297.

Where a depositor's passbook was lost, and a stranger presented the book at the bank and drew out the funds, the teller of the bank merely asking the formal questions, but failing to ask whether or not the party presenting the book was a depositor, Held, that a failure to give ninety days' notice forms no foundation for a claim of premature action, unless payment is refused on that ground; that plaintiff is not required to show negligence on the part of the bank; and that a savings bank is bound to the exercise of ordinary care and diligence.

FULLERTON v CHATHAM NAT. BANK (1896) 17 Misc. 529.

On bonds, deposited as collateral security. In August, plaintiff borrowed on a demand note from defendant bank, depositing securities "as collateral security for the payment of the note" and "of any and every other indebtedness or liability, due or to become due, which may exist on my part to the C National Bank." In September, plaintiff procured another loan by depositing other securities, and executing an identical paper. In February, plaintiff indorsed M's note, discounted it with defendant, and deposited the proceeds to his own credit. At the time of the

loan, plaintiff was under no liability to the bank, but his firm was, both for debts already due and to become due. Defendant contended that the securities were applicable to these debts and might be held for them and for the payment of M's note. Plaintiff demanded the value of the bonds and interest, but gave no evidence of the value or of demand necessary as proof of conversion.

Pryor, J. 1. The deposit of bonds was a security for plaintiff's individual indebtedness exclusively, as evidenced by the two demand notes. 2. Interest can be recovered only from the commencement of the action, as the only relief open to the plaintiff is that which he demanded in the complaint. Judgment accordingly.

GEITELSOHN v CITIZENS SAV. BANK (1896) 17 Misc. 574.

On savings bank deposit, paid to a stranger on presenting the passbook. The passbook stipulated that the depositors agreed to abide by the rules; that the presentation of the passbook should be sufficient authority to make any payment to bearer; and that all payments so made should be valid to discharge the bank. On presenting the passbook, the stranger was closely questioned by the teller, and answered every question correctly. The judge charged that the possession of the passbook constituted no evidence of a right to draw. Judgment for the plaintiff. Appeal.

Daly, P. J. The courts have uniformly given effect to such provision in a passbook where ordinary care on the part of the officer is exercised. There was no fact or circumstance to put the bank officers upon inquiry. Judgment reversed.

Cited: 19 Misc. 422; 20 id. 84.

NATIONAL BANK OF COMMERCE v BANK OF N. Y. (1896) 17 Misc. 691.

To recover proceeds of trust property. The plaintiff alleged that it was one of several banks originally associated as a clearing house association; that each of such original associates contributed to the purchase of land; that title was taken in the name of C and others as joint tenants; that said grantees executed a paper disclaiming any ownership in said premises, and acknowledged that they held the same for the benefit of the original associates and their assigns; that none of the subsequent associates in said clearing house association had in any way contributed to, or acquired any right, title or interest in the premises; that the premises had ceased to be used by said association, and the survivors of said grantees had sold the same and refused to account for the proceeds. The original associates and their assigns together with the surviving trustees or grantees, were made parties. Prayer for an accounting and distribution among the original associates and assigns. Defendants demurred.

Truax, J. 1. If the object for which the premises were purchased has been accomplished, and if they have been sold, and there is in the hands of the persons who are acting as trustees a fund arising from such sale, and if no other person or corporation than the original associates is interested in said fund or any part thereof, the plaintiffs are entitled to the relief demanded. 2. The effect of the transaction was, that the legal and equitable title to the premises was in the banks who were known as the original associates as tenants in common. The grantees had no title to the property, but had at most a power in trust to sell and distribute the proceeds among those who had held the legal and equitable title. Demurrer overruled.

HAYNES, EX'R v MCKEE (1896) 18 Misc. 361.

Money paid, under false representations. The complaint alleged that K deposited money in the U Savings Bank in trust for plaintiff; that K died without having withdrawn any part thereof; that defendant was K's duly qualified executor; that, not knowing she was entitled to this sum, plaintiff, because of the false representations of defendant, gave a check for this sum. Plaintiff rested without proving any representations of defendant. Defendant proved that he turned the money into K's estate. The court dismissed the complaint. Plaintiff contended that the complaint showed an action ex contractu, as for money had and received, and not simply one ex delicto, but did not waive the tort on the trial or make any effort to amend. Plaintiff further contended that the notice in the summons, that judgment would be taken for a specific sum on failure to answer, clearly intimated an action in assumpsit. Judgment for defendant. Appeal.

Van Wyck, C. J. 1. Where one deposits his own money in a savings bank and

requests and receives a passbook containing an entry that the account was with him in trust for another person named, a valid trust is created in favor of that person, although the depositor retains the book until his death. 2. The summons only serves to bring the party into court, but does not become a part of the pleadings, nor aid in their interpretation. 3. An allegation that defendant knowingly made a false representation, making the cause one under which an arrest may be granted, does not let in evidence that he made false representations without knowledge. Judgment affirmed.

Aff'd: 19 Misc. 511.

STEVENS v ORTON (1896) 18 Misc. 538.

On bond. B was appointed cashier of the C National Bank, and thereafter re-elected at each annual election at a certain salary. After the first annual election he unlawfully appropriated money of the bank. Defendant O was president and defendants S and W directors of the bank. The U. S. R. S. empowered the board of directors to appoint, require bond of, and dismiss the cashier at pleasure. The bank's by-laws provided that the cashier should be appointed and hold office during the pleasure of the board. The condition of the bond was that B honestly perform his duties as cashier. W set up a counterclaim that B delivered securities to S to apply to any liability on the bond; that S gave them up; and they were diverted by the plaintiff, the receiver of the bank.

Wright, J. 1. The action of the board was taken for the purpose of fixing the salary. 2. The condition of the bond is in harmony with the statute and by-laws, and the bond covers all defalcations of which the cashier is guilty during the entire period of the performance of his duties. 3. S, not W, if any one, is entitled to maintain an action against the plaintiff for the value of the securities. Moreover, demand upon and refusal by S are prerequisite to W's having a right to bring such action or to set up such matter as a counterclaim. Judgment for the plaintiff.

Cited: 15 App. Div. 173; 24 id. 488.

TWENTY-SIXTH WARD BANK v STEARNS (1896) 148 N. Y. 515.

On promissory note, against indorser. The defendants, at the request of K, a director of the plaintiff, indorsed certain notes made by T. These indorsements were procured, on the condition that T's mother should indorse the paper. The notes were not paid at maturity. The defendants set up the non-performance of the condition. Motion to direct verdict for plaintiff. Denied. Exception. Judgment for defendant. Appeal.

Andrew, C. J. 1. The fact that K was a director in the bank, tended to show that he was in fact acting as agent for the plaintiff, in which event the bank was chargeable with notice of the condition and its non-performance. 2. The question as to whether or not the bank was chargeable with the notice to K, cannot be raised on appeal, under the exception taken. Judgment affirmed.

SICKLES v HEROLD (1896) 149 N. Y. 332.

On promissory note. Defendant was a stockholder and director in a bank of which plaintiff had been appointed temporary receiver, in an action for its dissolution. The note in question had been given to enable the bank to continue business. Defendant interposed a counterclaim for the amount of his deposit in the bank, with interest from the time the bank was closed, but no demand was shown. The interest, claimed by defendant, was disallowed. Judgment for plaintiff. Affirmed at General Term. Appeal.

Haight, J. 1. Insolvency could not be inferred from the mere appointment of a temporary receiver pending the trial, so as to excuse a demand, which is always necessary in order to allow interest on a deposit. 2. The bringing of an action however, was a demand, and the interposition of a counterclaim by way of answer is, by analogy, of the same effect. 3. Defendant was entitled to interest on his deposit from the date of serving his answer. Judgment modified.

Cited: 45 App. Div. 323; 23 Misc. 201, 209.

MATTER OF HOUDAYER (1896) 150 N. Y. 37.

Transfer-tax appraisal. When H died, he was a resident of New Jersey. He had on deposit in a trust company in New York, a sum of money, part of which

was his own and part was money belonging to an estate of which he was trustee. In making the appraisal for transfer-tax purposes, a sum was deducted for expenses of administration and the entire balance reported for taxation, by the surrogate. Affirmed at General Term. Order reversed by Appellate Division. Appeal.

Vann, J. The ordinary relation of debtor and creditor existed between the depositor and the trust company. The appraisal was correct. The entire sum after making proper allowance for expenses, as was done, was taxable. Order of Appellate Division reversed.

Cited: 19 App. Div. 219; 44 id. 346; 30 Misc. 577; 31 id. 658; 32 id. 87; 150 N. Y. 36; 159 id. 85.

HUTCHINSON v MANHATTAN CO. (1896) 150 N. Y. 250.

Money had and received. On May 4, 1893, plaintiff indorsed, generally, to the order of P, in New York, with whom he kept a deposit account, a draft drawn upon a Massachusetts bank. At the same time he orally instructed P, to deposit it with defendant, for collection. P, on the same day indorsed it "for deposit to the credit of P," and deposited it with defendant, with no other instructions. Defendant credited the deposit to P, by making a "short" entry in the latter's passbook. At this time, P was heavily indebted to defendant, and had agreed that defendant should have a lien upon its deposit account and upon all property or securities left in defendant's possession. Defendant, having no notice of plaintiff's rights, on the same day forwarded the draft to Massachusetts, for collection. On May 5, the draft was paid, and on May 6, defendant received the proceeds by mail. Meanwhile, on May 5, at 3.16 p. m., P made an assignment. On May 6, after the collection was complete, plaintiff demanded the proceeds from defendant, on the ground that defendant was a holder for collection only. The demand was refused. Judgment for plaintiff. Appeal.

Bartlett, J. 1. The relation between P and defendant was more than that of bank and depositor, in view of the agreement between them. 2. Defendant received no notice of plaintiff's claim till May 6. 3. The rights of the parties became fixed upon May 5. 4. The court will take judicial notice of the general custom of banks to close at 3 p. m. 5. It follows that P's assignment occurring later, could not affect defendant's rights. 6. Defendant was also entitled to hold the proceeds as against plaintiff who was negligent in making a general indorsement to P. Judgment reversed.

Cited: 49 App. Div. 629; 30 Misc. 55.

MATTER OF MURRAY HILL BANK (1897) 14 App. Div. 318.

The facts in this case are reported in 10 App. Div. 328. The judgment of dissolution, entered in the attorney general's action, gave the assets to the receiver appointed in that action. On appeal, motion was made to have the assets turned over to the director's receiver. Motion granted. Appeal.

Rumsey, J. 1. Both proceedings may be carried on together. 2. The judgment of dissolution abated the first action, and while the power of the receivers in that action did not thereby cease, so far as assets in their hands were concerned, they had no power thereafter to take possession of other assets lawfully in possession of other persons. The assets must be given to the receiver appointed in the action brought by the attorney-general. Order reversed.

Aff'd: 153 N. Y. 199.

MATTER OF MUELLER (1897) 15 App. Div. 67.

Accounting. In the settlement of the accounts of the administrators of D, the deposit in question was included as an asset of the estate. D had deposited it in a savings bank, the account reading: "D, in trust for K." He had another account in his own name. The deposit was made in that way to enable D to deposit more money than he could under one name, according to the rules of the bank, and there was no intention to create a trust. Motion, to vacate an order confirming the report of the referee and settling the account. Denied. Appeal.

Goodrich, P. J. Where the depositor does not make the deposit with the intention of giving to the person named as cestui que trust any beneficial interest in the fund, he does not divest himself of the legal title to the deposit, but continues to be the beneficial owner. Order affirmed.

ULSTER CO. SAV. INSTITUTION v OSTRANDER (1897) 15 App. Div. 173.

On bond. On July 16, 1867, defendant O was elected treasurer of plaintiff bank for the ensuing year, and on that day gave the bond with the defendant B, as surety. The condition of the bond was that O, at the expiration of his term of office, would render a true account of all property which had come into his possession, as treasurer, and deliver the same to his successor. A by-law of the bank provided that the treasurer should hold office during the pleasure of the board of trustees. O was re-elected at the annual meeting in 1868 and 1869, each time for one year. No part of the treasurer's defalcation occurred prior to 1871. The bond was not renewed. Judgment for defendants. Appeal.

Putnam, J. Defendant B was only liable on the bond during the year for which O was elected, when the instrument was executed, and he was not affected by the by-law. Judgment affirmed.

Cited: 15 App. Div. 181.

ULSTER COUNTY SAV. INSTITUTION v YOUNG (1897) 15 App. Div. 181.

On bond. The bond was given for the faithful performance by T of his duties as assistant treasurer of plaintiff bank, "during his continuance in office," even though he held under successive appointments. T was elected in 1867 for the ensuing year, and re-elected in 1868 and 1869; but from that time until 1891, he served without further election. Between 1873 and 1887 he misappropriated money. Judgment for plaintiff. Appeal.

Herrick, J. The bond was a continuing obligation and the sureties were liable thereon for any defalcation occurring while T continued in office. Judgment affirmed.

DECKER v UNION DIME SAV. INSTITUTION (1897) 15 App. Div. 553.

On deposit. A deposit was made by D, then a widower, since deceased, and whose wife is one of the defendants, on July 31, 1886, "in trust for" plaintiff, sister of D. Later he married L. A part of the deposit was drawn out and re-deposited in the same bank "in trust for" D's wife L. Thereafter, he transferred the balance of the first account to a new account, also in trust for his wife. During his lifetime, D had drawn small sums from the accounts. Witnesses testified to declarations of D showing an intention to create a trust in plaintiff's favor. Judgment for plaintiff. Appeal.

Hatch, J. 1. The evidence amply warranted the finding of an intention in D, when the deposit was first made, to create a trust in favor of plaintiff. 2. In the absence of any reservation of power to revoke the trust, he could not revoke it. Judgment affirmed.

Cited: 34 App. Div. 109, 115; 51 id. 333; 53 id. 180; 54 id. 105; 56 id. 568; 33 Misc. 711.

DYKMAN v KEENEY (1897) 16 App. Div. 131.

For dividend unlawfully paid. Defendants were directors of an insolvent bank, of which plaintiff was receiver. It was contended that a dividend, which had been declared and paid before the failure, was not earned, within the meaning of sec. 23 of the Stock Corporation Law. Among the notes treated by the directors as assets in declaring the dividend, were notes made by various parties within the year and indorsed and discounted by H, the proceeds of which were used to take up other notes held by the bank, and given in renewal of former notes by various persons to K, who had discounted the same with the bank. Also notes given by directors of the bank to make it solvent, and which were afterwards paid to the receiver. The statute provided that the directors should be personally liable for a dividend not declared out of the surplus profits, and that all losses sustained by the bank, including debts due for more than one year, and upon which no interest was paid within that time, should be charged to profit and loss, and should not be included in the actual assets. Judgment for defendants. Appeal.

Hatch, J. 1. The liability created by sec. 23 of the Stock Corporation Law, is an indemnity for loss which the corporation or its stockholders may sustain from the payment of an illegal or unauthorized dividend. 2. The notes of K were unquestionably paid by the transaction, whereby H's notes were made to the bank, and the notes were properly treated as assets of the bank in declaring the dividend. 3. The notes given by the directors referred to the then existing condition of the

bank, and were legal assets in its hands when the dividend was declared. Judgment affirmed.

Cited: 34 App. Div. 46. Aff'd: 160 N. Y. 677.

BROWN, EX'R v MECHANICS AND TRADERS BANK (1897) 16 App. Div. 207.

To recover deficiency judgment. While plaintiff's testator was president of defendant bank, he bought in his own name, at a foreclosure sale, property of a customer of defendant, and gave a bond and mortgage thereon to a third person, the avails of the mortgage being paid over to the bank. In this, he was merely defendant's agent. After his death, the mortgage was foreclosed, and a deficiency judgment entered against his executor, the amount of which this action was brought to recover. A counterclaim was interposed for three notes made to the cashier, which were indorsed and discounted by the president, and the money used by him. Another counterclaim was based on a note payable to the president, and indorsed and discounted by him for his own benefit. He had recognized his liability on these notes, and had made part payments thereon, although they had not been protested. The notes had no legal inception until he had discounted them. Judgment for plaintiff. Appeal.

Rumsey, J. 1. Plaintiff's testator was entitled to indemnity from the bank for any loss suffered by him while acting in the course of his agency, but could not recover in this case until the deficiency judgment had been paid. 2. The notes were a legal obligation of the deceased to the bank, and should have been allowed as a counterclaim. 3. As to the bank, the deceased was a principal and no protest was necessary. Judgment reversed.

Cited: 30 App. Div. 365; 43 id. 175.

O'BRIEN v BLAUT (1897) 17 App. Div. 288.

Negligence against bank directors. The plaintiff, as receiver of the M Bank, brought this action. Defendant K demurred to the plaintiff's amended complaint which was sustained with leave to serve a second amended complaint. The plaintiff gave notice of appeal and the same day K died. His widow qualified as executrix of his estate. Plaintiff withdrew the appeal after the time to serve the amended complaint had expired. The widow claimed that the right of action did not survive. An order granted, substituting the executrix in the place of K. Appeal.

Van Brunt, P. J. The cause survives and the plaintiff loses no rights which he had before, and upon revival of the action is entitled to the same relief which he could have had, were the defendant living. Judgment affirmed.

KELLEY v PHOENIX NAT. BANK (1897) 17 App. Div. 496.

Negligence in collecting interest. The T Co. notified the plaintiff and other holders of bonds that, if they would delay presenting matured bonds for payment, it would pay a higher rate of interest from the time of the notice. Later it published a notice in local papers that, if the bonds were not presented by a certain date, no further interest would be paid. The plaintiff lived in another state and did not see this notice. His bank sent his bonds to the defendant bank for collection. Without asking for instructions, the defendant delivered the bonds in return for their face value and interest up to the time set forth in the published notice. Agreed case.

Williams, J. 1. The agreement of the T Co. was founded upon a sufficient consideration and could be enforced. 2. The published notice in no way constituted a tender of payment so as to stop the running of the interest. 3. The defendant was made the agent of the holders of the bonds, and was liable to them for its neglect to collect the amount of interest. Judgment for plaintiff.

STATE, EX REL. v BARKER (1897) 19 App. Div. 64.

Certiorari, to review an assessment. The relator bank was chartered under the laws of Connecticut. Among its assets is stock in the New York City Bank. The defendants assessed the stock without deducting from relator's gross assets the property taxable elsewhere or not taxable, and relator's real estate and debts. The surplus of the bank was greater than the assessed stock. Assessment vacated. Appeal.

Rumsey, J. 1. The amount due a depositor is a debt of the bank, and in valuation of its property for taxation must be deducted. 2. In ascertaining a foreign bank's liability to taxation of its surplus, if such surplus, after deducting all the property not taxable, and all its taxable property, and all real estate and cash, is equal to the value of the stock in New York banks, then the assessment is properly laid. 3. The action of the defendants was warranted by a consideration of its net assets. Order reversed.

BROOKLINE NAT. BANK v MOERS (1897) 19 App. Div. 155.

Assumpsit. The plaintiff alleged that the defendants, being owners of a check of F, sold it to the plaintiff and guaranteed its payment. The check was not paid on presentation or by the defendants on demand. The defendants set up the Statute of Frauds, claiming the contract was to answer for the debt or default of another, and was not in writing. Demurrer. Sustained. Judgment for plaintiff. Appeal.

Ingraham, J. The contract, as alleged, is an entirely independent contract for a new and independent consideration made between the plaintiff and the defendants, whereby the defendants became obligated to pay a sum of money upon the failure of the bank upon which the check was drawn, to pay it on demand. Such a contract is not a contract or promise to answer for the debt or default of another, and is not, by the statute, required to be in writing. Judgment affirmed.

DUNDEE NAT. BANK v HUNTINGTON (1897) 20 App. Div. 104.

On note. The defendant made his promissory note to plaintiff, payable in one year. The defendant held a mortgage on the property of the president of the plaintiff bank exceeding the amount of the note. After the note became due, it was taken from the bank by the president, and a forged one, payable a year later, was substituted. The defendant testified that the note had been paid by him to the president of the bank. The note was returned to him in exchange for a discharge of the mortgage. Judgment for plaintiff. Appeal.

Hardin, P. J. 1. The referee made no mistake, when he decided that the debt had never been paid. 2. The transaction between the defendant and the president, in regard to the discharge of the mortgage, was one of a personal nature apart from his relations as president of the bank. Judgment affirmed.

LATIMER v VEADER (1897) 20 App. Div. 418.

Foreclosure of mortgage. The defendant's testator, B, was a clerk in the I Bank for twenty-five years. During most of that time he and his subordinate clerks misappropriated money of the bank. The defalcation was finally discovered, and B admitted taking \$25,000, which he then paid. He also executed a mortgage to secure the payment of any further "indebtedness" that he might be shown to be responsible for. Other money had been appropriated by clerks under him to enforce the payment of which it was sought to foreclose the mortgage. Judgment for plaintiff. Appeal.

Ingraham, J. 1. The agreement was intended to secure the bank against any liability of defendant's testator to the bank in relation to the deficit which had been discovered, and which arose because of his relation to the bank. 2. He was negligent in allowing the clerks to steal, and connived at their appropriating the money of the bank. 3. When he had knowledge that the money of the bank was being stolen, he should have acquainted the trustees with the facts. Judgment affirmed.

KLING v IRVING NAT. BANK (1897) 21 App. Div. 373.

Debt. The plaintiff was the assignee of W, who, in Ohio, conducted a private banking business in the name of M Bank, and in such name transacted business with the defendant. His letterheads read, "M Bank, W, cashier." The defendant believed that the M Bank was an incorporated institution, and, upon its four months' draft, extended a credit of five thousand dollars. The defendant at that time held a balance due the M Bank of nearly that sum. When the credit was given, W was insolvent. He made an assignment before the draft became due. Defendant notified the plaintiff that it rescinded the credit given to the M Bank. Plaintiff was not allowed to prove that it was an Ohio custom to use such letterheads. Judgment for defendant. Appeal.

O'Brien, J. 1. If W conducted his business in form so as to make it reasonably to be inferred by persons dealing with him that he was an officer of an incorporated bank, and one relying upon these appearances acted to his injury, he would be justified, upon learning the true state of affairs, in refusing to be bound by any contract into which he might have entered, or in continuing a credit which he might have given. 2. The lender is entitled to know to whom his money is going, and if induced to part with it under the belief that it is going to a banking corporation, when in fact it is going to an individual, the right of rescission, upon knowledge of the true facts, will be sustained. 3. Evidence of an Ohio custom allowing the use of such letter heads was inadmissible. Judgment affirmed.

Cited: 53 App. Div. 488. Aff'd: 160 N. Y. 698.

KELLY v CHENANGO VALLEY SAV. BANK (1897) 22 App. Div. 202.

Debt. The N B C Bank and the defendant transacted their business in the same room. M was cashier of the N B C Bank and treasurer of the defendant. Plaintiff had a deposit with the defendant, and held one of its passbooks in which was printed its by-laws, which required all deposits to be entered in passbooks in its corporate name. The plaintiff surrendered his passbook to the treasurer, M, and received a passbook in the name of the N B C Bank. M informed him that notwithstanding that the name of the N B C Bank was on the passbook, the money would be on deposit in the defendant. The money so deposited was appropriated by M. All deposits entered on the white deposit books were treated in the same way. Judgment for plaintiff. Appeal.

Parker, P. J. 1. By transferring the account from one passbook to the other, there is a presumption that the plaintiff deliberately agreed for a transfer of the account from the savings bank to the national bank. 2. Unless the plaintiff followed the provisions of the by-law of the savings bank, he made no deposit with it. The depositor must have known that M exceeded his authority. Judgment reversed.

HAGMAYER v FARLEY (1897) 23 App. Div. 426.

To enforce stockholder's liability. Plaintiff was a creditor and depositor of the H bank, and brought the action in behalf of himself and other creditors. The complaint alleged that the bank was a domestic corporation, duly organized and carrying on business under, and pursuant to, the laws of New York relative to banks, and was a banking association, having its place of business in New York City; that it became insolvent; and that defendants were stockholders. It did not show when the deposits were made. Demurrer, for failure to allege specifically when and under what law the bank was incorporated, and when defendants became stockholders. It was contended that failure to show when the deposits were made, brought the action within sec. 55, ch. 688, of the Stock Corporation Law of 1892, which provided that no stockholder should be personally liable for debts, unless an action was brought against the corporation within two years after the debt became due. Demurrer overruled. Interlocutory judgment for plaintiff. Appeal.

Ingraham, J. 1. The objection averred does not appear upon the face of the complaint, and the omissions urged are not sufficient to sustain a demurrer. 2. A bank becomes the debtor of a depositor, but the amount is payable upon demand of the depositor. 3. The fact that an account existed for a number of years would not bring an amount due at any particular time within the Statute of Limitations until after a demand. 4. The allegations are sufficient to state a cause of action. Judgment affirmed.

Cited: 36 Misc. 67.

GEITELSOHN v CITIZENS SAV. BANK (1897) 20 Misc. 84.

On deposits. The paying teller of the defendant who knew the plaintiff, a depositor, paid out the entire deposit to a stranger on production of the bank book. The morning after plaintiff discovered that his bank book was stolen, he went to the bank, and was there familiarly addressed by name by the paying teller. Plaintiff had made thirty-eight deposits with defendant and had at nine different times drawn money from the bank. Judgment for plaintiff. Affirmed at the General Term. Appeal.

Per curiam. The affirmance of the General Term closes all further inquiry into

the facts. The evidence is sufficient to sustain a finding that the defendant did not exercise ordinary care and caution under the circumstances, but was guilty of negligence. Judgment affirmed.

Cited: 22 Misc. 319; 24 id. 178.

STAPLETON v ODELL (1897) 21 Misc. 94.

Money had and received. It was charged that the M Bank, of which defendant became receiver, received, from the plaintiff, deposits while its officers knew it was in an insolvent condition. No evidence was given of the officer's knowledge of its insolvency. The bank was closed by the superintendent of banks.

Dickey, J. 1. If a bank receives deposits of money, drafts, or checks, after knowledge of the officers or agents in charge thereof, of its insolvency, the bank is, in a legal sense, guilty of fraud. 2. From the circumstance that the superintendent of banks properly closed a bank, no inference can be drawn of knowledge, on the part of the officers thereof, of the bankrupt condition of the institution. 3. Where an attempt is made to rescind the contract on account of fraud, guilty knowledge must be shown on part of the officers. Judgment for defendant.

MATTER OF MURRAY HILL BANK (1897) 153 N. Y. 199.

The facts in his case are reported in 10 App. Div. 328. On motion reported in 14 App. Div. 318, the court granted an order turning over the assets to the receivers appointed in the attorney-general's proceeding. Appeal.

Vann, J. The Appellate Division based its determination on the ground that the proceeding for a voluntary dissolution of the bank, instituted by its directors, abated on the entry of a judgment dissolving said corporation in the action brought by the attorney-general. We think this conclusion sound, although we do not agree with the argument. Order of Appellate Division affirmed.

Cited: 40 App. Div. 412; 59 id. 191; 61 id. 29; 29 Misc. 252.

PEOPLE v BARKER (1897) 154 N. Y. 122.

Certiorari, to review assessment. The relator, a Connecticut savings bank, was assessed for \$43,000, as a part of its surplus invested in bank stocks in New York. Defendants were the tax commissioners of New York. Relator contended that if this was an asset and a liability as well, it should have been deducted from its assessable property, and was not taxable. By the law of Connecticut, the income or profits derived from investments was to be divided among the depositors, and the net income, less a small percentage, was to be divided among depositors semi-annually. Judgment for defendant. Reversed by Appellate Division. Appeal.

O'Brien, J. 1. The profits of savings banks, under the laws which govern the obligations and duties of the relator, belong in equity to the depositors. 2. The so-called surplus is, therefore, within the equity of the statute, exempting deposits of savings banks from taxation. 3. It is a debt or obligation due to depositors. Judgment reversed.

Cited 157 N. Y. 57.

PEOPLE v BARKER (1897) 154 N. Y. 128.

To vacate assessment. The relator was a savings bank organized under the laws of Connecticut. Defendants were commissioners of taxes of the City of New York, and assessed the relator upon the total amount of certain shares of national and state bank stock held by it, at its market value. The relator contended that it was entitled to have its deposits deducted from its taxable property, as an indebtedness, and that a part of its apparent surplus, which was invested in government bonds, should also be deducted. Judgment for relator. Appeal.

Bartlett, J. 1. The primary relation between a depositor in a savings bank and the corporation, being that of debtor and creditor, the deposits should have been deducted. 2. The government bonds were exempt from taxation, and formed no part of the surplus for purposes of taxation. Judgment affirmed.

Cited: 161 N. Y. 204.

DUNN v O'CONNOR (1898) 25 App. Div. 73.

Foreclosure of mortgage given by R, the president of a bank, for his own indebtedness to the bank. Plaintiff was the receiver of the bank. The defendant,

assignee of the mortgagor, claimed: 1, that the mortgage was the result of the undue influence of two directors; 2, that it was void under sec. 25 of the Banking Law, prohibiting banks from making loans exceeding one-fifth of their capital to any one person; 3, that sec. 43 of the Banking Law permitted the bank to take mortgages "by way of security for loans made," and "in satisfaction of debts previously contracted," and that this mortgage was void as it contained a provision for renewals. The plaintiff became the receiver of the bank. Judgment for plaintiff. Appeal.

Landon, J. 1. The court will not consider whether R was induced by undue influence to do right. 2. Sec. 25 of the Banking Law is a shield for the bank's protection, not a sword for its officers to destroy it with. 3. When a bank is compelled to take from a failing debtor such security as it can prevail upon him to give, a mortgage is not void because it provides that, in case of renewals, the security shall cover them. Judgment affirmed.

KIRKHAM v BANK OF AMERICA (1898) 26 App. Div. 110.

Debt. The plaintiff was a depositor with the defendant bank, and delivered to it a draft on the Bank of H, which it had received in due course of business, for collection. The draft was sent by the defendant to its correspondent at S, which in turn had it presented to the drawee bank, and accepted and received in payment a draft on a New York bank. Defendant then notified the plaintiff that the draft had been collected and placed its amount on plaintiff's deposit book and on the books of the bank. The New York draft was not paid for lack of funds. Thereafter the plaintiff was notified that the amount of the draft would be held back, and the defendant refused to pay over the same. Judgment for defendant. Appeal.

Ingraham, J. 1. The defendant, by accepting the draft for collection, assumed the responsibility of a collecting agent to the plaintiff, and the agents it employed to effect the collection were its agents and not the plaintiff's. 2. By the defendant's giving credit to the plaintiff, the defendant became indebted to the plaintiff to the amount of the deposit. Judgment reversed.

Cited: 46 App. Div. 540; 54 id. 344. Aff'd: 165 N. Y. 132.

HALES v SEAMANS BANK FOR SAVINGS (1898) 28 App. Div. 407.

Where, in an action to recover the amount of a deposit, it appeared that the passbook was lost, but its loss was not accounted for; and that the bank teller had made payment of the sum on deposit to a person producing the book and correctly answering the test questions, Held, that all the care necessary was exercised by the bank; and that a demand for the money was necessary before the institution of the action.

CONTINENTAL NAT. BANK v MYERLE (1898) 29 App. Div. 282.

Application for examination of bank's books. The plaintiff loaned the defendant's testator \$10,000 on his note, and took an assignment of a claim against the government as collateral. The claim was paid some years later. The T Bank claimed the whole fund. The plaintiff, in order to ascertain what its rights were against the claim of the T Bank, applied for an order to examine their books. Order denied. Appeal.

Rumsey, J. It is essential that the plaintiff, to make out its case, should have knowledge of the claim of the T Bank. The motion may be sustained on the ground that it is an effort on the part of the moving party to obtain evidence which is essential to its own use upon the trial in making its own case. Such motions are favored when there are any reasons to believe that they are made in good faith for the purpose of getting at the facts of the case and determining the rights of the parties. Judgment reversed.

SMITH v EIGHTH WARD BANK (1898) 31 App. Div. 6.

Where a bank discounted promissory notes for a corporation, some of which matured before, and others after, the appointment of a receiver for the corporation, Held, that the bank had a general lien on the notes past due to secure payment; and that the proceeds of such notes might be applied to the discharge of the notes falling due before the appointment of a receiver, but not to those maturing thereafter.

NASSAU BANK v NATIONAL BANK (1898) 32 App. Div. 268.

Money had and received. T was attorney for the executors of A. The executors kept their account with the defendant. T forged a check on that account and received the money. He thereafter opened an account with the plaintiff by depositing a draft payable to the order of C, upon which there was a forged indorsement of C. T drew his check on the plaintiff for the amount of the forged check he had drawn from defendant, and deposited it to the credit of the executors of A. This check was paid by plaintiff. Thereafter it was learned that both the indorsement of C, and the check on the defendant, were forgeries. Plaintiff sought to recover the amount of the check paid to defendant. Judgment for defendant. Appeal.

Cullen, J. 1. The effect of the transaction is the same as if T had drawn the money from the plaintiff and paid it to the defendant. 2. Money, whether obtained by fraud or felony, cannot be recovered where it has been paid to the creditors of the party who has thus criminally obtained it, even when the only consideration for the payment was the satisfaction of an antecedent debt. 3. The effect of the deposit by T to the credit of the executors, was to repay to the defendant the amount that he had fraudulently obtained from it. Judgment affirmed.

Cited: 159 N. Y. 456.

CLARK v NAT. SHOE & LEATHER BANK (1898) 32 App. Div. 316.

On deposit. The defendant paid the amount to plaintiff's bookkeeper on checks drawn by plaintiff, which were afterward raised by plaintiff's bookkeeper. When these checks were returned to plaintiff, they were received by the bookkeeper who restored them to their original amount, and the statement furnished by the bank was also changed to correspond with the checks. The plaintiff employed an expert accountant to examine his books each month, and such expert reported them correct. The forgeries extended over a year, and were not discovered until the plaintiff was notified by the defendant that he had overdrawn his account. The passbook contained a requirement that the bank be notified within a limited time of any error or irregularities. Judgment for plaintiff. Appeal.

Hatch, J. 1. There is no duty resting upon the depositor to personally examine the vouchers and accounts. 2. When the plaintiff has employed competent persons to appraise him of the true state of his business and accounts, he cannot be charged with negligence or the omission of ordinary care even though the examination by the employees was not carried so far as it might have been. 3. A requirement in the passbook, for notice of errors and irregularities within a limited time, did not create a short Statute of Limitations. Judgment affirmed.

MATTER OF HAIGHT (1898) 32 App. Div. 496.

Where part of the personal estate in the hands of an administrator consisted of a deposit in a savings bank, and the same was taxed under sec. 8 of ch. 908, Laws of 1896, Held, that under sec. 4, subdiv. 14, ch. 908, of the Laws of 1896, deposits in savings banks were not exempt from taxation.

WIGGINS v STEVENS (1898) 33 App. Div. 83.

On deposit. C became insolvent and B was made his assignee. B was also cashier of the C Bank. He collected \$4,600 from the estate of C, and deposited it in the C Bank. In anticipation of the bank examiner's visit, he drew a check on the fund so that he could have the proper amount in the bank's reserve. No money was shown to have been actually turned over to any one on the check. The transaction appeared to be regular on the bank's books, and it held the check on which the payment was claimed to have been made. Plaintiff became assignee of C in place of B. The bank failed and defendant was appointed receiver. Defendant contended that the transaction amounted to a payment to B, acting for C's creditors. Judgment for defendant. Appeal.

Ward, J. 1. The burden of showing payment of the deposit rested with the defendant. 2. The giving of the check and the entries in the bank books do not constitute, in and by themselves, a payment; they may be and usually are evidences of a payment, but the question still remains whether a payment was actually made. Judgment reversed.

DYKMAN v KEENEY (1898) 34 App. Div. 45.

Where an action was brought by the receiver of a bank against the directors to recover dividends declared by them when there were no surplus profits, except those created by improperly crediting certain renewal notes as assets, Held, that the evidence should have been submitted to the jury for the purpose of determining whether the notes were taken in due course, whether the amounts of accrued interest included in the renewal notes were really loans, or whether they were taken to recover defaulter's debts, as described in sec. 26, ch. 689, Laws of 1892.

RIVERSIDE BANK v WOODHAVEN LAND CO. (1898) 34 App. Div. 359.

On check. The defendant gave its check to A, in exchange for a worthless check represented by A to be good. A was a customer of the plaintiff and deposited the check to his credit with it. The same day A drew out his whole account, including the amount of this check. Defendant ordered payment on the check stopped. The check was subsequently charged back to A. Judgment for plaintiff. Appeal.

Patterson, J. 1. The title to money, checks or drafts deposited by a customer, passes to the bank. 2. The plaintiff was entitled to rely on the presumption that the check had been issued for a valuable consideration. 3. It is entirely immaterial that, by a bookkeeping entry, the plaintiff subsequently charged the amount of the check to A. Judgment affirmed.

MUTUAL LIFE INS. CO. v YATES CO. NAT. BANK (1898) 35 App. Div. 218.

Foreclosure of mortgage. F executed his bond to plaintiff for \$40,000 and gave a mortgage on real estate to secure it. An interest in the property was conveyed to defendant bank. Defendant, by its president, executed a bond, under seal, covenanting to pay any deficiency. An affidavit by the president was annexed, stating that the bond was given by authority of the board of directors. The minutes of the board showed no such order, and the clerk testified that he knew of none. The property sold for less than the amount of the mortgage, and the plaintiff sought to have a deficiency judgment against defendant. Judgment for defendant. Appeal.

Follett, J. 1. The seal of a corporation, when affixed to a contract, is presumptive evidence of a sufficient consideration for the contract. 2. The seal and the affidavit were prima facie evidence of the authority of the president to execute the bond. 3. The negative evidence of a want knowledge was not sufficient to overcome the presumption. 4. A national bank, having acquired the title to realty incumbered by a mortgage, has power to pay it and discharge the lien. The covenant to pay it on a future day is not beyond its power. Judgment reversed.

Cited: 41 App. Div. 115; 58 id. 356.

RHINELANDER v NATIONAL CITY BANK (1898) 36 App. Div. 11.

Money had and received. S & Co., brokers, held stock belonging to plaintiff, P and A. A's stock was paid for in full. S & Co. pledged all the stock to the defendant bank. S & Co. failed, and defendant sold the stock to satisfy its loan. This action was brought for the balance. P, A, and S & Co.'s assignees were made parties defendant. A filed a claim with the assignee for the value of his stock. The other parties contended that he thereby lost all claim to any part of the proceeds of the stock. The plaintiff and P made tender to the assignee of the balance due on their stock and demanded its delivery. Judgment that the balance be distributed ratably among the plaintiff, P, and A. Appeal.

Patterson, J. 1. The mere fact of the presentation of a naked claim to the assignee will not be construed as binding such claimant to the assignment. 2. Upon the tender, demand and refusal, the right to retain the stock ceased at once; and as to those stocks, the plaintiff and P stood in exactly the same relation as A stood to his stock. Judgment affirmed.

O'BRIEN v EAST RIVER BRIDGE CO. (1898) 36 App. Div. 17.

For accounting. On August 8, 1893, defendant was a depositor in the M Bank, of which plaintiffs afterward became receivers, and which was then about to fail. This fact was known to F, a director in the bank, and president of the defendant. F also knew that the N Bank was the clearing house agent for the M Bank, and

held securities of it. That night U, a stockholder of defendant, learning that the M Bank would probably fail on the following day, had a check filled out for the amount of the deposit and signed by the president and treasurer of defendant, and left it with F. The latter took it early in the morning of August 9, to another bank, which, under his instructions, sent it through the clearing house the same day, and it was paid. The M Bank failed. Sec. 48 of the Stock Corporation Law as amended in 1892, provided that a transfer of property of a corporation, when its insolvency is imminent, by any officer, director or stockholder thereof, with intent to give a preference, was void, and that the person receiving the preference must account therefor. Judgment for defendant. Appeal.

Patterson, J. What the statute condemns is a conveyance or transfer effected in a particular way and with a certain intent; not necessarily a corporate intent, but an intent of a person being an officer, to give a preference to any particular creditor. U's dealings with the check after it was drawn, establishes the intent. His active agency in getting it paid from the funds of the bank in which he was a director, connects him with the transfer of the M Bank's funds to pay a creditor preferentially within the meaning of the statute. Judgment reversed.

Cited: 41 App. Div. 538.

PEOPLE, EX REL. v PECK (1898) 22 Misc. 477.

Certiorari, to review an assessment. Defendant, the assessor, in assessing the property of the relator, a savings bank, included the surplus funds. The tax law exempted from taxation deposits in savings banks, and by the banking law, savings banks were authorized to accumulate a surplus fund. The relator contended that its surplus was exempt from taxation.

Hirschberg, J. The surplus of a savings bank is not taxable. Judgment for the relator. Aff'd: 157 N. Y. 51 (post p. 1079).

OPPENHEIM v WEST SIDE BANK (1898) 22 Misc. 722.

On deposit. Plaintiff innocently presented a raised check to the defendant bank. The defendant, upon collecting it, informed the plaintiff that the check was good, and plaintiff paid the proceeds to the person for whom he was cashing it. Defendant credited plaintiff's account with the check. Subsequently it was learned that the check was forged, and defendant refunded the money to the drawer. Plaintiff was not notified of the discovery of the forgery for some time. Defendant charged plaintiff's account with the amount of the check, and plaintiff sued for the same. There was no evidence of negligence on defendant's part, and no proof of damage to the plaintiff. Plaintiff contended that the defendant's statement that the check was all right, referred to its genuineness. Judgment for plaintiff. Appeal.

Giegerich, J. 1. The defendant's statement that the check was all right, was limited to the fact that it had been paid. 2. A person receiving the proceeds of a raised check, cannot avoid his liability to refund, by showing the party paying the check was negligent in discovering the forgery, or in giving notice, without showing he had been damaged by such failure. 3. The holder of a check warrants the genuineness of the instrument and all preceding indorsements. 4. The drawee of a check is only held to the knowledge of the genuineness of the signature of the maker, and not to any other part of the instrument. 5. The title to a check forwarded for collection does not vest in the collecting agent. Judgment reversed.

BARNES v ARNOLD (1898) 23 Misc. 197.

Statutory action to enforce the stockholders' liability. Defendants were stockholders in a national bank, which became a state bank and failed. Plaintiffs were creditors. Some of the claims arose and some of the stockholders acquired their stock, prior to the passage of the Law of 1892, requiring creditors to exhaust their remedies against the bank within two years from its failure. When the bank was dissolved, an injunction issued against bringing actions against the bank. Plaintiff obtained leave to prosecute the action against the stockholders, and commenced it within two years after the failure of the bank. Defendants contended that they were not liable to creditors who became such prior to the passage of the law; that there was no liability on stockholders who acquired stock prior to the passage of the act, and that depositors, holders of drafts, and certificates of deposit did not have claims due within two years, within the meaning of the statute, and that the liability of stockholders was unlawfully extended by the act.

Laughlin, J. 1. The conditions precedent required by the statute were dispensed with by the judgment of dissolution, and the injunction against prosecuting actions against the bank. 2. Creditors can bring an action against the stockholders within two years after the failure of the bank, whether the assets of the bank have been converted into cash or not. 3. The stockholders are not liable to creditors, who became such prior to the passage of the Law of 1892. 4. The legislature can extend the liability of stockholders in banks, other than banks of issue. 5. The liability of stockholders, who acquired their stock prior to the passage of the act, is the same as that of those who acquired theirs subsequent to its passage. 6. Depositors and holders of drafts issued by the bank, have claims due within two years within the meaning of the statute. 7. The stockholders are liable to holders of certificates of deposit. Judgment accordingly.

Cited: 45 App. Div. 314.

CARR v NATIONAL BANK & LOAN CO. (1898) 23 Misc. 368.

Money had and received, and to rescind a contract. The president of defendant, a national bank, invested plaintiff's money in worthless securities held by the bank, and fraudulently represented that they were valuable. Upon discovering the fraud, plaintiff offered to return them, and demanded the money paid therefor. Defendant refused to return plaintiff's money. The president had assumed to act entirely for plaintiff's interest and without compensation.

McLennan, J. 1. The plaintiff was entitled to rescind the contract, and to recover the money paid the bank. 2. An agent for purchase cannot sell his own property without the knowledge and consent of his principal. Judgment for plaintiff.

ST. MARY'S CHURCH v NATIONAL BANK (1898) 23 Misc. 588.

Where the cashier of a bank, directed the holder of certificates of deposit to indorse them for payment, but before the holder had completed the indorsement the cashier was forbidden by the president to pay any, and the bank thereafter suspended business, Held, that the act of payment not being fully executed, and there being no equitable appropriation, the plaintiff was not entitled to a preference over other creditors.

AMERICAN TRUST & SAV. BANK v AUSTIN (1898) 25 Misc. 454.

Where a bank discounted drafts on bills of lading, and the same were not paid when presented by the collecting agent, but the goods consigned were thereafter sold and the funds seized by an attaching creditor, Held, that the bank in discounting the drafts became the owner of the drafts, bills of lading, and the goods consigned, and that a rule adopted by the collecting bank, that it acted only as agent for the depositor, might be waived.

HOWARTH v ANGLE (1898) 25 Misc. 551.

To enforce stockholder's liability. Plaintiff was the receiver, and defendants were stockholders of a bank located in a foreign state. The statute in regard to a stockholder's liability was the same as that of New York. The receiver was duly appointed and had taken all the necessary steps to enforce such liability in the foreign state. Defendants contended: that the Statute of Limitations had run; that interest should not be allowed; and that the right of the receiver to institute such an action should have been litigated in New York.

Nash, J. 1. The liability of the stockholders of a foreign bank having been judicially ascertained by the courts of a foreign state, where the remedy is the same as in this state, can be enforced in the courts of this state by the receiver of the bank. 2. The Statute of Limitations did not commence to run until the receiver had determined the amount of the deficiency. 3. Interest should be allowed. Ordered accordingly.

PEOPLE, EX REL. v PECK (1898) 157 N. Y. 51.

Certiorari, to review assessment. The relator was a savings bank. Defendants were tax commissioners. The assessment was on the surplus fund of the bank. Sec. 4, subdiv. 14, ch. 908, Laws of 1896, provided that the deposits in any bank

of savings which are due depositors, were exempt from taxation. Sec. 123 of the Banking Law provided that the surplus should be paid to the depositor, after deducting a certain per cent at such times as the trustees might decide, not less than once in three years. Judgment for plaintiff. Appeal.

Gray, J. 1. The surplus which has accumulated is a part of a fund which represents the original deposits. 2. Its creation is authorized in contemplation that it may be needed to repay depositors the amounts put in by them. 3. It belongs to them and is not taxable. Judgment affirmed.

Cited: 31 Misc. 438; 158 N. Y. 416, 417.

HIRSHFELD v FITZGERALD (1898) 157 N. Y. 166.

To enforce stockholders' liability. Plaintiff sued as a creditor of the insolvent M Bank, for himself and all others similarly situated, to recover debts due to them, under sec. 52, Banking Laws of 1892. The receivers had refused to sue. They were, therefore, joined as defendants. Plaintiff assigned his claim, *pendente lite*, to a third party, who executed a release to defendants who had paid the claim, and plaintiff's assignee did not wish to continue the action. No other creditors had intervened. Complaint dismissed. Judgment for defendants. Reversed in Appellate Division. Appeal.

Haight, J. 1. Plaintiff ceased to have any interest in the litigation after the assignment of his claim, and could not continue the action in opposition to the wishes of his assignee. 2. By bringing a representative action, he did not become a trustee for other creditors, so that the act on might continue after his personal interest therein was at an end. 3. The action could not have been prosecuted by the receivers as such; such an action must be by the creditor. Order reversed.

Cited: 39 App. Div. 567; 41 id. 488; 42 id. 499, 500; 44 id. 79; 45 id. 350; 54 id. 172; 62 id. 130; 26 Misc. 618, 655; 27 id. 347, 349; 158 N. Y. 9; 161 id. 122, 604; 165 id. 253, 320, 483.

CONTINENTAL BANK v TRADESMEN BANK (1899) 36 App. Div. 112.

Money had and received. On June 7, the P Bank drew draft number 2269, of that date, for \$76 on plaintiff in favor of T. The usual letter of advice, showing the date, number, and amount of the draft was received by plaintiff on the following day. On the 13th, this draft, with the date altered to the 12th, and the amount changed to \$7,660, but with the same number, was presented to plaintiff and duly certified. It was then deposited by the payee with defendant, with which he had an account. It went through the clearing house on the 14th, and was paid by plaintiff. When the draft was certified, its serial number was not entered in plaintiff's book. This omission was noticed on the 13th, but no steps were taken until the 14th, after the draft was paid at the clearing house. The plaintiff contended that the payment was made under a bona fide mistake of fact. The defendant requested the court to submit to the jury the question whether the payment of this draft under the circumstances was culpable negligence, so as to preclude the plaintiff from recovering more than the balance of the depositor's account with the defendant at the time that notice of the forgery was given. Denied. Verdict directed. Judgment for plaintiff. Appeal.

Ingraham, J. 1. An action for money had and received is an equitable action, in which the defendant can be made liable no further than the money he has received, and in which he may claim every equitable allowance. 2. A bank is entitled to recover the amount it has paid under a bona fide mistake of fact to a person presenting a raised draft. 3. If it is inequitable to throw the loss on the person to whom payment has been made, a recovery will not be allowed. 4. The drawee is chargeable with knowledge of the signature of the drawer, but not as to the body of the bill. 5. If the drawee, having knowledge that the bill is forged, pays it, he will not be allowed to say that he paid it under a mistake of fact. 6. The question of negligence should have been submitted to the jury. Judgment reversed.

MEYERS v NEW YORK CO. NAT. BANK (1899) 36 App. Div. 482.

On deposit. M was a depositor with defendant. He was also committee for C, an incompetent person. He deposited the funds of his ward to his personal credit. He became indebted to defendant for money loaned, and his account, which included trust money, was appropriated by defendant in payment of the indebted-

ness. Thereafter M was removed as committee and plaintiff appointed in his place. This action was brought to recover the trust money. Defendant had no notice or knowledge of the character of the funds until after the appropriation. Judgment for defendant. Appeal.

Cullen, J. 1. A bank has a general lien on all moneys and funds of a depositor in its possession for the balance of the general account. 2. The opening of an account, in the absence of an agreement to the contrary, authorizes the appropriation of his deposit balance to any matured claims the bank may hold against him, the same as if he then executed an agreement in writing to that effect. Judgment affirmed.

Cited: 36 App. Div. 489; 44 id. 319.

LONDON PLATE BANK v HANOVER NAT. BANK (1899) 36 App. Div. 487.

Where a bank, under an agreement that it might retain all moneys deposited as security for liabilities due and not due, appropriated a credit standing to the depositor's account, which represented funds collected as factor, Held, that the appropriation of such balance, without knowledge of the equities of third persons, stands on the same footing as payment to it of that balance by the depositor.

PEOPLE v SHEPPARD (1899) 37 App. Div. 119.

On bond. On July 29, 1892, the bond in suit was executed by the Y Bank as principal and the three defendants as sureties, to the people, conditioned that the bank would faithfully account for and pay over all moneys deposited with it. Prior thereto the bank had been designated by the comptroller of the state as a depository for trust funds. Prior to July 29, 1892, there were on deposit in the bank, trust funds to the amount of \$2,049.40; and thereafter there was deposited, under the designation, the sum of \$535.76. On January 1, 1895, the outgoing county treasurer gave his check for the whole fund to the incoming county treasurer for this money, and the latter at once deposited this check in said bank to his own credit as treasurer. The Y Bank became insolvent. Judgment for plaintiff for \$535.76. Appeal by plaintiff.

Hardin, P. J. 1. A check given on a bank upon a particular fund operates as an assignment of that fund. 2. The transfer by the outgoing to the incoming treasurer was a deposit for which the bondsmen were liable. 3. The sureties were liable for the trust funds on deposit at the time the bond was executed. Judgment reversed.

WOERZ v SCHUMACHER (1899) 37 App. Div. 374.

For accounting. A savings bank, of which plaintiff and some of the defendants were trustees, became insolvent. A receiver was appointed. An agreement was made between the defendant receiver, and the trustees, whereby the remaining assets of the bank were turned over to them, they furnishing the money to pay a further dividend of 35 per cent. They were to reimburse themselves out of these assets, and to render the surplus to the receiver. By agreement between the trustees and the receiver, plaintiff received the assets and administered the same. The trustees complied with their part of the contract. Plaintiff, in administering the estate, incurred an indebtedness for counsel fees amounting to \$4,056.22, and other incidental expenditures, and also claimed commissions, and interest on the disbursements, and on the 35 per cent dividend. These items were not allowed. Appeal.

Barrett, J. 1. There was an implied understanding that the trustees should be fully reimbursed, and this included interest on advances made by them. 2. The reasonable expenses incident to an accounting and administration of the fund, were a proper charge against it. This included attorneys' fees, and sums expended in the management and realization of the property. 3. No commissions can be allowed as against the receiver. Judgment modified.

Aff'd: 161 N. Y. 530.

DELAHUNTY v CENTRAL NAT. BANK (1899) 37 App. Div. 434.

On deposit. Plaintiff was receiver for a co-partnership, which was entitled to a balance on deposit with defendant, a bank, when the receiver was appointed. A letter written by plaintiff as receiver was sent to defendant notifying it of his appointment, stating the amount due, asking that it be sent to him, and that the

bank let him know what papers it required for vouchers showing plaintiff's appointment, and offering to prepare and send them. The attorneys for defendant acknowledged the letter, and stated that defendant was a creditor of the partnership to an amount far in excess of the sum mentioned. The court granted a nonsuit on the ground that no demand or refusal to pay was shown. Judgment for defendant. Appeal.

O'Brien, J. 1. A demand must be made for money on deposit in a bank before action can be brought to recover. 2. If defendant intended to insist that the receiver should draw his check and present it, with his authority, it should have so stated. 3. Defendant, by its attorneys, indicated that it did not intend to comply with the demand, and therefore made any further demand unnecessary. Judgment reversed.

Cited: 63 App. Div. 179.

CITIZENS SAV. BANK v THE MAYOR (1899) 37 App. Div. 560.

To recover taxes paid. The taxes in question were levied on stock of a national bank in New York, which stock was owned by plaintiff, a Connecticut corporation. They were assessed for the years 1886, 1887, 1888, and 1889; and were paid by said bank and charged to plaintiff. No complaint to the tax officers was ever made, review of the assessment attempted, or deduction asked. Plaintiff contended that the tax was voidable because plaintiff had no taxable surplus. Judgment for defendant. Appeal.

Barrett, J. 1. A stockholder waived his right to a deduction by failing to ask for it. 2. The stock was prima facie taxable. 3. Plaintiff should have applied to the taxing officers for relief; and the fact that it was a non-resident corporation afforded no excuse for its failure to do so. Judgment affirmed.

Cited: 57 App. Div. 605. Aff'd: 166 N. Y. 594.

CLINTON NAT. BANK v NATIONAL PARK BANK (1899) 37 App. Div. 601.

Negligence. Plaintiff did business at C. Defendant, its correspondent in New York, made a charge for collecting checks outside of New York State. On July 12, 1893, D & T, a firm of brokers, applied to plaintiff for a loan of \$5,000 on certain bonds, the collateral to be left with defendant. This loan was accepted. A letter was written by plaintiff inclosing their draft on defendant in favor of D & T for the loan, and requesting defendant to receive from the brokers their note for the amount, with the collateral referred to in the application, and to deliver the draft, requesting the defendant to hold the collateral and forward the note. D & T delivered the note referred to, and what purported to be the bonds, and received the draft, of which plaintiff was advised. In January, 1895, the brokers failed, still owing the amount of the note, and shortly thereafter the bonds were found to be forged. They had been received without examination, except as to the outside, and contained defects that plaintiff claimed to be so patent that an examination of the bonds might have resulted in detecting the forgery. The court, over the objection of plaintiff, allowed defendant to show that the usage of the bank had been followed in this case. Judgment for defendant. Appeal.

Rumsey, J. 1. It was proper for the defendant to show the manner in which it was customary to transact business of that nature. 2. When the plaintiff dealt with D & T and sent them to the defendant's place of business to complete the transaction, it accredited them, so far as defendant was concerned, as proper and safe persons with whom to deal, and defendant had a right to rely on their statement as to the securities. Judgment affirmed.

Aff'd: 165 N. Y. 629.

THIRD NAT. BANK v TRAVELERS INS. CO. (1899) 38 App. Div. 518.

On bond. Defendant deposited with plaintiff \$10,001 to be used for a certain purpose for defendant's agent, the S Bank. Plaintiff had no notice of the condition on which the deposit was made. The S Bank wrongfully drew \$1,800 of the money, and failed. Defendant demanded the entire sum, and it was paid to it on its executing a bond conditioned that defendant would pay on demand such portion of the entire sum so paid, not exceeding \$1,800, as plaintiff might not collect from the S Bank within twelve months from the date of the bond. No part of said sum having been collected within the time, demand therefore was made of defendant, which refused to pay. Judgment for plaintiff. Appeal.

Hatch, J. The undertaking was a primary obligation on the part of defendant to pay if collection was not had; and this having failed, liability became fixed when demand for payment was made. Any payment that might be made by the S Bank thereafter would inure to the benefit of defendant. Judgment affirmed.

SULLIVAN v SULLIVAN (1899) 39 App. Div. 99.

On deposit. Prior to her death, S deposited in a bank \$2,000, and received a certificate of deposit, payable to her order, or in case of her death, to her niece, C. C died, possessed of the certificate. Her administrator brought this action against C, and the bank to recover the amount. C claimed it as a trust, and showed by parol that S had the certificate so made to enable C to draw it after S's death. Judgment for plaintiff. Appeal.

Putnam, J. Where a trust is attempted to be created for the benefit of a donee, a transfer of the title of the property affected, or of some interest therein, and a delivery thereof to the trustee, are essential to the validity of the trust. Judgment affirmed.

Aff'd: 161 N. Y. 554.

SPRING BROOK CHEMICAL CO. v DUNN (1899) 39 App. Div. 130.

Money had and received. Agreed case. Plaintiff owing R, a banker, the sum of \$1,700.00, gave him two drafts which more than covered the amount. R satisfied the debt and gave plaintiff credit for the balance. R was, in fact, insolvent, but this was unknown to plaintiff. R transferred the smaller draft to a bank of which defendant afterward became receiver. The bank credited it on a debt due from R, there being no understanding as to whether it should be received in payment or not. This action was brought to recover the difference between plaintiff's debt to R and the amount of the two drafts.

Parker, P. J. 1. The title to the larger draft was acquired by R, and his right to it was undisputed; but the title to the smaller draft was fraudulently acquired. 2. Defendant was not a bona fide holder for value, because the draft was taken as a credit, and not as payment of a pre-existing debt. Judgment for plaintiff.

Cited: 50 App. Div. 38.

HOWARTH v ANGLE (1899) 39 App. Div. 151.

To recover assessment from stockholder. Plaintiff was receiver of a bank in the State of Washington. He had fully administered the assets and had reported a deficiency to the court in Washington, which had levied an assessment against the stockholders in accordance with a law of that state. Defendant was a stockholder, and a resident of New York. This action was brought to recover the assessment. Under the law of Washington, which was found to have been complied with, defendant was liable for his proportion of the deficiency to the extent of the par value of his stock. The receiver was entitled to enforce such liability. Judgment for plaintiff. Appeal.

Hardin, P. J. 1. Foreign receivers may sue as such in the courts of this state. 2. In the absence of proof that a creditor in this state has made a demand upon defendant, or that there are creditors in this state whose rights would be prejudiced by plaintiff's recovery, the receiver is entitled to enforce defendant's liability. Judgment affirmed.

Aff'd: 162 N. Y. 179.

STATE NAT. BANK v WEED (1899) 39 App. Div. 602.

On promissory note. On cross-examination of the cashier of plaintiff, with regard to the consideration of the note sued on, it was shown that he had testified on a former trial of this same case to an entirely different statement of facts. To support the version given on the trial, plaintiff was allowed over objection to introduce in evidence a memorandum made by the cashier with reference to the subject matter concerning which he had already testified. Judgment for plaintiff. Appeal.

Patterson, J. 1. Such a memorandum is competent evidence of the facts mentioned therein only where the witness is unable to remember the facts; here the cashier had already testified of his own knowledge and memory. 2. As the memo-

random was not competent evidence in itself, it could not be admitted merely to establish the credibility of the witness. Judgment reversed.

Cited: 48 App. Div. 264.

HIRSHFELD v BOPP (1899) 39 App. Div. 613.

Where an action was brought to enforce the liability imposed upon the stockholders of an insolvent bank, by Laws of 1892, ch. 689, sec. 52, Held, that such an action cannot be maintained against one stockholder or any number less than all, if all can be made parties.

WALKER v STATE TRUST CO. (1899) 40 App. Div. 55.

On deposit. W, the special guardian of plaintiff, was directed by the court to deposit moneys of plaintiff, derived from a sale of her real estate, with defendant, to plaintiff's credit. He deposited the amount, receiving a certificate of deposit therefor, payable to plaintiff, "an infant," or her assigns on return of the certificate, which was assignable only on the books of defendant. In the signature book W wrote his own name followed by the words "special guardian of" plaintiff. Thereafter W returned the certificate claiming that it should have been made out to him, and obtained a new one payable to himself as special guardian. This certificate he cashed and used the money. Defendant had no knowledge of W's powers until after the money was drawn by W. Judgment for defendant. Appeal.

Cullen, J. 1. The certificate represents the contract and shows a deposit to plaintiff's credit. 2. An agent authorized to deposit in a bank, has no implied authority to draw on the account. 3. The signature book is kept merely for the bank's convenience, and in the absence of proof will not be regarded as affecting the contract contained in the certificate. 4. Though in general a debtor is justified in paying the agent where the same agent makes the investment and retains the security, this rule does not apply to defendant's payment of the first certificate; (a) because the certificate was not paid to plaintiff according to its terms; and (b) because, as defendant knew, plaintiff, as an infant, was incapable of authorizing an agent to collect. Judgment reversed.

BOARD OF MISSIONS v MECHANICS SAV. BANK (1899) 40 App. Div. 120.

On deposit. C was about to undergo a surgical operation which might prove fatal, and verbally instructed the cashier of defendant bank, with which she had the deposits in question, to make the deposit books payable to plaintiff. He accordingly made an entry therein: C "in trust" for plaintiff. C retained possession of the bank book until her death, two weeks later, after which her executor, one of defendants, returned the books to the bank in accordance with C's direction indorsed on the envelopes containing them. The rules of the bank required a transfer of deposit to be by a written order signed by the depositor. When the entry above referred to was made, the cashier informed C that he would have such an order prepared and signed by her; this was never done. Judgment for plaintiff. Appeal.

Hatch, J. 1. The acts of the depositor amounted to a declaration of trust, and had the effect to change the title to the money and vest it in plaintiff. 2. The requirement as to a written order is for the protection of the bank alone, and could have no effect upon the declaration of trust made by the donor. Judgment affirmed.

Cited: 51 App. Div. 334.

CHENANGO VALLEY SAV. BANK v DUNN (1899) 40 App. Div. 552.

Claim for preference. Plaintiff, a savings bank, was a depositor in the M Bank, of which defendant was receiver at the time of its failure, and claimed a preference to the amount of its deposit under sec. 130, ch. 689, Laws of 1892, giving savings banks such preference as to deposits made in accordance with ch. 689. Sec. 118 of said chapter provided for the deposit of an uninvested "available fund" limited in amount; and sec. 119 provided no limitation for "temporary deposits." Plaintiff's deposit was in one account and in amount greater than that authorized by sec. 118. The court found that it consisted partly of "available fund," and partly of "temporary deposits." Judgment giving plaintiff a preference only as to the amount authorized by sec. 118, and declaring it a general creditor as to the balance. Appeal.

Per curiam. 1. Savings banks may properly deposit "available fund" and "temporary deposits" in one account. 2. Where a savings bank makes a deposit for the purposes authorized by the two sections, in the absence of proof to the contrary, it cannot be said that any part of such deposit was unauthorized. Judgment reversed.

HAGMAYER v ALTEN (1899) 41 App. Div. 487.

Where an action was brought by a creditor on behalf of himself and all other creditors to enforce the liability of the stockholders under sec. 52 of the Banking Law (Laws of 1882, ch. 689), and a motion was made three years after the commencement of the action, for an order making other creditors parties plaintiff, Held, that, as the creditors have no rights until they have been made parties to the action, and as such action can be discontinued by plaintiff at any time without regard to the interests of those on whose behalf the action is apparently brought, the motion should be granted; and that there was no laches, as, prior to a recent decision of the Court of Appeals, this court took another view of the rights of creditors, upon which view applicants were entitled to rely.

PERSONS v GARDNER	}	(1899) 42 App. Div. 490.
PERSONS v SAXTON		
PERSONS v HOLLISTER		
PERSONS v FORD		
PERSONS v CLARKE		

To enforce stockholders' liability. Complaints alleged the insolvency of C Bank; the adjudication thereof by the Supreme Court in an action brought by the attorney-general; its dissolution in said action; the appointment of plaintiffs as receivers in 1896; the insufficiency of the bank's assets to pay its debts; that defendants were stockholders therein and ratably liable for such debts; and stated the number of shares owned by each. Demurrers. Overruled. Interlocutory judgments for plaintiffs. Appeal.

Hardin, P. J. 1. Under sec. 7, art. 8 of the constitution, defendants were individually liable to the extent of the par value of the shares owned by them in the insolvent bank for the debts thereof. 2. Ch. 441, Laws of 1897, giving receivers, at their election, the right to enforce the stockholders' liability, expressly include receivers already appointed. 3. That statute is not unconstitutional as depriving creditors of vested rights, as it relates only to a remedy; furthermore, if the receivers do not act upon request, creditors may bring the action in their own names. Judgments affirmed.

ROCKWELL v DYE (1899) 42 App. Div. 520.

On check, against administrator of drawer. It was conceded that payee, plaintiff's assignor, had neglected to present the check for more than three months, during which time W, the banker upon whom it was drawn, became insolvent and died. After W's death, drawer received from W's estate a dividend upon his deposit remaining in the bank, equal to or larger than the amount of the check, and the dividend was tendered to payee. Nonsuit. Reversed. Appeal.

Adams, J. 1. If, with knowledge of payee's laches, and of drawee's insolvency, drawer promises or indicates unequivocally an intent to make good a check to the holder, this amounted to a waiver of drawer's right due to such laches. 2. In view of the conceded laches of payee, plaintiff is bound clearly to establish a waiver by the drawer, and this is not accomplished by proof of tender to the payee, without proof of drawer's knowledge of the laches. Reversed.

BARNES v CUSHING (1899) 43 App. Div. 158.

For contribution. A bank was designated by the Canal Board as a toll deposit bank for 1880 and 1881. The state had the right to demand the money at any time; but when the contract of 1880 expired at the end of that year, there was a deposit of \$73,000. This sum was not withdrawn nor demanded; and in March, 1881, when a new contract was made, it was still on deposit. For the performance

of each contract, a bond was given. B, plaintiff's testator, was surety on each bond. Defendant C was surety on the first only. The bank failed in April, 1882, owing the state \$72,000. In an action on the second bond, judgment was obtained against B for \$58,000, which he paid. The present action was by his executor to compel C and other sureties on the first bond to contribute toward this payment. Judgment for plaintiff. Appeal.

Ingraham, J. 1. The liability of the surety was not to answer for a default of the bank under a new contract made in 1881. 2. By the redesignation of the bank and the making of the 1881 contract, the state accepted the obligation of the bank to hold the balance of the account, then on deposit, under the 1881 contract as a compliance with the condition of the contract of 1880; the default, therefore, was under the 1881 contract. 3. The contract of 1881 did not amount to accord and satisfaction of any claim under that of 1880, for the bank had fully performed that contract. Judgment reversed.

PEOPLE v ST. NICHOLAS BANK (1899) 44 App. Div. 313.

Insolvency proceedings. Motion to compel application of a deposit to satisfaction of execution. A Co. and R Co. were foreign corporations. A Co. had money on deposit with defendant. This, R Co. attempted to attach. The affidavit for attachment failed to show that the contract sued on was made in this state, or that it related to property situated therein at the time the contract was made, as required by the code, although the complaint stated these facts and was verified. No certified copy of the writ of attachment was left with defendant when the levy was made. Thereafter defendant failed and receivers were appointed. They applied the deposit of A Co. to the reduction of the indebtedness of A Co. to defendants. A judgment was subsequently recovered by R Co. against A Co. in the attachment suit; execution was issued thereon and a levy was made on the deposit. The present application was for an order requiring the receivers to apply sufficient of the deposit to satisfy the execution. The receivers contended: that the attachment was invalid; that there had been no sufficient levy; and that the application by them of the deposit to the satisfaction, pro tanto, of the debt due defendant from A Co. was proper. Motion granted. Appeal.

McLaughlin, J. 1. The affidavit was insufficient to support the attachment. 2. Though the verified complaint might have been treated as an affidavit, there is nothing to show that it was so treated, or was considered by the court in issuing the writ, and it cannot now be considered. 3. The levy was invalid for the reason that no certified copy of the writ was left with the bank as required by the code. 4. The bank, in any event, had a prior lien on the deposit for debts actually due it from the depositor at the time the attachment was issued, and of this right it could not be deprived by an attachment, even if there had been a valid levy. Reversed.

WOODBIDGE v FIRST NAT. BANK (1899) 45 App. Div. 166.

For accounting of trust funds. B, the trustee of an estate of which plaintiff had the beneficial interest for life, gave J, plaintiff's husband a power of attorney to manage the estate, with plaintiff's consent. J deposited moneys collected for the estate with defendant, and also his own moneys in his own name. Defendant knew that J was B's agent, but did not know what moneys belonged to the estate, except about \$30,000, which was properly accounted for. Except for this \$30,000 plaintiff did not show what sums deposited belonged to the estate. J converted moneys to his own use. After B's death, plaintiff was substituted as trustee. The court granted defendant an extra allowance of \$2,000. Judgment for defendant. Appeal.

Merwin, J. 1. A bank, in the absence of an adverse claim, has the right to assume that one who makes deposits to his own credit has the right to draw them out. 2. Equity will order an accounting in the case of a constructive trust, but the existence of the trust must be clearly established. 3. It was incumbent on plaintiff to show either that all the deposits were trust funds or to show what deposits were such. 4. The subject matter of this controversy is not the right to an accounting, but the deposits of trust moneys; an extra allowance based on their value is therefore, proper, but should be reduced to \$1,000, as their existence was proved only to the extent of \$30,000. Order modified. Judgment affirmed.

Cited: 32 Misc. 565. Aff'd: 166 N. Y. 238.

BARNES v ARNOLD (1899) 45 App. Div. 314.

To enforce stockholders' liability. The action was brought by a creditor, for the benefit of all creditors. The M Bank, not a bank of issue, was organized under a banking law, which provided that stockholders of a bank of issue were liable for the corporate debts to the extent of their shares. Thereafter the Banking Law was amended by sec. 52, ch. 689, Laws of 1892, making stockholders of all banks, except as provided in the Stock Corporation Law, liable for corporate debts to the extent of the par value of their shares in addition to the amount invested therein. Sec. 55 of the Stock Corporation Law provided that no stockholder should be liable for a debt not payable within two years from the time it was contracted, nor unless an action should be brought thereon within two years after the debt became due. Defendants contended: 1, that sec. 52, ch. 689, Laws of 1892, was unconstitutional as impairing the obligation of a contract; and 2, that, under sec. 55, of the Stock Corporation Law, defendants were not liable for ordinary deposits or deposits for which certificates of deposits were issued. Defendant T claimed the right to offset an indebtedness due him from the M Bank. Judgment for plaintiff. Appeal.

Adams, J. 1. Under art. 8, of the Constitution of 1846, power is reserved to the legislature to alter, suspend or repeal in any reasonable manner, the charter of any corporation thereafter created; sec. 52, ch. 689, Laws of 1892, is therefore not unconstitutional as impairing the obligation of a contract. 2. Though deposits and certificates of deposits are not strictly due until demand, a debt is due when legally enforceable, and if at the option of the creditor it may be enforced within the statutory limit, it may be said to be due within that limit. 3. If a demand was necessary, the bringing of this action is sufficient, especially as in view of M Bank's notorious insolvency, a formal demand would have been mere idle ceremony. 4. A stockholder cannot, in an action of this sort, set off an indebtedness due him from the bank. Judgment affirmed.

MAHONEY v BERNHARD (1899) 45 App. Div. 499.

To enforce stockholders' liability. Defendants were stockholders in M Bank which became insolvent, and for which receivers were appointed. The action was commenced by a creditor of the bank, before ch. 441, Laws of 1897, amending sec. 52, of the Banking Law, had gone into effect, although the summons was not served upon all of the defendants until after that event. Ch. 441 provided that in case of dissolution and appointment of a permanent receiver, actions under sec. 52 "shall be prosecuted" only in the name of the receiver unless he refused to act. Defendants contended that its effect was to abate this action. Two of the defendants had died, and the accounts of their executors had been settled, although the shares remained in the names of the deceased on the books of the bank. It was contended that the executors were not liable. The court allowed interest from the commencement of the action. Judgment for plaintiff. Appeal.

Barrett, J. 1. Where an action had been commenced before the amendment went into effect, the amendment referred to did not apply. 2. There being but one action, it did not abate even as to those defendants upon whom summons were served after the amendment went into effect. 3. A surrogate's decree on an executor's accounting is only a discharge pro tanto, and the executorial duty continues as to new assets which may be realized on new liabilities incurred. 4. By statute, as the shares remained in the names of the decedents, their estates are liable. 5. The court should not have allowed interest, as defendants cannot be mulcted beyond their precise statutory liability. Judgment modified.

Cited: 48 App. Div. 238.

ELDER v FRANKLIN NAT. BANK (1899) 25 Misc. 716.

On deposit. Defendant through inadvertence paid a check drawn by plaintiff, after notice to stop payment had been received. The passbook contained a notice providing that defendant would endeavor to stop payment on a check upon receiving notice, but would not be liable for a failure to do so. This passbook had been substituted for another containing no such notice, and plaintiff claimed that he had never seen the notice. Judgment for plaintiff. Appeal.

Beekman, P. J. 1. The question of fact as to whether plaintiff assented to the notice must be presumed to have been decided by the trial court in plaintiff's

favor. 2. The notice, even if agreed to by plaintiff, does not purport to relieve defendant from the exercise of ordinary care. Judgment affirmed.

Cited: 33 Misc. 94.

MOORE v RIVERSIDE BANK (1899) 25 Misc. 720.

On certified check, deposited by plaintiff with defendant in the ordinary course of business, and credited to plaintiff as money. The check was lost, while being transmitted to the drawee, and defendant charged it back to plaintiff. Judgment for plaintiff. Appeal.

Beckman, P. J. Upon deposit of a check by a customer with a bank, in the ordinary course of business, if the check is credited as money, it becomes the absolute property of the bank. Judgment affirmed.

Cited: 28 Misc. 450.

PERSONS v GARDINER (1899) 26 Misc. 663.

To enforce stockholders' liability. The complaint alleged that plaintiffs were receivers of an insolvent bank; that defendants were stockholders within two years before the commencement of the action; and that the assets of bank were insufficient to pay its debts. Demurrer on the following grounds: 1, that receivers were not the proper plaintiffs; and 2, that a cause of action was not stated. After the bank failed, but before this action was commenced, the statute allowing a remedy against a stockholder was amended by authorizing the receiver to commence such action; prior to such amendment a creditor was the proper plaintiff.

Laughlin, J. 1. The amendment, as it provided merely for a change in the mode of enforcing a pre-existing liability is constitutional and valid, and the receivers are proper plaintiffs. 2. Though the allegations of the complaint are informal and do not clearly set forth that defendants were stockholders before dissolution, and remained such until that time, these facts may be reasonably inferred, and mere informality will not sustain a demurrer. Demurrer overruled.

Aff'd: 42 App. Div. 490.

MAHONEY v BERNHARDT (1899) 27 Misc. 339.

To enforce stockholders' liability. Plaintiffs were creditors of an insolvent bank, and defendants were some of the stockholders and the receiver. When the action was commenced, creditors could enforce the liability. Plaintiffs proved the insolvency of the bank, the insufficiency of assets, and that they were creditors. Some of the stockholders and the receiver were not served with process until after an amendment to the banking law requiring the receiver to bring all the actions of this character. Defendants contended that this action was abated by the passage of the amendment.

Scott, J. 1. The receiver was not a necessary party prior to the amendment. 2. It was not a defense that all the stockholders were not made defendants, as stockholders are liable ratably and not one for the other. 3. Plaintiff proved all things necessary to allow a recovery, for the passage of the amendment did not operate to abate actions already commenced. Decree for plaintiff.

Cited: 42 App. Div. 501.

BRENNER v LAWRENCE (1899) 27 Misc. 755.

Where the cashier of a banking house was instructed by his principal to make out its check in payment of a debt, and the cashier did so, signing his own name as cashier, the signature was deemed to be the signature of the bankers, and they were held liable.

MILLS v ALBANY EXCHANGE SAV. BANK (1899) 28 Misc. 251.

On deposit. Plaintiff's testator made a deposit with defendant. The Banking Law provided that a savings bank could pay a deposit only on presentation of the passbook, and that it could make by-laws with regard to payments in case of a lost book. The by-laws printed in the book provided: that, by receiving the passbook, every depositor assented to the by-laws; that payment to the person presenting the book discharged the bank, and, in case of a lost book, the bank was to decide to whom payment should be made. The code of civil procedure provided that indemnity could be required before paying a lost instrument. The passbook

was lost, defendant notified and several years later payment was demanded. No other claim than that of plaintiff and his testator was ever presented to defendant. Defendant refused payment, without indemnity.

Chase, J. 1. The statute, in regard to requiring indemnity for lost instruments, relates to negotiable instruments and does not apply to the passbook of a savings bank. 2. The bank's refusal to pay the deposit without indemnity, was unreasonable and not warranted by its by-laws. Judgment for plaintiff.

SALOMON v STATE BANK (1899) 28 Misc. 324.

Where checks were stolen from the payees, and subsequently came into the possession of a bank, which credited the amount thereof to its depositors, and the makers ratified the payment and canceled the checks, Held, that the payees could affirm the payment by the makers, and maintain an action against the bank for conversion of the checks; and damages, in an amount equal to the amount collected on the checks could be recovered.

WALTON v RIVERSIDE BANK (1899) 28 Misc. 449.

On deposit. Plaintiff deposited a check with defendant and received credit therefor. The check would have been honored, had it been presented within a reasonable time. Defendant lost the check, notified plaintiff, and charged him with the amount. Whether the check was deposited in the ordinary course of business or under special agreement, was left to the jury. Interest was allowed from the time defendant charged plaintiff with the lost check. Judgment for plaintiff. Appeal.

Schuchman, J. 1. A deposit of a check in the ordinary course of business, such check being credited as money, creates the relation of debtor and creditor, and the bank was liable for the amount thereof. 2. Whether the check was deposited in the ordinary course of business or under a special agreement, was properly submitted to the jury. 3. Defendant was properly chargeable with interest from the time of charging plaintiff with the lost check. Judgment affirmed.

Aff'd: 29 Misc. 304.

PEOPLE, EX REL. v NEFF (1899) 29 Misc. 59.

Certiorari to review the assessment of relator's stock in a national bank. Sec. 12, of the Tax Law provided, that the capital stock should be assessed at its actual value, less the assessed value of the real estate; and sec. 24 provided, that in assessing shares of bank stock, there should be deducted from the value of the shares such proportionate sum as the assessed value of the real estate bears to the value of the shares. Respondents assessed the shares by deducting from the capital, surplus and undivided profits, the assessed value of the real estate, and dividing the balance by the number of shares. This with some minor modifications was adopted as the final assessment. The referee, appointed on the return of the writ, reduced the assessment by deducting the difference between the assessed and actual value of the real estate. Relators contended that failure to make such reduction would result in double assessment of the real estate, as the value of shares would in part be based upon its real instead of its assessed value. They further contended that the entire assessment was unconstitutional, as in contravention of U. S. R. S., sec. 5219, prohibiting the taxation of national banks at a greater rate than other moneyed capital. Trust companies, which, by ch. 696, Laws of 1893, were given some banking privileges, were permitted deductions not accorded to banks under the tax law.

Hirschberg, J. 1. The bank and the shareholders are distinct, and though the corporation be taxed on the assessed value of its real estate, the assessors may legally disregard that assessed value in estimating the real value of the shares. 2. Moneyed capital invested in trust companies does not come into competition with that invested in national banks within the meaning of U. S. R. S., sec. 5219, for while some of the functions of both institutions are identical, their essential features are sufficiently diverse, as to avoid competition. Referee's report modified.

WALTON v RIVERSIDE BANK (1899) 29 Misc. 304.

Where the check deposited in the ordinary course of business was lost by the bank in transmitting it to the clearing bank, the receiving bank was held liable to the depositor for the amount of the check.

WASHINGTON v SEAMENS BANK (1899) 29 Misc. 492.

On deposit. The complaint alleged: that plaintiff's intestate made a deposit with defendant, a savings bank; that it was made in the name of the intestate, in trust for T, and that the name T was fictitious. Plaintiff alone claimed the deposit. By statute a savings bank, by motion, could compel a plaintiff to make all persons claiming the deposit parties to the suit. Motion by defendant to have T, his heirs, or personal representatives made parties.

Bookstaver, J. As plaintiff was the only party claiming the deposit, defendant was not entitled to have T and his heirs, or representatives, made parties. Motion denied.

Cited: 47 App. Div. 625.

AUGUST v O'BRIEN, REC'R (1899) 30 Misc. 54.

Where bonds, pledged with a bank as collateral security for notes, were transferred by the owner to a third party, and the bank agreed to recognize the transfer, providing the transferee would pay the amount of one of the notes, Held, that upon such payment and demand, the bank was bound either to deliver the bonds, or return the money paid, and that defendant having sold the bonds, plaintiff was entitled to the value at the time of sale.

Aff'd: 50 App. Div. 626.

PEOPLE, EX REL. v DEDERICK (1899) 158 N. Y. 414.

Where the taxing authorities sought to assess depositors in savings banks, Held, that the exemption clause in subdiv. 14, of sec. 4, ch. 908, Laws of 1896, was intended to apply to such depositors.

NASSAU BANK v NATIONAL BANK (1899) 159 N. Y. 456.

On deposit. T deposited a draft for \$6,000 with plaintiff. The draft was paid, but some months later plaintiff repaid the amount on learning that the indorsement of the payee thereon was forged. T had disappeared and his account was exhausted. The check in suit was for \$2,400, drawn by T against his account with plaintiff, and deposited with, and collected by, defendant bank for the account of an estate of which the other defendants were executors. It reimbursed the estate for moneys drawn out by T on forged checks prior to his deposit with plaintiff. Defendant bank knew nothing of the defalcation or the reimbursement. Judgment for defendants. Affirmed by Appellate Division. Appeal.

Gray, J. 1. Money received in good faith for a valuable consideration cannot be pursued into the hands of the recipient by one from whom it was obtained through the fraud of a third person. 2. Payment of an antecedent indebtedness is a sufficient consideration. 3. The fact that restitution was made to defendants without their knowledge does not prevent the application of the foregoing rule. Judgment affirmed.

Cited: 50 App. Div. 37.

MARTIN v HOME BANK (1899) 160 N. Y. 190.

Money paid by mistake. A check on a Chicago bank was delivered to plaintiff's testator B, on May 27. On May 29, B indorsed and delivered it to defendant and the amount was credited to B. Had the check been forwarded in due course of mail it would have been paid. It was not presented at the Chicago bank until June 3. At that time, the Chicago bank had failed and the check was returned dishonored. On being notified, B in ignorance of defendant's failure to use due diligence in presenting the check, paid defendant the amount and received the dishonored check. The check was not returned to defendant, and demand had not been made before this action was brought. The original complaint alleged; that the check was received by defendant for collection; that it failed to present it in a reasonable time; and that in consequence plaintiff lost the amount. Plaintiff was permitted to amend the complaint to conform to the proof. Judgment for plaintiff. Affirmed by Appellate Division. Appeal.

O'Brien, J. 1. The legal effect of defendant's neglect to present the check in time was to discharge both drawer and indorser, and when the indorser paid the check without knowledge of the facts, defendant received so much money from him to which it was not legally entitled. 2. The gravamen of the cause of action on

the original complaint and of that in the amended complaint, was the same, namely defendant's negligence, and the amendment was, therefore, proper. 3. It was unnecessary to tender the check as it was valueless, and the law will not insist on an idle ceremony. 4. Defendant's duty to restore the money arose the moment it was received, and no demand therefor was necessary. Judgment affirmed.

Cited: 53 App. Div. 487; 56 id. 153; 57 id. 40; 31 Misc. 455; 162 N. Y. 355; 165 id. 362.

GILLET v BANK OF AMERICA (1899) 160 N. Y. 549.

Conversion. A, a customer, borrowed money from defendant and gave his note therefor, with collateral. The note, which was on a form prepared by defendant, contained provisions with regard to the collateral, and recited that "having deposited with the said bank as collateral security for this or any other liability or liabilities of the undersigned to the said bank, due or to become due, or which may hereafter be contracted or existing," the maker agreed to give defendant a lien for the "liabilities aforesaid," on that or any other collateral that might be deposited. X held a note of A, payable at defendant bank, which became due thereafter, but which was dishonored. Defendant then bought X's note, and refused to surrender the collateral until it was paid, although the original loan was paid in full. A assigned his claim to plaintiff. Verdict directed for plaintiff. Exceptions sustained by Appellate Division. Appeal.

Martin, J. 1. The agreement, being on a form furnished by defendant, should receive a liberal construction in favor of the customer. 2. It will be interpreted as giving a lien only for debts contracted with defendant in the ordinary course of business. The note purchased by defendant was not such a debt. Order reversed.

ULSTER COUNTY SAV. INSTITUTION v YOUNG (1899) 161 N. Y. 23.

On bond. The law, under which plaintiff was organized, gave its trustees power to make by-laws regulating the duties of its officers, and their appointment. A by-law provided for an assistant treasurer, who should hold office during the pleasure of the trustees. In 1867, T was elected assistant treasurer to serve one year. After his election, he gave the bond in suit as assistant treasurer, with defendant's testator as surety. He was re-elected in 1869. Thereafter he was not re-elected, but served until 1891. Defalcations above the penalty of the bond occurred between 1871 and 1891. The bond recited that it was to be binding for all the time T should hold office, even though he hold under successive appointments. Sec. 1822 of the code of civil procedure provided that an action against an executor on a rejected or disputed claim should be brought within six months after its dispute or rejection. No written claim had been made against the surety's estate. An oral demand and refusal was made more than six months before this action was commenced. Judgment for plaintiff. Appeal.

Martin, J. 1. The bond covered the acts of the assistant treasurer so long as he continued in office. 2. Sec. 1822, code of civil procedure, refers only to a written claim and an absolute rejection thereof by the executor. Judgment affirmed.

Cited: 163 N. Y. 434, 435, 436; 54 App. Div. 58. Affirming: 15 App. Div. 181.

PODMORE v SOUTH BROOKLYN SAV. INSTITUTION (1900) 48 App. Div. 218.

On deposit. A, under another name, had an account with defendant shortly before her death. Knowing that she was near her end, she took several passbooks from her pocket and handed them to R, telling her to keep them, to bury her, and to keep the balance for herself. She never afterward claimed the books. The passbook of defendant was not conclusively shown to have been among them. After A's death, R presented the book to defendant stating that A had given the money to her, and demanded the deposit. She was referred to defendant's attorney, who advised payment to her, and the money was paid. The attorney did not see R, but relied entirely on affidavits furnished by her attorney. A's administrator sued defendant for the money. The credibility of R as a witness was not left to the jury. The court charged that defendant had used due diligence and that there was a valid gift. A by-law of defendant provided, that, although it would endeavor to prevent frauds and impositions, all payments to persons producing the passbook issued by it should be valid payments in discharge of the institution. Another by-law provided that on the decease of a depositor, the amount standing to his credit should be paid to his legal representatives. Judgment for defendant. Appeal.

Barrett, J. 1. The first quoted by-law refers only to payments made in the lifetime of the depositor, or to payments made without knowledge of his decease; the second applies to a deposit after the death of the customer. 2. It was erroneous for the court to decide as a matter of law that the bank had used due diligence. 3. As defendant practically stood in R's shoes, R was an interested witness, whose credibility should have been submitted to the jury. 4. The validity of the gift depended upon the actual delivery of this particular passbook. Judgment reversed.

Cited: 55 App. Div. 624. Aff'd: 164 N. Y. 600.

BLAIR v HILL (1900) 50 App. Div. 33.

To recover the proceeds of a check. Plaintiff, who was not a customer of R & Co., bankers, delivered personally to R, the president of R & Co., a check for collection. R, without her knowledge, deposited it to plaintiff's credit with R & Co., who sent it to C Bank, its correspondent. C Bank collected the check and credited R & Co. Thereafter R & Co. gave plaintiff a draft for the amount on C Bank, but it was not presented until after R & Co. had assigned to defendant. R & Co.'s balance with C Bank up to the time of presentation of the draft was sufficient to pay the draft, and a balance in excess of the necessary amount was paid over by C Bank to defendant. Judgment for plaintiff. Appeal.

Spring, J. 1. As plaintiff's dealings were with R individually, she did not become a creditor of R & Co. by the unauthorized deposit. 2. The proceeds of a check intrusted to a bank for collection, belong to the owner of the check, and do not pass to the collecting agent or its correspondent. 3. The proceeds can be followed as a trust fund, even though not capable of specific identification, where intermingled with funds of the trustee. 4. Withdrawals by the trustee from the general fund are presumptively withdrawals of his own money, the trust fund remaining continuously unimpaired. Judgment affirmed.

Cited: 32 Misc. 567; 34 id. 138; Aff'd: 165 N. Y. 672.

DAVIS v STANDARD NAT. BANK (1900) 50 App. Div. 210.

Damages for refusal to pay checks. Plaintiff indorsed a note and had it discounted by defendant. It was not paid at maturity. After its dishonor, plaintiff drew checks on defendant which were dishonored, defendant claiming that as the note had not been paid, there was nothing due plaintiff. Plaintiff had not been properly charged as indorser upon dishonor of the note. Defendant was a large stockholder of L Co., the maker. The court refused to charge, at the request of defendant, that this fact did not prove or tend to prove that it was liable for the payment of the note. The court charged that, if defendant acted through willful malicious and wrongful motives, more than the actual damages, proved, and such substantial damages for the impairment of plaintiff's credit and for his feelings and mental anxiety as proximately resulted from defendant's wrongful acts, might be awarded. Judgment for plaintiff. Appeal.

Rumsey, J. 1. There was no authority for the bank to call upon plaintiff to pay the note, and the fact that it was dishonored did not give the bank any right to refuse his checks. 2. The court correctly instructed the jury on the question of damages. 3. The court erred in refusing to charge as requested by defendant in regard to its liability on the note. Judgment reversed.

SEVENTEENTH WARD BANK v SMITH (1900) 51 App. Div. 259.

Negligence. Plaintiff made loans to one firm for more than one-fifth of its capital. When the loans were made, defendant was president of plaintiff, and made the loans for it, passing on and approving the collateral. His action was ratified by the trustees. A loss occurred and plaintiff sued to recover. The statute prohibited such a bank loaning more than an amount equal to one-fifth of its capital to one concern, unless the collateral taken was worth more than 10 per cent above the loan. The court refused defendant's offer to show that the collateral had been taken at the same value by other banks, in several instances, and that it was generally considered good. Judgment for plaintiff. Appeal.

Woodward, J. 1. Defendant was the agent of the corporation and for a failure in the performance of his duties, he would be liable to it. 2. The trustees could

not ratify the act, so as to deprive the bank of the right to recover. 3. The evidence offered should have been admitted to rebut the evidence of negligence. Judgment reversed.

PEOPLE v MERCANTILE CO-OPERATIVE BANK (1900) 53 App. Div. 295.

To dissolve corporation. Defendant was organized under ch. 122, Laws of 1851. The state superintendent of banks made an examination of its affairs and reported its insolvency to the attorney-general, who, on authority of ch. 689, Laws of 1892, and secs. 1785 and 1786, of the code of civil procedure, commenced the present action in the name of the people, without a relator, to dissolve the bank. The court made an order appointing temporary receivers. Appeal.

Rumsey, J. 1. It is the duty of the attorney-general on receiving the report of the superintendent of banking, as to the insolvency of a bank, to institute proceedings for its dissolution. He has no discretion. 2. A relator is not necessary. 3. The appointment of temporary receivers was proper. Order affirmed.

Cited: 53 App. Div. 387.

PEOPLE v REPUBLIC SAV. AND LOAN ASS'N (1900) 53 App. Div. 384.

To have receivers appointed and corporation dissolved. Defendant was a mutual savings and loan corporation, organized under ch. 122, of the Laws of 1851. The state superintendent of banks made an examination of its affairs, and reported to the attorney-general that defendant had a large deficit, which would remain if it continued business. Thereupon the attorney-general instituted the present proceeding, under the Banking Act, sec. 18. The appointment of receivers was opposed on the grounds that the act did not apply to defendant, and that it was not insolvent. After the examination and report, the defendant, with the consent of the stockholders, conditioned on the assets being less than the liabilities, had scaled down the book value of its shares so as to cover the deficit, under a resolution reciting that the superintendent's allegation as to a deficiency was false, and that the company was solvent. Order appointing receivers. Appeal.

Bartlett, J. 1. The consent of the shareholders to scaling the book value of the stock was ineffectual, and did not render the bank solvent. 2. Sec. 18 of the Banking Act applies to corporations formed under the Act of 1851, ch. 122. 3. The appointment of receivers in this case was proper. Order affirmed.

CASSIDY v UHLMANN (1900) 54 App. Div. 205.

Statutory action for receiving deposits, knowing the bank to be insolvent. Plaintiff was the assignee of several depositors, and defendant was a director of the bank. Before the deposits were made, defendant examined the bank, met with the directors, prepared directions for the cashier in regard to receiving deposits in such a manner as to protect the depositors, and afterward countermanded the directions. Plaintiff proved that defendant met with the other directors on the night the bank failed, and drew checks, which were hurried through the clearing house for the benefit of companies in which he and his friends were interested. Judgment for plaintiff. Appeal.

Rumsey, J. 1. The evidence proved that defendant took part in receiving the deposits after he knew the bank was insolvent. 2. The evidence was competent to show that defendant was guilty of a fraudulent act toward the depositors. Judgment affirmed.

VENNER v FARMERS LOAN & TRUST CO. (1900) 54 App. Div. 271.

To restrain a trust company from receiving deposits. Under the special act incorporating it, the defendant was not authorized "to receive any deposit," or allowed "any banking privileges whatever." By an amendment it was given power "to execute such trusts of every description committed to it by any person, or corporation, or by order of any court of record, and to receive and take any real estate, the subject of any such trust." The Banking Law subsequently provided that every trust company incorporated under a special law should possess such powers of those incorporated under the act as were not inconsistent with the special law. Trust companies incorporated under the Banking Law had the right "to receive deposits of trust moneys, securities, and other personal property," from any person. Complaint dismissed on the merits. Judgment for defendant. Appeal.

O'Brien, J. 1. By the amendment to the charter, the defendant was a trust company at the time of the passage of the Banking Act. 2. That act conferred on such specially chartered corporations the rights given to trust companies formed under the general act. Judgment affirmed.

NATIONAL REVERE BANK v NATIONAL BANK (1900) 54 App. Div. 342.

Where a bank sent a draft, deposited with it for collection, to the drawee bank, and received in payment a draft on another bank, which the last named bank refused to honor, and no attempt to regain the first draft was made, and no notice of protest thereof was sent to its drawer, indorser, or the person sending it for collection, Held, that the collecting bank was liable for the amount of the draft.

REYNOLDS ELEVATOR CO. v MERCHANTS NAT. BANK (1900) 55 App. Div. 1.

Where checks, drawn on a corporation's bank account by its president were accepted and applied by the bank to the payment of the president's individual debts, Held, that if the president acted without authority, the corporation might recover the amount from the bank; that no demand was necessary; and that interest should be allowed on each check from its date.

FIRST NAT. BANK v ANDERSON (1900) 55 App. Div. 570.

On note against an accommodation indorser. The defendant, as payee, indorsed W's promissory note for A. A sold the note to K, who agreed not to hold W or the defendant. K discounted the note with the plaintiff, a national bank. The defendant set up usury. Judgment for plaintiff. Appeal.

Patterson, J. 1. The taking of usury by a national bank does not involve a forfeiture of the debt either as a penalty, or otherwise. 2. A bona fide holder of accommodation paper cannot be prejudiced by a statement of a previous holder. Judgment affirmed.

PEOPLE v FEITNER (1900) 30 Misc. 215.

An assessment on the shares of stock in a bank, the value of which is fixed by including certain shares of stock of railroad companies as part of the bank's capital and surplus, is valid, irrespective of the character of the assets owned by the bank, whether they be taxable or non-taxable; and if this amounts to a double taxation of the same property, the only remedy is with the legislature.

ADLER v BROADWAY BANK (1900) 30 Misc. 382.

Where the collector for the payee of a check forged his principal's indorsement, and the bank paid the check on such forged indorsement, Held, that the collector had no authority to indorse the payee's name, and payment to him was no defense to the bank; that the mere fact of the bank's having previously paid a similar check, at which time the drawer represented that the collector was entitled to receive money on the check, did not estop the drawer as to the second forged check, and that the payee, having taken an assignment of the rights of the drawer, might recover the amount of the check from the bank.

MASTER v BOWERY SAV. BANK (1900) 31 Misc. 178.

Where an application was made by a savings bank that it be allowed to pay into court the funds in suit, and that the claimant, owner of a draft thereon, be substituted in its stead under provisions of the Banking Law, sec. 115, ch. 689, Laws of 1892, and sec. 820 of the code of civil procedure, Held, that the bank was under no obligation to the holder of the draft to pay the same, and that it did not operate as an assignment, legal or equitable, of the funds in the hands of the drawee, and that the relief could not be had under sec. 820 of the code of civil procedure.

RANKIN v COLONIAL BANK (1900) 31 Misc. 227.

Where a check was certified at one branch of defendant bank, and a subsequent check, having the same maker and payee, was innocently certified at another branch

whereby the drawer's account was made short to the knowledge of the drawer and payee, the payee cannot, no rights of third persons having attached, hold the bank for the face value of the second check, but only for the balance remaining after paying the check first certified.

Aff'd: 60 App. Div. 629.

KOPF v DRY DOCK SAV. INSTITUTION (1900) 32 Misc. 35.

On deposit. The plaintiff and his wife made a deposit in defendant, a savings bank, in the wife's name. The wife subscribed to the by-laws, which provided that on the death of the depositor, the amount to his credit should be paid to his or her legal representatives. The wife died. Plaintiff alleged that the deposits were his earnings.

McAdam, J. The plaintiff is as much bound by this by-law as the depositor herself, it being the condition on which the deposit was received. Judgment for defendant.

ROSEN v STATE BANK (1900) 32 Misc. 231.

Where a depositor in a savings bank, having his place of business near the bank, and being unable to sign except by his mark, lost his passbook, and it was presented at the bank by a stranger who made a mark different from that of the depositor, and was identified by a third person merely as a depositor, on the strength of which the bank paid the money, Held, that the question whether or not the bank exercised proper care in making payment was one for the jury.

STRAUSS v YORKVILLE BANK (1900) 32 Misc. 239.

Where a bank was restrained by an order in supplementary proceedings from transferring any money in its possession belonging to a judgment debtor or deposited to the credit, and under the name, of his wife, Held, that the bank was justified in refusing to pay a check drawn by the wife against her account.

FICKEN v EMIGRANTS INDUSTRIAL SAV. BANK (1900) 33 Misc. 92.

On deposit. A deposit was made in defendant bank in trust for the plaintiff, then an infant. The by-laws of the bank provided that payment to a person presenting the bank book would discharge the bank. Plaintiff's father presented the book without her knowledge, and defendant, without inquiry, paid the money to him. Defendant contended that the father was entitled, as a matter of law, to the deposit; and that the money was spent for the benefit of the plaintiff. The father testified vaguely that as a result of his drawing the funds, the plaintiff remained in college a year longer than she would otherwise have remained. Motion to dismiss on the ground that payment was proved. Granted. Judgment for defendant. Appeal.

Beekman, J. 1. The savings bank did not use ordinary care in making the payment. 2. The father was not of right entitled to the deposit belonging to plaintiff. 3. It was not proved that the plaintiff received the benefit of the money. Judgment reversed.

BUFFALO GERMAN INS. CO. v THIRD NAT. BANK (1900) 162 N. Y. 163.

To compel transfer of stock. L, the owner of stock of defendant, a bank organized under the National Banking Act of 1864, borrowed money from plaintiff, pledging the stock and delivering the certificates as collateral. The loan not being paid, the stock was sold, and was bought in by plaintiff. A demand to transfer it on the books of defendant was refused, unless an existing debt against L and in favor of defendant was first paid. This indebtedness had existed when the stock was pledged, but of this plaintiff had no knowledge. On the face of the certificate was printed a reservation of a lien in favor of the bank. The National Banking Act prohibited a national bank from loaning money on the security of its own stock. Judgment for defendant. Affirmed at General Term. Appeal.

Gray, J. The by-law or reservation of a lien printed on the certificate was unauthorized; and it created no equitable lien in favor of the bank as against plaintiff. Judgment reversed.

JENKINS v NEFF (1900) 163 N. Y. 320.

Certiorari to review tax assessment. The plaintiffs were stockholders of the F National Bank. The defendant, the board of assessors, in assessing the value of the gross assets of the bank, deducted \$50,000, the value of the realty as assessed on their rolls, instead of \$93,000, the actual value. The tax law provided that there should be deducted from the value of the shares a sum bearing the same proportion to such value as the assessed value of the real estate bore to the capital stock. The plaintiffs contended that they were doubly taxed by the assessors in the sum of \$43,000; and that the assessment was in contravention of the National Banking Act, which provided that the tax should not be assessed at a greater rate than that assessed on other moneyed capital in the hands of individual citizens of the state, in that they were taxed at a higher rate than the trust companies. The referee held that the remaining \$43,000 should have been deducted. Assessment approved at Special Term. Judgment for defendants. Affirmed by the Appellate Division. Appeal.

Bartlett, J. 1. In order to reach the actual value of the shares it was necessary to ascertain the total value of the assets, and from that to deduct the assessed value of the real estate. There was no double taxation. 2. Trust companies are not, in the legal or commercial sense, engaged in the business of banking, and their shares are not moneyed capital within the act of Congress. Judgment affirmed.

Cited: 60 App. Div. 284; 33 Misc. 34.

GERMAN-AMERICAN BANK v ATWATER (1900) 165 N. Y. 36.

On notes. The defendant indorsed overdue notes of a firm to the plaintiff bank, the firm's assignee, with the understanding that after the firm debts were settled, these notes were to be paid from the assets, if sufficient. The plaintiff was to hold the notes as security. The defendant was allowed to withdraw practically all the value of the notes. The assets proved insufficient to pay the plaintiff's notes, and the plaintiff demanded the return of the money drawn by the defendant. On March 24, a written demand was made for payment. On April 9, notice of protest in due form was given. Plaintiff contended that oral demand was made by requesting defendant to live up to the agreement. Judgment for the defendant. Appeal.

Parker, C. J. 1. Where a party indorsed past due paper, the indorsee must proceed within a reasonable time to demand payment and must give immediate notice if not paid; and what is a reasonable time depends on the facts in each case. 2. When, on March 24, plaintiff had ascertained that the assets were not sufficient to meet the notes, the defendant was entitled to have demand made and notice of protest. 3. A demand that the defendant should live up to the agreement by restoring the money improperly withdrawn, was not a notice of dishonor. Judgment affirmed.

KIRKHAM v BANK OF AMERICA (1900) 165 N. Y. 132.

To recover the proceeds of a draft. The complaint alleged that the plaintiff deposited a sight draft with the defendant, a bank, for collection; that the defendant's agent presented it to the drawee and accepted in payment a check on the E Bank; that the defendant then notified the plaintiff that the draft was paid and credited it on his passbook as a cash item; that thereafter payment of the check was refused by the E Bank, and the defendant then refused to pay the plaintiff the amount of the draft; that, through the defendant's negligence, B, the solvent indorser of the draft, has been discharged. Judgment for defendant. Reversed by Appellate Division. Appeal, with stipulation for judgment absolute.

Gray, J. 1. The agencies selected by the defendant were in no sense the plaintiff's agencies. 2. The action of the defendant in crediting plaintiff was conclusive evidence of an intention to change its status from that of a mere collecting agent to that of a debtor. Judgment for plaintiff absolute.

HITCHCOCK v BANK OF SUSPENSION BRIDGE (1901) 57 App. Div. 458.

Where a bank received a note for collection and failed to properly protest the same, for which reason the indorsers were released from liability, the maker being insolvent, Held, that the bank was liable for damages sustained by reason of its neglect; and that the measure of damages was the principal of the note, the interest due thereon, and protest fees.

CITY OF NEW YORK v McLEAN (1901) 57 App. Div. 601.

Where an action was brought, under sec. 936, of the Greater New York Charter, against a resident of the State of New Jersey to recover taxes levied on stock of national banks located in the City of New York, Held, that a fair construction of the tax laws did not show any intention to enforce any liability against a non-resident owner of bank shares located in this state.

COHNFELD v TANENBAUM (1901) 58 App. Div. 310.

Where money of an infant and money of a corporation is deposited by a person, who is, at the same time, guardian of the infant and manager of the corporation, and the account stands in the name of the depositor "as guardian," the money so deposited will be deemed to have been withdrawn in the order it was deposited, and a creditor of the corporation, who accepts a check drawn on such fund signed by the depositor "as guardian," is chargeable with notice of such facts as would have appeared on investigation.

CONTINENTAL NAT. BANK v TRADESMENS NAT. BANK (1901)
59 App. Div. 103.

Money had and received. T deposited a draft with the defendant. It was then certified by the plaintiff, the drawee, without examination, although the plaintiff had advices from the drawer showing the draft had been raised. The draft was paid through the clearing house. Defendant then paid T the proceeds. Plaintiff claimed the amount between the draft as originally drawn and as raised. Judgment for defendant. Appeal.

Hirschberg, J. While the contract of certification extends only to the genuineness of the signature and the availability of the funds drawn upon, yet the plaintiff cannot be protected against its own negligence in putting the fraudulent draft in circulation. Judgment affirmed.

MT. MORRIS BANK v TWENTY-THIRD WARD BANK (1901) 60 App. Div. 205.

Money paid by mistake. Defendant held a note made by a depositor in plaintiff. Through a mistake, plaintiff certified that the depositor had funds sufficient to cover it. Discovering the mistake immediately, defendant was notified. Defendant sent the note to its clearing house agent, where it was presented and paid by plaintiff's clearing house agent. Defendant refused to refund the money on plaintiff's demand. Plaintiff put in evidence the rules of the clearing house, which provided that all paper passing through that institution should be paid, and, in case of error, corrected by the parties. Judgment for plaintiff. Appeal.

Rumsey, J. 1. The payment was made under a mistake of fact, and plaintiff should recover. 2. Plaintiff and defendant, by having clearing house agents, consented to be bound by the rules of the clearing house, and such rules were properly received in evidence. Judgment affirmed.

STEINER v EAST RIVER SAV. BANK (1901) 60 App. Div. 232.

On deposit. Plaintiff was president of a branch of a benevolent association which had deposited money with defendant. Defendant moved for an order making the receivers of the parent organization parties to the suit. There was no evidence that the receivers had a foundation for a claim. Sec. 820 of the code, and sec. 115 of the Banking Law of 1892, made it discretionary with the court to grant an order making persons, claiming money in a savings bank, parties to the suit. Motion granted.

Patterson, J. 1. Defendant should have shown that the claim made by the receivers had some reasonable foundation, and that it could not, without peril, determine to whom the money should be paid. 2. It was discretionary with the court, under the banking law, to refuse or grant the application of a savings bank, to make persons claiming the deposit, parties to the suit. Order reversed.

Cited: 35 Misc. 208.

CRITTEN v CHEMICAL NAT. BANK (1901) 60 App. Div. 241.

On deposits. Plaintiffs, as partners were depositors in defendant. After plaintiffs' clerk filled out the date, amount and payee in the checks, plaintiffs' president signed them and put them in sealed envelopes in a drawer for mailing. The clerk took

the checks, raised the amount and cashed them. The checks bore evidence of alteration, and defendant required the clerk's indorsement, though the clerk was not authorized to indorse checks. Plaintiffs did not examine their passbook and returned checks, except through the same clerk. Defendant contended that the knowledge of the clerk bound the plaintiff, and that the plaintiff should have examined the passbook and returned checks. Judgment for the plaintiff for the amount above the sum for which the checks were originally drawn. Appeal.

O'Brien, J. 1. There was no duty on the depositor to examine his bank account and vouchers when returned to him. 2. The clerk, in concealing his fraud on plaintiff, did not act as plaintiffs' agent, and the presumption of knowledge on plaintiffs' part did not arise. 3. The bank was liable for its negligence in paying the checks bearing evidence of alteration. Judgment affirmed.

Modified: 171 N. Y. 219.

DELAHUNTY v CENTRAL NAT. BANK (1901) 63 App. Div. 177.

On deposit. C, a depositor and a debtor of defendant, made an assignment. B, a judgment creditor of C, had the assignment set aside and plaintiff was appointed receiver, but not until after defendant's claims had become due, and it had applied the deposit in satisfaction thereof. Judgment for defendant. Appeal.

McLaughlin, J. The bank had a lien superior to that of the judgment creditor or the receiver and could apply the deposit in satisfaction thereof. Judgment affirmed.

BRADY v MOUNT MORRIS BANK (1901) 65 App. Div. 212.

Replevin for a certificate of stock in the E Co. Plaintiff never had possession of the certificate, but claimed it by assignment from B, the original holder. Defendant received the certificate indorsed in blank by B, from R, its cashier, as security for a loan, without notice that it did not belong to R, or that B had any interest in it. Plaintiff contended that the knowledge of the cashier was knowledge of the bank. Judgment for defendant. Appeal.

Hatch, J. Knowledge upon R's part, that he was without authority to pledge the stock, would not operate to charge defendant with such knowledge, as, in the matter of the loan in which he pledged the certificate, he was acting in his own interest and not in the interest of the bank. Judgment affirmed.

HALL v BAKER (1901) 66 App. Div. 131.

Libel. Plaintiff allowed his name to be used, and directed the business in a private bank after selling his interest. The bank failed, and defendants, after examination, authorized the publication of a statement of its condition. Defendant B, without the authority or consent of the other defendants, put in a sentence accusing the plaintiff of crime. The court charged, that the plaintiff was guilty, under the statute making it a crime for a private banker to receive deposits, knowing the bank to be insolvent. The plaintiff's bank was not under the supervision of the superintendent of banking. The complaint was dismissed as to all but B. Judgment for defendants. Appeal.

Chase, J. 1. The dismissal of the complaint against the defendants other than the defendant B was right. 2. Plaintiff, being a private banker, the statute did not apply. 3. The statute only related to private bankers under the supervision of the superintendent of banking. Judgment reversed as to B, and affirmed as to the other defendants.

CAMPBELL v UPTON (1901) 66 App. Div. 434.

To recover proceeds of a draft. Defendant sold horses to the cashier of a bank of which plaintiff became the receiver. The cashier and defendant were strangers. The cashier, in fraud of the bank, issued and indorsed the draft, as cashier, on the bank's correspondent. The draft was paid. The cashier did refund the amount. Plaintiff sued to recover the proceeds, on the ground that the cashier had no authority to issue it. The cashier had general authority to draw and sign drafts. Judgment for defendant. Appeal.

Nash, J. The cashier had power to draw drafts for his own use or payable to his own order, on the payment of the amount to the bank. He was acting within the apparent scope of his authority when he issued this draft, and plaintiff cannot recover. Judgment affirmed.

VAN REED v PEOPLES NAT. BANK (1901) 67 App. Div. 75.

To recover for legal services. Defendant was a national bank located in a foreign state. An attachment issued and the defendant moved to vacate it. By sec. 5242, U. S. R. S., an attachment could not issue against a national bank until a final judgment had been rendered in an action in a state court. Plaintiff had not procured judgment, and there was no evidence that the bank was insolvent. A statute, subsequently passed, provided that the jurisdiction for actions against national banks should be the same as the jurisdiction for actions against state banks. Plaintiff contended that this repealed the former statute. Motion denied. Appeal.

Laughlin, J. 1. An attachment cannot issue against a national bank, whether solvent or insolvent, before final judgment in any action in a state court. 2. There being no evidence of insolvency, the bank was presumed to be solvent. 3. The subsequent statute was intended to prescribe the form for litigations by and against national banks, and did not relate to provisional remedies to be had in such actions. It did not repeal the former statute. Order reversed.

SEVENTEENTH WARD BANK v WEBSTER (1901) 67 App. Div. 228.

Negligence. The complaint alleged that S, the president of the B Bank, wrongfully and negligently made loans to the injury of the plaintiff, a stockholder of the bank. S died, and plaintiff moved to have the action revived and continued against the executors. By statute, an action against one for a wrong done to property, rights, or interest of another, survived against the wrongdoer's representatives. The president was not shown to have benefited by the wrongs. Motion granted. Appeal.

Sewell, J. 1. The president of a bank is liable for all misfeasance or non-feasance in properly performing his duties. 2. The action was properly revived and continued against the executors. 3. It is not essential that the wrongdoer benefit by the wrongful act. Order affirmed.

MAAS v GERMAN SAV. BANK (1901) 35 Misc. 193.

On deposit. F made a deposit with defendant. She subsequently died and letters of administration on her estate were granted to plaintiff in New York. Defendant had no notice of this. M was appointed administrator of F in New Jersey. M presented a certified copy of his letter, together with F's passbook, and the defendant paid him the balance due F. Three days later the plaintiff gave the defendant notice of his appointment, and demanded payment of the amount due F, which was refused. Judgment for plaintiff. Appeal.

Delehanty, J. The mere fact of the presentment of foreign letters was sufficient to put the defendant upon inquiry to discover whether our courts had acted in the matter. Defendant could have required the foreign administrator, as a condition precedent to payment, to apply for ancillary letters of administration; but when it paid the fund without resorting to those safeguards, it failed in its obligation and continued its liability. Judgment affirmed.

HANNA v PEOPLES NAT. BANK (1901) 35 Misc. 517.

To enforce liability of bank directors for mismanagement. The plaintiff was a stockholder in the defendant bank. The action was prosecuted against the bank and its directors. The bank had discounted notes of L, an irresponsible person, to the extent of two-thirds of the bank's capital stock. The bank failed, and an assessment of 100 per cent of its capital was made upon the stockholders and it resumed business. The same directors, who were previously in charge of the bank's affairs, continued in office. A number of the directors were members of a committee to examine the affairs of the bank and report to the directors weekly. The directors contended that the plaintiff should have first demanded that the bank institute this action before his commencing it.

Houghton, J. 1. The fact that the bank is now under the control of the directors, whose acts and management are questioned, permits the plaintiff to bring an action, for under those circumstances a stockholder has the right to bring such an action, without the refusal on the part of the corporation to sue, because it is fair to assume that the delinquent directors would not permit a faithful prosecution of themselves. 2. The directors of a corporation are bound to exercise care

and prudence in the execution of their trust to the same degree that men of common prudence ordinarily exercise in their own affairs. 3. Members of a committee appointed for the special purpose of examining the affairs of the bank, or looking after the discounts, have a more active duty to perform than the general board of directors, and they are liable for losses resulting from the mismanagement of the cashier, which could have been ascertained by reasonable diligence. Judgment for plaintiff.

HAGMAYER v ALTEN (1901) 36 Misc. 59.

To enforce liability of stockholders of an insolvent bank. The defendants were stockholders of record of the H Bank, which was organized in 1890. Plaintiffs were creditors of the bank. In 1894, the bank, owing to its insolvency, was dissolved by the court of common pleas. By the Banking Act of 1882, no personal liability was imposed upon the stockholders for debts of the bank. This act was repealed by the Banking Act of 1892, which imposes a liability for the debts of the corporation upon its stockholders generally to the extent of their shares. The defendants contended: 1, that the court of common pleas had no jurisdiction; 2, that it was the intention of the legislature to impose a liability only upon those stockholders, who became such after the passage of the Act of 1892.

Bischoff, J. 1. The jurisdiction of the court of common pleas, for the purposes of an action to enforce the dissolution of a corporation, was coextensive with that of the supreme court. 2. Stockholders, who became such prior to the passage of the Act of 1892, are not exempt from liability for the future debts of the corporation, except in cases where the stock is held as collateral security or in a representative capacity, or where the debts of the corporation are not payable within two years from the time they are contracted. Judgment for plaintiff.

MASS v GERMAN SAV. BANK (1901) 36 Misc. 154.

On deposit. F made a deposit with defendant. She subsequently died, and plaintiff took out letters of administration on her estate in New York. Defendant had no notice of this. M was appointed administrator of F in New Jersey. M presented a certified copy of his letters together with F's passbook, and defendant paid him the balance due F. Three days later plaintiff gave defendant notice of his appointment and demanded payment of amount due F. This demand was refused. Judgment for plaintiff. Appeal.

McAdam, J. 1. The authority of the foreign administrator was superseded and he had no power to act. The failure of the defendant to ascertain whether administration had been granted in New York County is sufficient to charge it with all the information it might have obtained. 2. The provision of the bank's by-laws as to payment on production of the passbook does not excuse the bank from the necessity of using due care in ascertaining if the person demanding payment is the person entitled. Judgment affirmed.

S. c.: 35 Misc. 193, ante p. 1099.

FREY v TORREY (1901) 36 Misc. 216.

On deposit. Plaintiff deposited a sum of money with defendant, a private banker. At the time the deposit was made, defendant knew he was insolvent. Defendant was subsequently discharged as a bankrupt. Plaintiff proved his claim in the bankruptcy proceeding. Judgment for plaintiff. Appeal.

Gildersleeve, J. 1. By accepting the deposit the defendant was guilty of fraud. 2. His discharge in bankruptcy did not relieve him from a debt founded on fraud, and plaintiff, by proving his claim in the bankruptcy proceeding, did not waive his right to bring this action. Judgment affirmed.

STATE BANK v BROWN (1901) 165 N. Y. 216.

On a cashier's bond, against the sureties. The condition of the bond was that the cashier, W, at the expiration of his term of office, and "upon request to him thus made, should either render a true account of all moneys, or pay over the money, in his possession as cashier." The cashier's books were admitted in solido as evidence per se against the sureties. There was no proof of original entries of the persons who made them, nor of the handwriting, custom or duties, and it did not appear that W made the entries in question, or that the party who did make them was dead. Computations made solely from the books, and in part from en-

tries of an earlier date than the bond, were admitted. Judgment for plaintiff. Appeal.

Vann, J. Neither the books nor the computations were admissible against the defendants because the necessary conditions precedent were not complied with by the plaintiff. Judgment reversed.

Cited: 34 Misc. 404.

CAPONIGRI v ALTIERI (1901) 165 N. Y. 255.

On promissory note against maker and indorser. Plaintiff was an individual banker. As a counterclaim, defendants set up usurious interest taken by the plaintiff on the note, and sought to recover double the sum thus paid under sec. 55 of the Banking Act. The statute declared that its "true intent and meaning is to place and continue banks and individual bankers on an equality with national banks organized under the Act of Congress of June 3, 1864." Under the decisions of the Supreme Court of the United States, the penalty imposed by the National Banking Act can only be recovered in a separate action therefor, and cannot be set up by way of counterclaim. Plaintiff contended that the rule in the federal courts was binding. Judgment for plaintiff. Appeal.

Martin, J. The equality between state and national banks for which the legislature intended to provide, can be maintained in no other way than by confining the person seeking to enforce the penalty to the same remedy, whether the bank or individual banker be organized and doing business under the state law or under the federal statute. Judgment affirmed.

Cited: 167 N. Y. 389.

COTTLE v MARINE BANK (1901) 166 N. Y. 53.

On deposit. Plaintiff's testator made a deposit with defendant and received a certificate of deposit "to the order of himself and payable to his order hereon." R held the certificate and had notified the bank that he claimed the proceeds of it. Judgment for defendant. Appeal.

Langdon, J. 1. The defendant was not bound to pay the deposit except upon the production and surrender of the certificates properly indorsed. 2. The right of action had not accrued when the action was commenced, as the presentation of the certificate properly indorsed was a prerequisite. Judgment affirmed.

TRADESMEN'S NAT. BANK v CURTIS (1901) 167 N. Y. 194.

On draft, against acceptor. The N Co. agreed with defendant to deliver coal, and defendant thereupon accepted its draft upon the W Bank. The N Co. agreed to have the draft taken up by itself or the plaintiff, if the coal was not delivered. Plaintiff's cashier knew of the agreement, but did not know that it bound plaintiff to take up the draft. The plaintiff discounted the draft for the N Co. The coal was not delivered. Defendant contended that the acceptance was without consideration, and that plaintiff secured the draft so accepted with knowledge of the facts. Judgment for defendants. Appeal.

Parker, C. J. 1. The promise of the N Co. to deliver the coal was a sufficient consideration to support the defendant's promise to pay. 2. The plaintiff was a holder of the draft in due course, and entitled to recover thereon. Judgment reversed.

Cited: 63 App. Div. 15.

CARR v NAT. BANK AND LOAN CO. (1901) 167 N. Y. 375.

To rescind a sale of bonds. S, president and manager of defendant, induced plaintiff to give him her money to invest. Acting as agent for defendant, whereby it obtained a profit, S invested the money in second mortgage bonds of doubtful value. Plaintiff, relying wholly upon S, took no active part in the purchase. When she discovered the facts she tendered the bonds to defendant, demanding the money paid for the mortgages, with interest. Defendant contended that there was no actual fraud; that S acted in his individual capacity; and that as it could not engage in buying and selling securities, its officers could not subject it to any liability therefor. Judgment for the plaintiff. Appeal.

Gray, J. 1. Actual fraud is not essential to the granting of the relief. 2.

The question of ultra vires has no place in the case. 3. The plaintiff is entitled to the possession of her property, of which she was unfairly deprived to the defendant's advantage, through its agent's misconduct. Judgment affirmed.

BRADLEY v SEABOARD NAT. BANK (1901) 167 N. Y. 427.

On deposit. C gave a mercantile agency a statement showing assets and liabilities of his firm. Among the liabilities were "Capital stock paid in \$500,000. Undivided profits, \$29,692.33." Relying on this statement, defendant discounted a note for C's firm. C's firm assigned to plaintiffs, who seek to recover a deposit made with defendant. Defendant, claiming the discount, was gained by false and fraudulent statements, disaffirmed the credit and set off the note against the deposit. A member of C's firm testified that but \$50,000 capital stock was paid in money, and the balance out of subsequent accrued profits, consisting of valueless second mortgages. The court found that the statement was false and fraudulent and had been made with the intent to obtain credit. Judgment for defendant. Reversed by Appellate Division. Appeal.

Landon, J. 1. The evidence warranted the finding by the Trial Term. 2. Plaintiff was entitled to set off the amount advanced on the note, although it had not matured at the time of the assignment. Judgment of Trial Term affirmed.

NORTH CAROLINA

BANK OF NEWBERN v TAYLOR (1813) 2 Murph. 266.

Summary proceeding on promissory note. The defendant gave the note to the plaintiff bank. Being unpaid, at maturity, the plaintiff claimed judgment on notice and motion pursuant to the act of its incorporation. The defendant claimed this was in violation of the Bill of Rights, declaring "that no man, or set of men, are entitled to any exclusive or separate emoluments or privileges from the community, but in consideration of public services."

Hall, J. The grant is constitutional, and within legitimate powers.
Cited: 2 Jones 68.

STATE BANK v CLARK (1820) 1 Hawks 36.

Money had and received. The defendants were customers of the plaintiff bank and kept large deposits there. Upon these deposits they drew checks. The plaintiff alleged that the defendants had overdrawn. Plaintiff's offer to produce the bank's books to show the amounts overdrawn was rejected. Judgment for defendants. Appeal.

Taylor, C. J. 1. The acceptance and payment of a check is prima facie evidence that the defendants had on deposit with the plaintiff money wherewith to pay it. 2. The books of the bank are inadmissible in favor of the plaintiffs. Judgment affirmed.

Cited: 1 Ired. Eq. 360; 65 N. C. 374; 108 id. 402; 126 id. 294.

BANK OF NEWBERN v PUGH (1820) 1 Hawks 198.

Debt on a sealed note. S, being indebted to the plaintiff bank, it was agreed between plaintiff and M, S's administrator, that M should make a sale of S's effects and take bonds with approved sureties from the purchaser, payable to the plaintiff. Plaintiff agreed to receive such of these bonds, as should be approved in payment of S's note. A sale was made, and M took a bond from the defendant, which was offered to the plaintiff, which refused it, and returned it to M to proceed as he might think proper. Defendant contended that, by the agreement, M became the agent of plaintiff to take and receive the bond. Judgment for defendant. Appeal.

Taylor, C. J. 1. In pursuance of the authority, the bond was taken, and the delivery was complete and irrevocable from the moment it was delivered to M. 2. When an obligee once, by his agreement, has made the deed good, he cannot afterward, by his disagreement, make it void. Judgment reversed.

Cited: 2 Ired. 392.

HEART v STATE BANK (1831) 2 Dev. Eq. 111.

Bill to compel transfer of stock. B, being insolvent, conveyed his property, including five shares of stock in defendant bank, to plaintiff for the purpose of securing his debts. B was indebted to defendant. Plaintiff, under power of attorney from B, applied to the defendant to have the stock transferred on defendant's books to plaintiff's name. Defendant refused, contending the right to retain the stock as security for B's debt.

Hall, J. 1. The stock in bank is subject to sale and purchase, and is free from incumbrances. 2. The president and directors of the bank have no lien upon the stock for any debt which the holder may owe the bank. Decree for plaintiff.

Cited: 120 N. C. 336.

STATE v BANK OF NEWBERN (1832) 3 Dev. 372.

To collect a tax. The state treasurer levied a tax of 1 per cent on the shares of the capital stock of the defendant bank, held by the president and directors of the literary fund. The defendant contended that the stock was to all intents held by the State, within the meaning of sec. 11 of the Act of 1814, which provided that no tax could be levied on or for any stock held by the State. Judgment for defendant. Appeal.

Ruffin, J. The stock was, within the meaning of the charter, held by the State, and therefore not subject to taxation. Judgment affirmed.

ALLEN v STATE BANK (1834) 1 Dev. & B. Eq. 1.

Bill, to recover bills issued by defendant bank. The plaintiffs were co-partners and had received notes of defendant bank, payable to bearer on demand at the bank. The plaintiff W, for the purpose of securing a safe transmission of said notes, cut each of the two notes in two parts and forwarded the same to A by different mails. One of these parcels was lost. Plaintiffs then notified defendant of said loss, presented defendant with the half received for payment, and offered to indemnify defendant against any loss which it might sustain by reason of the missing half. Defendant paid one-half of the sum of the notes, but refused to pay more, contending that as two years had elapsed since the loss, the plaintiffs could not recover.

Gaston, J. 1. A court of equity has jurisdiction in cases of this character. 2. Where notes are so separated, and the two parts exist and are retained by the lawful holder, the rights and liabilities of the parties remain precisely the same as before the division. The loss was not a deliberate destruction of the notes by plaintiffs. 3. The plaintiffs, on offering an indemnity, may recover the amount of the whole note. 4. There was no laches such as to affect the plaintiffs. 5. The failure to give indemnity only affects the plaintiff's claim to damages and costs. Decree for plaintiffs.

STATE BANK v ARMSTRONG (1834) 4 Dev. 519.

Debt, on a judgment. Plea: payment and setoff. The judgment was obtained against the defendant's intestate and others. At the time of the intestate's death, he had a sum on deposit with the plaintiff bank, and he owed it a newly-contracted debt, besides his liability on this dormant judgment. After his death, the plaintiff applied the amount on deposit as a payment on the new debt, and in an action against the defendant, as administrator, recovered judgment for the amount, less the deposit. He contended that the deposit was the money of the intestate, and that he, as administrator, had the right of a debtor to apply it as he saw fit. Judgment for plaintiff, allowing the setoff. Appeal.

Gaston, J. 1. A debt due from a plaintiff to one defendant only cannot be set off to a joint demand against two or more. 2. The plaintiff had a right to apply the deposit as a payment on the other debt, because it could have set off that debt if it had been sued for the deposit. The defendant had not the right to direct the application of the fund. Judgment reversed.

Cited: 4 Dev. 533; 6 Ired. 339; 5 Jones 361; 64 N. C. 154.

STATE BANK v LOCKE (1834) 4 Dev. 529.

Debt, on cashier's bond, against principal and surety. The bond was conditioned that defendant L should "account for all moneys" as cashier of a branch

of the plaintiff bank. The charter required a bond to be taken for the "good behavior" of the cashiers. The breaches assigned were: 1, conversion of a deposit in 1816; 2, failure to pay over the amount of same when he resigned in 1821; 3, refusal to pay when payment was demanded in 1830. Special plea: that, in 1821, L rendered a final account, all of which was approved and passed by the plaintiff. The court rejected evidence offered to prove that the plaintiff had paid the amount in question to the depositors. The court instructed, that the bond was not void in whole or in part, and that the lapse of time raised a presumption of payment which might be repelled. Judgment for plaintiff. Appeal.

Ruffin, C. J. 1. Money deposited in a bank becomes the property of the bank. 2. Mere variance in wording between the requirements of the charter and the conditions of the bond will not avoid the latter. The instruction as to the validity of the bond was proper. 3. The presumption of payment from lapse of time cannot arise, except where the relation of debtor and creditor exists. This condition did not subsist between the parties until the accounting in 1821. 4. The special plea was bad, because nothing in pais can discharge the obligation, but performance or satisfaction. Judgment affirmed.

Cited: 5 Ired. 666; 122 N. C. 316.

ATTORNEY-GENERAL v BANK OF NEWBERN (1835) 1 Dev. & B. Eq. 216.

Information, to recover a state tax from individual stockholders. The charter provided for a tax to be levied "on all stockholders in the bank, except on the stock holden by the State to be paid by the president or cashier." This tax was paid from 1816 to the filing of the information, out of the common funds of the bank, and was not charged to each stockholder, but to the whole corporation. The State was a large stockholder. This proceeding was to require the defendant to pay to the State the loss to the State by reason of the whole tax not having been collected from the individual shareholders. Demurrer. Overruled. Appeal.

Ruffin, C. J. 1. The natural construction of a charter is that all the privileges conferred and all the burdens imposed relate to the corporation as a whole. 2. The separate property is not within reach of the president or cashier, who is required to make the payment, and the tax must therefore be paid from the common fund. 3. The tax is not payable out of the profits as profits. Decree reversed.

Cited: 4 Jones Eq. 290.

ATTORNEY-GENERAL v STATE BANK (1837) 1 Dev. & B. Eq. 545.

Information, for a settlement of account. The defendant's charter provided that the State might subscribe for a certain amount of stock, to be reserved for it and paid, when convenient. An amendment provided that for the portion unpaid by the State, the bank, on declaring a dividend of profits, could retain 4 per cent interest out of such dividends. The bank declared dividends and retained the 4 per cent interest. When these dividends were declared, there were no profits. The bank contended that its decision, in good faith, as to a dividend of profits was final, and it could retain the interest. Later a statute provided for winding up the bank. Under this, a dividend on the paid-up subscription of the State was declared; the bank claiming the right to charge the State with the whole amount of its unpaid stock at this time.

Gaston, J. 1. Public convenience is not a subject of judicial inquiry, and the state may defer the payment of the unpaid stock until the expiration of the charter. 2. The debt of the State was not a debt of the corporation, independent of the stock; but in a division of the capital it must be considered as a part of the bank's capital in the hands of the State. 3. The bank was not authorized to retain the whole amount for the unpaid stock, as the debt was not yet due. 4. A dividend which breaks in upon the capital is a dividend, not of profits, but of capital. 5. The State was not liable for the payment of interest, except out of dividends of profits and it is entitled to receive, on a partial division, an aliquot part of what it would have been entitled to receive on a complete division. Decree accordingly.

HORAH v LONG (1839) 4 Dev. & B. 274.

Debt, on a bond. The bond was payable to "H, Cashier," and "negotiable and payable at" the S Bank. Judgment was rendered for the plaintiff. The defendants had the judgment set aside and pleaded over to the same action. The

plaintiff again obtained a verdict. The defendants then moved for an arrest of judgment on the grounds: 1, that the charter of the S Bank had expired; 2, because it appeared upon the record that there had been a discontinuance of the suit in the court where the first judgment was obtained. Motion overruled. Judgment for plaintiff. Appeal.

Gaston, J. 1. The expiration of the charter in no way affects plaintiff's right of recovery. 2. The word "cashier" was but descriptive of the individual. 3. The legal interest was in plaintiff, and he properly brought the action. 4. There has been no discontinuance of which the defendants can take advantage. Judgment affirmed.

Cited: 2 Jones 4.

DEWEY v BOWERS (1844) 4 Ired. 538.

Assumpsit on promissory note against the makers. The note was made to procure a loan at the S Bank for the defendant B. The other defendants were accommodation makers. The plaintiff, cashier of the S Bank, was payee. On discounting the loan, the bank retained, beside discount, interest in advance. When the note fell due, B offered a New York draft, payable to himself, in part payment, and cash for the residue. The bank agreed to take the draft and send it to New York for collection; the proceeds, if paid when the draft fell due, to be applied toward the payment of the note. The S Bank, thinking the draft had been paid, delivered the note, canceled, to B. The draft was dishonored at maturity. On an agreed case. Judgment for plaintiff against all the defendants. Appeal.

Daniel, J. 1. The mere giving up of the note, under the mistake of facts, was not payment or satisfaction. 2. The New York draft never having been paid, the note was not paid. 3. As the money was loaned, the taking of the interest was not usurious. Judgment affirmed.

McLEAN v SHUMAN (1845) 3 Ired. Eq. 457.

Where the evidence is conflicting, whether or not a bank paid money of one man to another, without taking something to charge him, the bank will be liable for its failure to exercise due care.

BANK OF CAPE FEAR v EDWARDS (1845) 5 Ired. 516.

Assumpsit, to recover money paid to the defendant sheriff, under an assessment of taxes on the banking house of the plaintiff. The act of incorporation provided for a tax of 25 cents annually on each share of stock owned by individuals, and that it should not be liable to any further tax. Nonsuit. Appeal.

Nash, J. The act exempts the property of the plaintiff from the payment of all taxes, county, or state, except that specified. Judgment for plaintiff.

Cited: 7 Ired. 58; 1 Phill. 130.

RUNYON v LATHAM (1845) 5 Ired. 551.

Assumpsit, on a promissory note against maker. The note was payable to plaintiff, as cashier of F Bank. Defendant, in part payment of the note, gave the plaintiff his draft for \$300 to be discounted in plaintiff's bank. The bank did not discount the \$300 draft, which came back protested. By another draft, however, and money deposited by defendant, the full amount of the note was made up. Defendant also paid the expenses of the protested draft, except the damages, which he refused to pay. The plaintiff applied to the payment of the damages part of the sum given to be applied on the note. The court left it to the jury to find whether the defendant at the time of the settlement directed the plaintiff to apply the same to the discharge of the note now sued on, and charged them that if he did so, plaintiff was bound to make the application accordingly. Judgment for defendant. Appeal.

Ruffin, C. J. 1. The plaintiff can have no ground to complain of the court's instruction to the jury. 2. The defendants having paid in the fund as a full payment, and the plaintiff having accepted the money as such, it would now be unfair to divert these funds from the payment of the note and apply them to the other debt, which defendant denies. Judgment affirmed.

Cited: 11 Ired. 591; 5 Jones 399.

STATE BANK v FORD (1845) 5 Ired. 692.

Where a bank discounted a note under an agreement that the borrower should receive Virginia bank notes, and make payment in North Carolina bank notes, the former being six or seven per cent below specie, Held, that the transaction was prima facie usurious; and that it would be conclusively so, if the bank did not contract to make them good as cash.

BANK OF CAPE FEAR v DEEMING (1846) 7 Ired. 55.

Under the bank's charter, imposing a tax of 25 cents on each share of stock, and exempting the bank from further tax, the bank is not liable for any other town, or county or state taxes.

STATE BANK v BANK OF CAPE FEAR (1851) 13 Ired. 75.

Assumpsit on bank note owned by plaintiff, payable to bearer on demand at the defendant bank. Plea: setoff. Plaintiff's cashier presented the note to defendant for payment, and defendant's cashier offered two bank notes issued by the plaintiff, payable on demand, one to bearer at plaintiff's branch bank at M, and the other at its branch bank at W. The Act of the General Assembly of 1850-1 declared that when a bank or its branch presented a note of another bank for payment, the latter might pay its note with a note or notes of the same, without regard to the place where the same may be payable. Plaintiff contended that the Act of 1850 was unconstitutional, as impairing the obligations of contracts, and that the payment should be in coin or silver. Judgment for defendant on agreed case. Appeal.

Ruffin, C. J. 1. The offer of the notes did not amount to payment, and does not bar by way of setoff. 2. A note made payable in its body on demand at a certain place, becomes due only upon a presentment at that place. 3. A statute requiring the creditor, in his natural capacity, to take from his debtor a note, in payment of a sum due to him at one place, which had never been there demanded, is incompatible with the provisions of the Constitution of the United States, which restrains a state from making anything but gold and silver coin, a tender in payment of debts, and from passing any law impairing the obligation of contracts. The plaintiff was therefore not bound to take the notes of its branches in payment. Judgment reversed.

Cited: 2 Jones Eq. 32; 2 Jones 25.

STREATER v BANK OF CAPE FEAR (1854) 2 Jones Eq. 31.

Where a bank note payable on demand at a particular place is lost, no remedy will be afforded in a court of equity before a demand has been made at the place designated. Equity does not create law but follows it.

STATE v BANK OF FAYETTEVILLE (1856) 3 Jones 450.

Where the bank issued a note for less than three dollars, Held, that sec. 6, ch. 36, of the revised code, making such an act a misdemeanor, did not apply to banks.

STATE v MATTHEWS (1856) 3 Jones 451.

Where the teller of a bank passed a bank bill of a less sum than three dollars, Held, that he was indictable under ch. 36, of the revised code, for passing such bills, since January 1, 1856.

ATTORNEY-GENERAL v BANK (1858) 4 Jones Eq. 287.

Bill to compel payment of taxes. The Revenue Act of 1856, ch. 34, sec. 133, provided that every bank, except the State Bank, should pay a certain annual tax on the stock owned by shareholders, provided the tax did not reduce the annual profits below six per cent. Plaintiff contended this amounted to a tax on profits. The defendant bank claimed the first tax was a violation of its contract with the State, in that it was an additional tax on its franchise. Its charter provided that the bank should pay annually a certain amount on each share of its capital subscribed for and paid into the State treasury. The Bank, under its charter, paid this annual tax, which had always been held to be a franchise tax. Moreover, the legislature had required taxes upon franchises to be paid into the public

treasury, while the tax upon the dividends of stockholders had been made payable to the sheriff of the county. Argument on demurrer removed to this court.

Battle, J. 1. It was the design of the legislature to tax the franchise, and not the profits of the shareholders. 2. The tax could not, under the Constitution of the United States, be demanded over and above that agreed to be paid for the franchise under the terms of the contract, and the act was, therefore, unconstitutional. Bill dismissed.

Cited: 64 N. C. 162; 71 id. 505; 89 id. 306.

WEBB v BANK (1858) 5 Jones 288.

Assumpsit on a bank note. The note was issued by defendant, payable at its branch at W. The summons was served on one of the directors appointed for the branch, who was not a director of the parent corporation. The defendant's charter provided for 11 directors to be elected to manage the affairs of the corporation, and gave them authority to appoint directors for the various branches. The revised code, ch. 26, sec. 24, provided that service against an incorporated company should be made by leaving a copy with the president, head, cashier, treasurer or director of such company. Plea in abatement to the writ. Judgment for plaintiff. Appeal.

Battle, J. Although the note was payable at the W Branch, it was the debt of the whole corporation, and the process should have been served upon one of the directors elected by the stockholders for the management of the corporation. Judgment reversed.

Cited: 122 N. C. 404.

CRAWFORD v BANK OF WILMINGTON (1867) 1 Phill. 136.

Motion to set aside a judgment. The return by the sheriff was: "Served a copy of the within on M." At the return term, judgment was taken by default for the amount of the bank notes sued on, with interest thereon from the date of issue of the notes. The grounds of the motion were: 1, that the return did not show that M was president of the defendant; 2, that under the Act of 1861, defendant was not compelled to plead for twelve months, and therefore judgment taken at the return term was void; 3, that too much interest was allowed. Motion granted. Appeal.

Battle, J. 1. Notice to the defendant of the suit was accomplished by leaving a copy with one of its officers; in any event, the defect was cured by judgment. 2. The defendant was bound to enter its appearance before it could claim the benefit of the act extending the time for pleading. 3. The action being on notes of a bank, the cause of action did not accrue until a demand and refusal, and the notes did not bear interest until that time. Order reversed.

FORT v BANK OF CAPE FEAR (1868) 1 Phill. 417.

On deposit. The plaintiff deposited certain money with defendant, and received a certificate setting forth the deposit "in current notes of different banks of the state, payable in like current notes." Several years thereafter, when payment was demanded, the defendant refused to pay in United States currency, but offered to pay in the notes of the state banks then worth about 20 cents on the dollar. Judgment for plaintiff for 20 per cent of the amount deposited. Appeal by plaintiff.

Pearson, C. J. 1. But for the stipulation "payable in like current notes," the plaintiff would have been entitled to demand specie. 2. When the certificate was presented, none of the notes referred to being current, the defendant could not perform its stipulation, and it must bear the loss. Judgment for plaintiff for full amount.

BOYDEN v BANK OF CAPE FEAR (1871) 65 N. C. 13.

On deposit. At the beginning of the war, the balance on deposit was in par funds. During the war, the dealings were in confederate treasury notes. At the close of the war, the defendant refused to pay the balance to the credit of the plaintiff except in confederate notes. The plaintiff also made special deposits of bank notes with the defendant. Plaintiff made demand in March, 1864, which was refused. The defendant offered to prove the custom at its branches as to

payment of deposits made in confederate currency, for the purpose of showing that the relation of the parties was that of bailor and bailee. Excluded. The plaintiff offered in evidence his bank book showing debits and credits; the defendant asked the court to charge that the charges on the debit side should be appropriated to the discharge of the first items on the credit side in seriatim. Refused. The court charged the plaintiff was entitled to receive in good money the value of any deposit which might be due him, with premium added. Judgment for plaintiff. Cross appeals.

Dick, J. 1. The plaintiff cannot be affected by any different custom adopted by the defendant, without notice. The fact that the plaintiff also made special deposits, does not tend to show that he had such notice. 2. The defendant's implied contract was to pay funds equivalent in value to the funds deposited. 3. The plaintiff is entitled to the value of the currency at the time of deposit; and the payment of the plaintiff's drafts discharged, pro tanto, the debt. 4. The account should be adjusted by deducting each payment from the next preceding deposit, and when the deposits are in excess of payments, then a balance should be struck, and the value of excess ascertained according to a scale. The value of excess, with premium added, will constitute the true balance. 6. The bank is bound to keep the property thus deposited with the same care that it keeps its own property. Judgment reversed.

Cited: 65 N. C. 53; 72 id. 307; 83 id. 83; 101 id. 609; 107 id. 200; 114 id. 342; 114 id. 495.

EXCHANGE BANK v TIDDY (1872) 67 N. C. 169.

On promissory note. Motion to dismiss on the ground that the plaintiff corporation was in process of dissolution. Denied. Motion for continuance on the ground that the plaintiff had amended by joining its receiver as a party. Denied. Judgment by default. Rule upon the plaintiffs to show cause why they should not accept the bills of the plaintiff bank in payment. The plaintiff contended that the bank not being a North Carolina corporation, the Acts of 1868-9, relating to setoff of bank bills, did not apply. Rule dismissed. Appeal.

Rodman, J. 1. The plaintiff bank, though in liquidation, is kept alive by the South Carolina Statute, until its assets shall have been collected. 2. The defendant was not entitled to a continuance, as the amendment in no way altered the defense or changed the pleading. 3. The acts relating to setoff of bank bills apply to all banks suing a citizen of this state in the courts of this state. And under a proper construction of the acts, all banks suing must be regarded as chartered by this state. 4. The defendant is entitled to satisfy the judgment by payment of the plaintiff's bills. Judgment accordingly.

Cited: 70 N. C. 482; 90 id. 232.

BANK OF CHARLOTTE v HART (1872) 67 N. C. 264.

Rule on plaintiff to show cause why it should not accept its bills, with interest from the date of tender, in satisfaction of judgment herein. The Act of 1869-70 required banks to accept their bills in satisfaction of judgments. Plaintiff contended that the act was unconstitutional: 1, in that it made bank bills legal tender; 2, because interest could not be allowed on the bank bills. Rule discharged. Appeal.

Pearson, C. J. 1. The statute merely extends the principle of setoff and is valid. 2. Interest is an incident which the law attached to a debt not paid when due, and, since the judgment was drawing interest, the bank bills should also bear interest from the time the plaintiff refused to accept them in satisfaction. Order reversed.

Cited: 67 N. C. 174.

BLOUNT v WINDLEY (1873) 68 N. C. 1.

Motion to compel the plaintiff to accept bank bills in satisfaction of judgment. The plaintiff, as commissioner in insolvency of a bank, under an act of the general assembly for the benefit of such creditors as proved their debts within twelve months, recovered a judgment. Before execution issued, the defendant tendered bills of the bank in payment. Motion granted. Appeal.

Pearson, C. J. 1. The defendant had the right to tender the bills of the bank in payment to the bank. 2. The assignee and creditors stand in the shoes of the

bank; and neither the bank by its own act, nor by the act of the general assembly, can deprive the defendant of the right to make payment in such bills. Order affirmed.

LILLY v COMMISSIONERS (1873) 69 N. C. 300.

To reform tax lists, by striking therefrom two items: 1, money deposited in bank, consisting of national bank notes and United States treasury notes; 2, solvent credits. The plaintiff contended that these items were not taxable, because they were the proceeds of a business which was taxed. Proceeding dismissed. Appeal.

Reade, J. 1. Money deposited in a bank becomes the money of the bank, and the depositor becomes the holder of a credit. 2. The state has power to tax United States treasury notes, national bank bills and solvent credits. 3. Proceeds of a business in this form are as much liable to taxation as if they had been converted into real estate. Judgment affirmed.

Cited: 69 N. C. 500, 512; 74 id. 756; 106 id. 140.

RUFFIN v COMMISSIONERS (1873) 69 N. C. 498.

Petition, to strike from the plaintiff's tax list an item of money on deposit, on the ground that the deposit was made in United States treasury notes and national bank notes. Order for petitioner. Appeal.

Reade, J. Whether treasury notes or national bank notes are taxable or not, after the plaintiff put them in the bank as a general deposit, she held simply a credit, which is taxable. Order reversed.

Cited: 69 N. C. 307.

SIMONTON v LANIER (1874) 71 N. C. 498.

On promissory note. Motion to vacate a judgment taken by default, on the grounds: 1, excusable neglect in suffering the default; 2, that the note sued on was usurious. The note was payable to the plaintiff as cashier of the S Bank, and interest had been computed thereon at the rate of one and one-half per cent a month. The bank's charter empowered it to discount notes upon such terms and rates of interest as may be agreed upon. The general statute fixed the legal rate of interest at six per cent, but permitted eight per cent to be charged where both the consideration and the rate were set forth in the obligation. Motion denied. Appeal.

Bynum, J. 1. Application to open a default on the ground of excusable neglect, is addressed to the discretion of the court, and its decision thereon is final. 2. The charter of the bank does not confer upon it the right to charge a greater rate of interest than that established by the general law. Judgment reversed.

Cited: 71 N. C. 507; 82 id. 136; 93 id. 190; 96 id. 303; 103 id. 130; 104 id. 221; 116 id. 911, 922; 118 id. 491; 119 id. 431; 122 id. 38, 350; 123 id. 667; 124 id. 234; 125 id. 219.

WILSON v BANK OF LEXINGTON (1875) 72 N. C. 621.

On bank bills, against stockholders. The defendant had a branch at G where, some of its bank bills were payable. The original stockholders were liable in twice the amount of their subscription for the redemption of the bank's bills. The branch at G was made an independent bank. At that time the original stockholders, including the codefendant A, covenanted with plaintiff billholders, to redeem all bills payable at G. Both banks became insolvent. Demurrer. Misjoinder of parties plaintiff and defendant; misjoinder of causes of action; no demand; and premature action for want of reasonable time. Sustained. Judgment for defendant. Appeal.

Reade, J. 1. It is a creditor's bill and all the creditors are, or may be, parties, and share the recovery. 2. The defendant bank represents its stockholders who are secondarily liable. 3. The several causes are all connected, and can be settled in the same action. 4. The demand was not made of the branch bank of G, which has gone out of existence, but at the bank of G, which had undertaken to redeem them, and is therefore valid. A reasonable time has elapsed. 5. The billholders are entitled to all the securities which have been provided for their redemption. Judgment reversed.

Cited: 81 N. C. 48; 88 id. 440.

VON GLAHN v HARRIS (1875) 73 N. C. 323.

To enforce stockholder's liability. The plaintiff was a creditor of the insolvent C Bank and the defendant one of the stockholders. Other creditors of the bank, were not joined as parties. The statute provided that "in case of insolvency or ultimate inability of the bank to pay, the individual stockholders shall be liable to creditors in sums double the amount of the stock held by them respectively." The defendant contended that the bank and other solvent stockholders should be made parties. Judgment for defendant. Appeal.

Pearson, C. J. One creditor cannot maintain an action, but must sue in the name of himself, and all of the other creditors who will become parties to the action and prove their debts. 2. The creditors are joint obligees, and must all be parties. Judgment affirmed.

Cited: 73 N. C. 337; 81 id. 47, 471.

BANK OF GREENSBORO v COMMISSIONERS (1876) 74 N. C. 385.

To set aside tax on bank stock. The plaintiff returned to the township trustees for assessment its capital stock, for which certificates had been issued to the stockholders. A tax had been levied on the stock for county and state purposes. The defendants, in pursuance of the city charter, included the capital stock of the plaintiff in the list of taxes for collection. The plaintiff contended that under the city charter the defendants had no power to collect taxes on bank stock. The city charter authorized it to collect taxes on all personal property whatever, which may at the time be subject to taxation by the state. The charter of the bank required it to give in its stock for taxation. Judgment for plaintiff. Appeal.

Rodman, J. The defendants have power to tax the capital stock of plaintiff. Judgment reversed.

MERCHANTS NAT. BANK v MYERS (1876) 74 N. C. 514.

On promissory note. Plea: usury. The note was made by the defendant payable to the plaintiff, a national bank, with interest after maturity at 8 per cent per annum. The plaintiff reserved interest at the rate of 12 per cent per annum and paid the defendant the balance. Judgment for defendant. Appeal.

Reade, J. National banks are subject only to the penalties prescribed by the National United States Banking Act for taking usury. Judgment reversed.

KYLE v MAYOR OF FAYETTEVILLE (1876) 75 N. C. 445.

Injunction, to restrain the collection of taxes. The plaintiff was a non-resident owner of shares in a national bank. The defendants, the city taxing body, placed this stock on the assessment list, and defendant M levied upon the plaintiff's real estate to satisfy the tax. The Constitution, Art. 5, secs. 3 and 7, and Art. 7, sec. 9, provide that all taxes must be imposed upon all real and personal property. The National Banking Act confers upon the states in which the banks are located the power of taxing the shares of national banks, provided: 1, that the tax shall be no greater than is imposed upon other moneyed capital in the hands of individual citizens of such state; 2, that shares owned by non-residents of any state shall be taxed in the city or town where the bank is located, and not elsewhere. Judgment for plaintiff. Appeal.

Bynum, J. 1. Congress has impressed these bank shares with the character of taxable property in the state, where located. 2. The constitution requires that all the property of the plaintiff in the state is to be taxed equally. 3. The defendant town possesses the power to tax bank shares. Judgment reversed.

Cited: 79 N. C. 269; 91 id. 463; 93 id. 138; 94 id. 713; 106 id. 128; 111 id. 400; 112 id. 702.

KYLE v MAYOR OF FAYETTEVILLE (1876) 75 N. C. 449.

Facts reported in 75 N. C. 445, *supra*.

Bynum, J. 1. No distinction can be made between resident and non-resident shareholders. 2. The constitution and the revenue laws require the tax to be levied on national bank shares. Judgment reversed.

PLANTERS NAT. BANK v FIRST NAT. BANK (1876) 75 N. C. 534.

On draft. The plaintiff sent the draft to the defendant for collection. The defendant transmitted it to B & G, bankers, in Washington for collection. After collection and before turning over the money, B & G failed. When the draft was sent to B & G, they were in good standing and regarded as solvent. The defendant was to receive no compensation for collecting the draft. Judgment for defendant. Appeal.

Bynum, J. If the bank acted in good faith in selecting a proper agent where the draft was payable, there is no principle of public policy or justice by which the defendant, which was to receive no compensation, should be made liable for the default of the sub-agent. Judgment affirmed.

Cited: 90 N. C. 104; 114 id. 345.

BANK OF NEW HANOVER v KENAN (1877) 76 N. C. 340.

On check. The defendant had overdrawn his account, and the plaintiff bank had called upon him to make good the deficit. The defendant had sold, but not delivered, to M & Co., a quantity of rosin, and to enable him to meet the plaintiff's demand, M & Co. on September 6, gave the defendant their check on plaintiff for the rosin payable on September 9. The defendant offered this check to the plaintiff in payment of the balance. The president of the plaintiff received the check, and attached thereto a deposit slip. The jury found the check was received for collection, but no effort was made to collect it. On September 13, M & Co. failed, and the evening of the same day the defendant received notice that the check had not been paid. Plaintiff knew that M & Co. were in a bad condition financially. Judgment for plaintiff. Appeal.

Bynum, J. 1. When a bill, note, or check is placed with a bank for collection, it is the duty of the bank to take the necessary steps to its prompt payment by making presentment at maturity; and if it be not then paid, the bank must at once fix the liability of the drawer, by having it protested, and by giving due notice of its dishonor to the depositor for collection. 2. The measure of damages is the actual loss which has been suffered, and, *prima facie*, that loss is the full amount of the bill or note. 3. A promise to pay made thereafter by the depositor is only a *nudum pactum*. Judgment reversed.

ATTORNEY GENERAL v SIMONTON (1878) 78 N. C. 57.

Quo warranto. The complaint alleged the act of legislature granting the charter to the bank; the condition upon which the organization could be made; that these conditions were not performed; that S, without the consent of the other corporators, had advertised that the bank was organized, he being the cashier, and the other corporators directors; that they held such offices and conducted the bank without authority of law; that S died and bequeathed all his estate to his wife, a defendant, who had taken possession of all the assets of the bank, and continued to usurp the authority exercised by her testator. Defendant failed to answer. Judgment for plaintiff. Appeal.

Rodman, J. 1. The omission of the corporators to organize under the charter is not sufficient grounds for declaring a forfeiture for non-user. 2. The usurpation of S had ceased, and if others, who are living, usurp the same offices, the state has no interest in the right of an individual to an office in a private corporation. Judgment reversed.

Cited: 86 N. C. 497; 117 id. 507.

BANK OF NEW HANOVER v WILLIAMS (1878) 79 N. C. 129.

On draft. On April 6, the plaintiff bank took a mortgage from M & Co. to secure payment of advances. This mortgage was duly registered. On September 9 and 10, M & Co. raised money from the plaintiff on a shipment of rosin to the defendants. At the time, the balance due on the original advancement exceeded the amount in controversy. M & Co. shipped the rosin on September 10 to the defendants at New York, with a bill of lading, and a letter stating that he had drawn on them for the amount in favor of the cashier of the plaintiff. The defendants sold the rosin and placed the proceeds to the credit of M & Co. On September 13, M & Co. failed, which fact the defendants did not know when they refused to accept the draft. On September 22, the plaintiff telegraphed the defend-

ants: "We hold registered mortgage on the rosin shipped to you by M & Co. and must follow it, if draft is not accepted." This was the first information the defendants had of plaintiff's claim. Sec. 11 of the plaintiff's charter provided that it could aid planters, miners, manufacturers and others by advancing them money, taking in writing a lien on the crops raised or to be raised, or upon the present or prospective products of mining operations, or manufactures. The plaintiff contended that if the mortgage did not cover the goods, there was an equitable assignment. Judgment for defendants. Appeal.

Bynum, J. 1. The section cannot by implication extend to merchants. 2. The plaintiff was competent to take the mortgage to secure a present or past indebtedness, but it cannot be extended so as to rest in the mortgagee the legal title to goods purchased four months after its execution. 3. To constitute an equitable assignment, the intent and agreement to make the transaction such must appear, and the plaintiff's telegram showed that it did not then claim or rely upon the agreement of M & Co as constituting an equitable assignment. 4. The defendants are free to enforce their factor's lien against the proceeds of the rosin. Judgment affirmed.

BUIE v COMMISSIONERS OF FAYETTEVILLE (1878) 79 N. C. 267.

Injunction to restrain the collection of taxes. The plaintiffs were citizens of the state and owners of shares of stock in a national bank at F. They were not residents of F and did not carry on business there. The defendants, tax commissioners, assessed their share for municipal taxes and authorized defendant M, the town tax collector, to collect them. M levied on personal property of the plaintiffs and advertised it for sale. Laws of 1874-75, ch. 184, sec. 7, requires all personal property, including stock, in national banks, to be given in the township, in which the person so charged resides on April 1. Judgment for plaintiff. Appeal.

Smith, C. J. The shares in national banks owned by residents of the state may be assessed under the act of Congress, either at the place where such owners reside, or at the place where the bank is located, as the legislature of a state may elect and under existing state laws such shares must be taxed, and can be taxed only, at the place where the owner or person who is required to list them, resides. Judgment affirmed.

Cited: 80 N. C. 155; 82 id. 419; 99 id. 214; 116 id. 446.

MOORE v MAYOR AND COMM'RS OF FAYETTEVILLE (1879) 80 N. C. 154.

Injunction to restrain the collection of a tax. The plaintiff transacted business in F, but resided outside the corporate limits. He was assessed for an ad valorem tax on shares of stock of a bank in F, such as was assessed upon similar property possessed by resident owners. The plaintiff moved for an injunction restraining the collection of the tax. By the Act of 1864, sec. 4, amendatory of the act of incorporation, the defendants were empowered to impose the same tax for municipal purposes upon all persons whose ordinary vocations were pursued within the corporate limits of the town, though resident beyond the corporate limits, in like manner, and to the same extent, as upon persons resident within the corporate limits; provided the non-residents thus taxed should have the right to vote at municipal elections. Motion denied. Appeal.

Smith, C. J. 1. The intention and effect of the act was to make such a person, for purposes of taxation, an actual resident of the town. 2. If the constitution denies to the plaintiff the right to vote for office of the town government, for want of actual residence within its boundaries, he shares in the municipal privileges, and is not exempt from the common burden by which these privileges are secured to himself and others. 3. It is quite as much the duty of the authorities, in exercising the power of taxation, to provide for an existing legal obligation, as for the expense of governing the town and managing its affairs; and both are "for municipal purposes." Order affirmed.

Cited: 99 N. C. 213; 115 id. 283.

LONG v BANK OF YANCEYVILLE (1879) 81 N. C. 41.

Creditor's bill to enforce the liability of stockholders. The action was commenced in 1872, by the plaintiff's intestate, who alleged that he was the owner of notes issued by the defendant bank; that the bank was insolvent previous to Janu-

ary, 1866; and that there were no creditors, or billholders of the bank known to the intestate, other than himself. Sec. 12, Act of 1852-53, provides "that in case of an insolvency of the bank hereby created, or ultimate inability to pay, the individual stockholders shall be liable to creditors in sums double the amount of the stock by them separately held in said corporation. In 1866, the stockholders filed a bill in the name of the bank and proceeded to wind up its business. The assets admitted of a very small dividend among the creditors, which was paid only upon surrender of their claims. The intestate was not a party to the proceeding and did not participate in the division of the fund. The defendants moved to dismiss the complaint: 1, because none of the bills sued for bore date subsequent to November 24, 1860, when the bank failed, and the liabilities of the stockholders accrued and consequently they were outlawed; 2, because the action is in the name and for the benefit of one instead of all of the creditors; 3, because the proceedings in the court of equity are a bar to the plaintiff's action. Judgment for defendants. Appeal.

Smith, C. J. 1. While the controverted allegations of fact remain open and undisposed of, it is irregular to entertain a motion to dismiss and put the cause out of court. 2. The face of the bills is not evidence of the date and re-issue, nor does the Statute of Limitations, in its ordinary acceptance, apply to bank bills which circulate as money. 3. The action is in legal effect a creditor's bill prosecuted on behalf of all the creditors. 4. The general assembly has no power to coerce a creditor into an acceptance of his share of the assets of an insolvent debtor corporation, as a full discharge of his debt and of his right to look to the stockholders upon their collateral liability. Judgment reversed.

Cited: 82 N. C. 414; 107 id. 20; 108 id. 286.

BANK OF STATESVILLE v PINKERS (1880) 83 N. C. 377.

On draft. The defendants drew the draft on L, waived acceptance, and delivered it to the plaintiff bank for an antecedent indebtedness. The draft was indorsed in blank. The defendants contended that the plaintiff's failure to present the draft at its maturity to the drawees for payment discharged him. The plaintiff was allowed to ask questions to prove that there was a general custom with the banks to receive papers for discount without any purpose or practice on its part to present them for payment, and that the defendant knew of it when they delivered the draft. The court instructed that the jury must base their verdict on the evidence and should not be influenced by the non-introduction of a witness unfavorable to plaintiff. No exception was taken to the sufficiency of the evidence. Judgment for plaintiff. Appeal.

Smith, C. J. 1. When a leading question can be put is a matter resting in the direction of the court, and cannot be assigned as error. 2. Proof of usage among banks in a particular locality has been allowed to modify the days of grace as prescribed by the law-merchant, and to affect those dealing without notice. 3. The verdict of the jury is conclusive, and no exception can be heard for the first time in this court as to the insufficiency of the evidence to support the finding. 4. Although the indorsement is in blank, the plaintiff's name could have been inserted at the trial, as indorsee, waiving any objection that it had no beneficial interest. 5. The instruction was proper. Judgment affirmed.

FIRST NAT. BANK v ALEXANDER (1881) 84 N. C. 30.

On check. N, a creditor of defendant, drew his check on defendant in favor of plaintiff, a bank. It was presented by plaintiff to defendant who took it up and gave his own check on the M Bank, which was located a few hundred feet from the plaintiff. No demand was made on the M Bank during that day, and it failed at the opening of banking hours the next day. The M Bank was insolvent on the day the check was drawn, but the plaintiff had reason to suspect it. The defendant had funds in the M Bank sufficient to pay the check, and contended that the fund had been lost through the negligence of the plaintiff. Verdict for plaintiff. New trial granted. Appeal.

Smith, C. J. 1. The holder of a check, unless his diligence is quickened by information of the precarious condition of the drawee, and he then unreasonably delays to make demand of payment, may present it during business hours on the next day. 2. The verdict, while acquitting the plaintiff's officers of personal knowledge, charges them with having good reason to suspect the impending insolvency

of the M Bank. Under these circumstances, it is not error to set aside the verdict and remit the case for a new trial. Order affirmed.

Cited: 92 N. C. 642; 97 id. 74; 113 id. 316.

HAUSER v TATE (1881) 85 N. C. 81.

Creditor's bill to enforce the liability of bank officers. The general assembly granted a charter to the S Bank, authorizing an organization when 200 shares were subscribed and the money paid. Under the supervision of C, one of the commissioners, a stock subscription book was opened in which were entered the name of S for 180 shares and the names of the defendant and three others for five shares each. The shares taken by the defendant and one of the others were on the day of making the subscription transferred to S. The other two alleged subscribers denied the genuineness of their signatures. There was no proof of the amount or kind of funds paid in upon the subscription, or of any organization under the act, or of the election of officers and directors previous to the assumption and exercise of the corporate rights. The bank commenced operations through the agency of S, professing to be the cashier, with the defendant as president, which was communicated to the public in advertisements and printed letter heads. The plaintiff, with the assurance that the bank was managed by men of prudence and financial skill, deposited money with it which was lost by S's mismanagement. Judgment for plaintiff. Appeal.

Smith, C. J. 1. The defendant voluntarily assumed a position, the obligation of which demanded a faithful discharge of his duties, and if he bestows no attention on the business, it is his own neglect from which others should not suffer. 2. The assumption of the office of president is a positive act, the consequence of which he cannot evade by his failure to inquire into the existence and character of the organization. It is equivalent to a direct indorsement. 3. If the defendant's legal undertaking were collateral and subsidiary the damages, would consist in the money actually lost. 4. The declarations of S, and the letters written by him as cashier, are competent as against all the parties, and should be submitted to the jury. Judgment affirmed.

Cited: 115 N. C. 483; 118 id. 308, 320, 322.

OLDHAM v FIRST NAT. BANK OF WILMINGTON (1881) 85 N. C. 240.

To restrain the sale of real estate. The plaintiffs executed two mortgages, one to the defendant, a national bank, and the other to defendant B. The third count alleged that the mortgage to the bank was made up of three items: 1, a debt due; 2, a secret trust for the bank to conceal the true nature of a mortgage, which plaintiff alleged was given to evade the Act of Congress forbidding a bank to take real estate security except for an antecedent debt; 3, the amount of an overdrawn account. The mortgage bore a different rate of interest than the items had borne, and the plaintiff insisted that it was a contemporaneous claim and within the prohibition of the act of Congress. The sixth count alleged that B demanded another mortgage for further security, and caused it to be so written as to make it appear to be an additional indebtedness; that B failed and refused to rectify the error on the register's books. The seventh count alleged that the first note and mortgage were continuing parts of usurious transactions between the plaintiff A and the bank through its agent B; and that usurious interest had been received by the bank. The eighth count was to recover from the bank twice the amount of the usurious interest paid. Demurrer to the 3d, 6th, 7th, and 8th counts of action. Sustained as to 3d, 6th, and 7th causes. Overruled as to 8th. Plaintiffs allowed to amend as to 7th cause. Appeals.

Ruffin, J. 1. The mortgage is not obnoxious to the act of Congress. 2. The statute provides a remedy for a mistake in registration, and if, notwithstanding this, the plaintiffs submitted to loss without any effort to relieve themselves, the consequences of their failure cannot be thrown upon others. 3. No state law upon the subject of usury can be made to apply to national banks, and the only rules of law, which touched them in this respect, are the provisions of the statute under which they are organized. 4. An action for money had and received in excess of interest paid does not lie against the defendant bank, as it is not the remedy given by statute. The judgment sustaining the demurrer to the

3d and 6th causes of action affirmed and the judgment overruling the demurrer as to the 7th and 8th causes of action reversed. Certified to the Superior Court. Demurrer sustained.

Cited: 90 N. C. 477; 111 id. 421.

LEMLY, ADM'R v COMMISSIONERS (1881) 85 N. C. 379.

To set aside an assessment. The plaintiff's intestate having returned to the defendant board for taxation 1,316 shares of bank stock, applied to be relieved from any assessment as he did not know at the time that the bank would list the stock. He alleged that the bank has since listed its effects and paid the tax. The board ordered that the intestate be released from the tax. Subsequently the board learned that the intestate's statement was not true and rescinded its action, and placed this stock on the tax list. The matter was referred and the referee reported in favor of the defendants. Judgment for defendants. Appeal.

Smith, C. J. The board had the right on discovering the error, especially when it was caused by the intestate's own representation, to correct it and avert its consequences. Judgment affirmed.

BANK OF STATESVILLE v SIMONTON, EX'RX (1882) 86 N. C. 187.

Money had and received. Plaintiff, a bank, commenced business under the management of S, defendant's testator, as cashier. S deposited in plaintiff, as part of its capital stock, \$10,000 in county bonds. He subsequently withdrew them and used them in the purchase of real estate, the title to which was made to his wife, the defendant. S became indebted to plaintiff for money, taken, used and owing at the time of his death in 1876, at which time both the plaintiff and S were insolvent. This action is prosecuted by plaintiff's receiver on behalf of the creditors, to recover S's indebtedness from the defendant, and to charge the land so conveyed to her with the value of the funds used in the purchase. The defendant contended: 1, that at the time S had funds sufficient to pay all the creditors; 2, that there never was a legal organization of the bank; 3, that there was a gift under the Act of 1840. Judgment for plaintiff. Appeal.

Smith, C. J. 1. The trust fund may be followed in its investment in the real estate, which may, in the defendant's hands, be charged with the payment of the value of the fund. 2. The title in the defendant cannot be sustained as a gratuity, because it was not the property of the testator, but in equity belonged to the bank. 3. The existence of the bank as a corporation is to be assumed for the benefit of those to whom it has become indebted for moneys deposited, or otherwise, and for whose benefit the receiver is suing. Judgment affirmed.

Cited: 86 N. C. 494; 106 id. 343.

LONG, ADM'R v BANK OF YANCEYVILLE (1884) 90 N. C. 405.

Creditor's bill to enforce the liability of stockholders. Plea, Statute of Limitations. The defendant bank suspended specie payments in 1860 and never resumed. The action was instituted in December, 1872, on behalf of the creditors. Act of 1852-53, ch. 8, Dec. 12, provides: "In case of any insolvency of the bank hereby created, or ultimate liability to pay, the individual stockholders shall be liable to creditors in sums double the amount of stock by them respectively held in said corporation." The Statute of Limitations released the stockholders after three years. Judgment for defendants. Appeal.

Smith, C. J. 1. Since the bank never paid or offered to pay its obligations, it was ever afterward insolvent; and its failure must bear date from this first and continued refusal and inability to pay. 2. As both the bank and its stockholders were alike exposed to the suit, the statute would run in favor of each. Judgment affirmed.

WORTH v COMMISSIONERS OF ASHE COUNTY (1884) 90 N. C. 409.

To restrain the collection of taxes. The defendants made an assessment on bank stock owned by the plaintiff, a resident of this state, in a bank organized under the laws of Virginia, and doing business there. The plaintiff, alleged that the stock of the bank was taxed in Virginia for state and county purposes. Demurrer. Sustained. Judgment for defendant. Appeal.

Smith, C. J. The shares were liable to taxation under the laws of this state, the power to enact which was vested in the general assembly. Judgment affirmed. Cited: 91 N. C. 460; 105 id. 365.

MORGAN v THE FIRST NAT. BANK (1885) 93 N. C. 352.

Statutory action to recover a penalty. The plaintiff commenced the action in 1882 to recover double the amount of usurious interest exacted and paid for several years, upon loans made to him. Secs. 5197 and 5198, U. S. R. S., provides that banks organized under the National Banking Law may take such interest on the loan of money as is authorized by the laws of the states wherein such banks are situated. In case a greater rate of interest has been paid, the person by whom it has been paid may recover twice the amount of the interest thus paid, from the association taking or receiving the same, provided such action is commenced within two years from the time the usurious transaction occurred. As amended by Act of February 18, 1875, suits against any association may be had in any state, county or municipal court, where the association is located, having jurisdiction in similar cases. As amended in July, 1882, the jurisdiction of the state courts over suits brought by or against any association established under any national banking act, shall be the same as, and not other than, the jurisdiction for suit by or against banks not organized under any law of the United States. Judgment for plaintiff. Appeal.

Smith, C. J. 1. The amendment of 1875 specifies the local courts to which jurisdiction is confined, and no others may rightfully exercise it. 2. The objection to the jurisdiction must be made in time before putting in an answer, and if well taken, the result is a transfer to the court of a county which has jurisdiction. 3. The debt and usury are in each case specified, and the defendant is furnished in these allegations with all the information necessary to make his defense. 4. The complaint avers the taking of interest greater than at the rate of 3 per cent per annum, and the court judicially takes notice of the fact that this is the maximum allowed by contract under the law of the state. Judgment affirmed.

Cited: 113 N. C. 27; 121 id. 508; 122 id. 576.

DOBSON v SIMONTON (1886) 95 N. C. 312.

Creditors' bill. The statute authorized the organization of the Bank of S. Such bank was never organized, but defendants S and T subscribed for shares of stock at the contemplated organization, and held themselves out to the business community as cashier and president, respectively, of such bank. The bank failed, and plaintiff H, one of the depositors, recovered in a prior action against T the amount of his deposit demanded in his complaint, leaving a balance not embraced in that action. The creditors now institute a proceeding for the purpose of a distribution of the bank's assets, and H wishes to prove his entire deposit claiming the prior action was in tort and for damages only. Judgment that plaintiff be paid in the same proportion as the other creditors up to an amount sufficient to satisfy the balance due on his certificate of indebtedness after deducting the amount received by him. Appeal.

Merrimon, J. 1. The former action was for a debt. 2. H, having been allowed to recover the greater part of the very debt he now seeks to prove, has not the shadow of right to have the same amount allowed and paid a second time. Judgment affirmed.

McADEN v COMMISSIONERS (1887) 97 N. C. 355.

Injunction, to restrain collection of taxes. The plaintiff was the owner of 332 shares of national bank stock, and in sending a list of his taxable property, the stocks were given at their par value. The shares were assessed by the commissioners at \$85, and the plaintiff was charged with all the stock of the aggregate value of \$28,220. The plaintiff reduced the estimated value by deducting \$18,220 of indebtedness. The Revenue Act of 1885, ch. 175, sec. 12, provides that the party may deduct from the amount of solvent credits due to him the amount of collectible debts owed by him as principal debtor. Sec. 5219, U. S. R. S., provides: That no taxation shall be imposed upon national bank shares at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state; and that the shares of any national bank owned by non-residents of any state

shall be taxed only in the city or town where the bank is located. Judgment for plaintiff. Appeal.

Smith, C. J. The term moneyed capital has been construed to embrace investments in banking associations as well as credits in a more strict sense, and an act denying deductions for the indebtedness of the share owners for the value of their stock, when it is allowed to creditors who owe, would be in violation of the permitting act of Congress, and would be void as to shareholders, who are indebted, and have not such property, as the deductions are allowed to be made from. Judgment affirmed.

STATE v CROSS (1888) 101 N. C. 770.

Indictment for forgery. Indictment charged defendants, officers of a national bank, with forging and uttering of a note and then entering it in the books of the bank as an asset. Sec. 5209, U. S. R. S., provides for the punishment of the offense of making false entries in the books of national banks. Demurrer to plea that the courts of the United States have exclusive jurisdiction to punish such offenses. Sustained. Defendants made said forgery only for the purpose of deceiving the United States bank examiners. Sec. 5418, U. S. R. S., provides for the punishment of those who forge "any bond or other writing for the purpose of defrauding the United States." One of the three names on the bonds was forged. The court refused defendant's offer to prove, in order to repel the charge of intent to defraud, that most of the stock belonged to the father of the wife of one defendant, and also the condition of the bank under former officers. The State put in evidence spurious notes found among the bank's assets. The court refused to instruct that defendants were not guilty if the note was not forged for their benefit, but with the idea of creating a false idea of the condition of the bank, and if defendants did not receive the money on it, and that there could not be a conviction, if the resemblance between the genuine and spurious handwriting of the makers was not such as would deceive an ordinary man. The indictment contained four counts, and after due deliberation it was announced by the jury that they could not agree. The court then polled them and found that they could not agree upon two counts. The jury again retired, and the solicitor entered a nol pros. as to the two counts upon which the jury had disagreed, and a verdict of guilty was rendered as to the others. Appeal.

Smith, C. J. 1. Forgery and making a false entry are distinct and separate crimes, and the jurisdiction here assumed by the state court over the one offense against the state law is entirely consistent with the exercise of a like jurisdiction over the other offense, made such by the act of Congress. 2. Sec. 5418, U. S. R. S., is confined to frauds attempted to be perpetrated against the Government, and does not extend to forgeries made with intent to deceive a federal bank examiner, where the Federal Government has no pecuniary interest in the matter. 3. The proof of forgery of one of the two names signed to the note was sufficient to establish the crime charged. 4. There was no error committed in polling the jurors, and no injury could come to the defendants by eliminating so much of the charge as was abandoned by the solicitor. These steps were discretionary with the judge. 5. The intent to defraud is not repelled by the existence of family relations among the parties, and the misconduct of others in the bank's management is no defense or extenuation for defendant's act. 6. Alleged spurious notes found among the assets of the bank are admissible to show knowledge. 7. If the forgery was committed with a present intent to defraud, the offense was complete, whether the expected advantage was to accrue to defendants or another, or whether the purpose was successfully attained. 8. If the false paper writing be such that it might, from its nature and course of business, deceive or mislead to the prejudice of another person, the offense of forgery is complete. Judgment affirmed.

Cited: 104 N. C. 794.

DOWD v STEPHENSON (1890) 105 N. C. 467.

Money had and received. C, the president of an insolvent bank, of which plaintiff became the receiver, was indebted to the defendant. At C's request, the defendant drew checks on the bank for the amount in question, and the checks were paid. The defendant had no deposit at the bank. Judgment for plaintiff. Appeal.

Merrimon, C. J. 1. In the absence of special authority for such purpose, the officers of a bank have no right to appropriate the funds of the bank to the pay-

ment of the president's private debt. 2. The defendant obtained the money of the bank by the unauthorized and fraudulent acts of its officers. 3. There was no overdraft, as defendant had no account to overdraw. Judgment affirmed.

HAWES v BLACKWELL (1890) 107 N. C. 196.

On check. Defendant B drew the check to the order of the plaintiff who presented it to the bank and payment was refused. The check was protested and notice of protest was given to B. B made a deed in trust to defendants, H and M for the benefit of his creditors. W, who was president and owner of the bank, made a deed in trust to defendants K and N for the benefit of his creditors, and, by the same, the depositors of the bank were made preferred creditors. B, at the time of the bank's failure, had more than sufficient funds on deposit to pay the check. Judgment for the plaintiff for the amount claimed to be paid out of the funds of the bank due B. Appeal.

Merrimon, C. J. 1. The relation of the bank and depositor is simply that of debtor and creditor. 2. The payee of a check cannot maintain a separate action against the bank for non-payment of a check unless the bank accepted or agreed to pay it. 3. The plaintiff is not entitled to recover against the bank, but is entitled to a judgment against the drawer of the check, and to have so much of the dividends as shall be paid on account of the deposit, as will be equal to the pro rata share thereof in favor of the check. Judgment accordingly.

Cited: 116 N. C. 813; 118 id. 786.

COMMERCIAL BANK v BURGWIN (1892) 110 N. C. 267.

On promissory note. The defendants executed the notes to R, H and B, who indorsed them to the E Co., which subsequently indorsed them to the plaintiff bank before maturity, as collateral security for a loan. R was president of E Co., and at the time, a director and one of the discount committee of the plaintiff. The plaintiff discounted the notes, and from the proceeds satisfied the note of E Co. R, as president of E Co., indorsed these notes, when they were negotiated as collateral. Defendant contended that the notes were obtained by the fraud of R, of which the plaintiff had notice. Judgment for defendants. Appeal.

Shepard, J. 1. When the plaintiff showed that it had acquired the notes bona fide for value in the usual course of business, and while they were still current, the burden was on the defendants to show actual notice. 2. Where an agent of a corporation is dealing with the corporation on his own behalf, his attitude is one of hostility to his principal. 3. The plaintiff cannot be affected with R's knowledge, unless he was acting in his official capacity for it in the discounting transaction. Judgment reversed.

Cited: 111 N. C. 517; 113 id. 484; 118 id. 386, 455. S. c.: 116 N. C. 122.

MADDOX-RUKER BANKING CO. v ATLANTIC RY. CO. (1892) 111 N. C. 122.

On draft. The D Co. sold C mill machinery and shipped it to C's place of residence, to their own order. They drew on C with bill of lading and indorsed to the plaintiff bank, which sent the papers to the N Bank for collection. Payment was refused on the ground that the machinery was attached by a creditor of the D Co. and it was in possession of the defendant. The court refused plaintiff's offer to prove by the collector of the N Bank that the handwriting, purporting to be the signature of D on both draft and bill of lading, was in the same handwriting as the signature to his evidence in the deposition taken in this action, and that the draft and bill of lading were received by the collector in the course of business in a letter from the plaintiff. Judgment for defendants. Appeal.

Clark, J. 1. It was error to exclude the evidence offered. 2. The possession of the papers by the N Bank was prima facie a possession by it as trustee or agent for the plaintiff. 3. There would be a presumption that the plaintiff was the owner of the draft and bill of lading. Judgment reversed.

S. c.: 115 N. C. 642.

LE DUC, REC'R v MOORE (1892) 111 N. C. 516.

On promissory note. Defendant J M executed the note to E M, who, for value and before maturity, indorsed it for his own benefit to a bank of which plaintiff became receiver. E M was president of the bank, and he, together with the cashier,

constituted its discount committee. As a member of such committee E M participated in the discounting of this note. The defendant contended that the bank was affected with notice of any defenses to the note. Judgment for plaintiff. Appeal.

Shepard, J. The active official participation of the president as a director and also his actual knowledge, leave no room for the operation of any presumption, and the bank cannot escape its liability. Judgment reversed.

ADAMS v FIRST NAT. BANK (1893) 113 N. C. 332.

Money had and received. The plaintiff was a member of a firm which had a deposit with the defendant bank. On the day the firm dissolved, the plaintiff asked the bank for the amount of the firm's balance, and being told, drew out that amount on a firm check. Later he made a deposit in his own name. The bank paid him all of this deposit but \$40, which it claimed as a balance due on the firm's account. The bank had known nothing of the firm's dissolution. After the plaintiff had drawn the firm's balance, a firm check, drawn by another partner for \$40, was paid by the bank. The judge charged that if this check was paid after the balance was paid to the plaintiff, the plaintiff could recover. If it was paid before, and the balance was given by mistake, the plaintiff could not recover. Judgment for the plaintiff. Appeal.

Clark, J. While the bank might have pleaded a counterclaim, it had no lien on the deposit of a partner for a balance due from the partnership. Judgment affirmed.

Cited: 114 N. C. 333; 124 id. 543.

STEVENSON v FIDELITY BANK (1893) 113 N. C. 485.

On draft drawn by plaintiff on P, and payable to S, cashier of the N Bank. Plaintiff deposited the draft at the N Bank for collection, and was not to receive credit on the books of the bank until collected. The bank indorsed the draft for collection, and forwarded it to the defendant bank. The drawee accepted it and paid it shortly after the N Bank failed. The defendant was subsequently notified of the failure; and it credited the N Bank with the proceeds of the draft, having no notice that plaintiff had deposited the draft solely for collection. The N Bank was indebted to defendant. Prior to the first of the month, it was agreed between the banks, that each should remit to the other daily the respective items when collected. But the N Bank did not remit daily each item. Defendant contended it was a purchaser for value before maturity and without notice of any equities between the original parties. Judgment for plaintiff. Error.

MacRae, J. The defendant could in no sense be considered a purchaser for value, because it was the sub-agent of the N Bank to collect the draft. Judgment affirmed.

Cited: 118 N. C. 568.

DAVIS v INDUSTRIAL MANUFACTURING CO. (1894) 114 N. C. 321.

On promissory note against makers and indorsers. The defendant company made and delivered to N H Bank its promissory note. The note was indorsed by B and W. Both indorsers held certificates of deposit of the bank payable at a future day. B was also a depositor in the bank. The bank became insolvent and the plaintiff was appointed its receiver. The maker of the note also became insolvent, and the plaintiff brought this suit in his own name. The court refused to allow the defendants B and W to plead their claims against the bank by way of setoff. Judgment for plaintiff. Appeal.

Burwell, J. 1. Since the merging of the courts of law and equity into one tribunal, a receiver of an insolvent bank may maintain in his own name or in his name as receiver, a suit on a note due the bank. 2. In such a suit all the rights of the bank, of its creditors, and of the defendant debtor, both legal and equitable, may be adjudicated. 3. Equity and justice require that the receiver, when he comes to make a settlement with one who is a creditor of the bank, shall deduct from his credit all those sums for which he is debtor, and when he settles with a debtor of the bank shall allow him credit for all sums for which he is a creditor of the bank. 4. When a bank itself stops payment and becomes insolvent, the customer may avail himself in setoff against his indebtedness to the bank, of any indebtedness of the bank to him. 5. In the settlement of the affairs of an insolvent na-

tional bank, the indorser of a note in the hands of the receiver is allowed to set off against his liability on the note his deposits in the bank. 6. The effect of the insolvency of the bank and its closing its doors was to make all its deposit accounts and certificates of deposit at once due without any demand or notice. Judgment modified.

Cited: 129 N. C. 231.

UNITED STATES NAT. BANK v MCNAIR (1894) 114 N. C. 335.

On promissory note, indorsee against makers. Plaintiff bank re-discounted the note for the payee, the N Bank, and placed the proceeds to its credit. Defendants claimed an equity in the note, and notified plaintiff thereof. Before receiving notice of the equity, plaintiff allowed the N Bank to check out over half the proceeds of the re-discount. Between the date of the re-discount and notice of the equity, plaintiff credited other items to the N Bank. At the time of receiving notice plaintiff owed the N Bank more than the proceeds of the note. Defendants had a deposit in the N Bank when it became insolvent. Judgment for defendant. Appeal.

Clark, J. The plaintiff was a purchaser for value, before maturity, and without notice and by the law merchant the defendants cannot set up this setoff. Judgment reversed.

FIRST NAT. BANK v DAVIS, REC'R (1894) 114 N. C. 343.

To establish a preferential claim. Plaintiff bank delivered to N Bank, its correspondent, commercial paper for collection. The agreement was that the N Bank should remit collections daily. The plaintiff had no knowledge of N Bank's insolvency, until it went into the hands of the defendant, D, as receiver. At that time, it had made collections for plaintiff, according to custom, which passed to D as part of the general assets. Action dismissed. Appeal.

Burwell, J. 1. The relation of principal and agent between a bank and its correspondent, becomes that of debtor and creditor when money is collected and the money passes at once to the general fund of the bank according to the custom, which must be presumed to be a part of the contract. 2. There was no conversion, as the contract remained in force until the failure. Judgment affirmed.

Cited: 118 N. C. 554, 555.

COMMERCIAL AND FARMERS NAT. BANK v DAVIS (1894) 115 N. C. 226.

To obtain a preference as to assets in the hands of a receiver. The plaintiff bank sent the N Bank drafts for collection. Just after the N Bank collected these drafts, it failed, and went into the hands of defendants as receivers. All the money, so collected, was mingled with the general funds of N Bank, and passed with the assets to the receivers. The plaintiff contended that the officers of N Bank knew it was insolvent. Judgment for the plaintiff for the amount admitted, without any preference, and with costs to the defendant. Appeal.

Burwell, J. 1. We must affirm the judgment on the authority of Bank v Dowd, 38 Fed. Rep. 172. 2. Not only are the rules laid down by the federal court in regard to the assets of insolvent national banks in the hands of receivers proper, but it is important that the rules which are to govern the distribution of the assets of insolvent state banks be in accord with them. Judgment affirmed.

Cited: 115 N. C. 554.

MERCHANTS NAT. BANK v DAVIS (1894) 115 N. C. 233.

This case follows Commercial and Farmers Nat. Bank v Davis, *supra*.

DUNN v JOHNSON (1894) 115 N. C. 249.

Accounting. Plaintiff alleged that he was receiver of the C Loan Association, which did a banking business; that defendant was its cashier; that defendant had possession of all money, notes, books, accounts, mortgages of the association; that on his resignation, defendant wrongfully neglected to turn over a large sum of money; and that to ascertain defendant's liabilities it was necessary to take an account, involving examination of books and accounts kept by defendant during his term of office. The plaintiff amended his complaint to make it more definite, and furnished defendant a bill of particulars. Demurrer on the ground that the

complaint did not state a cause of action. Overruled. Judgment for plaintiff. Error.

MacRae, J. 1. The foundation of the action is in the nature of an indebtedness assumptit, upon an account stated, in which action it is not necessary to state the particular items constituting the debt. Neither is it necessary in equitable proceedings of this character to state with precision each item of the balance claimed. 2. The relation of trust between a bank and its cashier gives equity jurisdiction to compel an accounting for money misappropriated. Judgment affirmed.

TOWNSEND v WILLIAMS (1895) 117 N. C. 330.

Fraud. The plaintiff was a depositor in the N Bank and the defendant was vice-president and a director. Hearing that the bank was insolvent, the plaintiff went to it to withdraw his deposit, but was there informed by defendant that the bank was perfectly solvent. Relying upon such representation, the plaintiff permitted the deposit to remain and continued to deposit until the bank failed. The bank was insolvent when the representations were made by the defendant, and this fact was well known to the defendant. Demurrer. Overruled. Appeal.

Clark, J. 1. The directors of a corporation are trustees and liable for losses attributable to their bad faith, misconduct, or want of care. 2. The plaintiff had a right to rely upon the defendant's representations, and he must be liable for any loss occasioned thereby. No error.

Cited: 118 N. C. 319, 322; 130 id. 537.

TATE, TREASURER v BATES (1896) 118 N. C. 287.

Deceit. The plaintiff, treasurer of the state, permitted deposits, made by his predecessor in office, to remain in the N Bank, in which defendants were directors, and also made deposits therein. The N Bank failed, and a receiver took charge. The first count alleged the false and misleading statements published in the press with the knowledge and consent of the directors. The second count alleged a report made to the treasurer of the state by the cashier, signed by three directors, and acquiesced in by the others, which report was false and fraudulent. The third count alleged the specific acts of the president and vice-president in making loans upon inadequate security, all of which the directors knew or should have known, but did not allege that the loans were lost or could not now be collected, or that their loss caused the insolvency, or in anywise affected the plaintiff injuriously. Demurrer, on the ground: 1, that a cause of action for negligence and mismanagement against directors is ex contractu and cannot be joined in an action against them for fraud and deceit; 2, that a single depositor cannot maintain the action in his own name; 3, that the allegation for fraud and deceit is not sufficient, unless the defendants are specially charged with having known or believed the bank to have been insolvent; 4, that the defendants were not liable for money which the plaintiff's predecessor deposited and the plaintiff permitted to remain; 5, that there was no allegation that the bank or its receiver had been requested to bring the action and had refused. Demurrer as to first and second causes of action, overruled. Demurrer to third cause of action, sustained. Cross appeals.

Clark, J. 1. The cause of action against the directors for the loss of the deposit caused by their neglect and mismanagement was in tort. 2. The directors being trustees for creditors and stockholders, any creditor or stockholder, who has been misled to his hurt by their fraud and deceit, or injured by their misconduct and gross neglect in discharge of the trust, can maintain an action for such injury against them personally in his own behalf. 3. The directors are conclusively presumed to know the conditions of the bank. 4. If the defendants are liable for the deposits made by the plaintiff, they are liable for the deposits made by his predecessor and left by him in the bank. 5. It was not necessary to allege as set forth in the fifth ground of demurrer. 6. The third count was defective in not averring that the loans were lost or could not be collected. No error.

Cited: 118 N. C. 322; 130 id. 537.

SOLOMON v BATES (1896) 118 N. C. 311.

Deceit. Defendants were directors of an insolvent state bank. The plaintiff, relying upon reports of the defendants, made deposits therein. The plaintiff set up the insolvency of the bank and a failure of the directors to obey the by-laws

and to examine the condition of the bank; that they made loans on inadequate security, which loans were lost; and that they willfully and fraudulently caused false statements to be published. Demurrer: 1, misjoinder of causes of action; 2, misjoinder of parties defendant; 3, that the complaint did not state facts sufficient to constitute a cause of action. The defendants also contended that the action could not be brought by a depositor unless there appeared a failure or refusal on the part of the receiver or the corporation to bring it, and that as the plaintiff had not distinctly charged that when he made the deposit, they knew or believed, he would not get it back, or intended by deceit to cause him to lose it, an action for deceit would not lie. Demurrer overruled. Appeal.

Clark, J. 1. The failure to discharge the duties imposed by the by-laws was a tort properly united with a tort by fraud and deceit. 2. As the complaint alleged that the defendants acting together committed the acts complained of, this would make them jointly and severally liable. 3. For any breach of duty toward a stranger to the company, such stranger may have redress against the directors, either at law or in equity, according to the nature of the injury, and it is no defense that their principal is liable. 4. Directors are liable for injury caused by relying upon a statement issued by them, which they did not know to be true, as well as when they knew it to be false. No error.

Cited: 118 N. C. 322, 323; 122 id. 370; 125 id. 136; 126 id. 102; 128 id. 375; 129 id. 512; 130 id. 537.

CALDWELL, EX'R v BATES (1896) 118 N. C. 323.

This case follows the ruling of the court in Solomon v Bates 118 N. C. 311.

ARMOUR PACKING CO. v DAVIS (1896) 118 N. C. 548.

To recover possession of a check. The plaintiff's agent deposited a check with unrestricted indorsement with the N Bank. It was the custom of the bank in such cases to credit the plaintiff with the check as cash, and, if the check were not paid on presentation, to deduct the amount from the next deposit ticket and to return the unpaid check. The check was unpaid, but before it was returned, the defendant was appointed receiver of the bank. He claimed the check as an asset of the bank. Judgment for defendant. Appeal.

Clark, J. When it is agreed that the amount of a check is to be credited to a depositor and he can draw against it, yet if the paper so deposited is not paid on presentation, the amount is to be charged up to the depositor, or taken off his next deposit ticket, the transaction is a bailment for collection. Judgment reversed.

Cited: 129 N. C. 456; 130 id. 176.

BOYKIN v BANK OF FAYETTEVILLE (1896) 118 N. C. 566.

To recover amount of a draft. The plaintiff sent the draft indorsed for collection and remittance to the N Bank. The N Bank sent it to the defendant bank, which collected it and so notified the N Bank. Before any money was remitted, the N Bank passed into the hands of a receiver. It had been customary for the N Bank and the defendant bank to keep a running and reciprocal account. The judge charged that the defendant was responsible. Judgment for plaintiff. Appeal.

Clark, J. 1. The indorsement was notice to the defendant that the plaintiff was the owner of the paper and the N Bank merely an agent. 2. As there has been no actual payment to the agent, and it has gone into liquidation, the principal may intervene. No error.

Cited: 119 N. C. 308 id. 568; 129 id. 456; 130 id. 176.

COMMERCIAL NAT. BANK v FIRST NAT. BANK (1896) 118 N. C. 783.

On check. J was engaged in a general mercantile business. L was engaged in the same business in the same town, and also as a private banker. To prevent L's knowing of or handling his checks, J, at the defendant bank's suggestion, stamped his check not payable if presented by L's bank or its agents. J then drew such a check on the defendant bank to the order of a creditor who indorsed it to plaintiff and sent the check to L's bank. It was presented by an agent of L's bank and payment refused. Judgment for plaintiff. Appeal.

Clark, J. 1. The holder of a check cannot maintain an action against the bank

upon which the check is drawn until after acceptance. 2. The stipulation was not an unreasonable restriction of trade. Moreover, if it was an illegal transaction, the check itself would be void. Judgment reversed.

COX v FIRST NAT. BANK (1896) 119 N. C. 302.

Conversion of bank stock. C died, leaving by will, stock of the defendant, a national bank, to trustees for successive parties. Shortly after C's death, one of the life tenants presented a certificate of the stock to the bank with the following indorsement: "For value received we hereby sell, assign, and transfer to F (signed), D, W, and F, Executors of C. Transferred to F." Thereupon the bank transferred the stock to F, and she sold and assigned her certificate to the president of the bank. A trustee, who did not sign the original certificate, brought this suit. The bank had actual notice of the contents of the will. Judgment for plaintiff. Appeal.

Faircloth, C. J. The defendant bank, as a corporation, is made the custodian of the shares of its stockholders, and is clothed with power to protect the rights of every one from an unauthorized transfer. It is a trust placed in its hands for the protection of individual interests, as well as its own, and, like every other trustee, it is bound to execute the trust with proper diligence and care, and is responsible for any loss sustained by its negligence or misconduct. Judgment affirmed.

Cited: 128 N. C. 121.

NATIONAL CITIZENS BANK v CITIZENS NAT. BANK (1896) 119 N. C. 307.

For the amount of a check. The plaintiff sent a check to the N Bank, indorsed "for collection for account of" the plaintiff. The N Bank sent the check to the defendant bank, indorsed "for collection account of N Bank." The defendant collected the check and credited the N Bank just before the N Bank registered its deed of assignment. The defendant and the N Bank kept reciprocal accounts, and there was a balance due the defendant. The plaintiff and the N Bank did not keep reciprocal accounts. The defendant had not paid the N Bank. The plaintiff sued for the amount of the collection. Judgment for the plaintiff. Appeal.

Montgomery, J. Whenever it appears on the face of a paper that it is in the possession of a bank for collection, the proceeds of the collection are the property of the owner, and the actual collecting bank is liable to the owner in case of the insolvency of any intermediary bank, unless the actual collector has remitted the proceeds, or its equivalent, before it had knowledge of that bank's insolvency. No error.

Cited: 124 N. C. 568.

PEOPLES BANK v CITIZENS NAT. BANK (1896) 119 N. C. 310.

The judgment in this case was affirmed on the authority of *National Citizens Bank v Citizens National Bank*, *supra*.

BOYD v REDD, ADM'R (1897) 120 N. C. 335.

To enforce lien on bank stock. The plaintiff took a note from B. To secure it, B gave plaintiff forty shares of stock in defendant bank. B gave two unsecured notes to the H Co. The H Co. was indebted to the defendant bank, of which B was president, and deposited B's two notes with it as collateral. On H Co.'s default, the bank asserted its supposed statutory lien on the forty shares, to satisfy the two notes deposited with it. The bank had not organized until two years after its charter was granted. Judgment for defendant bank.

Clark, J. 1. The statutory lien on stock is intended only to secure the direct indebtedness which the stockholder creates with the corporation, either as principal or surety, and not any involuntary indebtedness to it caused by the purchase of his liabilities incurred to third parties. 2. There was no impairment of whatever lien was conferred by the charter by the delay of the bank to organize till after the statutory period of two years had elapsed, and a defect of this character can only be taken advantage of in a direct proceeding by the state. 3. It is of no significance that B was president of the bank when the notes were deposited. Judgment reversed.

Cited: 123 N. C. 547.

WORTH v PIEDMONT BANK (1897) 121 N. C. 343.

For appointment of receiver. Plaintiff, the state treasurer, procured the appointment of a temporary receiver for defendant, an insolvent bank. A few hours later, on the same day, the bank's creditors procured a temporary receiver to be appointed by another court. The courts had equal jurisdiction. The creditor's receiver, by order of the court, took the bank's assets and refused to deliver them at the demand of the treasurer's receiver. The creditor's receiver was made a permanent receiver. The treasurer then applied for a permanent receiver in his suit, and obtained a rule on the creditor's receiver to show cause why he should not be punished for his refusal. The Act of 1891, ch. 155, as amended by Act of 1893, ch. 478, made it the duty of the state treasurer to secure the appointment of receivers for insolvent banks, but did not expressly forbid creditors to apply for receivers. The court ordered that the temporary receiver in the treasurer's suit be made a permanent receiver, and that the creditor's receiver turn over the assets to him. Appeal.

Clark, J. 1. The court first appointing a temporary receiver acquired jurisdiction to the exclusion of the other court. 2. The receiver appointed by the latter, is not punishable for contempt for acts done by its order. Order affirmed.

MOREHEAD BANKING CO. v TATE (1898) 122 N. C. 313.

On bond. The plaintiff was a bank "having its principal place of business at Durham," as provided by the charter. It established a branch bank at B. The defendants were sureties on a bond given by the cashier of the branch bank to the plaintiff for its protection against fraud on his part. The bond was made to plaintiff "of B." The establishing of branch banks was neither authorized nor forbidden by statute. The plaintiff alleged that the cashier had defaulted. Defendants, sureties, contended that as the bank had no power to establish branches, the bond was void as against public policy. Judgment for defendants. Appeal.

Furches, J. 1. This contract is not one of those declared void by statute, nor is it one that affects the public morals of the state, and therefore it is enforceable. 2. The state alone can question the plaintiff's power to establish branches. 3. Equity will treat the words "of B" as surplusage. Judgment reversed.

HOUSTON v THORNTON (1898) 122 N. C. 365.

Deceit. The defendants, directors of a national bank, authorized the cashier to issue a statement of the bank's financial condition, when an examination of the books would have shown the statement to be false. The directors owed large sums to the bank. Relying on this statement, plaintiff purchased stock. The bank was insolvent, and a receiver was subsequently appointed. The receiver assessed the stockholders and recovered a judgment against plaintiff for her assessment. The issues tendered by defendants involved fraud and misrepresentation on defendant's part, those settled by the court at the close of plaintiff's evidence involved negligence. The date when the Statute of Limitations began to run against plaintiff's action was agreed upon. The summons issued by the clerk for the purpose of being served, came into the sheriff's hands the following day. Judgment for plaintiff, except as to her claim for the amount of the judgment recovered against her by the receiver. Cross appeals.

Clark, J. 1. This cause of action did not pass to the receiver. 2. It was not necessary for the plaintiff to show that the defendants participated in the fraudulent statement. 3. The action was commenced when the clerk issued the summons for the purpose of having it served. 4. Not till the plaintiff has paid the receiver's judgment will her cause of action on that account accrue. 5. The issues submitted were proper. Judgment affirmed.

Cited: 130 N. C. 537.

WORTH v BANK OF NEW HANOVER (1898) 122 N. C. 397.

Insolvency proceedings. The defendant bank was chartered under the Act of January 12, 1872, which authorized it to establish agencies. It established a branch at W. No stock was issued by the branch bank. It had no separate charter. Its officers were appointed by and reported to the parent bank, at regular intervals. The parent bank, in its published reports, included in its items of capital and surplus fund, the capital and surplus fund of the branch. The parent bank

became insolvent. The branch bank was not insolvent, if regarded as a separate corporation. The creditors of the parent bank sought to avail themselves of the assets of the branch bank, whose creditors contested the proceedings. The referee found that the facts as found, operated as an estoppel to deny the branch bank's existence. Judgment, exempting the assets of the branch bank from the claims of the creditors of the parent bank. Appeal.

Clark, J. 1. The parent bank was a principal, and the branch bank its agent, and all the assets and liabilities of the branch are the assets and liabilities of the parent bank. 2. Upon the distribution of the assets of the insolvent estate, all creditors must share equally. 3. Estoppel arising out of the dealing with the branch bank would not affect the creditors of the parent bank. Error.

Cited: 127 N. C. 434.

FIRST NAT. BANK v TAYLOR (1898) 122 N. C. 569.

Money paid under a mistake of law. The plaintiff bank discounted a note indorsed by defendants, and rediscounted it in New York. When it fell due, it was protested for non-payment. Notice was duly sent to defendants, but they did not receive it. The plaintiff charged the amount of the note to their account. Subsequently, with knowledge of all the facts, plaintiff, thinking defendants were not liable on the note, at their request credited them with the amount thereof, to correct the supposed error in the accounts. Judgment for plaintiff. Appeal.

Clark, J. A voluntary payment, with knowledge of the facts, though made under a mistake as to the law, cannot be recovered. Judgment reversed.

FIRST NAT. BANK v RIGGINS (1899) 124 N. C. 534.

On note, secured by a pledge of bank stock. The defendant subscribed to the stock of the plaintiff, but only partly paid for it. Afterward the bank became insolvent, and a committee was appointed to collect the assets and pay the debts. The defendant sought to set off his distributive share against his individual indebtedness to the bank. Judgment for plaintiff. Appeal.

Faircloth, C. J. The defendant, as a stockholder, is liable in an amount equal to his stock; but as a creditor he is entitled only to a dividend in proportion to the other creditors. He must pay his share in full, before he can take advantage of the distributive fund. Judgment affirmed.

HODGIN v PEOPLES NAT. BANK (1899) 124 N. C. 540.

Overruled. See Hodgin v Peoples Nat. Bank (1899) 125 N. C. 503.
S. c.: 125 N. C. 503; 128 id. 110; 129 id. 247.

PIEDMONT BANK v WILSON (1899) 124 N. C. 561.

On promissory note, against maker and indorsers. The note in suit was executed by defendant W to defendant M Co., and by it indorsed to the plaintiff bank. The maker alleged that the plaintiff had agreed to discharge defendants from liability on the note; and that, in consideration of a payment of part thereof, the note being due, the plaintiff agreed, through its cashier, to look for the balance to another note, not then due, made in the maker's favor, and held by another bank for collection. Sec. 224 of the code provided that nothing should be allowed as a counterclaim unless it arose out of the cause of action in the complaint or was connected with the subject of the action, or unless, in an action of contract, it also arose on contract and was in existence at the commencement of the action. At the time of the bank's failure, the defendant indorsers had money deposited with it. This they offered as a setoff pro tanto to plaintiff's demand. Judgment for defendants. Appeal.

Douglas, J. 1. The cashier could not take in payment of a note, a mere verbal assignment of an intangible interest in another note already held by another bank as collateral security. 2. The counterclaim is neither connected with the plaintiff's original cause of action, nor was it in existence when that cause of action arose. New trial ordered.

Cited: 128 N. C. 313.

HODGIN v PEOPLES NAT. BANK (1899) 125 N. C. 503.

On deposit. Petition for rehearing. The plaintiff was a member of a firm which was indebted to the defendant, a bank, on a note. He was also an indorser on a note made by his partner and held by the defendant. The firm failed. His partner died. He proceeded to wind up the firm's business, and deposited with the bank firm money collected by him. The notes were overdue and unpaid. The bank applied the deposits to their payment, knowing the deposits to be firm property. At the former hearing the court charged that the bank rightly applied the deposits on the firm's note, but was not entitled to apply it upon the other. Judgment for defendant. Appeal.

Furches, J. 1. Where a rehearing has been ordered, and a manifest error is made to appear, it is the duty of the court to correct it. 2. Knowing the facts, the bank had no right to apply the deposits to a debt created by the partnership before its dissolution. 3. The plaintiff was the owner of the deposits, though he held them in trust for the benefit of the creditors of the partnership before its dissolution, and afterward, for the benefit of the estate of the deceased partner. Judgment in 124 N. C. 540, overruled. Rehearing granted.

Cited: 129 N. C. 347.

CARR v FIDELITY BANK (1900) 126 N. C. 186.

On deposit. The plaintiff and S were tenants in common of real estate. Defendant L, their agent, deposited the rents in the defendant bank to the credit of S & C. The bank had no notice of the nature of the property whence the fund was derived. S made out a check to the order of S & C, so indorsed it, and drew out most of the deposits. Thereafter the plaintiff made a demand on the bank for half of the deposit. The bank offered to pay the balance on his producing a check signed by S & C. The plaintiff refused the offer. The judge charged that the plaintiff was entitled to recover his half of the whole deposit. Judgment for plaintiff. Appeal.

Clark, J. 1. The bank was not called upon to inquire into the nature of the fund or of the supposed partnership, and having discharged the trust confided to it, it is not liable. 2. No cause of action is shown against L. Error.

HANOVER NAT. BANK v COCKE (1900) 127 N. C. 467.

Money lent. At a stockholders' meeting of a national bank, it was resolved to go into voluntary liquidation, convey the assets to W, as trustee, and authorize him to make a loan to pay off the liabilities. The agreement was signed, whereby the stockholders agreed to be liable, but not jointly, to any person who should advance the sum, and, to contribute such proportion of any deficit in the loan, after the bank's assets had been used, as the number of shares held by each bore to the aggregate number of shares. The trustee borrowed the amount in various sums from the different plaintiffs. He paid the debts, and applied the balance of the assets to this loan. Several of the stockholders, thereupon, on demand, paid their pro rata share. The rest were the defendants, and were sued, each for his pro rata share. The complaint did not allege that the contract was signed by the owners of two-thirds of the capital stock, necessary in such an agreement. On the trial this point was not raised. Certain of the defendants' names were signed by their guardians. They contended lack of authority on the part of the guardians, and demurred also on the grounds: 1, that the plaintiffs were not parties to the transaction set up as the foundation of the action; 2, misjoinder of causes of action and parties; 3, not enough parties, in that W and the bank were not made parties. Overruled. Appeal.

Clark, J. 1. The defendants are principals and properly sued as such. 2. If each plaintiff had brought action against each defendant, any court would have consolidated the action to avoid unnecessary costs. 3. Neither W nor the defunct bank were necessary parties. 4. Having benefited by the action taken, the wards are in no position to absolve themselves from the liability incurred. 5. If a good cause of action is defectively stated, a failure to demur will cure the omission after judgment. No error.

Cited: 128 N. C. 104.

HUTCHINS v PLANTERS NAT. BANK (1901) 128 N. C. 72.

On guaranty. The defendant, a national bank, agreed that plaintiff's draft on C, for hides to be shipped C, would be paid. In consideration of the guaranty, the plaintiff shipped the hides. The defendant refused to pay the draft. Demurrer, that the defendant had no power under the National Banking Act to make such a guaranty. The act contained no prohibition against such banks guaranteeing paper. Demurrer sustained. Appeal.

Clark, J. Even if it be conceded that the guaranty was ultra vires, it does not lie in the defendant's mouth to say that it had no authority to do what it did. Judgment reversed.

NORTH DAKOTA

DOTY v FIRST NAT. BANK (1892) 3 N. D. 9.

To compel transfer of bank stock. W owned 220 shares of stock in defendant, valued at \$2,200. He was indebted to defendant for advances of \$2,300. He assigned, by writing, the certificates for these shares to the president of defendant as collateral security for the debt. The plaintiff sued W for a debt and attached the stock in the hands of defendant, which stock still remained upon the books in W's name. Plaintiff obtained judgment and the stock was bid in by him at the sheriff's sale. Defendant refused to transfer the shares to plaintiff. Sec. 5139, U. S. R. S., provided that national bank shares shall be transferred on the books of the association as provided by the by-law. The by-law made them transferable only on the books on surrender of the certificates. Judgment for defendant. Appeal.

Bartholomew, J. 1. The act of Congress pertaining to the transfer of national bank stock and the by-laws adopted in pursuance of said act, do not constitute a registry law, but were enacted for the benefit of the corporation, its stockholders and creditors; and as to all other persons, a transfer of such stock, good at common law, is good under the federal statute. 2. The rights of a transferee under an unrecorded transfer, good at common law, are superior to the rights of a subsequent attaching creditor of the transferrer without notice. 3. The negotiability or transferable quality of stock of a national bank depends upon the laws of the United States. Judgment affirmed.

Cited: 8 N. D. 50.

SECURITY BANK v KINGSLAND (1895) 5 N. D. 263.

On promissory note against maker. Defendant gave the note in question to the U Co. for a patent right. The U Co. pledged it to A, its secretary and treasurer, for money advanced by him, the amount of which the record did not disclose. A borrowed money of the plaintiff and indorsed the note to it as collateral. The indorsement was made in the name of the U Co. by A, treasurer. Plaintiff's president was informed of the circumstances by which A individually had possession of the note. Defendant contended that the plaintiff was not a bona fide holder and set up failure of consideration. The court charged the jury that if they found that the plaintiff took the note in the ordinary course of business, they should find for the plaintiff at least for the amount of their interest. Verdict for plaintiff. New trial granted. Appeal.

Wallin, C. J. 1. The president of the bank was, from the nature of the case, chargeable with knowledge that A never acquired the right to sell the paper, or put it afloat in the business community by an unlimited general indorsement. 2. The mere fact that A was secretary and treasurer of the U Co. would not clothe him with power to indorse and pledge the paper of his principal to secure a personal loan to himself; nor is the fact that the board of directors had authorized A to hold its papers as collateral to a debt due A alone sufficient to authorize that officer to indorse the paper to himself. 3. A could not subpledge to one, having notice of the facts, to an amount beyond his own claim against the U Co., nor could the bank knowing A was a mere pledgee, take any better right or fuller power over the paper than possessed by the original pledgee. Order affirmed.

Cited: 6 N. D. 245.

ANDERSON v FIRST NAT. BANK (1896) 5 N. D. 451.

Assumpsit, to recover value of notes. Plaintiff delivered to defendant negotiable paper, which he requested defendant to sell at a specified price. Defendant retained the paper for his own benefit. The defendant pleaded *ultra vires*, and also that the transaction had been entirely performed by its cashier, without its authority. Verdict directed for defendant. Appeal.

Corliss, J. 1. The defendant, in assuming to act for plaintiff in the sale of the notes, kept entirely within the limits of its power. 2. If a bank acted as agent, and received the proceeds of sales, it must account for them as agent. 3. After the bank had discovered what course its cashier had pursued, it could no longer keep the fruits of his acts without ratifying what he had done. Such ratification related back to the time when the cashier assumed to represent it, and rendered all his acts binding upon the bank from their inception. Judgment reversed.

Cited: 6 N. D. 497; 9 id. 467.

NATIONAL BANK OF COMMERCE v JOHNSON (1896) 6 N. D. 180.

Creditor's action. G, the intervener, indorsed a certificate of deposit on the L Bank to the A Bank for collection, and received a receipt therefor. The A Bank sent the certificate to plaintiff, which in turn presented it to the L Bank, and a draft on the S Bank was accepted in payment. Plaintiff forwarded the draft to the S Bank, and in the meantime credited the A Bank with the amount, and the A Bank gave G a certificate of deposit upon itself. The draft was dishonored by the S Bank, and plaintiff charged back the amount to the A Bank, and the A Bank received from G the certificate of deposit, and gave him in place, a receipt for his original certificate left for collection. Both the L and the A Banks failed. The A Bank owed plaintiff, which claimed a lien upon the L Bank's claim. The receiver of the latter, having declared a dividend, plaintiff sought to obtain it. Judgment for intervener. Appeal.

Corliss, J. 1. So long as the plaintiff should continue to owe the A Bank on this credit, the intervener could claim the same as his own property in another form, and therefore could, while this condition existed, compel the plaintiff to account to him for the amount of such credit. 2. Plaintiff had no authority to receive anything but cash in payment of the certificate. 3. Whatever change of form the principal's property undergoes while in the hands of the agent, it is still the property of the principal, and may be followed by him as such. The intervener became entitled to his original certificate or the draft accepted in lieu of it. The plaintiff cannot treat the draft, as its own property nor can it claim any lien thereon, growing out of the indebtedness owing to it by the A Bank. Judgment affirmed.

Cited: 10 N. D. 146.

BANK OF GILBY v EARNSWORTH (1897) 7 N. D. 6.

On draft against drawer. Defendant drew on G & Co. to the order of plaintiff. Plaintiff discounted the draft for defendant and forwarded it to the F Bank for collection. The draft was lost in transmission of mail, which fact was not learned until six months after. G & Co. had then failed. Plaintiff requested the defendant to give a duplicate draft. Subsequently defendant gave plaintiff an exact duplicate of the lost draft. Written upon the draft in two places was the word "duplicate." Rev. Code, sec. 4941, provided: "If a bill of exchange payable at sight, or on demand, without interest, is not duly presented for payment within ten days, after the time in which it could, with reasonable diligence, be transmitted to the proper place for such presentment, the drawer and indorsers are exonerated unless such presentment is excused." Judgment for defendant. Appeal.

Corliss, C. J. After a contract is duly entered into, the making of a duplicate adds nothing to the liability of any of the parties to the agreement. 2. The defendant was discharged from liability and he did not waive his right to rely on such discharge. Judgment affirmed.

HILLSBORO NAT. BANK v HYDE (1898) 7 N. D. 400.

Assumpsit. Plaintiff alleged that it had employed defendant as its cashier and had agreed to pay him a salary of \$1,500 in consideration of his giving his entire time to plaintiff and that defendant had conducted a real estate brokerage business

during the time employed by it, and had earned \$1,456, which he had not accounted for the bank. Defendant admitted conducting the sales of real estate on commission, but denied that it had interfered with the business of the bank or that he had agreed to account to the bank for his earnings. Judgment for defendant. Appeal.

Corliss, C. J. 1. The work performed by defendant was not such as a banking corporation is authorized to engage in. 2. A contract to give all of one's time to the employer does not mean that outside earnings of the employee are to belong to the employer. Judgment affirmed.

SECOND NAT. BANK v FIRST NAT. BANK (1898) 8 N. D. 50.

Conversion, of a certificate of stock. Plaintiff was the holder of a certificate of 10 shares of stock of the defendant, which had been issued to C, and assigned by him to plaintiff. Defendant showed that plaintiff held the stock only as collateral, and that defendant had attached the interest of C to the shares and purchased it under an execution sale. Plaintiff offered no evidence of its interest other than the assignment. Judgment for plaintiff for the full value of the stock. Appeal.

Bartholomew, J. 1. As the plaintiff had not the absolute, but only a special, interest in the stock, its measure of damages was not necessarily the value of the stock, but the value of its special interest therein, which would be measured by the indebtedness to which it was collateral, not exceeding the value of the property. 2. It was incumbent upon the plaintiff to establish the amount of its special interest. Judgment reversed.

Cited: 8 N. D. 245.

KRUMP v FIRST STATE BANK (1898) 8 N. D. 75.

Money had and received. Plaintiff and H were joint owners of a car of wheat, which they sold to B, receiving therefor his check, payable to H. Defendant cashed the check for H and he paid half of the proceeds to plaintiff, on the condition that it be repaid if the check was protested. The check was protested and defendant demanded and received from the plaintiff the proceeds of the check. Plaintiff alleged that she was induced to part with the money through fraud and threats of the defendant. Judgment for defendant. Appeal.

Young, J. H was liable to defendant for the entire amount received from it and plaintiff was legally bound to repay to him the portion she had received. Therefore it cannot be said that the defendant obtained money which in equity and good conscience it ought to repay. Judgment affirmed.

Cited: 9 N. D. 30.

PEOPLES STATE BANK v FRANCIS (1899) 8 N. D. 369.

Covenant. Defendant, as surety for her husband, executed two real estate mortgages to secure payment of his notes given to a national bank. The bank went into the hands of a receiver before the maturity of the notes or mortgage. The receiver extended the time of the payment. The notes and mortgage were purchased by plaintiff, which sought to recover a personal judgment upon the covenant. Defendant claimed her liability as surety was discharged by the extension of time of payment of the mortgage. The plaintiff contended that the receiver had no authority to extend the time of payment, and that he had no knowledge that the defendant was liable only as surety. Judgment for defendant. Appeal.

Bartholomew, C. J. 1. The receiver of a national bank is an agent and officer of the United States, and he simply acts in lieu of the officers of the bank, and stands exactly in their shoes, so far as the assets are concerned. Their knowledge necessarily becomes his knowledge. Whatever the receiver did by way of extending time of payment, was done with full knowledge that defendant was surety only. 2. The receiver had full power to grant an extension of time. Judgment affirmed.

Cited: 10 N. D. 531.

COMMERCIAL BANK v RED RIVER VALLEY NAT. BANK (1899) 8 N. D. 382.

Negligence. R gave M his promissory notes for \$300. Before maturity, they were indorsed in blank by M and given to plaintiff for collection. Plaintiff forwarded them to defendant, with instructions not to protest, but to immediately return if not paid. Defendant received them before maturity, and held them 20 days after due, without notifying plaintiff. Between the time of maturity and no-

tice to plaintiff, defendant took from R mortgages on all his property, in excess of their value, to recover the indebtedness of R to defendant, part of which accrued after receiving the notes from plaintiff. Judgment for defendant. Appeal.

Wallin, J. 1. An agent may maintain an action against his sub-agent for the latter's negligence. 2. The defendant has neglected to discharge its duties and obligations in the premises, and such neglect has resulted in damages to the plaintiff. The proper measure of damage is the face value of the note with interest. Judgment reversed.

ANHEIER v SIGNOR (1899) 8 N. D. 499.

Foreclosure. Plaintiff was receiver of the C Bank. Defendant gave his note to the bank for \$10,000; he also assigned his interest in a land contract to "C. C. Schuyler, Cashier." The receiver of the C Bank sought to foreclose defendant's interest in the contract. Defendant offered evidence to show that the assignment had not been intended for the bank, but for Schuyler personally. Judgment for plaintiff. Appeal.

Bartholomew, C. J. The general rule that a word like "Agent," or "Treasurer," added to a name is simply *descriptio personæ*, is not qualified in its application to bank cashiers in transactions other than those relating to commercial paper. Judgment reversed.

FIRST NAT. BANK v MICHIGAN CITY BANK (1899) 8 N. D. 608.

On promissory note. C, cashier of defendant, negotiated with plaintiff to discount what notes defendant might take in the course of business, the defendant guaranteeing all notes that they should discount. Plaintiff agreed to discount the notes. Thereafter, C sent a number of notes to the plaintiff and received cash therefor. The notes were signed by C, cashier. The names of the makers were all forgeries, and the proceeds went exclusively into the hands of C and not of defendant. Plaintiff sued on the indorsement and guaranty made by C. Verdict directed. Judgment for defendant. Appeal.

Young, J. 1. These acts of the cashier are far beyond the ordinary duties and implied authority of a cashier, and do not bind the corporation. 2. Borrowing money is out of the course of legitimate banking business. Judgment affirmed.

LEALOS v UNION NAT. BANK (1899) 9 N. D. 60.

Statutory action to recover penalty for usury, under sec. 5198, U. S. R. S. Plaintiff and her husband executed two promissory notes to defendant, one for \$1,000 and the other for \$50. It was claimed that the \$50 note was given merely as usury for the loan of \$1,000, which note stipulated for interest at the full amount allowed by statute. Plaintiff's husband died and she paid the \$50 note before she was granted letters testamentary. She thereafter paid the \$1,000 note with interest. The jury found that the \$50 had been given as usury. Plaintiff sued as executrix under the will of her husband. Judgment for plaintiff. Appeal.

Young, J. 1. When one of two makers of a note brings an action under sec. 5198, U. S. R. S., he will be denied a recovery, if it shall appear that the payment of usury was not made by him, but by his joint maker. 2. The usury, having been paid by the plaintiff in her individual capacity, before letters testamentary were issued to her, no right of action to recover the penalty ever existed in the plaintiff in her representative capacity. Judgment reversed.

ANDREWS v STATE BANK (1900) 9 N. D. 325.

On deposit. Plaintiff had a purchasing agent at W who kept funds of plaintiff in the defendant bank in his own name. In adjusting the agent's accounts, it was found that the funds to his credit at the bank were short. The agent thereupon asked the defendant's cashier for credit sufficient to cover the deficiency. A deposit slip was issued and the same inserted in his passbook. Plaintiff thereupon drew upon the defendant for the amount, but the draft was not honored. Judgment for plaintiff. Appeal.

Bartholomew, C. J. The transaction was in effect a loan by defendant to the agent of so much money which it transferred to the plaintiff. Judgment affirmed.

TOURTELOT v WHITHED (1900) 9 N. D. 467.

On promissory note. Plaintiff was the receiver of the F National Bank. Defendant was assignee of the N Co. Before either became insolvent, the N Co. was indebted to the bank on several promissory notes to the value of \$10,000. The N Co. increased its capital stock and delivered to the bank \$10,000 in stock under a contract reciting the purchase by the bank and an agreement by the N Co. to pay 10 per cent on the amount, and to find a purchaser for it at its face value within a year. The contract was made by the president of the bank and the notes surrendered. The directors of the bank had ceased to perform their duties as directors. Defendant refused to allow the claim for the amount of the notes, averring that it had been satisfied by sale of stock to the bank. Plaintiff contended that the contract made by the president was not binding on the bank, as it was beyond his authority, and that the purchase of the shares was ultra vires. Judgment for defendant. Appeal.

Bartholomew, C. J. 1. By the contract, the old indebtedness was gone and in lieu thereof the bank became the owner of the stock. 2. Where the entire control of the affairs of the corporation has been abandoned to one of its officers, it will be presumed that he is authorized to do any act that the corporation might lawfully do. 3. In the honest exercise of the power to compromise a doubtful debt owing to a bank, stocks may be accepted in payment and satisfaction. Even in a contract which is ultra vires, if it has been executed by the parties, the law will leave them where it finds them. Judgment affirmed.

OHIO

OHIO v KINNY (1817) 1 Tapp. 169.

Indictment, for passing counterfeit bank notes. The cashier of the bank, who was also a stockholder, was called to prove the forgery. His signature was on the note. Objection by defendant. Overruled. Figures on the margin of the note were not described in the indictment.

Tappan, P. 1. The verdict and judgment in this criminal case cannot be evidenced in a suit brought on this note, nor can the stockholders be made liable for the costs of this prosecution, therefore the witness has not, as a stockholder, sufficient interest to exclude his testimony. 2. The signature of a cashier of a bank to its note is the attestation of a witness merely, and it cannot be said to be his note which is alleged to be forged. 3. Figures in the margin of a bank note are not a material part and need not be described in the indictment. Defendant convicted.

PANCOAST v RUFFIN (1824) 1 Ohio 381.

Injunction, to prevent a levy under an execution. Complainant gave his note to the Bank of C. The bank recovered a judgment thereon and assigned it. The assignee issued execution. Complainant tendered to the sheriff the amount of the note and interest, in notes of the Bank of C, which, at the request of the assignee, the sheriff refused to receive. Sec. 8 of an act regulating suits where banks are parties, provides that the debtor of a bank may pay his debt in the notes issued by that bank, in all suits prosecuted by a bank, or to persons claiming as its assignees or under it in any way for its use and benefit. The preceding sections were intended to aid creditors of banks to obtain its property. Demurrer.

By the court. 1. In order to allow beneficial effect to the preceding section the privilege conferred by the eighth must be limited to suits prosecuted for the use and benefit of the bank, whose notes are offered in payment. 2. Where a debt has been bona fide assigned, the bank has no interest left in it and the assignee is not bound to accept its notes. Bill dismissed.

Cited: 4 Ohio St. 592; 39 id. 337; 43 id. 14; 47 id. 79.

HOUGH v YOUNG (1824) 1 Ohio 504.

Case for negligence. Plaintiff averred that he left a note with defendant, cashier of C Bank, for collection; and that defendant made demand and gave notice on the last day of grace, but so negligently that the indorsers were discharged. The negli-

gence proved was that the demand was made and notice given on the second day of grace. Judgment for plaintiff for full amount. Motion for new trial.

By the court. 1. Since defendant received no notice from the declaration that the negligence complained of referred to the day of giving notice, the variance between the declaration and the proof was fatal. 2. To charge defendant with the whole amount of the note, plaintiff must have proved the maker insolvent, otherwise he could recover only nominal damages. New trial granted.

THOMPSON v YOUNG (1826) 2 Ohio 334.

Bill, to compel contribution. Bank of M was incorporated in 1811, its charter to continue until January 1, 1818. M was appointed cashier and plaintiff and K with three others became his bondsmen. Before January 1, 1818, a law was passed extending the charters of existing incorporated banks to January 1, 1843, on certain conditions. Bank of M complied with the conditions and M, being continued as cashier, became a defaulter in 1819, or after the expiration of the first charter. Judgment was obtained against the bondsmen then living, and plaintiff, having paid one third of it, brought this bill against K's executors and devisees for contribution.

By the court. The securities were not bound for any defalcation that took place after the expiration of the first charter. Defendants are not concluded by the adjudication in the suit against the bondsmen to which they were not parties. Bill dismissed.

Cited: 7 Ohio 228, part 2.

HEIRS OF LUDLOW v HEIRS OF KIDD (1827) 3 Ohio 48.

Petition, to have cause removed to the United States Circuit Court. Plaintiffs, having obtained a reversal of a decree rendered against them, proceeded against other parties who had become interested. The Bank of the United States appeared and presented this petition. Its charter contained no provision authorizing the removal of a cause, on its application, from a state court to a United States Circuit Court. Sec. 12 of the Judicial Act of 1789 extends that privilege to parties particularly enumerated. The bank was not one of them.

By the court. 1. The bank, not being one of the parties enumerated in the act, cannot claim what the law does not provide for it. 2. Even if it were, it could not secure the removal of this cause, because some of the defendants are not entitled to the privilege of such removal, and the privilege cannot be extended by one defendant to his codefendant. Motion overruled.

Cited: 3 Ohio 49; 7 Ohio St. 453.

BANK OF CHILLICOTHE v YOE (1829) 4 Ohio 125.

Bill, against administrator of a deceased indorser. Complainant, having protested a note held by it, on which V was liable as maker and M and C as indorsers brought an action at law against them jointly, and recovered judgment against V and C, the process being returned as not served on M. After M's death, this bill was brought to set up the bank's claim against his administrator, it being alleged that V was insolvent. Sec. 9 of the Act to Regulate Judicial Proceedings where banks and bankers are parties, authorizes a joint action against the drawers and indorsers, and declares that if the bank shall institute a separate action against the drawer and indorser no costs shall be recovered. Complainant claims to have lost its legal remedy under the statute by the death of M. Demurrer.

By the court. The legal remedy is still perfect against C, the survivor, upon the judgment secured against him, and until complainant has exhausted its legal remedies, it cannot seek relief in equity under our statutory regulations concerning banks. Bill dismissed.

TAYLOR v MIAMI EXPORTING CO. (1831) 5 Ohio 162.

Bill, for accounting and other relief. Complainant alleged that he was a stockholder in the defendant company; that the president and directors had so mismanaged its affairs as to destroy its credit, and render it insolvent; that it had ceased to do business as a bank; that certain stockholders had been allowed to transfer their stock to the bank for debts due it; and that, in order to control an election of directors, stock had been sold and later taken back by the company, the original

price being refunded. The stockholders, who had participated in the transactions, were joined as defendants. Demurrer.

Wright, J. 1. A court of equity has power to grant relief to a stockholder against the fraudulent acts of directors, and need not wait until the corporation has been dissolved by legal means. 2. The directors are liable, as trustees, to the stockholders. 3. The proper defendants are the bank, the directors, and those stockholders charged with fraud. Demurrer overruled.

Cited: 46 Ohio St. 504.

IN THE CASE OF THE BANK OF MT. PLEASANT (1831) 5 Ohio 249.

Quo warranto. Application was made to the Supreme Court of J County by an attorney, in the name of a private individual, for a rule to be directed to the Bank of M in that county, to show cause why a writ of quo warranto should not issue to determine why its charter should not be forfeited for alleged misfeasances.

By the court. 1. Such an application must be commenced by a rule against the corporation to show cause why the writ should not be awarded, and the rule must be applied for by the prosecuting attorney of the county in behalf of the state. 2. If, in a proper case, he decline to make such an application, the court will direct him to make it or direct that it be made by another person. 3. The application may be made to the supreme court sitting in any county, after due notice to the party concerned, but the rule must be made returnable to the supreme court of the county where the party against whom it is taken, resides or is located. 4. In case the writ be awarded, the proceeding must be according to the common law. Application refused.

Cited: 5 Ohio 368; 6 id. 449.

TAYLOR v MIAMI EXPORTING CO. (1833) 6 Ohio 176.

Bill, to compel retransfer of stock. Complainant was a stockholder in defendant and pledged his stock to secure a debt due it. Being sued on the debt without regard to the pledge, he brought this bill alleging mismanagement of its affairs and that the directors had permitted certain stockholders to pay their debts to the company by transferring to it their stock, in fraud of the rights of other stockholders; and that defendant had transferred stock to B before an election of directors, and after the transaction had allowed it to be retransferred to defendant. By the charter, defendant's directors were allowed to dispose of its funds as they should think most advantageous. The stock was bought at market value. The stockholders were then solvent. Years had elapsed since these transactions. Plaintiff knew of them from the time they happened.

Collett, C. J. 1. The powers of defendant's directors were broad enough to enable them to buy and sell stock of their own company and to fix the price and mode of purchase and payment. 2. Complainant has slept too long on his rights and cannot now compel the stockholders who transferred their stock to defendant years ago to accept a re-transfer of it. 3. As to the transaction between defendant and B, complainant is entitled to no redress in this suit because he has not shown that he was injured by it in any way. Bill dismissed.

Cited: 6 Ohio 176; 38 Ohio St. 279.

STATE, EX REL. v BUCHANAN (1833) Wright 233.

Quo warranto, for exercising office of director. The charter of a domestic bank provided that no director of any other bank, or partner of such director, should be eligible to the office of director in this bank. Defendant was elected director and qualified as such. Relator had the next largest number of votes. Defendant was a partner of two persons each of whom was a director of a foreign bank. After the jury was sworn, the state offered in evidence an agreement between the opposing attorneys used on the hearing of the rule to show cause. The state offered to prove by relator defendant's admissions that he was a partner of a director of a foreign bank. A witness examined a newspaper clipping and stated that it was his understanding that the persons therein named were directors of one of the foreign banks. Statements made by defendant that he had admitted, should and intended to admit, all the facts necessary to sustain the action were proved.

Wright, J. 1. Defendant's admissions are competent. 2. Relator is disqualified by interest. A resignation of the office will restore his competency. 3. The agreements between counsel are not evidence, as they are not defendant's admissions.

4. The testimony of the witness from the newspaper clipping was incompetent. 5. A statement that one admits everything necessary to sustain an action, is not an admission of facts and does not dispense with proof. 6. An examination of the design of the law to learn the intention of the legislature shows that a partnership with a director of a foreign bank, is forbidden, and the present case comes within its restriction. Judgment for defendant.

GOODENOW v DUFFIELD (1833) Wright 455.

Debt. Plea: nil debet. Defendant and B, as partners, were respectively president and cashier of an unincorporated banking company, since defunct. B died. Defendant was sued as surviving partner. Plaintiff declared on bills of the banking company. He offered testimony to prove defendant's declarations that he was a partner. Defendant offered evidence to show that the bills were taken from his possession and sold to plaintiff by levy under an execution against defendant's partner, and that they had never been issued, or returned and redeemed.

By the court. 1. The declaration of a partner is evidence against the surviving partner after death had dissolved the partnership. 2. If defendant was or held himself as a partner and notes were issued by the bank, then plaintiff has a prima facie right to recover the amount, with interest from demand, or from the time the bank stopped redeeming its notes in specie. 3. The defense is good if proved. The promissory notes of a man in his own possession, unissued, are not the subject of levy on execution. Judgment for defendant.

Cited: 10 Ohio 534.

DOWNER'S ADM'R v ZANESVILLE BANK (1833) Wright 477.

Case, for refusing to permit the transfer of stock in a bank. Plaintiff's intestate died insolvent, owning stock in defendant and indebted to defendant as principal on two notes with sureties. One of the notes had matured and the other had not. Defendant refused to permit a transfer on its books until both notes should be paid. The bank's charter declared that no stockholder indebted to the bank for any demand due and payable could transfer until such debt was paid or collateral security given. It gave the bank a first lien on its debtor's stock. Agreed facts.

Wright, J. 1. Defendant's refusal rendered a tender of the amount of the matured note unnecessary. 2. Defendant has a lien, by its charter, for all debts of its stockholders, whether already due, or to become due in the future. 3. By permitting the transfer before the unmatured note was paid, defendant would release the surety. Judgment for defendant.

BURRIDGE v GEAUGA BANK (1834) Wright 688.

Assumpsit, to recover amount of bank notes destroyed by fire. Plaintiff kept the notes in his store. The store was burned, and the notes were supposed to be destroyed. Plaintiff offered to prove that he said at the time that his money was upstairs in the store and burnt. Plaintiff was offered as a witness to prove that he had \$450 of defendant's bills. He did not know the date, amount, or numbers.

Wright, J. 1. Plaintiff's declarations at the fire were inadmissible. 2. Plaintiff cannot prove the amount of the notes by his own testimony, without identifying them. Plaintiff nonsuited. Judgment for defendant.

STATE v COMMERCIAL BANK (1835) 7 Ohio 125.

Debt, for taxes. Defendant's charter read, "the State of Ohio shall be entitled to receive four per cent on all dividends made by said bank." It contained no express reservation of power in the legislature to alter the rate or to levy any additional tax on the bank. A tax of 5 per cent on the dividends was levied under a general law subsequently passed. The question, as to which rate the bank must pay, was submitted to this court.

Hitchcock, J. 1. The charter of a private corporation is in the nature of a contract with the state. 2. Any law requiring the payment of an amount greater than 4 per cent varies defendant's contract and impairs its validity and is therefore void. Judgment for plaintiff for 4 per cent.

Cited: 1 Ohio St. 577, 657, 679, 682; 5 id. 366, 427, 428, 440, 446; 6 id. 444; 7 id. 509.

GILMORE v BANK OF CINCINNATI (1837) 8 Ohio 62.

Bill, by judgment creditors to compel subscribers to the stock of a bank now insolvent, and their transferees, to pay the subscription. The bank ceased doing business about 1820 and no officers were thereafter chosen. This bill was filed in 1832.

Wood, J. In relation to the stock of this bank, to the debts due to it, and from it, all values have changed whilst the complainants have been sleeping over their rights. Bill dismissed.

BANK OF CHILLICOTHE v SWAYNE (1838) 8 Ohio 257.

Assumpsit: against drawers of a bill of exchange protested for non-payment. Plea: that the bill was discounted for a usurious loan. Replication that the bill was drawn for a good and legal consideration and purchased by plaintiff from defendant for good and valuable consideration. Replication concluded to the country. Special demurrer. A statute provided that creditors should be entitled to interest on all money due on bill or promissory note, at the rate of 6 per cent and no more. Plaintiff's charter provided that it should not take more than 6 per cent on its loans or discounts.

Hitchcock, J. 1. The replications are bad on special demurrer, as multifarious, and as concluding to the country, though introducing new matter. The allegations of the plea are neither traversed nor confessed and avoided. 2. Plaintiff was without power to make a contract for repayment of money with interest at a rate greater than 6 per cent and for that reason the contract is void. Leave to plaintiff to amend.

MATTER OF OHIO LIFE INS. & TRUST CO. (1839) 9 Ohio 291.

To investigate the affairs of a corporation. A special master was appointed to report as to whether the company had issued notes or bills to circulate as money. He found that it had issued the bills. The act incorporating the company gave it the power to buy or sell drafts and bills of exchange. Under this section the company claimed the right to issue bills to circulate as money.

Lane, C. J. The authority to buy and sell drafts and bills of exchange conferred by the charter does not empower the company to issue evidences of debt designed to be used as money. Order issued to the company, to suppress all bills designed to circulate as money.

STATE v FRANKLIN BANK (1840) 10 Ohio 91.

Assumpsit. On two dates when defendant bank declared dividends, its cashier held shares of its stock in trust for it. No tax was paid on the dividends on this stock until it was subsequently divided among the stockholders, when the tax on dividends required by the statute was paid. The State now claimed a tax on the dividends received by the cashier in trust for the bank. On a dividend declared May 1, 1831, the bank paid 4 per cent up to April 1, and five per cent thereafter. Up to March 12, 1831, the statute in force required 4 per cent; the act then passed required 5 per cent on dividends declared after April 1. The State now claimed the additional 1 per cent before April 1, the bank claiming the benefit of the lower rate as long as the old act remained in force. The stock of the bank had been increased and the new issue sold at a premium which was distributed among the old stockholders. The State collected a tax on this, as being a dividend. The bank claimed the right to a judgment against the State for the amount so collected, or at least to setoff its claim in this action.

Hitchcock, J. 1. No other payment of the tax can be required since it was once paid when the dividends were finally paid to stockholders. 2. The tax does not attach to the profits until they are divided, hence under the Act of March 12, 1831, the dividend of the following May 1 was all taxable at 5 per cent. 3. The premium obtained on the sale of this new stock, was not a profit derived from the use of corporate property, nor was it taxable as a dividend when distributed to the old stockholders. 4. Judgment cannot be rendered against the State, but a defendant in an action brought by the State may set off debts due him from the State. Setoff allowed in favor of defendant.

Cited: 11 Ohio 95; 34 Ohio St. 670.

ATWOOD v BANK OF CHILLICOTHE (1841) 10 Ohio 526.

Assumpsit. Defendant refused to redeem its notes, on April 19, 1841. Plaintiff then brought this action. Thereafter, but before trial, he obtained other notes of defendant, amounting to \$4,000, on which he had made no demand. He offered them in evidence also and asked judgment on all the notes with interest from April 19, 1841. The act regulating judicial proceedings where banks were parties, provided that in actions against a bank on its notes plaintiff might give in evidence to support the action any such notes which he might hold at the time of trial, and might recover the amount thereof with interest from the time of the refusal by the bank to redeem its notes.

Hitchcock, J. 1. The act clearly allows a recovery in such a case on notes acquired after action commenced but before trial, and is valid. 2. Plaintiff is entitled to interest from the date of the bank's suspension of specie payments on all notes. 3. After such suspension a demand would be superfluous. Judgment for plaintiff.

STATE, EX REL. v COMMERCIAL BANK	} (1841) 10 Ohio 535.
SAME v LAFAYETTE BANK	
SAME v FRANKLIN BANK	

Quo warranto. The prosecuting attorney brought in question, by the pleadings, as grounds of forfeiture of franchises, the following acts of the bank: 1, suspension of specie payments for periods of six weeks or more; 2, loaning of notes at an usurious rate of interest; 3, expansion of the bank's circulation. He also contended that the creation of banks of issue by a state was in violation of the United States Constitution.

Lane, C. J. 1. The imposition of a penalty for suspension of specie payments, by the charter of this bank, indicated that nothing less than an entire derangement of the bank's business by such suspension, will work a forfeiture. 2. Under the general law, a rate in excess of 6 per cent may be expressly contracted for, and there is nothing in defendant's charter to prevent such contracts. 3. Expansion of indebtedness over capital is not ground for forfeiture, as a specific remedy is given by making the directors personally responsible for the excess. 4. The constitutional question raised is not now a judicial question after the many years of the existence of such banks and such a currency. Judgment for defendant.

Cited: 11 Ohio 9, 518; 1 Ohio St. 620; 32 id. 489.

STATE v GRANVILLE ALEXANDRIAN SOCIETY (1841) 11 Ohio 1.

Quo warranto. The information was filed under a statute passed subsequent to defendant's charter. It charged defendant with the unlawful exercise of banking powers. Defendant's charter empowered it to hold, sell and mortgage real and personal property. Defendant pleaded that it had exercised banking powers for more than 20 years before this proceeding, and that it had banking powers. Demurrer to pleas. Defendant's charter was expressly subject to such regulations as the legislature might afterwards make. The statute required proceedings against a corporation for the exercise of a franchise to be begun within 20 years after the exercise began.

Hitchcock, J. 1. Corporations have such powers as are specifically granted by the act of incorporation, or as are necessary for carrying into effect the powers expressly granted, and no others. 2. No power of banking was expressly or impliedly granted to this corporation. 3. The plea that defendant had exercised banking powers for 20 years successively before this information was filed, is sufficient in law to bar this prosecution. Judgment for defendant if demurrer not withdrawn.

STATE v FARMERS BANK (1841) 11 Ohio 94.

Debt for a penalty. Under the Act of 1816, dividends of a bank's profits might be made semi-annually; and, by the Act of 1831, a statement thereof was required from the bank for the purpose of assessing the dividends. A penalty was imposed in case of refusal. Defendant applied \$50,000 of its profits to the payment of its capital stock belonging to the stockholders without complying with the above acts. Submitted.

Lane, C. J. Whenever, by the act of the directors, the ownership of profits is so changed that it ceases to be the property of the corporation, and becomes the

property of the stockholders, it is a dividend of profits, upon which the tax was intended to apply. The application of the profits to the shares which are the property of the stockholders is a dividend within the definition, and neglect of furnishing the statement is an act incurring the penalty. Judgment for plaintiff.

ROCKWELL v STATE (1841) 11 Ohio 130.

Debt for a penalty. A bill issued by C Bank was presented at the bank and payment in specie refused by defendant, the cashier. He also refused to indorse and sign said note as required by the Act of 1839, which provides that if any banking institution shall hereafter suspend specie payment, it shall be the duty of the cashier to indorse his refusal and the date thereof on the back of the bill, in default of which cashier shall pay a fine to the use of the person or persons aggrieved. It was contended that an action for debt would not lie as the amount of the penalty was uncertain. Judgment for plaintiff. Error.

Wood, J. 1. The pleader has not averred the suspension of specie payment, but that plaintiff presented a single bill and payment was refused. This averment is insufficient to sustain the judgment, as the statute is penal and must be strictly construed. 2. An action for debt is the proper remedy. 3. As the charter of C Bank provides that the legislature may enact laws, enforcing and regulating the recovery of the notes, bills, or debts of which payment shall be refused, the act under which this suit is instituted is not unconstitutional as impairing the obligation of a contract. Judgment reversed.

BROWN v STATE (1842) 11 Ohio 276.

Indictment, for acting as officer of an unincorporated bank, under a statute which provides that any person acting as an officer of an unincorporated bank shall be liable to a fine. The indictment named a day, the proof showed the act to have been committed on the next day. Verdict: guilty. Defendant was directed to stand committed until the fine and costs were paid. Error.

Wood, J. 1. The variance between the indictment and proof as to time was not fatal, as the time was not material. 2. It was not necessary for the State to prove affirmatively that the bank had not been incorporated, as acts of incorporation in this state are public laws which the court and jury are presumed to know. 3. As a court of general jurisdiction is presumed not to err, it will be assumed that C Bank was not a foreign institution, whose failure to incorporate, plaintiff would be required to prove. 4. A commitment until the fine and costs are paid, is an addition to the punishment prescribed by law for the offense, and is, therefore, illegal. Judgment reversed.

Cited: 34 Ohio St. 81; 11 Ohio 276; 46 id. 650; 52 id. 55.

CREED v COMMERCIAL BANK (1842) 11 Ohio 489.

Assumpsit on bills of exchange. Plea, usury. Plaintiff contended that, as its charter did not prohibit usury, but on the contrary, gave it power to discount bills of exchange "on banking principles and usages," the contracts were valid. Judgment for plaintiff. Error.

Wood, J. 1. The limitation as to discounts in plaintiff's charter forbids usurious contracts. 2. Plaintiff is subject to the general law which forbids usurious discounts; a law prescribing a rate of interest where a rate is not fixed or referred to in a bank's charter does not violate such charter as a contract. Judgment affirmed.

Cited: 1 Ohio St. 235, 329; 4 id. 262; 38 id. 196; 41 id. 381.

LEWIS v BANK OF KENTUCKY (1843) 12 Ohio 132.

Assumpsit for money loaned. Plaintiff offered in evidence bills of exchange drawn by defendant H, and indorsed by defendant S, for \$3,000. Defendants contended that the declaration was insufficient; that plaintiff, a foreign bank, could not maintain a joint action against the drawer and indorser, under the statute; and that no proof was made of plaintiff's incorporation. Judgment for plaintiff. Error.

Birchard, J. 1. An averment that plaintiff is a corporation is not essential, even in the case of a foreign corporation; it is sufficient to declare in the corporate

name. 2. The act regulating actions to which banks are parties, applies equally to foreign and domestic banks; and plaintiff may, therefore, maintain this action. 3. Foreign corporations must prove their corporate capacity under the general issue; but the objection here was not properly taken at the trial. 4. The proof, to entitle defendant to protest damages in suits of this description, is the same as that required in those cases where the statutes have not dispensed with specific allegations in the pleadings. The law makes the common count sufficient for the bank. Judgment affirmed.

BANK OF GALLIPOLIS v DOMIGAN (1843) 12 Ohio 220.

On promissory note for the use of V. The note was given by M, at four months, non-negotiable, payable to plaintiff. Five days afterward plaintiff, being in a failing condition, assigned the note to V, who put it in the hands of S for collection. S brought suit on the note, and defendant, a sheriff, receiving notes of plaintiff in discharge of the execution, returned it satisfied. A motion to amerce the sheriff for not executing the writ of execution, was overruled. The return set out that V was not a bona fide assignee. A statute regulating judicial proceedings where bankers were concerned, required the sheriff to receive a bank's notes in satisfaction of an execution in favor of the bank, or its assignee; and this statute was interpreted as referring to all assignees except those taking bona fide. Error.

Wood, J. 1. If the return on its face shows that the sheriff was justified in taking the bills of the bank in satisfaction of the execution, plaintiff's remedy is not by motion to amerce, but by action for false return. 2. Unless V was a bona fide assignee, the sheriff was bound to accept the notes in satisfaction of the execution. Affirmed.

Cited: 10 Ohio St. 32; 16 id. 53.

MIAMI EXPORTING CO. v CLARK (1844) 13 Ohio 1.

Assumpsit against acceptor of bill of exchange. Plaintiff had, for several years, done a banking business without any express legislative authority. In 1816 an act was passed incorporating certain unchartered banks, and providing that "said corporations shall not take more than 6 per cent interest in advance." It was also provided that if plaintiff should accept the provisions, it also should be exempt from a certain tax. Plaintiff accepted the provisions. Subsequently it discounted the bills in suit, at the request of defendant, at 11 per cent. Plaintiff claims a recovery, on counts for money had and received, of at least the principal with legal interest. Judgment for defendant. Motion for new trial.

Birchard, J. 1. Plaintiff's banking powers being based solely on the Act of 1816, it is bound by the provision prohibiting all banks from taking more than 6 per cent interest. 2. As both parties are in pari delicto, no action of any kind can be maintained. 3. An objection to evidence not made until appeal, is too late. Motion overruled.

Cited: 16 Ohio 475, 477; 1 Ohio St. 329; 9 id. 35, 36, 41; 35 id. 530; 38 id. 196, 199; 40 id. 283.

MARTIN v TRUSTEES OF BELMONT BANK (1844) 13 Ohio 250.

On bond executed by defendant to B Bank, with a warrant of attorney authorizing judgment to be entered "at the suit of the president, directors and company" of B Bank and confession of judgment for costs and attorney's fees. B Bank's charter expired by limitation, and suit on the bond was brought in their collective name by trustees authorized by statute to close up its affairs. Judgment was confessed, including attorney's fees. Error.

Birchard, J. 1. An agreement to pay a percentage as collection fees, in addition to interest, is against public policy, and void. 2. This suit is substantially a suit of the corporation, and the warrant justified the entry of appearance and confession of a proper judgment. 3. The suit was properly brought in the collective name of the trustees. Judgment reversed, for including attorney's fees.

PORTER v KEPLER (1846) 14 Ohio 127.

Debt, on a certificate of deposit, to charge defendants as stockholders and partners in an unauthorized bank. The act of January 27, 1826, made stockholders or partners in such a bank jointly and severally liable, and provided that if, in

a suit against one or more jointly, some should not be found liable, the suit might proceed to judgment against others who were liable. Swan's Statutes, 147, provided that bills issued for circulation by unauthorized banks should be void. Judgment against some, and for others, of the defendants. Error.

Hitchcock, J. 1. Though at common law judgment in favor of one defendant in an action of debt would discharge all, this rule has been changed by the statute; but the statute did not give a new form of action and that of debt is still proper. 2. A certificate of deposit issued by an unauthorized bank is a valid contract as against the stockholders; it is not a bill designed for circulation and void under Swan's Statute, 147. 3. Where the declaration shows a good cause of action, informality in its statement will not warrant a reversal of judgment. Judgment affirmed.

Cited: 14 Ohio 220.

RECEIVERS OF BANK OF CIRCLEVILLE v RENICK (1846) 15 Ohio 322.

Injunction. R, president of C Bank, delivered to L \$4,000 of its notes, to be exchanged for other funds and returned to the bank. L converted part of the fund to his own use. R, having become insolvent, transferred the claim of the bank against L, as his own personal claim, to defendant, his brother. Defendant sued L in R's name, and obtained judgment for the balance due. C Bank had done everything necessary to entitle it to act as a corporation, but the commissioners had failed to perform some minor executive duties. Plaintiffs, receivers of C Bank, seek to restrain defendant from collecting the judgment. Defendant claimed that the bank was not properly incorporated.

Wood, C. J. 1. As the claim was a mere chose in action, not negotiable, the bank, by its receivers, may pursue it even into the hands of a bona fide assignee without notice. 2. C Bank was a de facto corporation, and its corporate existence cannot be attacked collaterally, especially by one who accepted its funds and transacted business with it. Decree for complainants.

Cited: 19 Ohio. 469.

JOHNSON v BENTLEY (1847) 16 Ohio 97.

Assumpsit. In the first count plaintiff sought to recover under the Act of 1816, on notes put in circulation by defendants, as an unauthorized banking association. The second count differed from the first in that it was alleged that defendants assumed to act under a charter that had become forfeited by nonuser, and were therefore unauthorized bankers. The Act of 1816 made unauthorized banks and their stockholders liable on the notes put in circulation. Sec. 24, Act of 1824, prohibited suits on such notes and made them void for the purpose of suit. This section was subsequently repealed. The notes in suit were put in circulation prior to the repeal. General demurrer.

Read, J. 1. Sec. 24, Act of 1824, did not make the notes absolutely void but merely suspended the legal remedy thereon. 2. The repeal of sec. 24, Act of 1824, revived the right of recovery under the Act of 1816 on notes put in circulation by an unauthorized banking company prior to such repeal. 3. The court will not inquire collaterally into the forfeiture of a charter of incorporation. Demurrer overruled as to first count; sustained as to second.

LEWIS v McELVAIN (1847) 16 Ohio 347.

Assumpsit, on a promissory note. The note was made to and discounted by an unauthorized banking company while the Act of 1816, declaring such a note void was in force. Plaintiff was appointed trustee to wind up the company's affairs. The Act of 1845 authorized him to collect the notes made to the company and prohibited any one from pleading that the notes were void under any statute. Defendant, a stockholder, claimed that the act was unconstitutional as making valid contracts which were void when made. Judgment for defendant. Error.

Hitchcock, J. 1. The Act of 1845 is retrospective; the constitution does not prohibit the enactment of retrospective laws that interfere with no vested rights. 2. The act authorizes suit against the stockholder on his note, as well in law as in equity, and to that extent alters the general rule that a partnership cannot sue a partner at law. Judgment reversed.

GORDON v KEARNEY (1848) 17 Ohio 572.

Assumpsit, for proceeds of a bill of exchange. Plaintiff drew a bill, payable to his own order, and indorsed it unqualifiedly in terms, but really for collection only, to M & Co. M & Co. indorsed it to defendant for collection. Before maturity of the bill, M & Co. failed owing defendant more than the amount of the bill. Defendant applied the proceeds of the bill to M & Co.'s account. Judgment for defendant. Error.

Birchard, C. J. A party entrusting commercial paper, before due, to another, under such circumstances as to enable him to deal with others as the apparent rightful owner, cannot, after the other has so dealt, regain the paper or its proceeds by proving his original equity. Judgment affirmed.

Cited: 8 Ohio St. 483, 489, 491, 494, 500.

LAWLER v WALKER (1849) 18 Ohio 151.

On notes of an unauthorized bank, against stockholders. Pleas, non-assumpsit, and Statute of Limitations. The C Co. although not authorized to transact a banking business or to issue bills or notes to circulate as money, issued the notes in suit, made to resemble bank notes. These circulated as money for more than a year. The Acts of 1816, and 1839 provided that stockholders of an unauthorized bank should be individually liable for its bills and notes, and that every corporation, except an incorporated bank, that should issue bills or notes intended to circulate as money, should be deemed an unauthorized bank. Judgment for plaintiff. Error.

Spalding, J. 1. This company is within the meaning of the acts relied upon, and since its powers did not extend to the issue of obligations to circulate as money, its stockholders are individually liable upon the obligation. 2. The Statute of Limitations is no defense, for the liability of defendants for acts unauthorized by the charter is *ex contractu* and not by way of a penalty, and therefore the four years limitation asserted does not apply. Judgment affirmed.

Cited: 1 Ohio St. 364; 7 id. 352; 16 id. 610.

CLINTON BANK v HART (1850) 19 Ohio 372.

On note against makers. Four defendants were named as joint makers; one was not found, one defaulted in pleading, and the other two obtained a judgment on a finding that they had not promised. Judgment was entered on the default for plaintiff, and a writ of *scire facias* was issued against the defendant who had not been served, to make him a party to this judgment. Demurrer. Sustained. Error.

Hitchcock, C. J. 1. At common law a judgment cannot be obtained against some of the joint makers of a promissory note when others are found not liable. 2. As the record shows that no judgment could have been legally entered against this defendant he cannot be made a party to the judgment by this writ. The Act of March 12, 1844, providing for recovery against one or more joint makers, and relied upon as having changed this rule, has no application to suits by banks. Affirmed.

Cited: 3 Ohio St. 415; 42 id. 13, 14.

VOORHEES v RECEIVERS OF BANK OF CIRCLEVILLE (1850) 19 Ohio 463.

Bill, to enforce stockholder's subscription to stock. Defendants contended that the bank had never been legally organized under the charter, in that, after the other requirements had been fulfilled, the governor had failed to give a public notice required as to the compliance of the bank with its charter, which notice was by the charter a condition precedent to its right to do a banking business. The bank had, however, put its paper into circulation and transacted ordinary banking business. Decree for complainants. Bill of review.

Hitchcock, C. J. The stockholders of this institution cannot in a suit like this against themselves, defend on the ground that in assuming to act under the charter of incorporation, and to do a banking business, they have acted in violation of, and without authority of law. Bill of review dismissed.

Cited: 34 Ohio St. 63.

MYERS v MANHATTAN BANK (1851) 20 Ohio 283.

Assumpsit on a note against maker and indorser. Pleas, general issue, and that the note was payable at the plaintiff, an unauthorized bank. Replication: that the bank was incorporated by the Legislature of Michigan when Manhattan, its situs, was within that state, and that after the change of boundary the act of incorporation, conferring banking privileges, continued in force in Ohio. This act was passed by a state government set up by the people of Michigan in constitutional convention prior to the Act of Congress providing for the admission of Michigan as a state. This act of Congress admitted Michigan on condition that this territory be conceded to Ohio. Judgment for plaintiff. Error.

Ranney, J. 1. The Legislature of Michigan could not, when plaintiff was incorporated, rightfully exercise any legislative power whatever; for until abolished by the admission of the state, the territorial government alone had jurisdiction. 2. The state government of Michigan had no jurisdiction, either rightful or actual, over this disputed territory, when the act in question was passed. 3. Even if the preceding propositions were incorrect, an act of incorporation by the law of Michigan would not authorize this bank to do such business in Ohio, where the statute declares unauthorized all banks not incorporated by a law of this state. Reversed.

BARTHOLOMEW v BENTLEY (1852) 1 Ohio St. 37.

Debt, on bank notes, to charge defendants as unauthorized bankers. A bank was organized in 1816 under the act of that year. It became insolvent and slumbered for 16 years. B and J, who had been directors, attempted to revive it, for purposes of fraud, and elected a board of directors. The following year also a board of directors was elected the members of which held but one share of stock, and had no real interest in the concern. Notes were issued in fraud on the public. The Act of 1816 required directors to be stockholders also. It provided that directors might fill vacancies on the board. Verdict for plaintiff. Motion for new trial.

Ranney, J. 1. Mere irregularity in organization under a charter will not deprive the officers and stockholders of the corporation of its benefit nor make them privately responsible. 2. To entitle them to such protection the provision of the act of incorporation must be substantially pursued. 3. Sixteen years' abandonment of their official duties by J and B constituted an implied resignation as directors. 4. The charter of the bank was never revived and the corporation reorganized under it so as to afford defendants any protection or to relieve them from the charge of being unauthorized bankers. Motion overruled. Judgment on the verdict.

Cited: 1 Ohio St. 364; 2 id. 155; 5 id. 61; 16 id. 611; 34 id. 58; 47 id. 541.

CONANT v SENECA CO. BANK (1853) 1 Ohio St. 298.

To compel transfer of stock and to have assets applied to creditors' claims. Plaintiffs B & G held capital stock of defendant bank as collateral security for a note. Defendant R, the assignor, was at the time indebted to the bank, part of his indebtedness having matured. He gave the bank notice of the assignment and induced the cashier to transfer the shares to B & G on the books. Thereafter R's indebtedness to the bank was paid, but he later became again indebted to the bank. B & G, the note being unpaid, sought to have themselves declared the owners of the stock. Sec. 46 of the Banking Law gave the bank a lien on stock for the holder's indebtedness, that could not be divested in the case of matured debts and could be divested in the case of unmatured obligations only by consent of a majority of the directors. Plaintiffs C E & Co. sought to have applied on R's indebtedness to them, the proceeds of land, conveyed to the bank's president and cashier by R, then a director, in satisfaction of a debt due from R to the bank. The evidences of indebtedness had been surrendered to R by the bank at the time of the conveyance. R's indebtedness then amounted to more than was allowable under the charter.

Thurman, J. 1. As R's debt to the bank was in part matured the bank's lien on his stock could not be divested and the attempted transfer to B & G did not pass the legal title. 2. Subject to such a lien, the stock could be transferred, and an equitable title passed to B & G which the bank, having notice, was bound to respect. 3. As the present indebtedness of R to the bank accrued after such notice, B & G have the entire equitable interest in the stock. 4. The fact that the land was conveyed in discharge of a debt that the grantor was forbidden to contract,

does not avoid the conveyance as against the grantor's creditors; for money paid in discharge of a non-collectible debt cannot be recovered by the debtor or his creditors. Decree accordingly.

Cited: 6 Ohio St. 266.

PREBLE CO. BANK v RUSSELL (1853) 1 Ohio St. 313.

Assumpsit, on promissory notes. Defendants, B, P and T pleaded non-assumpsit. Judgment was entered against defendant R on default. Defendants offered to prove by R that he was the principal debtor on the notes and the other defendants his sureties and by R and B, plaintiff's cashier, that the notes were made and given to plaintiff for a usurious loan. Objection. Overruled. Sec. 4, Act of 1848, provided that the forfeiture specified in sec. 61 of the act incorporating the bank should only be established by an action in the name of the person from whom the illegal interest was taken. Sec. 4 of the Act of 1848 was repealed by sec. 1 of the Act of 1850, and sec. 61 of the bank law so far as it might have been repealed by the Act of 1848, was revived. Between the enactment and repeal of the Act of 1848 the notes sued on were given. The bank was expressly limited by its charter to six per cent interest. Sec. 61 of the bank law declared that the charging of a rate of interest greater than six per cent should work a forfeiture of the debt. Judgment for defendants. Error.

Ranney, J. 1. The testimony of R was admissible; he was not an interested party as judgment had been entered against him. 2. The Act of 1848 did not attempt to legalize usurious contracts, but left them forfeited as before and authorized their establishment by an action against the bank. 3. No right of the bank was affected by the repeal of this act. The bank had no right to any part of the testimony evidenced by such a contract. The Act of 1848 operated only upon the remedy, and after its repeal, is to be regarded as if it never existed. Judgment affirmed.

Cited: 1 Ohio St. 329; 3 id. 306, 415; 38 id. 196.

KEARNY v BUTTLES (1853) 1 Ohio St. 362.

On bills issued by an unauthorized banking company, against stockholders, under the Act of 1816 to prevent unauthorized banking. The declaration alleged that defendants were stockholders at, and subsequent to, the time when the bills were issued, and that the bills were issued in 1836 and from then to the commencement of the suit. Defendants demurred, contending that as the company was incorporated in 1807 for literary purposes, no new liability could be imposed by the Act of 1816; that it should be alleged that defendants were stockholders at the commencement of the suit; that there was no allegation that the acts complained of took place after 1816; that the Act of 1822, to regulate judicial proceedings where banks and bankers are parties, made all such issue of bills absolutely void. Demurrer sustained. Judgment for defendants. Error.

Ranney, J. 1. A stockholder in a literary society, acting within the scope of its powers, is not affected by the unauthorized acts of others, who step beyond them, without his assent. 2. But such a corporation cannot be used to shield those who act in its name, but go outside its limits. It was sufficient to state that the defendants were stockholders at the time of, and subsequent to, the issuing of the notes, without alleging that they were stockholders at the commencement of the suit. 3. The allegation that notes were issued from 1836 to the time of the commencement of the action is sufficient. 4. The Act of 1822 rendered notes issued without authority, void for the purposes of suit only, and its repeal in 1840, revived the provisions of the Act of 1816, relative to such notes. The Act of 1822 merely suspended the remedy and did not change the character of the notes. Judgment reversed.

Cited: 2 Ohio St. 155; 16 id. 610; 42 id. 261.

KNOUP v PIQUA BANK (1853) 1 Ohio St. 603.

Rule to show cause why defendant should not pay taxes. Defendant was organized under the Act of February 24, 1845, which prescribed a rule and rate of taxation. The Act of March 21, 1851, altered the rate by imposing a heavier tax on defendant. The tax in suit was assessed under the Act of 1851, but as the remedy given by this act to the state for enforcing the collection had been repealed and a

substantially similar remedy substituted by the Act of March 23, 1853, this proceeding was begun under the latter act. Rule refused. Appeal. Motion to dismiss appeal. Case reserved.

Corwin, J. 1. Where a statutory remedy for a right created by that statute is repealed, but the repealing statute provides a substantially similar remedy, the right may be prosecuted under the repealing statute. 2. Sec. 60 of the Act of 1845 contains no pledge on the part of the state not to change the mode or amount of taxation therein specified. The Act of 1851, therefore, does not impair any right secured defendant by the Act of 1845. Judgment for plaintiff.

ELLIS v LINCK (1853) 3 Ohio St. 66.

Money paid, for taxes. Plaintiffs were private bankers. They returned the value of their property as \$90,300. The auditor taxed plaintiffs on the further sum of \$880,000 which included the amount of their deposits. Sec. 3, art. 12, of the constitution, provided that all property employed in banking should always bear a burden of taxation equal to that imposed on the property of individuals. Plaintiffs contended that the amount of their deposits should be deducted from the gross amount of their money and credits, and that only the credit balance should be taxed. Case submitted.

Corwin, J. 1. Plaintiffs are bankers within the meaning of the constitution. 2. Deposits are the property of the banker; and whether used in the discounting of paper, in the purchase of notes and bills, or held in reserve to pay current demands, they are employed in the business of banking and are therefore taxable. Judgment for defendants.

BATES v LEWIS (1854) 3 Ohio St. 459.

On promissory note. Plea, general issue, with notice of setoff. Defendant, a stockholder and director of a bank, gave the note for an additional subscription to the stock. This subscription was intended to show that a considerable amount of stock had been taken, in order to prevent others from obtaining control of the bank. It was not intended to be paid. Under the Act of 1845 plaintiff was appointed trustee of the bank with power to prosecute suits against its debtors. Defendant claimed a setoff of \$300, paid since the commencement of the suit on a judgment against him and others, as partners in the bank. Disallowed. Defendant contended that the bank was not incorporated by law when the note was given and that the note was therefore void. Judgment for plaintiff. Error.

Warden, J. 1. As partners in an association doing an unlawful banking business, these men cannot be released from a subscription which may have induced creditors to trust the bank. 2. The object of the Act of 1845 was not to change the ordinary rules of setoff or to provide for the settlement of the partnership concerns. The right of setoff would in any action at law be limited to matters in existence at the time of suit brought. Judgment affirmed.

ELLIS v OHIO LIFE INS. & TRUST CO. (1855) 4 Ohio St. 628.

Assumpsit, for money paid under mistake of fact. A check purporting to be drawn on plaintiff by E, payable to bearer, was presented to defendant by a stranger. Defendant made no inquiry as to the bearer's identity or right to the check. Plaintiff paid defendant the amount of the check without examining it. Ten days after, the check was found to be a forgery. It was returned to defendant and payment demanded. Plaintiff, to show defendant's negligence, introduced evidence of a general custom of banks in the locality when a check was presented for sale by a stranger at a bank other than the drawee, to make inquiries with reference to the identity of the stranger and his right to the check. After plaintiff's evidence was in, defendant moved for a nonsuit. Granted. Judgment for defendant. Affirmed at General Term. Error.

Ranney, J. 1. When the evidence offered by plaintiff has been given and a motion for a nonsuit is interposed, a question of law is presented. 2. Defendant's negligence in not making inquiry in accordance with the custom, as to the identity of the bearer and his right to the check, contributed to induce plaintiff's mistake; defendant is, therefore, liable. Judgment reversed.

Cited: 38 Ohio St. 393.

STATE, EX REL. *v* SENECA CO. BANK (1856) 5 Ohio St. 171.

Quo warranto. Sec. 66 of the Act of February 26, 1845, under which defendant was organized, provided for forfeiture if the directors of any bank organized under this act, should knowingly permit any of its officers, agents, or servants to violate any of the provisions of the act. Sec. 59 provided that on specified days the cashier should make a verified statement of the bank's condition and should transmit it to the auditor. Sec. 44 provided that the stockholders collectively should at no time be liable to the bank, either as principal debtors, or sureties, or both, to an amount greater than three-fifths of the capital stock actually paid in; nor should the directors be so liable except to such amount and in such manner as should be prescribed by the by-laws of the company. The following were alleged as violations of the act in five replications: 1, that defendant neglected and refused to make or transmit such statement or to cause the same to be made and transmitted to the auditor; 2, that on a day less than five years previous, defendant ceased to use and exercise its franchise and voluntarily abandoned the same, by assigning to its assets for the purpose of liquidation; 3, that without authority of any by-law, defendant made loans to the directors and permitted them to become sureties for each other and for other persons. By the Act of March 12, 1841, non-user, in order to constitute a ground of forfeiture, must have continued for the term of five years prior to filing the information. The Act of March 17, 1838, provided that a bank's charter should be liable to forfeiture whenever it should have done or omitted any acts which amounted to a surrender of its corporate rights and franchises. General demurrer.

Brinkerhoff, J. 1. The averment in the first replication necessarily implies guilty knowledge. 2. The facts in the second replication are insufficient to work a forfeiture of corporate franchises on the ground of non-user under the statute. 3. The act of defendant in transferring its assets constituted a surrender of its franchises. 4. Sec. 44 clearly prohibits all loans to directors without authority of a by-law passed by the stockholders. 5. A corporation is presumed to know the law under which it was organized. Demurrer overruled.

STATE EX REL. *v* MOORE (1856) 5 Ohio St. 444.

Mandamus, to compel county auditor to ascertain bank capital. A branch of the State Bank was organized under the Act of 1845, which prescribed the rate of taxes to be paid by the bank. By the Act of 1852 a larger rate was provided for. Defendant, a county auditor, refused to assess a tax against the branch under the Act of 1852. The United States Supreme Court had held that the Act of 1845 prescribed a tax rate which could not be raised without the consent of banks organized thereunder. The state auditor seeks to compel defendant by mandamus to assess under the Act of 1852.

Bowen, J. 1. This court will be governed by the decision of the United States Supreme Court. 2. The legislature, under the constitution of 1802, after creating a private corporation, and declaring a rule whereby it shall be taxed, and after, by implication, excluding the right to change such a rule, cannot modify the charter thus granted. Motion denied.

Cited: 5 Ohio St. 449.

ROSS COUNTY BANK *v* LEWIS (1856) 5 Ohio St. 447.

Where a tax was assessed under the Act of March 21, 1851, against a corporation organized under the Act of February 24, 1845, which provided for a different rate of taxation, the enactment of 1851 was deemed to impair the obligation of contracts, and therefore to fall within the constitutional prohibition.

STATE, EX REL. *v* CHASE (1856) 5 Ohio St. 528.

Mandamus to compel the governor to issue proclamation. Relator and others organized a banking association under the Act of 1845, which provided that no more than four banks should be organized thereunder in H County. Four banks were organized, but one failed, and the bank in question was organized to take its place. Application was made to defendant to issue his proclamation, as required by statute, setting forth that this company was authorized to commence business. He refused. The new constitution, adopted after the Act of 1845, provides that corporations may be formed under general laws, and shall be subject to taxation.

Bartley, C. J. 1. Mandamus will lie against the governor in regard to a mere

ministerial duty enjoined on him by statute and affecting a specific private right. 2. No authority is conferred by the Banking Law of 1845 and its amendments, to fill the places of any corporations, formed under this law, which have gone out of existence. 3. As, after the new constitution took effect, no new corporation could be formed at variance with the terms therein prescribed, authority to form additional banking corporations under the Law of 1845 fell by operation of the constitution. Motion overruled.

STARK COUNTY BANK v MCGREGOR (1856) 6 Ohio St. 45.

Mandamus, to compel county auditor to accept return. Plaintiff tendered a return of its assets for taxation, made out in the language of the Statute of 1852, including a statement of the average amount of bills and notes discounted or purchased. With the return was a statement of the amount of money on hand not used with a view to profit, which sums plaintiff did not consider should be taxed. The statute authorized the state auditor to furnish general forms for returns, and the forms furnished in this case called for a return of specie in the vaults.

Swan, J. 1. Specie in banks and balances due from other banks, not used with a view to profit, are not required to be returned to the assessor, but specie kept for sale and balances on interest are required to be taxed. 2. The forms furnished by the auditor of the state, so far as they comply with the requirements of the statute, must be used. But if the auditor requires banks to make up items of information not required by law, he cannot reject a return made out according to law. Mandamus granted.

CITIZENS BANK v WRIGHT (1856) 6 Ohio St. 318.

Mandamus, to compel the state auditor to issue notes. Plaintiff was organized for banking purposes under the Act of March 21, 1851, passed several months prior to the Constitution of 1851. Sec. 7 provided that whenever such company should lawfully transfer to the auditor certain stocks, it should be entitled to receive from the auditor an equal amount in circulating notes. Plaintiff had done everything necessary under the act, to entitle it to the notes. The auditor, thinking the act unconstitutional under the Constitution of 1851, repealing all statutes inconsistent with that constitution, refused to issue the notes.

Brinkerhoff, J. 1. A proceeding upon mandamus is the proper remedy. 2. The provisions of the Constitution of 1851 as to the organization of banking corporations are prospective only, not retrospective. 3. The Act of 1851 is not inconsistent with the Constitution of 1851, and therefore was not repealed thereby. Mandamus granted.

DUNKLE v RENICK (1856) 6 Ohio St. 527.

On bill of exchange. Plaintiff sued as first indorsee, alleging indorsement before maturity for full value, and protest, and set forth the bill, which was payable to L, cashier. Defendant set up that, being indebted to C Bank, of which L was cashier, he gave it a bill, a note of W's, and his own check in payment, C Bank discounting the W note at more than 6 per cent, and that the bill now sued on was a renewal of the first bill, which bill, on account of the usury in the transaction, was void. The act incorporating C Bank empowered it to loan money, buy, sell, and negotiate bills of exchange, provided it "shall not take more than 6 per cent" on its loans and discounts. Motion to strike out answer. Reserved.

Scott, J. 1. If C Bank had capacity to make the contract by which it became holder of the note, plaintiff, as a bona fide purchaser of negotiable paper before maturity, without notice, could not be affected by the usury in the transaction. 2. The W note, valid in its inception, was taken by C Bank in payment of a bona fide pre-existing debt. This amounted to a purchase of the note and was not prohibited by the charter provision as to loans and discounts, as that provision refers only to discounts in the sense of taking interest in advance. Motion granted.

CHAMPAIGN COUNTY BANK v SMITH (1857) 7 Ohio St. 42.

Money paid for taxes. Defendant was the county treasurer. Plaintiff alleged that it had furnished tax returns, omitting the amount of state bonds held by the auditor as security for circulating notes, and had paid the tax levied in accordance therewith; that thereafter, without notice to plaintiff, the county auditor added

the amount of such bonds to the duplicate; that defendant, the county treasurer, knowing that the county auditor had acted solely on instructions from the state auditor, brought a statutory action against plaintiff for refusal to pay; and that while said action was pending, defendant forcibly took the amount of the taxes. There was no allegation that defendant personally knew that plaintiff had not been notified or that that fact appeared on the face of the duplicate. Demurrer. The Law of 1852 provided for taxation of all property upon which banks were entitled to receive interest. Plaintiff contended that the act was unconstitutional, as impairing the obligation of the state's contract to pay interest on its bonds. A statute provided that the county auditor, if he has reason to believe that a return is false or erroneous, may correct it and "notify any such person before making the entry on the duplicate." Case reserved.

Scott, J. 1. If this petition is in the nature of an equity action, plaintiff must show that the amount should be repaid *ex æquo et bono*, and recovery will depend upon whether the bonds were taxable. 2. The bonds were subject to taxation under the Law of 1852. 3. A state cannot affect the obligation of contracts to which it is a party further than it can affect contracts between other parties, but all property, including state bonds, is subject to taxation, unless there is a stipulated exemption. 4. If the petition be regarded as equal to a declaration in trespass, defendant is in the position of a ministerial officer, protected by process valid on its face; as personal knowledge by him of failure to notify plaintiff is not alleged, he is not liable for the alleged trespass. Demurrer sustained.

Cited: 37 Ohio St. 125; 44 id. 572.

REZNOR v HATCH (1857) 7 Ohio St. 248.

On bill of exchange, against drawer, first indorser, and acceptor. The bill was discounted in Kentucky by a Kentucky bank, which gave its notes in exchange, with the understanding that the notes were to be paid out in purchase of wool in Ohio. Plaintiffs were indorsees of the bank, which took the bill only as collateral for a pre-existing debt. A statute of Ohio made it unlawful for any bank to give, in exchange, any note intended to circulate as money, except notes of banks organized under the Ohio law. Judgment for plaintiff. Appeal.

Scott, J. 1. Plaintiffs took subject to any defense available against the bank. 2. Though the contract be a Kentucky contract, it will not be enforced in Ohio, if designed to contravene the policy of Ohio laws. 3. The design of the act could not have been entirely to prevent the circulation of foreign bank bills in this state, else the prohibition would have been general: it is highly penal and should be strictly construed. 4. The statute merely forbids bankers and money brokers from circulating foreign bank bills; it does not forbid circulation of such bills by those engaged in other occupations. Judgment affirmed.

Cited: 37 Ohio St. 680.

LAWLER v BURT (1857) 7 Ohio St. 340.

To enforce statutory liability of stockholders. Defendants, as president and secretary of a canal company not authorized to do a banking business, made and issued notes, like bank notes, engraved, signed "B, president, and F, secretary." Defendants gave them for the company's debts. The company acknowledged the liability and took up the notes as far as it was able. Plaintiff sought to hold defendants under statutes providing that every company, not lawfully authorized, that shall issue, put in circulation, or pay out for debts, any notes, shall be deemed an unauthorized bank, and the stockholders be jointly and severally responsible. There was a four years' limitation for actions for a statutory forfeiture or penalty. Judgment for plaintiff. Appeal.

Sutliff, J. 1. The facts bring the defendants within the provisions of the statute making them liable as stockholders. 2. The liability is not in contract on the notes, but in the nature of a penalty, and the four-year limitation applies. Judgment reversed.

Cited: 16 Ohio St. 610; 39 id. 271; 44 id. 313.

SANDUSKY CITY BANK v WILBOR (1857) 7 Ohio St. 481.

Money paid for taxes. Plaintiff was a bank organized under the Act of 1845. Defendant collected a tax levied under the Act of 1851. The Act of 1851 provided that in lieu of any tax on the dividend or profits, certain banking corporations

should list their capital stock at its true value, together with the surplus and contingent funds, and be taxed thereon as on personal property. The Act of 1845 provided that corporations organized thereunder should pay 6 per cent of the profits in lieu of all other taxes. The Act of 1842 provided that subsequent acts of incorporation should be amendable. Judgment for defendant. Error.

Sutliff, J. 1. The Act of 1845 was not a contract within the meaning of the United States Constitution. 2. The legislature has not power, gratuitously and arbitrarily, to prohibit a subsequent legislature from passing an equal and uniform tax law for the bona fide purpose of raising the necessary revenue. 3. Though the United States Supreme Court has construed the Act of 1845 differently, its construction will not be followed by this court since it is in conflict with prior uniform decisions of this court. Judgment affirmed.

STURGIS v BURTON (1858) 8 Ohio St. 215.

To recover penalty, against directors. The petition alleged two causes of action. The first count alleged the existence of the S corporation, during 1848, during which year defendants were directors; that sec. 3 of the act of incorporation provided that if the indebtedness of the bank exceeded a certain amount, the directors, under whose administration the excess was incurred, should be liable personally to any creditor for the excess; that in 1848 the debts exceeded the proper amount; and, that plaintiffs are creditors in the sum of \$5,000 for notes issued then. The second count alleged the same facts, except that the \$5,000 "constituted a part of the excess" indebtedness, and that the excess amounted to \$50,000. On defendant's motion, plaintiffs being compelled to elect, proceeded on the first count. Demurrer on the ground that it appears on the face that the cause of action was barred by the Statute of Limitations. Judgment for defendants. Error.

J. R. Swan, J. 1. As there was manifestly but one cause of action, it was not error to compel plaintiffs to elect between their counts. 2. There is no provision in our code requiring the pleading of the Statute of Limitations; and where the cause of action appears upon the face of the petition to be barred, a demurrer will be sustained. 3. As the statute makes directors liable, not for the indebtedness but for the excess, and not to those holding contracts, but to any creditor, it does not create a contract liability, but a penalty. Judgment affirmed.

Cited: 16 Ohio St. 91, 504; 18 id. 67; 22 id. 30; 29 id. 249; 30 id. 195; 32 id. 235; 43 id. 625; 44 id. 16, 17; 60 id. 32.

REEVES v STATE BANK OF OHIO (1858) 8 Ohio St. 465.

For preference against assignees. Plaintiff sent a draft to the C Bank for collection, which the C Bank forwarded to the A Bank, to which the draft was paid. The proceeds were not set apart, but the amount was credited to the C Bank. The C Bank became insolvent and defendants were its assignees, to whom the general balance due the C Bank from the A Bank had been paid. After the collection and prior to the insolvency, there had been dealings between the A Bank and the C Bank involving many times the amount of the draft. Judgment for defendants. Appeal.

Brinkerhoff, J. 1. The A Bank was the agent of the C Bank, not the sub-agent of plaintiff; and the entry of the proceeds of the draft to the credit of the C Bank was a payment to the latter, making it plaintiff's debtor. 2. As the proceeds of the draft had become indistinguishably mingled with the general assets of the C Bank, plaintiff cannot establish the right to a preference. Judgment affirmed.

Cited: 10 Ohio St. 446; 41 id. 522, 526; 46 id. 232.

VANATTA v STATE BANK (1858) 9 Ohio St. 27.

On note and for money lent. Defendant borrowed from L Bank, giving a note payable to "L Bank or order." L Bank suspended and plaintiff became assignee. Plaintiff's petition averred the making of the note, as set forth; and, as a second cause of action, the loan. The act incorporating L Bank required all evidence of debt to be made "payable solely to said company." Judgment for plaintiff. Error.

Scott, J. 1. The note was void, and no action could be maintained on it. 2. But as to the second cause of action, defendants cannot claim that this void note, in respect to which they stand *pari delicto* with L Bank, shall operate as a discharge of a bona fide indebtedness for money lent. Judgment affirmed.

ANDREW v BLOCKLY (1860) 11 Ohio St. 89.

On check, against the maker. Defendant gave plaintiff a check payable on a future day. The check was not presented for payment until the day following the due day, when the drawee had stopped payment. Notice of non-payment was given defendant. Judgment for plaintiff. Appeal.

Brinkerhoff, C. J. 1. An instrument in the form of a check but payable at a future day, is *prima facie*, but not conclusively, a bill of exchange, and entitled to days of grace. 2. Where such instrument is drawn against an existing fund and intended to operate as a transfer of part of the fund, it is a check, and not entitled to days of grace. 3. The instrument in question being a check, the plaintiff had the whole of the following day in which to make presentment. Judgment affirmed.

STURGES v BANK OF CIRCLEVILLE (1860) 11 Ohio St. 153.

On guaranty of a bill of exchange. L, cashier of defendant bank, proposed to sell plaintiffs a bill of exchange, drawn by B & Co. for \$5,000. Plaintiffs agreed to buy and forwarded the money in payment. L received the money and forwarded a bill drawn by F & Co. for \$5,000, informing plaintiffs that the former bill was gone, "but this bill is perfectly safe." Plaintiffs took the bill but were unable to collect it.

Sutliff, J. 1. The acts of the cashier in the transaction are to be regarded as the acts of the bank by its agent. 2. The language used constituted an undertaking on the part of defendant upon which a right of action in law has accrued to plaintiffs. Judgment for plaintiffs.

Cited: 45 Ohio St. 237.

HOWE v HARTNESS (1860) 11 Ohio St. 449.

Attachment. A certificate of deposit was issued on Cleveland by defendants, H & Co., a banking company, for \$4,000, payable "in currency" to the order of the depositor, defendant M, who negotiated the same to P Bank in Detroit. The certificate was interest-bearing paper. P Bank acquired it two days after its date in the regular course of business. Plaintiff sued M, and H & Co. were made garnishee defendants. H & Co. claimed they were liable to P Bank on the certificate. Judgment for defendant H & Co. Error.

Scott, C. J. 1. A certificate of deposit is not prevented from being negotiable by being made payable "in currency" even where the currency referred to is bank paper, which is not legal tender. 2. Demand paper is not overdue if indorsed within a reasonable time; two days is not an unreasonable time for negotiation in another city of an interest-bearing certificate. 3. As the garnishees are liable to the assignee of the certificate they could not be made liable to account for the same debt to the attaching creditor. Judgment affirmed.

Cited: 39 Ohio St. 233; 45 id. 42, 50.

OWEN v PURDY (1861) 12 Ohio St. 73.

Statutory action to charge defendants as stockholders, on notes of Bank of W. By the Act of February 15, 1844, in relation to the bank, it was provided that on the assent of all the stockholders, in writing, to the individual liability provided for therein, the bank should enjoy the rights originally granted free from restrictive laws which would otherwise apply. The petition showed that some of the stockholders did not so assent, but the bank proceeded to exercise and enjoy the privileges granted by the act; knowledge and consent of defendants to the exercise of these privileges was alleged. Demurrer.

Gholson, J. 1. The act is to be regarded as an amendment to the charter of the Bank of W, and if it was accepted, any person who thereafter became stockholder, became liable in his individual capacity for every valid claim against the bank. 2. An acceptance may be presumed from the acts of those interested, although the prescribed form of acceptance was not pursued; and while such informal acceptance would not be binding on stockholders not assenting thereto, it constituted an estoppel conclusive on those who participate in the acts constituting an acceptance. Demurrer overruled.

LAFAYETTE BANK v BUCKINGHAM (1861) 12 Ohio St. 419.

For substitution of receiver and to enforce a trust. Plaintiff alleged that it was a judgment creditor of a branch of the State Bank; that upon insolvency of the branch bank, the board of control of the State Bank appointed defendant receiver; that in violation of his duties, defendant failed to carry out the trust in favor of the creditors of the branch bank under sec. 24 of the Act of 1845. Sec. 24 provided that upon insolvency of a branch bank, its assets should become the property of the board of control, for certain uses including the trust in favor of creditors. Demurrer. Sustained. Error.

Sutliff, J. 1. Defendant's relation to the property is that of a ministerial officer of the board of control, the legal owner. 2. As it is not alleged that he has failed to act in accordance with the directions of the board, the doctrine of respondeat superior prevents recovery against him. Affirmed.

Cited: 64 Ohio St. 214.

PICKAWAY COUNTY BANK v PRATHER (1861) 12 Ohio St. 497.

On bill of exchange, by indorsee against makers. The bill was made in Ohio, drawn on New York, acceptance waived. It was protested for non-payment. The answer set up that the payee was cashier of Bank of K, the real payee thereof; that Bank of K was a foreign corporation doing business in Ohio, through its said cashier, and that it discounted the bill, though not authorized to do so by any Ohio law; that the reason why it was drawn on New York was to obtain for the bank the rate of exchange, in addition to the full legal discount, and that the note was therefore usurious. Plaintiff was a bona fide holder for value before maturity. Demurrer to answer.

Peck, J. 1. A banking corporation of one state has capacity to make a contract falling within its corporate powers in any other state, unless its capacity to make such contract is opposed to the statutes or settled policy of such other state. 2. As such securities are not expressly avoided by a statute, an assignee for value before maturity and without notice may recover the amount of the bill from the drawers, even though the bank itself could not have maintained such action. 3. Commercial paper in the hands of a bona fide purchaser, without notice, is not void for usury in the original contract, unless the statute not only prohibits usury, but renders usurious contracts absolutely void. The Ohio statutes do not render the contracts void. Demurrer sustained.

Cited. 16 Ohio St. 157, 379; 46 id. 385.

STETSON v CITY BANK OF NEW ORLEANS (1861) 12 Ohio St. 577.

Debt, against one of several sureties on a bond given by H, plaintiff's cashier. The sureties were severally liable, each for a certain amount. After suit brought, plaintiff sold and transferred its assets to L Bank, the latter stipulating to pay and discharge plaintiff's liabilities to a specified amount. Plaintiff's charter expired a few days after this assignment. The court allowed the action to be prosecuted in plaintiff's name for the use of L Bank. Judgment for plaintiff. Affirmed on the Circuit. Error.

Scott, J. 1. The Act of May 1, 1852, does not repeal former statutes allowing plaintiff to bring a suit in the corporate name after the expiration of its charter; it merely affords further facilities to domestic corporations. 2. L Bank is an assignee within the statute of this state so as to authorize the prosecution of this action for its use. 3. The sureties being severally liable, plaintiff can recover the full amount of damage from one up to the limit of his liability. Judgment affirmed.

STATE, EX REL. v CLAYPOOL (1861) 13 Ohio St. 14.

Quo warranto. Defendant was appointed, under statutory authority, receiver of D Bank by the auditor, treasurer, and secretary of state. He continued in the receivership for several years. The said state officers then attempted to remove him and appointed relator to the vacancy. Under the statute, the duties of the receiver, when appointed and qualified, did not depend upon any discretion to be exercised by the officers who appointed him, but were prescribed by law. The object of the proceeding is to oust defendant from the receivership.

Scott, J. We know of no case in which it has ever been held that under such circumstances the power of removal is incidental to the mere power of appointment and may be exercised at the pleasure of the appointing party. Judgment for defendant.

ROBINSON v WARD (1862) 13 Ohio St. 293.

Money paid for taxes. The tax was assessed against plaintiff as member of R, K & Co., of which defendants were the other members. R, K & Co., were engaged in banking and brokerage. Plaintiff retired in May, 1858, under a contract between the partners, that those remaining in the firm should pay and discharge all debts of the firm that had accrued or might accrue and save him harmless. Judgment for plaintiff. Affirmed in District Court. Error.

Gholson, J. By the Act of April 12, 1858, sec. 3, banking companies or partnerships, as well as their individual members, are liable for the tax. It is a tax connected with the business of the partnership, and can be ascertained properly and correctly only by an inspection of its books and papers; it should, therefore, be regarded as a partnership charge, not only as respects the state, but as between the individuals interested. Judgment affirmed.

STANBERY v SMYTHE (1862) 13 Ohio St. 495.

Where a banker assigned a note to C, who had notice that the maker held an assignment of part of a deposit account with the banker, Held, that the deposit account so assigned, could not be set off in an action on the note, as the demand was not entire.

Cited: 58 Ohio St. 372.

NIAGARA COUNTY BANK v BAKER (1864) 15 Ohio St. 68.

On promissory note, W made six promissory notes payable to the order of H, who indorsed them to defendants. Defendants indorsed the notes, which were then taken by plaintiff, a New York bank, at a rate of discount of 20 per cent. The New York statute against usury forbade the taking of more than 7 per cent per annum on any loan under pain of forfeiture; and was construed by New York courts to refer to loans only and not to sales. Plaintiff offered evidence of a custom among New York bankers inconsistent with the statute. Plaintiff was empowered to carry on the business of banking by discounting bills, notes and other evidences of debt. Plaintiff claimed that the note in question was purchased and did not come within the usury laws. Judgment for defendants. Error. Case reserved.

Ranney, J. 1. A statute of another state is a matter of fact; and if it has received authoritative construction there, no inquiry into its correctness is allowable. 2. A statute cannot be abrogated by custom or usage of a particular trade. 3. "Discounting," as the term is used in the business of banking, is only a mode of loaning money; plaintiff's authority to discount notes did not therefore, authorize it to purchase them. Judgment affirmed.

Cited: 26 Ohio St. 151; 36 id. 622; 40 id. 265; 48 id. 634.

DOTY v KNOX CO. BANK (1865) 16 Ohio St. 134.

To vacate a judgment. The plaintiff gave defendant his note for \$1,800. Defendant, in discounting the note, gave plaintiff foreign bank bills of a denomination of less than \$10. A statute prohibited the receiving or passing, in the State of Ohio, of bills of this description, and rendered notes given therefor void. The plaintiff renewed this note when due, by giving a new note. On maturity of the latter note, he gave still another note for the amount of the first renewal note and an additional loan of money, making his obligation altogether \$4,000. The defendant entered judgment by default on this last note. The plaintiff had default opened and the judgment was remitted to the extent of the first note. The plaintiff now brings error, and assigns as such that the whole judgment was void according to the rule that where a part of a contract is void, the whole is void, and that the second renewal note was void as well as the first.

Day, J. 1. The first note was void, under the statute. 2. The third note was void only to the extent of the value of the first note. Judgment affirmed.

Cited: 20 Ohio St. 96, 438, 439; 35 id. 527.

WEIRICK v MAHONING CO. BANK (1865) 16 Ohio St. 296.

On promissory note. Defendant W executed the note in question for the accommodation of M, who had it discounted at the plaintiff bank. Subsequently W deposited in the P Bank to the credit of the plaintiff \$450, which was to be applied on the note. The P Bank gave W a letter to the cashier of the plaintiff, stating that \$450 had been credited to it by W. When W returned to Ohio, he handed the letter to M to deposit it in the plaintiff bank, to be credited on the note. W indorsed the latter in blank. M collected the money from the bank for his own use. Judgment for plaintiff. Error.

White, J. 1. It is no defense against a bona fide holder to prove that the person to whom the paper was intrusted was only authorized to fill the blank upon certain conditions which had not happened. 2. The effect of the paper signed in blank was, in the hands of M, like a check signed in blank. 3. On accepting the deposit, the bank had the right to presume M to be invested with full authority over the fund, and might safely pay it, or apply it, as he might direct. Judgment affirmed.

HUBER v GERMAN CONGREGATION (1865) 16 Ohio St. 371

On promissory note against maker. Defendant answered, that plaintiff was incorporated under the Act of March 5, 1836, to organize religious societies, and, without authority, engaged in banking business, in violation of the Act of March 12, 1845, that the note in suit was discounted by plaintiff, in the transaction of such illegal business, and that it was therefore void. General demurrer. Sustained. Judgment for plaintiff. Error.

Day, J. Plaintiff had no authority, under the act under which it was organized, to do a banking business. The Act of 1845 prohibited it from engaging or continuing in such business. Since the note in suit was discounted by plaintiff, in the transaction of a business forbidden by statute, it was illegal and void. Judgment reversed.

Cited: 33 Ohio St. 328; 36 id. 434; 37 id. 338.

MEDILL v COLLIER (1866) 16 Ohio St. 599.

On certificate of deposit. Defendants did business under the name of C Bank and received by their agents the deposit sued for. They answered that the transaction of plaintiff was with the bank, and denied all personal liability. Defendants signed articles of association and organized a bank, under Act of March 21, 1851, "to authorize free banking." Sec. 44 of the Act required them to deposit securities to a stated amount with the state auditor before beginning business. This they did not do, although in other respects the organization was complete. Judgment for defendants. Error.

Day, J. 1. The corporation was lifeless to engage in the business for which it was organized, until the required deposit was made. The contract was void. 2. Persons who occasion injury to others by the fraudulent use of corporate powers are personally liable therefor. Only those who assume the liability of the business, who engage in or sanction it, are responsible. Judgment reversed to incorporate proper parties.

Cited: 35 Ohio St. 166.

FRAZER v SEIBERN (1866) 16 Ohio St. 615.

Injunction, to restrain collection of a tax assessed on shares of a national bank. The plaintiffs were shareholders in a national bank organized under the Act of Congress of June 3, 1864, which provided that national bank shares could be taxed by the state to their holders, provided they were not assessed at a greater rate than other moneyed capital in the hands of individuals, and provided the state tax laws did not discriminate against them in favor of shares in state banks. Plaintiffs' shares were assessed at par value without allowing any deduction for real estate owned by their bank, or for untaxable United States bonds. In the case of state banks, however, the shares were exempted from taxation by the Act of 1861 (58 Ohio L. 59), which provided that the capital of state banks should be taxed after deducting the value of the bank's real estate and untaxable bonds. Demurrer by defendant. Sustained. Petition dismissed. Error.

Welch, J. 1. Congress had power to authorize a state tax on national bank stock. 2. "Shares," as used in the act of Congress, designate the separate property

of the owners and not their interest in the common property of the bank. 3. The intent of Congress was that national bank shares should be taxed at their full value, without deduction on account of the franchise, untaxable bonds, or real estate. 4. They are not discriminated against in favor of moneyed capital, unless subjected to a higher percentage of taxation than other property. That this is so is not pretended. 5. They are, however, discriminated against in favor of shares in state banks, in that the Act of 1861, exempting shares from taxation, allow the value of untaxable bonds and of real estate to be deducted from the capital assessed. 6. The exemption of shares from taxation by the Act of 1861 is not unconstitutional. 7. Plaintiff must pay a tax equivalent to that which his shares would bear, indirectly, were their bank a state bank. Decree reversed. Injunction granted.

DODGE v NATIONAL EXCHANGE BANK (1870) 20 Ohio St. 234.

Damages for wrongful payment of check. Plaintiff sent a certificate of indebtedness, indorsed in blank, to B, an army paymaster, requesting him to return the proceeds in check. One representing himself to be plaintiff, stole the certificate and presented it to S, another paymaster, who drew a check on defendant payable to plaintiff, and the same was thereafter accepted and paid by defendant to the stranger on his forged indorsement. S thereafter settled his account with defendant. Judgment for defendant. Error.

White, J. 1. A check payable to order is an authority to pay to a holder on a genuine indorsement only; and payment on an unauthorized indorsement gives the holder the right to sue the bank as on an acceptance. 2. In the absence of fraud or a special understanding, the liability of the bank cannot be affected or discharged by any act or omission of the drawer in issuing the check, of which the bank had no knowledge and which in no way influenced its conduct. 3. A subsequent admission by the drawer of a check that it had been paid to the proper party can in no way affect the rights of the payee as against the bank. 4. The plaintiff could ratify the giving of the check in his name, and thus make it his own without ratifying the indorsement, since an agency to receive implies no authority to indorse. Judgment reversed.

Cited: 46 Ohio St. 518.

GERMAN CONGREGATION v STENGER (1871) 21 Ohio St. 488.

On promissory note. Defendants answered that plaintiff was incorporated by special act, with limited powers; that without authority the society constituted itself a savings bank contrary to the Act of March 12, 1845, "to prohibit unauthorized banking;" and that the note was given to and discounted by it for a loan in the course of banking business. Demurrer to the answer. Overruled. Case taken up on error. Reversed and remanded. Plaintiff then alleged that it had established a savings bank, that S, one of the defendants, was treasurer; that he appropriated the deposits to his own use; and, not being able to refund them, gave the note in suit. Demurrer. Sustained. Error.

West, J. The money received on deposit by plaintiff, in the course of an unauthorized business, did not become public plunder. The note in suit was given to secure a legal liability, not in furtherance of an unlawful transaction. To withhold process would not subserve but outrage public policy. Ruling reversed.

Cited: 39 Ohio St. 151.

FIRST NAT. BANK v GARLINGHOUSE (1872) 22 Ohio St. 492.

On promissory note, indorsee, against makers. The note was discounted by the plaintiff, a national bank, for the payee at 9 per cent interest. The plaintiff had knowledge that defendants, with the exception of the payee, were sureties and accommodation makers. In defense, two of the makers interposed the statute of March 19, 1850, which makes void a note on which more than 6 per cent interest is charged, and the Act of Congress of 1864, by the provisions of which a national bank is limited in taking interest to the same rate allowed to state banks in the state in which it is located. Judgment for defendants. Error.

White, C. J. 1. The forfeiture, provided for by the National Currency Act of 1864 for knowingly charging a usurious rate of interest, is limited to the interest which the note carries with it. 2. The Statute of March 19, 1850, has no application to national banks. 3. An agreement, usurious as between the principal debtor and creditor, though made without the knowledge of the surety, is not void

beyond the extent to which it is void as against the principal. Judgment reversed.
Cited: 22 Ohio St. 524; 23 id. 102, 104; 34 id. 146; 38 id. 196, 198; 40 id. 286; 43 id. 36.

SHUNK v FIRST NAT. BANK (1872) 22 Ohio St. 508.

On note, bearing interest at 8 per cent. The Acts of 1850 and 1851 limit state banks of issue to charging 6 per cent. The Act of 1869 allows parties to a promissory note to agree to a rate not greater than 8 per cent. Sec. 30 of the Act of Congress of 1864 limits a national bank to the rate of interest allowed to state banks of issue, on pain of forfeiting the entire interest. The judgment awarded to defendant, a national bank, allows interest at the legal rate from maturity of the note to judgment. Plaintiff moves to vacate it for usury. Motion denied. Affirmed by the District Court. Error.

McIlvaine, J. 1. The defendant, notwithstanding the Act of 1869, was limited by the National Currency Act to take interest at the same rate as is allowed by the state laws to the state banks of issue. 2. The provisions of the Act of 1869 do not extend to banks of issue organized under the laws of the state. 3. The taking of a greater rate than 6 per cent by a national bank located in Ohio forfeits not only the interest accruing before the maturity of the note, but that which accrues between maturity and judgment as well. Judgment reversed.

Cited: 25 Ohio St. 33; 34 id. 146; 39 id. 632; 51 id. 235, 236.

SHINKLE v FIRST NAT. BANK (1872) 22 Ohio St. 516.

On promissory note, and to foreclose mortgage. Defendant and his partners were indebted to plaintiff, a national bank, on usurious notes. Each assumed the obligation of paying a specified part of the entire indebtedness. Defendant gave plaintiff his note for his share, secured by a mortgage. The note bore interest at the legal rate. The note in suit was given more than two years prior to commencement of this action. By statute, for a bank of issue to charge more than 6 per cent is usurious. The National Currency Act of 1864 limits plaintiff to the same rate, and provides that an action to recover illegal interest must be begun within two years from the time it is paid. Judgment for plaintiff for the amount of the note without interest, but including the usurious interest incorporated in the note. Error. Plaintiff filed a cross petition, alleging error in excluding the interest on the note in suit. The petition and cross-petition were heard without objection at the same time. Judgment for plaintiff to District Court. Error.

Welsh, J. 1. An objection to the court's entertaining and acting on a cross-petition in error comes too late. 2. A special finding of the court, although in the language of the witnesses, is a finding of facts, and it is not error to render a final judgment instead of remanding the case for a retrial. 3. The reservation of interest by a national bank does not render the bill or note void in toto. 4. The mutual agreement of the parties and its execution on the part of the bank and by defendant were the real consideration for the execution of the note and mortgage to the plaintiff. 5. A national banking association has power, incidental to the powers conferred by the Act of Congress of 1864, to take notes and mortgages for the purpose of collecting and securing its debts. 6. The transaction of settlement was an absolute payment of the old notes, and the new note will carry interest. 7. The right to recover usurious interest must be exercised within two years from the time the judgment is made. 8. The right to recover the interest being barred, the right to set off the amount against the claim of the bank is also barred. Judgment affirmed.

Cited: 34 Ohio St. 147; 35 id. 80; 45 id. 168; 46 id. 150, 151.

ALLEN v FIRST NAT. BANK (1872) 23 Ohio St. 97.

On notes, against maker and to foreclose mortgage securing them. The notes were given in satisfaction of two other notes which were usurious. One of the original notes was given for money borrowed by defendant prior to plaintiff's change from a state bank to a national bank. Plaintiff subsequently accepted payments on it. The loan was for an amount larger than a national bank could legally lend to one person. The second renewal note was for the unpaid balance of another loan. Under the National Currency Act of 1864, the bank might have contracted a loan for the amount of the renewal note, but not for the amount of the original indebtedness. Judgment for defendant. Error.

White, C. J. 1. Sec. 30 of the National Currency Act does not affect notes given for money lent by a state bank prior to its conversion into a national bank by which they were renewed, although the loan for which they were given was for an amount larger than said national bank could contract under the above act. 2. The fact that a national bank has made a loan for an amount in excess of its authority can constitute no ground for the discharge of the borrower from an obligation given to the bank for the balance, and which it was clearly within the corporate authority to take. 3. A national bank may take a mortgage on real property to secure a pre-existing indebtedness, and usury in a note, which the mortgage is given to secure, will vitiate the mortgage only to the extent of the interest. Judgment affirmed.

Cited: 45 Ohio St. 168; 50 id. 177; 53 id. 133.

HIGLEY v FIRST NAT. BANK (1875) 26 Ohio St. 75.

On notes, against maker. The answer attempted to recoup for payment of usury. Plaintiff replied, alleging that one of the payments of usurious interest was made more than two years before the filing of the answer. Defendant demurred. The National Currency Act of 1864 provides the party who pays usurious interest may recover twice the amount paid within two years from the time the payment is made. Judgment for plaintiff. Error.

McIlvaine, C. J. 1. The knowingly taking of a rate of interest greater than is lawful, by a national bank on a loan made by it in this state, does not entitle the party paying the illegal interest to have it applied as a payment of so much of the principal, in an action brought, more than two years after the payment was made, to recover the principal sum. 2. A provision of Congress in relation to charges of usury by national banks must be regarded as exclusive of state legislation on the same subject. 3. A person entitled to recover twice the amount of usurious interest paid is not entitled to interest thereon from the date of payment to the time of recovery. Judgment affirmed.

Cited: 49 Ohio St. 116.

SMITH v EXCHANGE BANK (1875) 26 Ohio St. 141.

On bill of exchange, against drawer and acceptors. Plaintiff, a national bank, purchased the bill from the payees. Defendants averred in their answer that the plaintiff did not have authority under the National Currency Act of 1864 to purchase the bill, and also that the transaction between the payee and the plaintiff was usurious. The Ohio Code provides that all the parties to a bill may be joined in one action. Demurrer to answer. Sustained. Judgment for plaintiff. Error.

White, J. 1. Subject to the usury laws, a national bank may purchase negotiable paper perfect and available in the hands of the holder. 2. The rights and liabilities of antecedent parties to a note are not affected by the usurious character of a transaction in which they did not participate. 3. Where a separate action might have been maintained against a party, a separate judgment under sec. 371 of the code is certainly proper. Judgment affirmed.

Cited: 37 Ohio St. 444.

DODGE v NATIONAL EXCHANGE BANK (1876) 30 Ohio St. 1.

Negligence, for paying a check to the wrong person. Plaintiff sent a voucher issued by the United States to a paymaster to have it cashed. It was stolen in transit and presented to the paymaster by the thief, who represented himself to be the plaintiff. The paymaster gave him a check for the amount on the defendant bank, payable to plaintiff or order. The bank paid this check to the thief on his being identified as plaintiff. Defendant introduced parts of conversation between drawer and the thief. Judgment for defendant. Error.

Scott, J. 1. By the act of acceptance, defendant became bound to pay to plaintiff or his order the sum named in the check, and for the breach of this obligation and implied promise, plaintiff has a clear right of action. 2. The check was paid on the assumption that the party presenting it was rightfully in possession of it. But the rightful possession of a check by no means implies a right to demand payment of it, without the genuine indorsement of the payee. 3. Defendant, after introducing parts of the conversation, could not object to the whole. Judgment reversed.

Cited: 46 Ohio St. 520. S. c.: 20 id. 234, (ante p. 1152).

HADE, REC'R v McVAY (1877) 31 Ohio St. 231.

On bill of exchange, by the receiver of a national bank, against drawer and acceptor. It was discounted by the bank. Defendants set up that defendant G accepted it for the accommodation of defendant M, the drawer, which fact was known to the bank; that the bank, in discounting the bill, reserved in advance interest exceeding that allowed by law; that during the two years next preceding, M had borrowed of the bank divers other sums, and that in each case the bank had reserved and received interest greater than that allowed by law. They prayed that the interest agreed to be paid on the bill be adjudged forfeited, and that they recover by reason of the other usurious loans twice the amount of interest paid thereon, to be applied by way of setoff to the plaintiff's claim. Demurrer to the setoff. Overruled. Plaintiff contended, that the setoff could not be pleaded in an action brought by a receiver of a national bank; that the state court had no jurisdiction to enforce the provisions of the National Bank Act of 1864 with reference to usurious interest; and that an action for recovery of such interest did not arise under contract within the meaning of sec. 97 of the code of civil procedure, and could not be set off against a debt. Interest agreed to be paid on the bill adjudged forfeited, and the amount of interest paid on other loans ascertained, and twice the amount set off against plaintiff's claim. Error.

Boynton, J. 1. By the Act of 1789, Congress gave state courts, if competent to receive it, jurisdiction concurrent with that of federal courts, in suits, actions, and proceedings arising under the Banking Act. 2. The cause of action to recover the penalty imposed by the act of Congress is not one arising in contract within the meaning of sec. 97 of the code of civil procedure, and is not available as a setoff. Judgment reversed.

Cited: 49 Ohio St. 388; 50 id. 98.

SIMMONS v CINCINNATI SAV. SOCIETY (1877) 31 Ohio St. 457.

Where the drawer of a check delivered the same to the payee, intending thereby to make a gift, but the check was not presented for payment or acceptance until after the death of the drawer, Held, that death operated as a revocation of the check, because, until the check was paid or accepted, the gift was incomplete.

Cited: 43 Ohio St. 472.

SECOND NAT. BANK v HEMINGRARY (1878) 34 Ohio St. 381.

On note against maker. Defendant, a partner in the firm of H & Co., purchased of H, a banker, certain real estate, giving his note therefor. The firm kept an account with H, and paid defendant's notes as they fell due. H pledged the notes with plaintiff bank without defendant's knowledge, and thereafter sent the usual notice on maturity of one of the notes. Defendant obtained an extension of time to pay from H, who shortly after became insolvent. H, at the time of the failure, held moneys deposited by H & Co., and by the defendant in the account of H & Co. H & Co. thereupon gave defendant a check for the full amount of the deposit to use as a setoff to the notes. The plaintiff, having satisfied its debts out of the collateral pledged, held some of the defendant's notes which the assignee of H claimed as belonging to the estate, and against which defendant sought to set off the amount of his deposit. The bank claimed to be entitled to attorneys' fees.

Gilmore, J. 1. Although the deposit account is joint in form, the special equities in favor of defendant entitle him to a setoff of the firm deposits against the balance due H or his assignees on all the notes, without respect to the check by which the account was transferred to the defendant. 2. Against the maker, who has a valid equitable defense to the payee, the pledgee can only recover the extent of his interest, and the maker may attempt a complete defense without incurring a liability to pay to the pledgee anything in addition. Judgment accordingly.

Cited: 49 Ohio St. 387.

FRANKLIN BANK v COMMERCIAL BANK (1881) 36 Ohio St. 350.

Conversion. The defendant issued to F, its president, a certificate of stock for 200 of its shares. The by-laws of the defendant prohibited a transfer of the shares of a holder while indebted to the bank. F borrowed of the plaintiff \$10,000 on demand and delivered this certificate of stock as security at the time he was indebted to the defendant. The plaintiff subsequently demanded a transfer of the stock, which was refused. Under the Act of March 21, 1851, no banking com-

pany could be a purchaser of the capital stock of any incorporated company, unless to prevent loss on a debt previously contracted in good faith. Judgment for defendant. Error.

Boynton, J. 1. One corporation may not buy another's stock and thereby enable itself to interfere with the internal management of that other corporation, especially where the doing so is prohibited by statute. 2. There was no conversion. Judgment affirmed.

DAYTON NAT. BANK v MERCHANTS NAT. BANK (1881) 37 Ohio St. 208.

To recover the value of stock of defendant, the D Bank, pledged by G to plaintiff with an irrevocable power of attorney to the president of plaintiff to make the transfer. There were several notes which plaintiff held from G, and claimed that the security applied to all. One of the notes was partly paid, and renewed as to the balance. G was adjudged a bankrupt and defendant refused to allow the transfer of stock to be made to plaintiff. The assignee of G was made a party, by consent, and filed a cross petition for an account and sale of the stock. The court ordered a sale of the stock, and in the event the amount realized should not pay plaintiff's claim, ordered judgment that defendant pay the deficit to an amount not exceeding the difference between the proceeds and the value of stock when defendant refused to transfer it. Defendant claimed that the note given in part renewal of another note was not entitled to share in the security. Error.

Okey, J. 1. Plaintiff could take the stock of another national bank in pledge as security. 2. Although an assignee in bankruptcy had been appointed for the pledgor when plaintiff applied for the transfer, this did not affect its right to the transfer. 3. The proper decree was that the amount of plaintiff's claim for which the security was held, should be ascertained; that defendant should pay the amount of dividends received on the stock, if any; that the stock should be sold at public sale, and that the proceeds should be applied to the balance due plaintiff. The decree should not provide for payment of any deficiency by defendant. 4. The renewal of a promissory note will not affect the creditor's interest in the pledge, which will remain as security for the new note. Judgment modified accordingly.

BANK v ZENT (1883) 39 Ohio St. 105.

Conversion of bonds. The cashier of the defendant bank received United States bonds belonging to plaintiff, as a special deposit for safe-keeping. The bank sold the bonds and converted them to its own use. There was a demand and a refusal to deliver. The bank was accustomed to receive United States bonds for safe-keeping. Judgment for plaintiff. Error.

Upton, J. 1. It was a part of the ordinary business of the bank to receive United States bonds for safe-keeping, and it follows that the cashier in dealing with plaintiff acted within the scope of his authority as cashier, and that the bank was therefore bound by his act. 2. The bank was bound to exercise the care an ordinary man would exercise in regard to his own property. 3. Demand and refusal give plaintiff a prima facie right to recover. Judgment affirmed.

CHAFFEE, ASSIGNEE v FIRST NAT. BANK (1883) 40 Ohio St. 1.

To recover proceeds of draft. L & Co. gave a note to H, who indorsed it to defendant, a bank. L & Co. thereafter deposited with defendant, for collection, a draft on B, and the same was paid. L & Co., prior to assignment to plaintiff, gave a check to H, who presented it to the bank after assignment, with a request that it apply the same in payment of the note on which he was indorser; but the bank instead, with knowledge of L & Co.'s prior assignment to plaintiff, applied the proceeds of the draft in payment of the note. Judgment for defendant. Error.

McCauley, J. 1. The bank, not having made any advance on the faith of the draft, had no interest or lien on it and no right to retain it to apply in satisfaction of a note held against the owners of the draft. Judgment reversed.

RIDENOUR v MAYO (1883) 40 Ohio St. 8.

On certificate of deposit. The defendants were directors of the F Bank in which the plaintiff deposited \$1,150, for which he received a certificate of deposit. The organization of the bank was attempted under the statute relating to savings banks, but a general banking business was conducted. Depositors did not sign

articles of membership or partake of the profits of the institution. By injudicious investments the bank lost heavily and was unable to pay its debts. The petition alleged that the defendants were co-partners doing a general banking business. Defendants claimed that the bank was a duly incorporated concern and that they were not proper parties. Judgment for defendants. Error.

Martin, J. 1. The mere fact of corporate existence imposed no imperative duty to proceed farther and protect defendants from a liability arising while conducting a different business. 2. The partnership was prima facie established and the defendants incurred a liability to the plaintiff for his debt. Judgment reversed.

CLEVELAND v SHOEMAN (1883) 40 Ohio St. 176.

Replevin. The plaintiff, a firm, sent merchandise to L, to sell on commission. L delivered it to the defendant, a warehouseman, and took his warehouse receipt. He then borrowed \$600 from a national bank and gave his note with the warehouse receipt as security. The bank was joined as defendant. Judgment for plaintiff. Appeal.

Dickman, J. 1. A national bank can lawfully take personal property as security for a loan of money. 2. If the bank loaned the money and took the warehouse receipt in good faith, such transaction and agreement will be valid, and the bank will be entitled to hold the merchandise as security for the payment of the note. Judgment reversed.

FIRST NAT. BANK v BUTLER (1885) 41 Ohio St. 519.

Negligence. The plaintiff deposited an indorsed promissory note with the defendant bank to collect, or, if not paid, to protest. The note was not paid and the bank gave the same to a reputable notary to protest. No demand was made on the maker, though the note was protested and notice given the indorser. The indorser was adjudged released on account of the notary's negligence, for which plaintiff sought to charge the bank. Judgment for plaintiff. Error.

Martin, J. When a duty in the course of collection is necessarily intrusted to a sub-agent, the risk of negligence rests on the owner of the paper in the absence of an agreement for compensation indicative of an intent to warrant against loss from the negligence of such sub-agent. Judgment reversed.

DEARBORN v NORTHWESTERN SAV. BANK (1885) 42 Ohio St. 617.

On promissory note against maker. The defendant denied plaintiff bank's corporate existence. Sec. 7, art. 13, of the Constitution prohibits any act of the general assembly authorizing "associations with banking powers," from taking effect until expressed conditions shall be complied with. Plaintiff had not complied. Plaintiff assumed to exercise banking powers exclusive of the power to make and issue bills and notes to circulate as money. Defendant contended that the act was unconstitutional. Judgment for plaintiff. Error.

McIlvaine, C. J. The phrase "banking powers," as used in the constitution, has a restricted meaning which relates only to the powers employed in the making and issuing of paper money, or powers exercised by associations organized to deal in money, including the making and issuing of bills and notes to circulate as money. Judgment affirmed.

Cited: 42 Ohio St. 670.

CITIZENS SAV. BANK v BLAKESLEY (1885) 42 Ohio St. 645.

On certificate of deposit. Defendant bank commenced business in the rooms occupied by C & Co. when they retired from business. Claims against C & Co. were paid by defendant's cashier, who was a member of C & Co., by defendant's certificates of deposit, and charged to C & Co. Defendant's managing officers fraudulently gave C & Co. a large credit, though C & Co. had made no deposit. Neither defendant's trustees nor plaintiff knew this. Plaintiff, while C & Co. were solvent, surrendered C & Co.'s certificate and received one of defendant's. The certificate was renewed from time to time. Defendant's charter authorized it to receive deposits. Defendant contended that plaintiff was a party to the fraudulent transaction with C & Co. Plaintiff's father and agent was a trustee of defendant. Judgment for plaintiff. Error.

Owen, J. 1. The power to receive deposits carries with it the power to issue cer-

tificates. 2. Plaintiff, not knowing that the credit was unauthorized, or that C & Co. were insolvent, was not guilty of fraud. 3. The notice of knowledge of any fact which the agent may be held to have known as a trustee, cannot be imputed to the plaintiff. 4. As the business of making loans and extending credits properly pertained to the business of such a bank, the fraud or bad faith of the managing officers is no defense against an innocent party. 5. The surrender of C & Co.'s certificate was a good consideration for the one issued by defendant. Judgment affirmed.

EWING v TOLEDO SAV. BANK (1885) 43 Ohio St. 31.

On promissory notes and to foreclose a mortgage. Defense: usury. Plaintiff was an Ohio savings bank, which accepted a mortgage on Ohio real estate to secure a note made by defendant. The amount of interest to be paid was lawful in Illinois, where the contract was made, but was greater than that allowed in Ohio. By the Act of February 26, 1873, as amended March 3, 1875, plaintiff was authorized to charge the legal rates of interest and was liable to the same penalties as a natural person. Plaintiff claimed that the law of Illinois governed. Defendant contended that the contract was entirely void. Judgment for plaintiff. Error.

McIlvaine, J. 1. The bank cannot enforce the contract to the extent of the usury. 2. The bank cannot enforce contracts made out of the state, which are not authorized in the state. 3. The forfeiture of interest is a penalty. Judgment reversed.

CITIZENS NAT. BANK v BROWN (1887) 45 Ohio St. 39.

Debt. The plaintiff sued for a deposit made by him in the defendant bank, for which a certificate was issued payable on presentment properly indorsed. Plaintiff lost the unindorsed certificate and demanded the deposit. The bank refused to pay unless he gave an indemnity bond. Judgment for plaintiff. Error.

Dickman, J. 1. The certificate is a negotiable instrument. 2. The payee or owner, in an action at law against the maker on a lost negotiable instrument, need not tender to him an indemnity, if the paper, when lost, was in such a state that the maker would not be compelled to pay the contents again to a bona fide holder. Judgment affirmed.

BARBOUR v NATIONAL EXCHANGE BANK (1887) 45 Ohio St. 133.

Statutory action to recover a penalty for usury. The S Co. borrowed money of the defendant bank and was charged usurious interest. Subsequently S, alleging that he was surety of the S Co. for a large sum past due, and that the business could not be continued without wasting its assets, had plaintiff appointed receiver. Defendant contends: 1, that only the company can recover; 2, that there was no jurisdiction in S's case to appoint a receiver. Sec. 5198, U. S. R. S., provides that the person by whom the usurious interest has been paid, or his legal representative, may recover. Sec. 5845, U. S. R. S., provides that a surety may compel a principal to discharge a liability, for which the surety is bound, after it becomes due; and sec. 5587 provides for the appointment of a receiver in an action by a party, whose interest in the property is probable, when the property is in danger of being lost or materially injured. Judgment for plaintiff reversed by District Court. Error.

Owen, C. J. 1. A receiver is a legal representative. 2. The appointment came within the express provisions of the statute. Judgment reversed.

KAHN v WALTON (1889) 46 Ohio St. 195.

To enjoin payment of check. Defendant K bought wheat for plaintiff for future delivery. The transactions were speculations, without any intention on the part of either that the wheat should be delivered or paid for. Plaintiff was loser, and drew his check for the amount on defendant bank, where he had a deposit, to K's order. K asked the bank if plaintiff's check for that amount was good, and received an affirmative answer. Plaintiff then notified the bank not to pay the check. K was insolvent, and the bank claimed it had accepted the check and was bound to pay it. Before presentation of the check, plaintiff brought this action. Judgment for plaintiff. Appeal.

Williams, J. 1. A contract to speculate on the rise and fall of prices, where no goods are to be delivered, partakes of the nature of a wager, and is void. 2.

The check is tainted with the vice of its origin and is subject to all the infirmities of securities given for illegal considerations. 3. A bank owes no duty to a holder of a check, except under the drawer's direction, until it has accepted or certified or otherwise bound itself to pay the check. 4. To prove acceptance there must be enough to indicate the acceptance of a particular check. 5. Equity will assist neither party to undo what has been done in the execution of an illegal enterprise. Judgment reversed.

Cited: 49 Ohio St. 250; 51 id. 280; 58 id. 441. .

MILLER v FIRST NAT. BANK
 MILLER v MERCHANTS NAT. BANK } (1889) 46 Ohio St. 424.
 MILLER v THIRD NAT. BANK }

To collect taxes. The plaintiff was county treasurer. He alleged that the defendant's cashier had given him false statements as to its assets, and had failed to give a list of the stockholders and of the number of shares that each held; but had agreed to pay the tax on all the stock on behalf of the stockholders; that a tax was levied against defendant according to such statements; that when it was found that such statements were false, an additional tax was assessed against defendant according to the true value of its stock, which additional tax the bank had neglected to pay. Plaintiff prayed that the bank be restrained from paying dividends to the stockholders, and that the court cause an accounting of the stockholders' money in defendant's possession to be made, and cause the taxes to be paid therefrom. Demurrer. Sustained. Error.

Minshall, C. J. 1. Shares in a national bank must, under sec. 2765, R. S., be assessed for taxation in the names of their owners, and not in the name of the bank itself. 2. Returns are to be corrected under sec. 2769, R. S., and not under sec. 2782, R. S. Judgment affirmed.

Cited: 59 Ohio St. 256.

ARMSTRONG v NATIONAL BANK (1889) 46 Ohio St. 512.

On deposit the amount of which the bank had paid out on a check drawn by the plaintiff, the payee of which was a fictitious person. The plaintiff, in drawing the check had supposed the payee was a real person and had used ordinary care in issuing it. The indorsement of the payee was forged. The amount was paid by the bank. Judgment for defendant. Error.

Minshall, C. J. If the drawer of a check, acting in good faith, makes it payable to a fictitious person or order, supposing there is such person, when in fact there is none, the banker will not be excused if he pay the check to a fraudulent holder on any less precaution than if it had been made payable to a real person. Judgment reversed.

TREASURER v PEOPLES & DROVERS BANK (1890) 47 Ohio St. 503.

To collect taxes. The defendant, an incorporated bank, filed a statement of its assets with the county auditor pursuant to law. Sec. 2759, R. S., required the bank to make a statement to be used in computing the value of its property for the purpose of taxation, and that the average amount of bills, notes and accounts receivable, together with the average amount of cash, stock, and other investments in possession be added; and therefrom deduct the average amount of all deposits, the value of its real estate and accounts payable. The deduction was made, but later the treasurer assessed the bank without making the deductions, on the supposition that the statute was unconstitutional. Judgment for defendant. Error.

Dickman, J. 1. The bank was entitled to have deducted from the average amount of all its notes and bills receivable, discounted, or purchased, and considered good and collectible, the average amount of all deposits and the average amount of all accounts payable exclusive of current deposit accounts; but the deduction of the average amount of the bank's cash, or cash items in possession, may well be unlawful on constitutional grounds. 2. One part of a statute may be void for unconstitutionality, without avoiding the remainder of the statute, if the parties are separable. Judgment reversed.

Cited: 48 Ohio St. 109; 49 id. 618; 57 id. 679.

COVERT v RHODES (1891) 48 Ohio St. 66.

On draft. The defendant was the assignee of C & B, bankers. Prior to the assignment a draft in favor of plaintiff was drawn by C & B on a New York bank in which C & B had more than sufficient money to meet the draft. Plaintiff indorsed the same and it duly came to the New York bank which refused to accept or pay it, the firm of C & B having failed prior to the time it was presented. The New York bank paid over the whole of the funds of C & B to the defendant. Defendant demurred. Sustained. Error.

Williams, J. 1. The unaccepted draft for a part only of the amount due the drawer did not give the payee or holder a priority over the other creditors of the drawer. 2. An ordinary bill of exchange or draft, drawn generally, and not on any particular fund, whether accepted or not by the drawee, does not before presentation operate as an equitable assignment. Judgment affirmed.

Cited: 50 Ohio St. 156; 54 id. 71.

BANK v BANK (1892) 49 Ohio St. 351.

Damages, for failure to notify indorser. Plaintiff sent defendant a promissory note indorsed for collection. At maturity the makers promised that, if defendant would wait awhile, they would pay the note providing P, a remote indorser, refused to extend the time. At this time the makers had funds with the defendant sufficient to meet the note. P did not know this. Thereupon defendant failed to notify either plaintiff or P. But two days afterward the makers wrote P, asking him to advise the defendant to hold the note until June 25. P answered, "we have instructed our bank (plaintiff) to whom the note belongs, to grant extension." The makers checked out their balance with defendant and became bankrupt. Judgment for defendant. Error.

Bradbury, J. 1. If the holder of a promissory note passes by an immediate indorser, he must notify the remote indorser within the same time required for notice to the immediate indorser. 2. P's granting an extension was an innocent act, and he should not be charged with consequences he had no reason to suspect would flow from it. 3. Defendant assumed the risks that would naturally flow from its actions. Judgment reversed.

ARMSTRONG, REC'R v WARNER (1892) 49 Ohio St. 376.

To establish a setoff. On February 19, the plaintiff drew a draft on defendant G, who accepted it. Before maturity, W sent his check to G for the precise amount of the draft. The check was presented on June 20 to the F Bank, of which defendant A became receiver. The F Bank gave New York exchange for part, leaving a balance to G's credit. The New York draft was not paid and plaintiff stopped payment of his check. The same day the F Bank failed. On February 21, the plaintiff accepted a draft drawn by G payable to G four months after date. The F Bank discounted this draft for G, and held it at the time of failure. There was a balance on G's deposit when the bank failed. G subsequently made an assignment to defendant H. Defendant contended that plaintiff's liabilities to F Bank not being due at the time of its failure, the right of setoff did not exist and that they could not be allowed without violating sec. 5242, U. S. R. S., forbidding an insolvent bank to transfer any of its assets, to create a preference. Judgment for plaintiff. Error.

Williams, J. 1. The plaintiff can properly set off the amount of the draft against the claim of F Bank on his check. 2. The plaintiff being acceptor on the draft drawn by G, can set off against his liability as acceptor, the amount due G from F Bank. 3. Sec. 5242, U. S. R. S., does not prohibit the allowance of any valid setoff, legal or equitable, which a debtor of a bank may have against any obligation owing to it by him, at the time of its insolvency. Judgment affirmed.

Cited: 85 Ohio St. 654.

JONES, EX'RS v KILBRETH (1892) 49 Ohio St. 401.

To recover the proceeds of a draft. The plaintiff's testator deposited a draft on D & Co. with the O Trust Co. for collection. Prior to maturity of the draft the O Trust Co. failed and defendant was appointed trustee. The draft was accepted and paid at maturity. Before it was collected, B Co., a creditor of the O Trust Co., attached the draft and received the proceeds. Defendant adjusted the matter with B Co. by accepting the draft as a credit. Plaintiff sought to recover the full

amount of the draft. Defendant contended that he was only entitled to the dividends declared, the same as any creditor of the company. In another court, defendant sued plaintiff's testator for money due on account, and the testator set up the indebtedness on the draft. A judgment in testator's favor was entered blank as to the amount. An execution issued thereon was quashed. Defendant contended that the court of probate alone had jurisdiction. Judgment for defendant. Error.

Dickman, J. 1. After a bank has suspended, it ought not to receive payment upon business paper previously deposited with it for collection, in such a manner that the money so received by it will pass into its general assets, and the owner of the paper be placed in the position of one of its creditors, entitled only to take his dividend. Proceeds received after the bank becomes insolvent, will be held in trust and may be recovered in full. 2. To all intents and purposes, the proceeds of the draft went into the assets of the O Trust Co. as much so as if the company had just collected the draft, and then paid over its contents to B Co. 3. The adjudication in the other court did not estop the plaintiff or his testator from proceeding to obtain equitable relief. 4. This court has jurisdiction, as there was no question of preference among the creditors. Judgment reversed.

BANK OF MARYSVILLE v BREWING CO. (1893) 50 Ohio St. 151.

On bank check. S gave a check to plaintiff on defendant bank, which was presented to defendant and payment refused. S had more than sufficient funds on deposit to pay it, but the bank had applied them toward the payment of an overdue note of S held by it. Defendant had no knowledge of the check when the deposit was so applied. Defendant averred these facts in answer. Demurrer to the answer. Sustained. Judgment for plaintiff. Error.

Williams, J. 1. As there were mutual debts existing between the parties, there was a right of offset, and the right of offset was not defeated or impaired by check. Judgment reversed.

KING v ARMSTRONG, REC'R (1893) 50 Ohio St. 222.

To obtain a dividend, withheld by a receiver of a national bank. The bank was indebted to B on a deposit. B assigned it to plaintiffs, as a security for a pre-existing debt. Plaintiff's claim was allowed by the receiver, and a certificate issued to them as creditors of the bank. The comptroller of currency declared a dividend and issued checks to creditors, including plaintiffs. Defendant refused to pay it. At the time of failure of the bank B owned stock in the bank, on which, under the National Banking Act, he was indebted to the bank to the amount of his stock, in addition to the sum invested. He was insolvent when he made the assignment, and remained so. At the time of the assignment the comptroller had not determined the amount necessary to be collected from the stockholders for payment of its creditors. The receiver set off the deposit against the plaintiffs' claim. Judgment for defendant. Error.

Williams, J. The liability of B as a stockholder was due, in every essential, to the setoff, when the bank failed; and the assignment of his claim against it to the plaintiffs presented no obstacle to the allowance of the setoff. Nor did the certificate, which the plaintiffs obtained from the receiver, for that gave them no new right, and amounted to nothing more than an acknowledgment of the correctness of the claim and its assignment to them. Judgment affirmed.

NILES v SHAW (1893) 50 Ohio St. 370.

Where the defendant, as collector of taxes, placed upon the tax duplicate the valuation of certain shares in a national bank, and the plaintiff claimed a deduction of legal debts, Held, that the shares of stock in a national bank are, within the meaning of secs. 2730 and 2731, U. S. R. S., investments in stocks and not credits; and that bona fide debts, owing by such stockholder, could not be deducted in determining the amount to be charged on the duplicate for taxation.

Cited: 56 Ohio St. 325.

OYSTER & FISH CO. v NATIONAL BANK (1894) 51 Ohio St. 106.

On certified check, against drawer. On June 20, defendant paid a draft presented by plaintiff bank by defendant's check, certified by the drawee at defendant's request. On June 21, plaintiff presented the check to the F Bank, the drawee,

and F Bank having failed, payment was refused. The check was duly protested and notice of non-payment served on defendant. Judgment for plaintiff. Error.

Dickman, C. J. Where the drawer of a check delivers it already certified, the relations of the payee and the drawer are not affected by the circumstance that the check is certified. Judgment affirmed.

LA DOW v BANK (1894) 51 Ohio St. 234.

Where a statute provided that a state bank should not stipulate for or reserve a greater rate of interest than 6 per cent, and the National Currency Act provided that national banks located in the state, could reserve no greater rate, and the state statute was subsequently repealed, and a new one passed allowing state banks to reserve 8 per cent, Held, that a national bank located in this state may, under sec. 30 of the National Currency Act, reserve the same rate of interest.

C. H. & D. R. R. CO. v METROPOLITAN BANK (1896) 54 Ohio St. 60.

On check by the holder, against the drawee. A gave plaintiff the check, and at the time had a deposit in defendant bank in excess of the amount of the check. Defendant refused to accept or pay the check. Demurrer to complaint. Sustained. Judgment for defendant. Error.

Spear, J. Defendant was liable to account with the drawer for failure to honor his check, but it could not be held, either legally or equitably, at the same time liable to the holder. Judgment affirmed.

CHAPMAN v FIRST NAT. BANK (1897) 56 Ohio St. 310.

Injunction to restrain the collection of taxes on 390 shares of national bank stock held by eight stockholders. The plaintiff bank averred that its cashier had made return for the year 1893, and filed affidavits of said eight stockholders, that their debts amounted to more than their credits and bank shares combined, and that they should be allowed to deduct their debts from said shares. Judgment for plaintiff. Error.

Burket, C. J. National bank shares cannot have the double advantage of both stocks and credits, and the holders of shares have no right under the statutes, state or national, to deduct their legal bona fide debts from the assessed value of such shares. Judgment reversed.

FIRST NAT. BANK v FIRST NAT. BANK (1898) 58 Ohio St. 207.

On check by indorsee against drawee. E indorsed the check of H, and caused it to be cashed by the defendant, which indorsed it "for collection" and sent to P Bank. The latter in turn indorsed it "for collection," and, presenting it to the plaintiff, received payment. H had no account with the drawee except as administrator. H pronounced the check a forgery and refused to allow it in settlement with the plaintiff, which bank then caused it to be protested, and notifying defendant of the forgery, demanded payment. Judgment for defendant. Reversed by Circuit Court. Error.

Burket, J. 1. The drawee of a check or bill on paying it to a bona fide holder, cannot recover back the money on discovering it to be a forgery. 2. The drawee is presumed to know the signature of the drawer. 3. When the indorsement is "for collection," it is notice to the drawee that the bank presenting the check for payment, is the agent of the owner, and the successive indorsers are his agents. 4. Such indorsement is a guaranty only of the names of the indorsers then on the paper. 5. The plaintiff was negligent in charging the check to the administrator's account. Judgment reversed.

STAFFORD v PRODUCE EXCHANGE BANKING CO. (1899) 61 Ohio St. 16.

To compel a transfer of bank shares. Defendant, a savings and loan company, issued a certificate to L, who assigned it to plaintiff. By a provision in the certificate, defendant reserved a lien on the stock to secure any indebtedness of the holder to defendant. L was indebted to defendant, at the time plaintiff demanded a transfer on the books, by transactions subsequent to the assignment to plaintiff, and the refusal to transfer was in consequence of that indebtedness. Petition dismissed. Error.

Shauck, J. By the transfer the plaintiff became the equitable owner of the stock and it was within his power to acquire the legal title, by presenting the certificate for transfer on the books of defendant at the time when L was not indebted to it. As he did not exercise that right, he must submit to the assertion of an adverse equity, either superior in character, or equal in character, and prior in time. Judgment affirmed.

STATE, EX REL. v MATTHEWS (1900) 62 Ohio St. 146.

Mandamus, to compel defendant to issue a license to relator, a corporation organized under the laws of West Virginia. The relator deposited \$25,000 in cash with the state treasurer. Defendant averred that the Act of April 25, 1898, requires that the corporation, to obtain a license to do a business of placing and selling securities in the state, must deposit \$25,000 wholly derived from its capital stock, to the end that the security for investors may be derived wholly from a source other than the means which they deposit with the company; and defendant averred that the whole amount of the deposit was not derived from relator's capital stock.

By the court. The view taken by defendant might be entitled to legislative consideration, but it finds no warrant in the statute, which is fully satisfied with the deposit made, without regard to the source from which it is derived. Writ allowed.

THE CLEVELAND TRUST CO. v LANDER (1900) 62 Ohio St. 266.

To enjoin the collection of taxes. The plaintiff, an incorporated state bank, contended that it was entitled to deduct from the resources, on which the value of its shares was computed, the value of United States bonds owned by it, because: 1, such bonds were non-taxable under sec. 3701, U. S. R. S.; 2, it was the custom of banks and tax officers so to deduct them; 3, unincorporated state banks, taxed on their capital, were allowed to deduct therefrom untaxable bonds. Sec. 5219, U. S. R. S., provided that the taxation of shares of national banks should not be at a greater rate than that assessed on other moneyed capital. In taxing national bank shares, no deduction of non-taxable bonds was allowed by the state. The state constitution provided for uniformity of taxation. The state legislature made the shares of incorporated banks taxable and not their capital. Demurrer. Sustained. Petition dismissed. Judgment affirmed. Appeal.

Burket, J. 1. Customs, whether of banks or of officials, cannot prevail over a statute. 2. The first restriction in sec. 5219 means that both the rate, per centum, and the valuation on national bank shares shall not be greater than on other moneyed capital. 3. Since government bonds held by a national bank are included in its return for taxation, from which the value of its shares is determined, the same must be done in the case of incorporated state banks. 4. Moneyed capital in sec. 5219 means taxable moneyed capital. 5. The tax is not unconstitutional, for, while the unincorporated state bank is taxed on all of its property, except such bonds, yet the incorporated bank is taxed on its shares, whose value does not include the value of the franchise. 6. Plaintiff cannot be allowed to deduct the bonds from the value of its resources, on which the value of the shares is based; nor can it pay taxes on its capital, less such bonds. Judgment affirmed.

Cited: 66 Ohio St. 596.

STATE, EX REL. v ATKINS (1900) 63 Ohio St. 182.

A stockholder in a national or incorporated bank has no right to have his indebtedness deducted from the value of his shares by the county auditor in assessing taxes; but when this has been done in former years, the deduction cannot thereafter be placed on the list as an omission and the taxes collected thereon; and there is no false return in omitting to include in one year's assessment the improper deduction of a previous year.

ZINN v BAXTER (1901) 65 Ohio St. 341.

Statutory action to enforce stockholders' liability, brought by plaintiff, a shareholder in a national bank, of which defendant was a director, under sec. 5238 of the National Banking Act, which provides that every director who participates in certain violations, shall be liable in his personal and individual capacity for all damages which the bank, its shareholders, or any other person shall have sus-

tained in consequence of such violation. Plaintiff, after parting with his stock, brought this action to recover his individual share of the common damages suffered by all the shareholders. The petition failed to allege whether or not the bank had been dissolved. Judgment for defendant. Error.

Burket, J. 1. It must be presumed in this case that the bank is a going concern. While the bank is a going concern and has not been dissolved, the action of a shareholder against the directors for damages for wrongful acts can be maintained only for the common benefit of himself and all the other shareholders, and a single shareholder cannot maintain an action against such director for his individual share of the common damages. 2. Plaintiff, having parted with his stock, has lost his right to sue as a stockholder, and cannot change what was a stockholder's action into a cause of action in favor of a creditor or any other person not a stockholder. Judgment affirmed.

OKLAHOMA

NATIONAL BANK v EARL (1893) 2 Okla. 617.

To recover attorney's fees. Plaintiff was engaged by S, the defendant's president, to represent the bank in a legal proceeding, and defendant accepted his services. U. S. R. S., sec. 5136, provides that national banks shall have the power to complain and defend in any court, as fully as a natural person. Judgment for plaintiff. Appeal.

McAtee, J. 1. A national bank has the power to employ attorneys in any suit to which the bank may be a party. 2. This power is not limited to suits in which the bank may be successful, nor is the right of the attorney to recover limited by the character of the questions which may arise. 3. The president of a bank is authorized to retain an attorney to appear for the bank. 4. The acceptance of the plaintiff's services by the bank, estopped it from denying compensation. Judgment affirmed.

Cited: 6 Okla. 180; 8 id. 281, 286; 9 id. 311, 469.

JOHNSTON FIFE HAT CO. v NATIONAL BANK (1896) 4 Okla. 17.

Fraud. The complaint alleged: 1, that plaintiffs sold goods on credit to M Bros., who entered into a fraudulent conspiracy with the defendant, a bank, through its president, whereby the bank was to loan M Bros. money on a chattel mortgage, secured by the goods; 2, that the bank foreclosed the mortgage and retained the proceeds of sale; 3, that no money was actually loaned, the entire transaction being a fraud on plaintiffs. Demurrer to complaint. Sustained. Judgment for defendant. Error.

Burford, J. 1. The complaint stated a good cause of action. 2. The act alleged were within the scope of the president's duties. 3. Defendant was liable for fraudulent acts of its president, done in performing duties incident to his office. 4. Ultra vires had no application. 5. It was sufficient to charge the defendant, that it took part in the conspiracy, knowing its purpose. 6. Title never passed to M Bros., who therefore could convey none by the mortgage. Judgment reversed.

Cited: 4 Okla. 36, 37.

RICHARDSON v EVANS (1897) 5 Okla. 803.

To enforce a partnership liability. Defendants carried on business under the name of the S Bank. They transferred their business to the P Bank, and ceased to have any connection with it. A newspaper article described the transaction as a "continuation of the two banks, and published the defendants' names in the list of stockholders. There was also an advertisement in local newspapers to the same effect. Neither of the statements were authorized by the defendants. Subsequently plaintiff became a depositor in the P Bank, which shortly failed. The court permitted this article to be read to the jury. Judgment for plaintiff. Error.

McAtee, J. In the absence of evidence, showing that its publication was authorized by the defendants, this article should not have been given to the jury as evidence against them. Judgment reversed.

GUTHRIE NAT. BANK v GILL (1898) 6 Okla. 560.

On bill of exchange, indorsee against drawee. M Bank, by its cashier, made its draft for \$156, payable to the order of K, directed to the defendant bank. K indorsed it to the plaintiff. On March 11, defendant held on deposit \$364 to the credit of the M Bank. The next morning, at 7 a. m., the M Bank made an assignment for the benefit of creditors to B. The O Bank was the correspondent of defendant, and at the time held an account with it. At 8 a. m., on March 12, defendant received the draft for collection. At 9 a. m., the teller of defendant stamped the draft "paid." B telegraphed defendant of the failure of the M Bank, and not to pay the draft. The president of the defendant ordered the teller to erase the stamp on the draft, which he did, and the draft was protested. Defendant contended that the giving of a check or issuing a draft is an equitable assignment of the funds on deposit and in the hands of the drawee. Demurrer. Overruled. Error.

Tarsney, J. 1. The only theory upon which the plaintiff can recover is that when the draft reached the bank for collection there were funds belonging to the drawer; that the making of the draft was an assignment pro tanto of the funds in the bank; but there were none, as the funds had been previously assigned for the benefit of creditors. 2. The assignment when executed and trust accepted by the assignee, operated coinstanti to divest the assignor of the ownership and control of the property. 3. The holder of the draft was not entitled to payment in full out of any fund upon which it was drawn, but must prorate with the other creditors. Judgment reversed.

Cited: 7 Okla. 103.

GRAY v LOGAN COUNTY (1898) 7 Okla. 321.

To recover arrears of taxes. The defendant was appointed receiver of the National Bank of G. The bank owned real estate in the city of G, which was assessed for territorial and county taxes for 1893-4-5. Penalties had accrued thereon. The capital stock of the bank was assessed for 25 per cent of its face value against the stockholders, but the aggregate assessed value was placed in the tax roll in the name of the bank. Taxes for \$835.36 for 1893 were levied thereon, and penalties of \$369.99 were claimed by the plaintiff, the county, for non-payment of the taxes. The plaintiff contended that both real and personal taxes and the penalties should be paid by the receiver. Motion granted as to the real estate taxes. Denied as to the personal tax. Cross-error.

Tarsney, J. 1. The county could not recover against a national bank, or its receiver, out of the bank's assets, taxes levied on the shares of its capital stock. 2. Such taxes are in no sense the obligation of the bank, but are the personal property of the holder, and taxes thereon are securable as other personal property taxes against the property of persons holding such stock. 3. When penalties accrue, they are as much a claim of the state as the tax itself. The payment of the penalty does not relieve from the payment of the tax. Tax and penalty constitute but one claim. Judgment reversed as to real estate tax, and affirmed as to personal tax.

Cited: 8 Okla. 200.

WINFIELD v OTT (1898) 7 Okla. 512.

Money had and received. On October 1, 1895, the F Bank received from the plaintiff, subject to his check, a deposit of \$550. Defendant was a director in the bank. The bank was insolvent at the time of taking the deposit. By statutes it was unlawful for any director of a bank, knowing that it was insolvent, to receive any funds on deposit and it was the duty of every director to know the condition of the bank as to its solvency, and his failure to know its financial condition was no defense to any action, civil or criminal. Defendant contended that the statute sought to establish a conclusive rule of evidence, foreclosing the defendant from showing his knowledge of the condition of the bank, contrary to the constitution. Demurrer. Overruled. Judgment for plaintiff. Error.

McAtee, J. 1. The citizens of the state, claiming the statutory privilege of organizing a bank, must do so under the terms of the statute. 2. If they undertake the rights, they must assume and be subject to the duties and liabilities prescribed by it. Judgment affirmed.

WINFIELD NAT. BANK v McWILLIAMS (1900) 9 Okla. 493.

On check. Plaintiff, the owner of a check on the R Bank for \$405, deposited it with the F Bank for collection, indorsing it in blank; and receiving \$50 on account. The F Bank indorsed it in blank and sent it with other checks to the defendant, a bank in Kansas, for "collection and credit." The check was forwarded by defendant to the R Bank, with instructions to remit to defendant, which it did. Meantime the F Bank had failed, having to its credit with defendant subject to check, \$834. After charging the F Bank with drafts and notes, its credit was reduced to \$13.92. The plaintiff demanded the proceeds of her check, which was refused. Defendant pleaded want of jurisdiction of the probate court, in which the action was brought. Plaintiff levied on certain notes of defendant under attachment. Judgment for plaintiff. Appeal.

Burwell, J. 1. The defendant waived the jurisdictional defect by filing its answer. 2. The bank with which a check is deposited for collection, does not act as agent of the real owner, but acquires a lien on it for a balance due from the bank from which it is received. 3. The holder of a check indorsed in blank, is presumed in law to be the legal holder for value, and indorsed to him before maturity and the burden is upon the one claiming to be real owner to prove such ownership. 4. The bank should show by preponderance of evidence that it had received the check in good faith for value or had permitted an existing indebtedness to remain unpaid. Judgment reversed.

BANK OF BLACKWELL v DEAN, ASSIGNEE (1900) 9 Okla. 626.

On deposit. The plaintiff drew its draft to its own order on the K Bank, and mailed it to the M Bank at K to be placed to plaintiff's credit. On the same day plaintiff sent \$400 to the K Bank to recover the draft. The M Bank sent the draft to the K Bank, which canceled and issued its own draft drawn on the F Bank for the same amount and sent the same to the M Bank. The M Bank sent the draft to the F Bank for payment, but in the meantime the K Bank had failed, defendant being appointed its assignee. The M Bank then canceled the credit of \$400 it had given plaintiff. Plaintiff paid the \$400 to the M Bank and asked to be paid as a preferred creditor. Error.

Burford, C. J. The burden was on the plaintiff to show by satisfactory evidence that its deposit of \$400 was not made in the ordinary course of banking business, but was made as a special deposit under express stipulations. This it failed to prove. The plaintiff can only share pro rata with the other creditors. Judgment affirmed.

MORRISON v FARMERS & MERCHANTS BANK (1900) 9 Okla. 697.

On draft. Defendant ordered a car load of fruit from P Bros., who made a draft on the defendant, payable to the order of plaintiff, and delivered it, with the bill of lading, to plaintiff. The plaintiff took the draft and an assignment of the bill of lading and gave P Bros. credit therefore on their deposit. The draft was forwarded by plaintiff to the S Bank, for presentation to the defendant, who accepted it, though the fruit had not yet arrived. Defendant, claiming to be damaged by the delay, refused payment when due. Plaintiff contended that it was a bona fide holder for value before acceptance or notice of infirmities. Defendant set up counterclaim for \$300 for breach of contract. Judgment for plaintiff. Appeal.

Burford, C. J. 1. The signature of every drawer, acceptor, and indorser of a negotiable instrument is presumed to have been made for value, before maturity and in the ordinary course of business. 2. There being no evidence that the deposit was withdrawn by the drawers on their orders, prior to the acceptance by the defendant, the presumption in favor of the bank becomes conclusive of its right to recover. Judgment affirmed.

OREGON

STATE v HIBERNIAN SAV. & LOAN ASS'N (1880) 8 Ore. 396.

To determine the validity of a corporation. The constitution of the State provided: "The legislature shall not have the power to establish or incorporate any bank or banking company or moneyed institution whatever, nor shall any bank, company, or institution exist in the State with the privilege of making, issuing or putting into circulation any bill, check, certificate, or promissory note to circulate as money." The defendant was incorporated with power to do a general banking business, but without power to issue paper to circulate as money. The State claimed that the act of incorporation was unconstitutional. Judgment for plaintiff. Appeal.

Kelly, C. J. In framing the constitution, the convention did not intend to exclude banks and moneyed institutions from the State, but to prohibit them from issuing bank notes to circulate as money. Judgment reversed.

Cited: 28 Ore. 529.

PORTLAND NAT. BANK v SCOTT (1891) 20 Ore. 421.

On promissory note, against maker. Defendant made and delivered its promissory notes to plaintiff. Defendant alleged that the P Co. received the consideration on which the notes were made, and he asked leave to put in evidence a parol agreement that the P Co. would pay the notes. The P Co. was indebted to the plaintiff in an amount exceeding one-tenth of the capital stock of the bank. U. S. R. S., sec. 5200, provides that the total liability of any person or corporation to a bank shall at no time exceed one-tenth of its paid in capital stock. Judgment for plaintiff. Appeal.

Strahan, C. J. 1. Where there is no illegality or fraud, a contemporaneous parol agreement may not be introduced to vary and contradict a written instrument. 2. Public policy does not require, nor did Congress intend, that an excess of loans beyond the portion specified should enable the borrower to avoid the payment of the money actually received by him. Judgment affirmed.

Cited: 5 Ore. 261; 36 id. 451.

FIORE v LADD (1892) 22 Ore. 202.

On certificate of deposit. Plaintiff could neither write nor speak English. He went, with A, to defendants' bank to deposit \$800. A signed plaintiff's name in the signature book. A certificate of deposit was issued which A subsequently gained possession of by fraud. Thereafter A brought the certificate to the bank indorsed as in the signature book, and the money was paid him. The defendants requested the court to instruct the jury, that if the evidence showed that the money was delivered to the teller by a person other than the plaintiff, who signed the signature book, and thereafter returned the certificate of deposit properly indorsed, and received the money; and that the teller had no reason to believe he was not the owner, the plaintiff cannot recover. Refused. Exception. Judgment for plaintiff. Appeal.

Bean, J. The instruction should have been given. While a bank may be bound at its peril to see that money deposited is paid only to the depositor or to his order, it may, in the absence of suspicious circumstances, safely assume without further inquiry that the name by which the depositor is known in the transaction is his true name. Judgment reversed.

Cited: 22 Ore. 499; 25 id. 423; 30 id. 598.

LA BRANDE NAT. BANK v BLUM (1895) 27 Ore. 215.

On promissory note against makers. At the time the note was executed, the plaintiff owned two notes made by R. These were delivered to the defendant for collection, and the note in suit was given by him as security for the faithful performance of his duties as such collector. This arrangement was entered into by the plaintiff's cashier without authority. The defendant performed his part of the agreement. Proof of service of notice to take a deposition was made by a certificate of the marshal serving it. Plaintiff objected to the receipt of the deposition in

evidence, contending that proper proof of service of notice had not been made. Judgment for defendant. Appeal.

Bean, C. J. 1. The principal cannot, of his own mere authority, ratify a transaction in part, and repudiate it as to the rest. He must either adopt the whole or none. 2. There was proper proof of service of notice, and it was not error to receive the deposition. Judgment affirmed.

COMMERCIAL BANK v SHERMAN (1895) 28 Ore. 573.

On a promissory note, against indorser. Plaintiff, a foreign corporation, purchased the note at Portland, through its agent. Plaintiff had not filed a power of attorney with the county clerk, but the purchase of this note was the only business ever transacted or contemplated by the plaintiff in that county. Sec. 3276, Hill's Code, provides that a foreign banking corporation, before transacting business in this state, must acknowledge a power of attorney, and have the same recorded with the county clerk of each county in which it has a resident agent. Judgment for plaintiff. Appeal.

Bean, C. J. To require a foreign banking corporation to execute and file the power of attorney required by the statute as a prerequisite to its right to purchase a promissory note, or to do any other single act of business, when there was no purpose or intention to engage in banking here, would be an unwarranted construction of the statute. Judgment affirmed.

FIRST NAT. BANK v LINN CO. BANK (1897) 30 Ore. 296.

Negligence in collection. Plaintiff, on June 16, forwarded to defendant, its correspondent, for collection, a sight draft drawn by C on defendant. Defendant should have received it on June 17, but no action was taken upon it until June 24. Defendant, in the meantime, failed and went into the hands of a national bank examiner, who, at the request of the plaintiff, presented and protested the draft. Until June 19, C was solvent. C had no deposit with the defendant when he drew the check. The court refused to admit in evidence a letter written by the bank examiner on July 28, stating that the draft was not renewed until June 21. Judgment for defendant. Appeal.

Bean, J. 1. The letter was incompetent evidence, it being but a narrative of a past event, and does not appear to have been written within the scope of the examiner's authority. 2. If the drawer has no funds at the time of drawing his check, he commits a fraud on the payee, and can suffer no loss or damage from the holder's delay in presentment or notice. In such a case he is liable and cannot insist on a formal demand or notice of non-payment. Judgment affirmed.

RE-ASSIGNMENT OF BANK OF OREGON (1897) 32 Ore. 84.

Accounting of assignee. The bank made an insolvent assignment to T, its assistant cashier. T and the cashier were officers of another corporation and had its money on deposit in the bank. Prior to the assignment, B indorsed to T certain promissory notes held by the bank, to reimburse the corporation for the money on deposit. A by-law restricted the cashier from transferring any negotiable securities of the bank except to its directors. T failed to account for these notes. Decree, that he pay their amount to his successor. Appeal.

Moore, C. J. When the presumption of authority arising from the mere indorsement of negotiable paper by a cashier of a bank has been overcome by proof that such transfer of the bank's securities was not made in the regular course of business, but prejudicial to its rights, no title to the chose in action so indorsed passes to the assignee. Decree affirmed.

Cited: 39 Ore. 299.

FARMERS BANK v SALING (1898) 33 Ore. 394.

On promissory note. The note was given by S & Co. The defendant I claimed that he was not a member of the firm. Credit was given to the firm generally, on the supposition that he was a member, which fact the members of the firm well knew, but did nothing toward correctly informing the firm's creditors. The defendant I showed that the cashier of the plaintiff and the officer who actually loaned the money on this note, had positive knowledge that he was not a member of the firm. Judgment for plaintiff. Appeal.

Wolverton, J. 1. The plaintiff has adopted the acts of its officers and agent, by seeking to enforce the obligation growing out of the transaction. 2. Plaintiff cannot be permitted to ratify in part and reject that which may operate to its disadvantage. 3. The plaintiff cannot now ignore knowledge acquired through its agent, on the ground that he did not act in good faith in loaning its funds, and thereby escape the effect of such knowledge. Judgment reversed.

JACKSON v McINNIS (1898) 33 Ore. 529.

On certificate of deposit, against indorser. A bank issued to defendant a negotiable certificate of deposit. Defendant indorsed it to the plaintiff for value. Thereafter the bank became insolvent, and a receiver pendente lite was appointed. At maturity, presentment and demand of payment was made on the receiver and notice of non-payment given to the defendant. Judgment for plaintiff. Appeal.

Bean, J. The presentment for payment must be made to the person whose duty it is to pay. The receiver pendente lite of a corporation is not the agent of the corporation, nor is it his duty to pay or discharge any of its obligations except as he may be directed by the court. The insolvency of a corporation and the appointment of a receiver constitute no excuse for neglect to make due presentment for payment of its paper, or give notice of dishonor to an indorser thereof. Judgment reversed.

FIRST NAT. BANK v HOVEY (1899) 34 Ore. 162.

Money had and received. Plaintiff was the indorsee of a promissory note. The maker delivered money to the F Bank to be forwarded to the payee to apply on the note. The F Bank telegraphed the amount to the defendant, with instructions to pay it to the payee generally. The defendant was not instructed to pay to the plaintiff or see that payee applied it to the payment of this note. Complainant did not state that defendants still held money for use of plaintiff. Demurrer. Sustained. Appeal.

Wolverton, C. J. As the defendants were not charged with any duty to pay plaintiff or see that the money was applied upon this note, it cannot be held that defendants hold money, which, in equity and good conscience, belongs to plaintiff. Judgment affirmed.

Cited: 34 Ore. 312.

KERSHAW v LADD (1899) 34 Ore. 375.

Negligence. Plaintiff drew a check payable to defendants, bankers, on the A Bank located in another city, to collect and place to the credit of plaintiff in defendants' bank. Defendants forwarded the check to the A Bank direct by mail. That bank sent the defendant a draft on the B Bank. This draft was duly presented, but payment was refused. In the meantime the A Bank failed. There was a local usage among bankers to send checks direct to the drawee bank for collection, when the bank was out of town and they had no representative there. The plaintiff contended that the custom was unreasonable and void, and that the plaintiff was liable for negligence in not having it presented personally and obtaining cash. Judgment for defendant. Appeal.

Wolverton, C. J. The transmission of the check by the defendants, direct to the bank through the post for collection and return, operated as a good presentment for payment. Judgment affirmed.

SHUTE v HINMAN (1899) 34 Ore. 578.

To recover trust funds. P was appointed administrator of M, and collected moneys belonging to the estate and deposited them in a bank which he owned and managed. The bank failed, and at the time of the failure had more than sufficient in the vaults to cover the amount of the estate which P had deposited. P was removed and plaintiff was appointed administrator. Defendant became assignee of the bank. It was contended by plaintiff that the funds found in the vaults should be first applied to the payment of the amount belonging to the estate. Decree for plaintiff. Appeal.

Bean, J. 1. In the absence of evidence to the contrary, a deposit in a bank will be regarded as a general deposit, and creates the relation of debtor and creditor between the depositor and the bank. 2. Although a bank may have retained

in its vaults a sum greater than the trust fund, a general deposit thereof was technically a use of such funds in its business. 3. One claiming a preference over other creditors, on account of trust property, must either identify the specific property or the proceeds thereof, or show that the property of the debtor, which he seeks to work with such lien or preference, includes the trust property. Judgment reversed.

Cited: 39 Ore. 299.

PENNSYLVANIA

[*N. B.—Citations to Pa. should read Pa. St.*]

LEVY v BANK OF UNITED STATES (1802) 1 Binn. 27.

On deposit. A check, purporting to be drawn by W in favor of T, on defendant bank, was passed to plaintiff, who presented it at the bank the third day from date. It was entered to plaintiff's credit as cash. Later in the day, the bank discovered that W's name had been forged. The credit was canceled, and plaintiff notified. Plaintiff then admitted that he was not entitled to the credit if there was a forgery, but the next day notified the bank that he would hold it for the amount.

Shippen, C. J., to the jury: 1. The bank was supposed to know the handwriting of the drawer of the check, and having accepted it as cash is bound thereby. 2. The delay of plaintiff in presenting the check, even if proved, is of no importance as between these parties. 3. Plaintiff's admission being made under a mistake as to his right, does not bind him. Verdict for plaintiff.

Cited: 6 S. & R. 374; 1 W. & S. 97; 52 Pa. 209.

(Altered by statute. See 66 Pa. 438; 78 id. 237; 159 id. 50.—Ed.)

LEVY v BANK OF UNITED STATES (1802) 4 Dall. 234.

On deposit. The check of W, a customer of the defendant bank, drawn in favor of F, and by him indorsed to plaintiff for its face value, was deposited and credited to plaintiff in his passbook. On the same day the check was discovered to be a forgery. The defendant canceled the credit, notified plaintiff, and offered to return the check, which was refused. Judgment for plaintiff. Error.

The court. Any attempt to distinguish between a credit in the bank book of a customer and a cash payment, is impolitic on the part of the bank, and unjust toward the individual who accepted the credit instead of the money. Judgment affirmed.

Cited: 3 Yeates 533, 537, 538; 52 Pa. 209.

UNITED STATES v VANGHAN (1811) 3 Binn. 394.

Attachment. The plaintiff attached stock of the United States Bank owned by the defendants, and standing in the name of B garnishee. B failed, being greatly indebted to plaintiff. Previous to his failure, B had sold the stock to defendants, and given them a power of attorney to transfer the same, but no attempt was made to do so until after the levy. To the introduction of depositions establishing these facts, the plaintiff objected, on the ground that under the bank's charter such proof would not be admissible to show change of title to the property so as to prevent it from being attached by the United States. Objection overruled. Judgments in part for plaintiff and one of the defendants. Cross motion for new trial.

Yeates, J. 1. The plaintiff can have no claim to the stock which their debtor had sold bona fide, previous to the attachment. 2. The depositions tended to prove the bona fides of the sale, and are therefore admissible. New trial denied.

BOWMAN v CECIL BANK (1814) 3 Grant 33.

On bill of exchange against indorsers. N drew a bill, payable to his own order, and indorsed it under other indorsers. Defendants are co-partners, and the firm name was indorsed by one member of the firm, without the knowledge or consent

of his co-partners. Plaintiff discounted the bill, for benefit of N. At maturity it was duly protested for non-payment. Judgment for plaintiff. Error.

Lowrie, C. J. 1. The very form of the bill is prima facie evidence that it was accommodation paper. 2. The law does not presume that one partner is agent for his co-partners, to indorse as surety for others, or outside the sphere of ordinary mercantile partnership. Judgment reversed.

Cited: 91 Pa. 25.

FARMERS & MECHANICS BANK v GREINER, EX'R (1815) 2 S. & R. 114.

On promissory note. Defendant was executor of M, who had given his note to plaintiff bank. The bank claimed that the note was to be classed as a specialty and given a preference in payment over other claims against the estate. The act incorporating the bank provided that notes or bills discounted by the bank, or deposited for collection and falling due at the bank, were placed on the same footing as "foreign bills of exchange or as bills obligatory," so that the like benefit should be had in payment, against the "drawers, indorsers, and their representatives." Case reserved.

Yeates, J. The note was not a specialty or entitled to a preference. Judgment for defendant.

Cited: 10 S. & R. 12; 1 Rawle 341.

HESS v WERTS (1818) 4 S. & R. 356.

On bank notes. The defendants, proprietors of an unincorporated bank, issued notes promising to pay the same "out of their joint funds, according to their articles of association." The plaintiff was the holder of a number of these bills. The joint funds of the association having been exhausted, the plaintiff sought to hold the partners individually liable. By Act of Assembly of 1814, all notes of an unincorporated bank were declared void and unenforceable. In 1817, before plaintiff acquired the bills, the assembly repealed as much of the Act of 1814 as prevented suits on such notes against the banks issuing them. The defendants contended that as the bills were made void by the Act of 1814, the Act of 1817 could not give them effect. Judgment for plaintiff. Error.

Gibson, J. 1. The object of the Act of 1814 was to restrain the circulation of the notes of unlawful banking associations, and not to shield these associations against suits by the noteholders. 2. Where a statute is repealed, without any particular saving clause, it is as if it never had existed, except as to acts done pursuant to it. Judgment affirmed.

Cited: 17 S. & R. 65; 2 Rawle 363; 5 id. 158; 1 Watts 358; 11 Pa. 496; 50 id. 482, 483, 484; 52 id. 480.

SMITH v BANK OF WASHINGTON (1819) 5 S. & R. 318.

On promissory note, against indorser. This action was commenced on May 16, notice of dishonor having been mailed to defendant May 13, which, in the ordinary course could not reach him until May 19. B, a stockholder of plaintiff, was objected to as a witness on the ground that he was an interested person. B thereupon transferred his stock to C in trust for B's daughter, who knew nothing of the transaction, and B was allowed to testify. Judgment for plaintiff. Error.

Gibson, J. 1. In an action by a corporation the stockholders as individuals are not parties. 2. A stockholder, who executes a transfer of his stock in trust for his daughter, who is ignorant of the transaction, thereby loses his interest in a case in which the corporation is a party and his disability as a witness is removed. 3. An action on a note against the indorser is premature if the notice of dishonor was sent by mail and in the ordinary course could not have reached him before the commencement of the action. Judgment reversed.

Cited: 9 S. & R. 249; 3 Pen. & W. 426; 5 Watts 344; 8 id. 11; 9 id. 279; 3 Whart. 119; 5 id. 92; 7 Pa. 326; 21 id. 476; 35 id. 255; 9 Sup. Ct. 630.

LEAZURE v HILLEGAS (1821) 7 S. & R. 313.

Ejectment. Plaintiff claimed under a warrant and survey to H, and through several deeds. One of these deeds was made to, and another by, N Bank, whose charter prohibited it from "purchasing and holding" lands except in certain specified cases. The commonwealth had never taken any action to defeat the title con-

veyed by the bank. The court admitted in evidence: 1, a paper purporting to be the original survey, found among the private papers of a deputy-surveyor, on the signatures thereon being proved genuine; 2, an exemplified copy of the record of a deed affecting the property in question, but recorded in another county where other property covered therein was located; 3, and a deed by the corporation, though no proof was given of the corporate seal. Judgment for plaintiff. Error.

Tilghman, C. J. 1. A paper purporting to be an original survey, though found among the private papers of a deputy surveyor is admissible in evidence where there is proof that the signatures thereon are genuine. 2. A properly exemplified copy of the record in one county of a deed covering lands in that and another county is evidence of its whole contents. 3. The seal of a corporation must be proved before a deed of the corporation can be admitted in evidence. 4. A restriction in the charter of a bank preventing it from "purchasing and holding" lands except in certain specified cases, does not prohibit it from purchasing subject to the Statutes of Mortmain. 5. A corporation has by its nature the right to purchase lands, even if its charter contain no license, and the Statutes of Mortmain have not altered the law except in the case of superstitious uses. Since those statutes, however, it is necessary, in order to enable a corporation to retain lands which it has purchased, to have a license to do so. 6. A corporation which has no right to retain property, may convey it, and such conveyance is defeasible only by the commonwealth. Judgment reversed.

Cited: 7 S. & R. 163; 11 id. 418; 2 Rawle 18; 1 P. & W. 5; 7 Pa. 240; 13 id. 648; 15 id. 165; 53 id. 131; 63 id. 136, 152; 72 id. 468; 91 id. 493; 97 id. 536.

MORGAN v BANK OF NORTH AMERICA (1822) 8 S. & R. 73.

Damages for refusal to transfer stock and pay dividends thereon. W, who owned shares of stock in defendant bank and was largely indebted to it, failed and made a general assignment to plaintiffs. Their application to have the stock transferred to them was refused, unless W's indebtedness to the bank was first paid. Defendant proved a usage of the bank, which had been acquiesced in by all its stockholders, that no transfer of stock could be made while the owner of the stock was indebted to the bank. Verdict for plaintiff, subject to the opinion of the court on the evidence.

Duncan, J. The usage was binding on W; and his assignees under the general assignment took no greater right than he had. Judgment for defendants.

Cited: 17 S. & R. 286, 287; 37 Pa. 85; 72 id. 385; 137 id. 299.

STERLING v MARIETTA TRADING CO. (1824) 11 S. & R. 179.

On accommodation note against indorser. The note was payable to defendant S at a bank of which C was president and plaintiff successor. A bond, signed by the maker of the note, with O, and two other sureties, was given as collateral. The note was indorsed in blank by defendants and delivered for collection to C, who delivered it to plaintiff. The defendant was not allowed to introduce the depositions of the maker and sureties in evidence. O had deposited with C a sum of money and had received a receipt signed by C, but not as president, stating that the money was to be placed to O's credit in the bank. An offer of this receipt, of which defendant had no notice before trial, under plea of payment, was rejected. Judgment had been taken on the bond, but not collected. Evidence of confessions made by C, while president of the bank, as to payments, was rejected. The court refused to instruct the jury that, if the note was indorsed to C before plaintiff was organized, and never indorsed by him to plaintiff, but merely put into its hands for collection, this suit could not be maintained; also, that taking judgment on the bond, or mere forbearance of the holder to sue on the note, would discharge defendant. Judgment for plaintiff. Error.

Tilghman, J. 1. The depositions were inadmissible on the ground of interest. 2. The receipt was competent evidence. 3. Not being a party to this action, the confessions of the president as to payments made, were properly excluded. 4. The refusal to give the instructions asked was proper. Judgment reversed.

Cited: 6 W. & S. 289; 15 Pa. 271; 54 id. 382; 57 id. 344

BAIRD v BANK OF WASHINGTON (1824) 11 S. & R. 411.

Money had and received and money lent. Defendant was indebted to plaintiff, a bank. By agreement with the directors, he transferred land to trustees to be

sold for plaintiff's benefit. Seven directors constituted the quorum necessary to fill vacancies, and to transact business other than discount. There were seven present when the agreement was made, but one, B, had been elected at a meeting at which there was no quorum, but had participated in subsequent full meetings. He had an interest in the agreement, opposed to the plaintiff's interest. Plaintiff's charter empowered it to hold only "such lands as were bona fide mortgaged or conveyed to it in satisfaction of debts previously contracted in the course of its dealings." Plaintiff contended that the sale was void. Judgment for plaintiff. Error.

Gibson, J. 1. B was an officer de facto. 2. The acts of an officer de facto cannot be declared invalid where the interests of an innocent third person will be thereby prejudiced. 3. The acts of a bank director are not, as between the bank and an innocent third person, voidable by the bank on the ground of interest. 4. A conveyance made not with a view to permanent ownership by the corporation but with the view of raising money by a sale of the property, is not within the prohibition of the charter. 5. If the bank can prove that the defendant and the directors conspired together to bring about this arrangement, knowing it to be disadvantageous to the bank, there ought to be a verdict for the plaintiff; otherwise for the defendant. Judgment reversed.

PHILADELPHIA BANK v OFFICER (1824) 12 S. & R. 49.

Money had and received against executor, to recover money collected on execution. To show that defendant's testator had not paid the sum collected to plaintiff, but to the W Bank, an incorporated bank, plaintiff offered the books of the W Bank showing the entry therein of the sum. Plaintiff did not prove that the clerk making the entries was dead or beyond the process of the courts. Defendant, on notice from plaintiff, produced testator's passbook with the W Bank, which showed a corresponding entry. Judgment for defendant. Error.

Duncan, J. The books of the W Bank were not, under the circumstances, admissible either as proving the deposit or as explaining the passbook entry. Judgment affirmed.

Cited: 12 S. & R. 87, 263; 16 id. 90; 3 P. & W. 280; 4 Watts 48; 57 Pa. 318.

LYON v HUNTINGDON BANK (1824) 12 S. & R. 61.

On promissory note. The original loan was made by plaintiff bank to P, who gave his note therefor, indorsed by S, the cashier of the bank. At the same time P assigned to the bank several bonds made by D and E, with warrant of attorney to S to enter judgments thereon. P became insolvent; and a new note, the one sued on, was given by L and E, as makers, with R as indorser. The action was against L and R. Defendant was not allowed to prove that before L assumed any liability to the bank, P told him that the bank had agreed to look solely to the collateral and not to hold the makers or indorsers of the old or new note. The court instructed the jury that, if the collateral was given, both for the bank and the indorsers, they were equally negligent with the bank in not attempting to collect. Judgment for plaintiff. Error.

Tilghman, C. J. 1. The bank could not be affected by any thing that passed between P and L at the time the note in suit was made; and the evidence was properly rejected. 2. The bonds were assigned to the bank; and it was its duty, and not that of the indorsers, to collect them. The charge given was erroneous. Judgment reversed.

Cited: 20 Pa. 457; 78 id. 338.

ROGERS v HUNTINGDON BANK (1824) 12 S. & R. 77.

To recover instalment paid on stock. M, a stockholder in the defendant bank, was indebted to it for money borrowed. Before he had fully paid for his stock, he transferred it to plaintiffs. They paid an instalment due thereon, without notice to the bank of the transfer, and without disclosing that the instalment was not paid for M. Thereafter plaintiffs notified the bank of the transfer and asked to have the stock issued to them. The bank refused unless M's debt was first paid. Plaintiffs sued for the instalment paid. Defendant's charter provided that no stockholder should transfer his stock while indebted to the bank. Judgment for defendant. Error.

Tilghman, J. 1. The stock could not be transferred until M's debt to the bank was paid or discharged. 2. The money cannot be recovered; defendant has received nothing that it was not entitled to. Judgment affirmed.

Cited: 15 S. & R. 144; 17 id. 286; 1 Rawle 60; 29 Pa. 151; 137 id. 299; 172 id. 628

RIDGWAY v FARMERS BANK (1825) 12 S. & R. 256.

On draft. The president of the defendant, an incorporated bank, drew a draft to raise funds for the defendant, which plaintiff obtained in due course. The board of directors had authorized the president and cashier to borrow money, or obtain discounts as often as they found occasion. A copy of entries in the books of the bank was offered. Rejected. The court charged the jury that the president had no power to execute the draft; that even though plaintiff was a bona fide holder of the bill, he could not recover if it had been negotiated by the president and a prior indorsee, in fraud of the bank; but that if the directors had directly or indirectly sanctioned the act of the president in issuing the draft, the bank would be bound. Judgment for defendant. Error.

Tilghman, C. J. 1. The copy of entries in the books of the bank, uncorroborated by other evidence, was no competent evidence. 2. Though there was no authority to execute the draft in question, yet the court correctly told the jury that the bank was bound by the draft, if it had sanctioned the act. 3. Plaintiff was not affected by the fraud between the president of the bank and the payee. Judgment reversed.

Cited: 3 P. & W. 281; 7 Watts 329; 5 W. & S. 369; 57 Pa. 318.

BANK OF NORTHERN LIBERTIES v CRESSON (1825) 12 S. & R. 306.

Debt, on bond. Plaintiff's directors were by the charter authorized generally to manage its affairs, and to take security for the good behavior of officers. The form of security was prescribed only in the case of the cashier. Plaintiff's by-laws provided that the security of the first bookkeeper should be a bond executed by himself and two sureties. The directors, however, accepted a bond of the sureties alone. This action was brought on the bond, and defendant claimed that it was void, because not in accordance with the by-laws.

Duncan, J. Directors, having by charter discretionary power to appoint officers on any security they may think proper, may take security which is not in accordance with a by-law, and the obligors thereon will be bound. The stockholders alone can take advantage of the discrepancy. Judgment for plaintiff.

Cited: 2 Rawle 156, 159; 3 W. & S. 327.

BARRINGTON v BANK OF WASHINGTON (1826) 14 S. & R. 405.

Debt, on bond. The defendants, together with H, were joint obligors on a bond to the plaintiff bank, conditioned that B, the cashier, should perform the duties of cashier, to the best of his ability. The breach was that B had overstepped his authority, either ignorantly or carelessly. The name of H, the defendant's joint obligor, was erased from the bond. It was not shown that the defendants had consented to his release. Defendants contended that the erasure avoided the bond. The written appointment of the cashier was not introduced, but a resolution of the directors authorizing payments was admitted, and it was shown that B acted as cashier. Judgment for plaintiff for more than compensatory damages. Error.

Duncan, J. 1. A man, who accepts an office of trust, contracts that he will exercise it with ability, and his sureties warrant the performance of this contract. 2. The burden of proof is on the obligee, where the alteration is material, to show that it was done without his consent, or, if done with his consent, that the consent of all the parties was obtained. 3. The bank, in bringing the action against these defendants and omitting the name of H, admits that the alteration was made with the bank's consent and it was incumbent on the bank to prove that it was by consent of defendants, as well. 4. Compensatory damages only may be recovered against sureties. 5. There was a written paper, proving the appointment, and this ought to have been introduced. Judgment reversed.

Cited: 3 P. & W. 61; 2 Watts 356; 8 id. 450, 518; 2 Pa. 55; 23 id. 172, 249; 63 id. 330; 64 id. 185.

HARWOOD v RAMSEY (1826) 15 S. & R. 31

Assumpsit, on a judgment. The stockholders of P Bank sold their banking house to H, and received in part payment, an assignment of a judgment against B, guaranteed by the defendants. At the time the assignment was given, the sheriff held money belonging to B, obtained on other executions against him, to an extent sufficient to satisfy this judgment. B was then insolvent, but this fact was not known to the P Bank. The judgment had been assigned and guaranteed to the defendants by A. Defendants contended that the P Bank should have proceeded against A and the sheriff, when it found that B was insolvent, and also that the purchase of judgments by banks was prohibited by statute. Plaintiff was appointed to collect and distribute the assets of the bank. Judgment for defendant. Error.

Tilghman, C. J. 1. The guarantee of defendants is an engagement to pay the debt, on the failure of B to do so. B being insolvent at the time of the assignment, plaintiff was not bound to proceed against him. 2. As the bank had no notice of his insolvency, *prima facie* it was not the intention of the parties that it should proceed against the sheriff or A. The legislature did not intend to prohibit the bona fide purchase of judgments in a case like this. Judgment reversed.

GRANT v MECHANICS BANK OF PHILADELPHIA (1827) 15 S. & R. 140.

Damages for refusal to transfer bank stock. When the stock in defendant bank was transferred to plaintiff by W & W, they were indorsers to the bank on an unpaid note given by P, and not then due. The maker and indorsers were insolvent, and defendant refused to make the transfer, under a provision that no stockholder indebted to the bank should make a transfer till such debt was paid, secured or discharged.

Tilghman, J. The word "indebted," as used in the charter, covers the case at bar. Judgment for defendant.

Cited: 29 Pa. 151; 137 id. 299; 172 id. 628.

BLEAKNEY v FARMER & MECHANICS BANK (1827) 17 S. & R. 64.

Debt, on promissory note. After this action was commenced by the bank, its charter was forfeited by a failure to comply with certain provisions of the law, The legislature passed an act providing for the closing of banking institutions, declaring all notes made to the bank legal and valid, and validating all acts of the bank, as if no forfeiture had taken place. Judgment for plaintiff. Error.

Duncan, J. The act is constitutional, and applied to pending actions. Judgment affirmed.

Cited: 9 Pa. 99, 110; 15 id. 171; 52 id. 480; 79 id. 410; 88 id. 307.

SEWALL v LANCASTER BANK (1828) 17 S. & R. 285.

Trover, for bank stock. Under the charter of the defendant bank, it was provided that no stockholder indebted to the bank should make any transfer, until such debt was discharged. B was the owner of the stock, which had been sold to plaintiff under execution. Transfer was refused to plaintiff, as B owed the defendant money on notes falling due after the levy. The amount due defendant was less than the value of the stock. Judgment for defendant. Error.

Huston, J. 1. The bank could hold the stock until the debt was paid, even though it was not due, and the amount was less than the stock was worth. It was not obliged to apportion the stock. 2. Trover may lie for a stock certificate, but not for so many shares of stock. Judgment affirmed.

Cited: 29 Pa. 151; 69 id. 407; 137 id. 299; 172 id. 628.

FARMERS & MECHANICS BANK v BORAEF (1829) 1 Rawle 152.

Money had and received. Plaintiff offered in evidence his deposit book in defendant bank showing an entry for \$800, and W swore he made that identical deposit for the plaintiff on the day named. Defendant claimed the entry was a mistake for \$80, and offered M, a clerk and the bank's book, in which M said he had entered the deposit previous to his entry in plaintiff's deposit book. The court rejected the bank book without which M could not swear at all. Judgment for plaintiff. Appeal

Tod, J. The book ought to have gone with the plaintiff's book, and with M's testimony, to the jury, as containing one of the entries made by him at the time, with his explanations, if he had any. Judgment reversed.

Cited: 25 Pa. 292.

RAHM, EX'R v PHILADELPHIA BANK (1829) 1 Rawle 335.

On note, indorsee against indorser. Plaintiff bank discounted a promissory note made by L and indorsed by K, whose executor is defendant. At maturity, payment was refused by K and the note was protested, but no notice thereof was given K. The next day, plaintiff's clerk told K that the note was protested. L had died and administrators of his estate were appointed. The note was payable at plaintiff's bank, and all the parties were in the same town. The holder was at the place of payment during the whole of the day on which the note was due ready to receive payment. By the charter of defendant, discounted notes were placed on the same footing as foreign bills. Judgment for plaintiff. Appeal.

Tod, J. 1. Under the circumstances it would have been unnecessary to make any demand of the drawer or his representative. 2. The verbal notice of the clerk was sufficient. 3. Neither the copy of the protest, nor notice of it, need be sent or given in the case of a foreign bill where the party to be affected happens to be in the county at the time of the refusal to accept or pay. Judgment affirmed.

Cited: 4 W. & S. 511; 41 Pa. 326.

BANK OF WASHINGTON v BARRINGTON (1830) 2 Pen. & W. 27.

Debt, against sureties on bond. The bond was given for B, principal, as plaintiffs' cashier in 1814. On account of a failure to comply with the act of incorporation, the charter was forfeited in 1818; but an act was passed the following month renewing and continuing it "in as full force and ample manner as if no forfeiture had taken place." Before B's delinquencies were discovered, most of which were after the restoration, both plaintiff and defendants tacitly regarded the bond as good. Plaintiff contended that even if the bond became of no effect after the forfeiture, all the loss thereafter was the result of B's omission, which caused the forfeiture. Judgment for plaintiff. Appeal.

Gibson, C. J. 1. The liability of a surety is commensurate in duration with the commission of his principal. 2. The sureties' silence will not prevent them from standing on their rights after the forfeiture. 3. The measure of damages for the cashier's omission is only the loss which it necessarily and naturally occasioned. Judgment reversed.

COMMONWEALTH v HUNTINGDON BANK (1831) 2 Pen. & W. 438.

Where the State forfeited the charter of a bank, because of non-payment of the 8 per cent duty on its dividends, as provided by the Act of April 21, 1814, Held, that the forfeiture of the charter did not preclude the State from recovering the duty.

LANCASTER BANK v IRVINE (1831) 3 Pen. & W. 250.

Where the cashier of a bank fraudulently obtains a note from the drawer, and procures it to be discounted by the bank, the bank cannot recover in an action thereon against the indorser.

KUHN'S ADM'RS v WESTMORELAND BANK (1833) 2 Watts 136.

On promissory note, against an indorser. The note was given by S to the defendant's intestate, who had it discounted by plaintiff bank. At the time S owned 50 shares of the capital stock of the bank, and subsequently acquired 15 more. This stock was sold by the bank under an execution issued on a judgment for a note subsequently due. Under the Act of March 21, 1814, sec. 7, the bank had a lien on a stockholder's shares for any indebtedness due the bank. The defendant contended that an indorser had an interest in the lien under the Act of 1814 on the bank stock of the debtor; that the debt for which the note in question was given, had priority in the order of payment out of the proceeds of the stock; and that the bank by taking this stock under an execution and selling it, discharged the indorser. Judgment for plaintiff. Error.

Gibson, C. J. 1. The lien is undoubtedly for the benefit of the bank in the first

place, for the surety is entitled to but the resulting benefit of it after the bank has been satisfied. 2. It would be unconscionable to shift a security on the credit of which a surety had consented to be bound. 3. The bank had at one time the means of satisfaction in its hands, or rather, it yet has a fund in its hands, which in equity belongs to the defendants who are but sureties, and they therefore cannot be called upon. Judgment reversed.

Cited: 105 Pa. 501.

MONONGAHELA BANK v PORTER (1833) 2 Watts 141.

Where a note owned by a bank, was protested by a notary, who was a stockholder in the bank, Held, the protest was incompetent evidence to charge an indorser in a suit by the bank.

Cited: 4 Whart. 15; 18 Pa. 520.

MERCHANTS BANK v BANK OF THE UNITED STATES (1833) 4 Rawle 318.

For deficiency in payment. Plaintiff, in New York, sent its agent to Philadelphia with negotiable paper to demand specie of defendant. Defendant, for its own convenience, got the money from three other banks. The boxes came labeled and marked so as to be easily identified and were put in a convenient place for plaintiff's agent. The agent, without counting the money, had it, in his presence in defendant's office, taken out of the boxes and placed in kegs. When counted by plaintiff, the money was \$192 short. The judge charged that if each box was so labeled as to identify the bank that sent it, and the agent, for his own convenience, without counting the money, mixed it up, thus knowingly preventing the defendant from protecting itself, the verdict should be for defendant. Judgment for defendant. Error.

Gibson, C. J. The act, which rendered the loss inevitable, was done by the plaintiff's own agent. The agent's supposed knowledge was not, however, an essential ingredient. Judgment affirmed.

MECHANICS BANK v EARP (1834) 4 Rawle 384.

Negligence, for refusal to transfer stock. The plaintiff's firm, having accounts due from debtors in Virginia, drew on them to the firm's order, indorsed the bills and gave them to defendant bank for collection. The bills were entered on the defendant's bank books to the firm's credit and the next day, the defendant indorsed the bills, and sent them to its Virginia correspondent, a bank, "for our account." According to common usage, defendant credited the firm on defendant's books, and at the request of the firm, credited them on the firm's bank books. Owing to the negligence of defendant's correspondent, the bills were not paid. Thereafter, when the plaintiff, a director of the defendant bank, applied for a transfer of his stock, defendant refused, claiming a lien. The statute provided that no stockholder indebted to the bank for a debt, actually due and unpaid, should be authorized to make a transfer, until such debt was discharged or security given. After the bills were given to the defendant, there were several settlements of the firm's accounts on their bank book, and there was at the time of the refusal a sum greater than the amount of these bills, on deposit to the firm's credit. Defendant did not tender the bills. Judgment for plaintiff. Error.

Rogers, J. 1. Defendant was a mere agent for the transmission of the bills, and was not obliged to tender them to plaintiff. 2. If reasonable security had been offered and refused, the plaintiff would have had a right of action. 3. The settlements were not such as can alter the rights of either party, and the accounts are still open to examination and correction. 4. The bank had no lien on the deposits. 5. If the firm had been indebted on the note discounted by the bank, they would have a lien on the stock, without regard to the amount of their deposits. The bank was justified in refusing to permit the transfer. Judgment reversed.

HENRY v OVES (1835) 4 Watts 46.

Debt, on a book account against the administrator of the debtor. Defendant offered in evidence a check to plaintiff, with proof of its signature by the deceased, together with the books of the bank showing that a check of like amount was credited to the payee on that day, and that such check was the only check for that amount paid by the bank on that day. The evidence was excluded. Judgment for plaintiff. Error.

Huston, J. A check accompanied by proof of its signature, together with the books of the bank showing credit to the payee on the same day of a check of like amount, is evidence of the payment. Judgment reversed.

WALKER v GEISSE (1838) 4 Whart. 252.

On check, against the drawer. Defendant filed an affidavit of defense, under a statute requiring such affidavit to state the facts of the defense. The affidavit set forth that there was a failure of consideration, and that defendant was told by the payee that plaintiff took the check before the day of its date and in payment of an antecedent indebtedness. The affidavit was held insufficient. Judgment for plaintiff. Error.

Kennedy, J. 1. A check is transferable before the day of its date. 2. One who accepts a check in payment and discharge of an antecedent debt is a holder for value. 3. An affidavit of defense, under the statute, must state the facts on which the defense is based, not that deponent is informed that such facts exist. Judgment affirmed.

Cited: 16 Pa. 123; 20 id. 386; 29 id. 160; 32 id. 78; 40 id. 44; 83 id. 249; 103 id. 83.

BELLEMIRE v BANK OF UNITED STATES (1839) 4 Whart. 105.

On promissory note. The plaintiff deposited the note in the defendant bank for collection. When the note fell due, the clerk of the bank's notary called at the store of G, the last indorser, to ascertain the address of the first indorser, C. G's wife stated that C resided at a place which was in fact the place of business of C's son. Notice was left at this place, and G was informed of his wife's direction. The note was renewed, and when it fell due, notice was left at the store of C's son. C set up want of notice. Judgment for defendants. Error.

Gilson, C. J. 1. A bank employed to transmit for collection is bound to concern itself with the act of transmission alone, and its correspondent becomes the agent for subsequent measures. 2. The bank performed its duty by committing it to the person employed in its own concerns. 3. Neither the bank nor the notary is bound to know any one in the transaction except the last indorser. The notary is the agent of the creditor. Judgment affirmed.

Cited: 6 W. & S. 508; 18 Pa. 263; 109 id. 427.

HARRISBURG BANK v FORSTER (1839) 8 Watts 12.

On promissory notes made by the defendant, cashier of the plaintiff bank. Plea: Statute of Limitations. The defendant was cashier of the bank, and had charge of all the notes and bills. He made no report to the board of trustees that the notes in suit were due. There was no evidence that the directors knew at the time that the notes were unpaid. Judgment for defendant. Error.

Rogers, J. Until the directors had official knowledge that the notes were not paid, the statute did not begin to run against the bank, notwithstanding the notes were due. Judgment reversed.

Cited: 2 Grant's Cases 275; 8 Pa. 190; 12 id. 54; 40 id. 204; 48 id. 525; 102 id. 204; 159 id. 287.

SCHOOL DIRECTORS v CARLISLE BANK (1839) 8 Watts 289.

To collect taxes, assessed upon stock of its own, and other banks held by defendant bank. The assessment was made under the Act of March 25, 1831, which provides that the taxable property of all persons shall be assessed for school purposes. A return was made showing that notice of the time and place of appeal had been given all those assessed, including the defendant bank; but the bank did not attend. Judgment for defendant. Error.

Kennedy, J. 1. The word "person" was not intended to include the defendant corporation. 2. As the defendant was not liable for the assessment; he was not bound to pay attention to the notice, and his failure so to do will not operate as a waiver of his rights on appeal. Judgment affirmed.

Cited: 9 Pa. 361, 362, 363; 18 id. 58; 24 id. 231; 112 id. 350; 129 id. 451.

HAWLEY v THE LUMBERMANS BANK (1840) 10 Watts 230.

The capital stock of a bank, owned by itself, and in its own possession, cannot be reached by attachment for the payment of its debts, under the Act of June 16, 1836.

BANK OF PITTSBURGH v WHITEHEAD (1840) 10 Watts 397.

On drafts. The drafts in question were drawn at four and six months, discounted by the plaintiff, and protested for non-payment, of which the defendants had regular notice. The action was brought against the defendants jointly as the firm of W, S & Co. Defense, that defendant I was not a member of the firm when the drafts were drawn. It was shown that one of the directors spoke about I being out of the firm of W, S & Co. at a meeting of the board of directors, when they were considering the loan to the firm. The question of dissolution was left to the jury. Judgment for defendants. Error.

Gibson, C. J. 1. Notice to the board by one of the directors at a regular meeting is notice to the bank. 2. Where there is a spark of evidence, the question of fact must be submitted to the jury as the legitimate triers of it. Judgment affirmed.

Cited: 9 Pa. 28; 14 id. 301; 23 id. 445; 33 id. 403.

HALL v BANK OF THE UNITED STATES (1840) 6 Whart. 585.

On bank notes and on post notes, against maker. An Act of April 3, 1840, provided that certain claims against banks could be collected "according to the common law in force in this commonwealth and not otherwise." Defendants failed to file sufficient affidavits of defense as required by Act of 1835, and claimed that as such affidavits were not required by the common law, they were not necessary.

Pettit, P. 1. Where a statute provides that certain rights shall be enforced according to the common law and not otherwise, recovery according to the existing procedure of common law courts is authorized. 2. Holders of promissory notes, payable on days subsequent to their date, are entitled to judgment, under the Act of 1835, for the amount and interest from the due day at 6 per cent. 3. Holders of ordinary bank notes are entitled to interest at 12 per cent from the institution of the suit. 4. Protest fees are recoverable on notes payable to order, but not on those payable to bearer. Judgment for plaintiffs.

BANK OF PENNSYLVANIA v REED (1841) 1 W. & S. 101.

Scire facias, to continue a lien of a judgment. Plaintiff agreed that defendants might give in evidence all which might have been given on the original judgment. W gave a note to defendants, payable at the F Bank, which was indorsed by defendants and discounted by plaintiff. W failed to pay. L, cashier of plaintiff, agreed with defendants to take a judgment against them on the note as collateral security; and plaintiff would bring suit against W, and endeavor to collect of him. Judgment was recovered against W and his property seized and sold, on which a small amount was raised and applied to the payment of the note. Defendants contended that by the agreement of L, plaintiff undertook to collect the debt from W, and that it had been guilty of laches. Defendants offered to show the amount of property in the hands of W, previous to the time the judgment was obtained. Excluded. Plaintiff claimed that L's agreements did not bind plaintiff. Judgment for defendants. Error.

Rogers, J. 1. By the contract of L, defendants' absolute liability was changed into a contingent one. 2. A cashier has a general authority over the collection of notes, and to make arrangements to facilitate their collection. 3. When the principal, with a knowledge of the facts, adopts or acquiesces in the acts done, he cannot afterward impeach them, under pretense that they were done without authority. 4. Plaintiff was bound to the exercise of ordinary, not extraordinary, diligence. 5. Evidence of the ability of W to pay at a time when plaintiff could not enforce the liability, was not admissible. 6. Injury to defendants, and the extent of it, should be proved to justify a verdict in their favor. Judgment reversed.

Cited: 3 W. & S. 376; 4 Pa. 329; 69 id. 429.

IRVINE v LUMBERMENS BANK (1841) 2 W. & S. 190.

On promissory note, against makers. Defendants pleaded that plaintiff had forfeited its charter; that the note was taken contrary to its act of incorporation by being made payable in plaintiff's bank notes; fraud in the discount in that the president and cashier of plaintiff did not sign it, according to agreement; that the debt attached under process of a foreign state. Defendants objected that the note was not properly admissible in evidence, without other proof of its execution

than that of the handwriting of the makers; and that a juror who had expressed an opinion from what he had been told by another, without any particular knowledge of the facts, was not excused, although challenged. Defendants objected to the rule of damages, stated as the cash value of the note at maturity with interest. Judgment for plaintiff. Error.

Rogers, J. 1. The note was properly admitted in evidence. 2. The juror challenged, not having formed an opinion as to the merits of the case, it was proper to retain him. 3. If the charter of plaintiff had been forfeited, this fact could not be investigated in this proceeding. The only evidence competent to prove it would be a judgment of a court directly in point. 4. The fact that the note was payable in the notes of the bank, was not contrary to the provisions of its charter. 5. The agreement of the president and cashier to sign the note and their neglect to do it, was not such a fraud as would avoid it without knowledge of it being brought home to a quorum of directors, whose duty it was to discount notes. 6. The attachment to be available to defendants should have been pleaded in abatement. 7. The rule of damages is the amount of note and interest, and not the specie value of the bank notes. Judgment affirmed.

Cited: 2 W. & S. 213, 216; 9 Pa. 82; 25 id. 290; 32 id. 32; 40 id. 160; 44 id. 331; 56 id. 335; 82 id. 46; 94 id. 434, 513; 104 id. 406; 187 id. 130; 190 id. 493; 193 id. 136, 257; 196 id. 29.

BANK OF UNITED STATES v THAYER (1841) 2 W. & S. 443.

On bank notes, and post notes, payable to bearer with 12 per cent interest after demand of the plaintiff bank. Defendant's affidavit of defense set up that the interest should not exceed 6 per cent, or be chargeable at that rate, except from the time the paper sued on, according to its face, became payable; that if any intrinsic matter be relied on, it should be proved hereafter and not be assumed upon application for judgment for want of affidavit for defense; that on notes payable on demand or to bearer there could be no judgment for want of an affidavit of defense for more than the principal and interest, after suit was brought. The defenses set up in the affidavit were abandoned and judgment was objected to, without the production and deposit of the notes in court. Judgment for plaintiff. Error.

Rogers, J. 1. If it be necessary to make averments dehors the instrument on which suit is brought, the fact so set forth may be denied in the affidavit of defense. If not denied it is admitted, and the court can say with certainty whether, taking the statement with the affidavit, defendant has any defense. 2. Plaintiff was not bound to part with the notes before judgment. Judgment affirmed.

Cited: 30 Pa. 506; 31 id. 82; 50 id. 284; 53 id. 190; 55 id. 242; 90 id. 276; 115 id. 287.

COMMONWEALTH v BANK OF PENNSYLVANIA (1842) 3 W. & S. 173.

Case, to determine the number of votes the State was entitled to in the election of an assignee or trustees of defendant bank. The act, under which the election was held, provided that the state treasurer should have as many votes on the stock held by the State as though the shares were held by individuals. The act of incorporation prescribed a scale of votes in an inversed ratio of progression from 1 to 30, in proportion to the number of shares held by the voter. The State owned 3,750 shares, and claimed the same number of votes that it had shares. The stockholders all had a right to vote, and claimed that the State was only entitled to 30 votes. On case stated.

Gibson, C. J. The language of the act is devoid of certainty. It was not intended to measure the right of the State by that which a single transferee of her shares would have, and limit her vote to thirty. It was not the design to give her a vote for each of her shares, as if each were held by different owners. No legal election has been held, and none can be held without further legislation. Case withdrawn.

Cited: 10 Pa. 176; 104 id. 547.

DANA v BANK OF UNITED STATES (1843) 5 W. & S. 223.

Motion for judgment against garnishee. The garnishees were trustees under a deed of assignment by defendant bank of certain property to secure creditors, who were thereby preferred. The preference was such as would have been valid if

made by an individual. The bank's directors were authorized generally to manage its affairs, and had directed this assignment without authorization by the stockholders. The assignment referred to schedules thereto annexed and "bearing even date," the date, however, was omitted from the schedules. The property assigned was of much greater value than the debt secured, and the deed expressly provided for repayment to the bank of any surplus, and that the trustees should, from time to time, apply the money in their hands to the payment of the debts, and if the debts were not fully paid within two years, should sell the property. By statute, the courts, upon application made after one year from the date of such assignment, were authorized to compel such trustees to close their accounts. The witness, who proved the execution of the deed before a magistrate, did not sign as a subscribing witness. The assignment was made a few days before an act was passed which would have rendered it illegal.

Kennedy, J. 1. Corporations, in the absence of statute, have the same right to dispose of their property as have individuals. 2. Where the directors of a bank are authorized generally to manage its affairs, they may make an assignment without express authority from the stockholders. 3. Where a deed of assignment refers to schedules annexed thereto, as "bearing even dates," the schedules, if they bear no date, will be deemed to have been executed simultaneously with the deed. 4. The probate of the deed of assignment was not invalid because not signed by the subscribing witness to the deed. 5. In the absence of restrictive statutes, a bank, like an individual, to secure a debt, may assign property of much greater value, and it is immaterial whether or not the assignment contains an express stipulation to pay back any surplus remaining after the debt is satisfied. 6. A provision in a deed of assignment that after two years, if the debt secured be not fully paid, the trustee shall sell the remaining property, accompanied by a provision that said trustee shall from time to time make payments on the debt out of the money in their hands, is not a conflict with a statute giving the courts power to compel such trustee to close his account, upon application made after one year from the date of the assignment. 7. A valid assignment is not rendered invalid by a subsequently enacted statute, though made just before its passage with intent to evade said statute. Motion denied.

Cited: 1 Grant's Cases 49; 32 Pa. 476; 33 id. 209; 57 id. 218; 66 id. 382; 84 id. 324.

BANK OF NORTHERN LIBERTIES v DAVIS (1843) 6 W. & S. 285.

Money had and received. Plaintiff kept a deposit account with defendant. Defendant paid checks which plaintiff claimed to be forgeries. Defendant's teller testified that in his opinion the checks were genuine. Plaintiff thereupon was allowed to ask whether his testimony on another occasion had not been different. Plaintiff was allowed to prove statements made by defendant's cashier, after the payment of the checks, that the checks were forgeries. Judgment for plaintiff. Error.

Rogers, J. 1. An unwilling witness may be asked by the party calling him whether he has given different testimony respecting the same matter on another occasion. 2. Evidence of declarations made by cashier of a bank as to the genuineness of checks, not at the time of their presentation, but some time thereafter, is not admissible against the bank. Judgment reversed.

Cited: 9 Pa. 160, 161; 53 id. 497; 57 id. 344; 82 id. 123; 150 id. 616; 199 id. 217.

COMMERCIAL BANK v WOOD (1844) 7 W. & S. 89.

Money had and received. M transferred a draft to defendant bank which agreed to pay an obligation of M to plaintiff. The president of defendant thereupon wrote to plaintiff a letter, signed by P, who acted as M's agent in the indorsement of the draft, telling plaintiff of the arrangement made. This letter was admitted in evidence as well as testimony of P as to the terms of the contract, that the transfer was unconditional, that the draft was taken without discount, that he was informed that such drafts were at a premium, that he indorsed the draft as M's agent and received no consideration therefor, and that he was never given notice of dishonor. The draft was never paid, owing to the failure of the bank on which it was drawn. The court charged that if defendant accepted the draft as cash, it was bound to pay plaintiff's claim. Judgment for plaintiff. Error.

Kennedy, J. 1. A letter signed by a third party, but actually written by the

president of a bank, and documents referred to therein are admissible in evidence against the bank. 2. A statement by a witness, who has set forth the terms of a contract, that the agreement was absolute and subject to no conditions, is not an opinion, but a statement of fact. 3. A witness, who states that he took a draft without discount, because such drafts were at a premium, may testify that he was informed that they were at such a premium. 4. A witness, who has testified that he indorsed a note merely as an agent, may state that he received no consideration and has not been notified of dishonor, though no testimony was offered on that point. 5. Where a bank accepts a draft as cash under an agreement to pay an obligation to a third party, the bank becomes a trustee of the funds for such third party, who may recover the same from the bank directly, in an action for money had and received. 6. It is immaterial in such a case that the draft was never collected by the bank. Judgment affirmed.

Cited: 40 Pa. 451.

BOGGS v LANCASTER BANK (1844) 7 W. & S. 331.

On bill of exchange, against acceptors. The bill was discounted by B, one of plaintiff's officers, who had neither actual nor apparent authority to discount. Defendants, who had a good defense thereto against the drawer, notified B that the bill would not be paid. Thereafter the discount was ratified by plaintiff. Before this action was brought, plaintiff had received part of the amount of the bill from the drawer, but sued defendants for the full amount. Judgment for plaintiff. Error.

Huston, J. 1. Notice to an acting officer of a bank that a draft will not be paid, is notice to the bank. 2. Though ratification of an agent's act is equivalent to previous authority so far as the agent is concerned, such action cannot affect the rights of those who are not parties to the transaction. 3. The holder of a protested bill may sue either the drawer or acceptor or both, but payment in part by one reduces the claim against either to the amount of the balance. 4. One who takes a bill with notice that the acceptor disclaims liability thereon is not, as against the acceptor, a bona fide holder without notice. Judgment reversed.

NORTHAMPTON BANK v BALLIET (1844) 8 W. & S. 311.

On bond, for the use of S. The bond was given by defendants to plaintiff bank, and by the latter assigned to S. Defendant pleaded payment, and made a tender of plaintiff's bank notes. Defendant did not receive notice of the assignment until some time subsequent to its being made. Defendant contended that he had tendered the notes at the time he received notice of the assignment. Evidence was received of transactions between the bank and the defendant, beginning before the assignment. Judgment for defendant. Error.

Rogers, J. 1. Tender of the notes was equivalent to a tender in specie. 2. The bond in suit went into the hands of the assignee with all of the incidents attached to other assignments. 3. If the defendant held the notes of the bank at the time he received notice of the assignment, the assignee would be bound to receive them as cash. 4. The evidence of the transactions of the defendant with the bank was properly admitted on the question of when the defendant acquired the notes tendered. Judgment reversed.

Cited: 8 W. & S. 325; 18 Pa. 404; 20 id. 193, 194; 72 id. 385; 76 id. 81.

MANUEL v MISSISSIPPI RAILROAD CO. (1845) 2 Pa. St. 198.

On certificate of deposit. Plaintiff commenced the present proceeding by foreign attachment, against the B Bank. After the suit was instituted, plaintiff surrendered the certificate sued on, and received in place thereof a number of smaller certificates which were not paid. Nonsuit. Error.

Sergeant, J. The surrender and cancellation of the certificate sued on was a fulfillment by the bank of its obligations thereunder, and the nonsuit was properly granted. Judgment affirmed.

WEST BRANCH BANK v FULMER (1846) 3 Pa. St. 399.

On promissory note, against indorser. The note was given in renewal of a similar one discounted by the plaintiff for the use of the maker, C, who was a member of the firms of C & P and B, C & Co. Before the original note matured,

C gave as collateral security, the note of B, C & Co. indorsed by C & P. B, C & Co.'s note was renewed and left with plaintiff to be collected and applied to this note. When the renewed note of B, C & Co. became due, it was protested, but no notice was given to C & P. Two members of the firm of B, C & Co. constituted the firm of C & P. The defendant set up the neglect to give notice on the B, C & Co. note. Judgment for defendant. Error.

Gibson, C. J. 1. Whether the note was deposited for collection or as collateral security, it was the duty of the bank, in the absence of specific instructions, to follow the usual course. 2. A bank, employed to collect, is bound to present for payment, and to give notice of dishonor, only when those measures are necessary to preserve its employer's recourse to those contingently responsible to it. 3. Knowledge is notice, and the knowledge of one firm was the knowledge of the other. It was as much the business of one firm as of the other to provide for the payment of the note at maturity. Judgment reversed.

Cited: 10 Sup. Ct. 156.

PRESBYTERIAN CONGREGATION v CARLISLE BANK (1847) 5 Pa. St. 345.

Case, for refusing to permit transfer of shares on the bank's books. A father, by will, left 40 shares of the capital stock of defendant bank to be divided, share and share alike, among his four sons, G, W, J, and C. C was a minor. G, W, and J were indebted to defendant on notes not yet due. Defendant, with notice of the will and at the request of all the sons, and the sureties on the notes, permitted the executor to transfer 30 shares to purchasers. Defendant recovered judgments against G and J, equal in amount to the value of the 10 remaining shares. C became of age and assigned these 10 shares to plaintiff. Sec. 3, art. 11, Act of March 25, 1824, provided that stock should be assignable only on the books of the bank, and that the bank should be entitled to a lien on the stock for the owner's indebtedness to it. Defendant contended that the judgments were a lien on the 10 shares, and refused to permit a transfer to plaintiff. The court rejected evidence of an agreement, prior to the transfer of the 30 shares, that the stock should be divided between the four sons, and that the 10 in suit should be the property of C. Judgment for defendant. Error.

Coulter, J. 1. Evidence of the agreement should have been admitted. The act gives defendant no power to sequester the stock of one individual to pay the debt of another. 2. Plaintiff may bring this action in its own name, for the damage arises out of a tort to plaintiff, and not out of a breach of the contract between the stockholder and the bank. Judgment reversed.

FARMERS BANK OF READING v GILSON (1847) 6 Pa. St. 51.

Money had and received. Plaintiff was accommodation indorser of a note made by M and discounted by defendant bank, in which M was a stockholder. By statute, no stockholder indebted to the bank could transfer his stock or assign the dividend until the debt was paid. The note was due in 1833, but not paid, and defendant recovered judgment against plaintiff, who paid the amount due in 1841. Thereafter M assigned the dividends and transferred the stock to B. Plaintiff notified defendant that, as surety, he claimed to be subrogated to its rights in M's stock. This action was brought in 1843. Verdict directed. Judgment for plaintiff. Error.

Per curiam. 1. This suit is in substance an application to be substituted for defendant, and there can be no substitution if the debt is discharged between principal and surety, or barred by the Statute of Limitations. 2. An indorser of accommodation paper can recover from the maker only on the contract of indorsement. 3. Plaintiff could have sued the maker in 1833 on the note, but any action against him is now barred by the Statute of Limitations. Judgment reversed.

On a new trial an agreement between plaintiff and M was offered in evidence. The agreement showed a partnership between plaintiff and M, and the note was treated as M's contribution to the common stock; there was no covenant to defend plaintiff against defendant or to account. The agreement was rejected and the court directed a verdict for defendant. Error.

Per curiam. As recourse on the contract of indorsement is precluded by the Statute of Limitations, and there is no covenant in the agreement on which plaintiff could recover against M in an action at law, there is no ground on which, in equity, he can be subrogated to the rights of the bank. Judgment affirmed.

Cited: 31 Pa. 165; 40 id. 154; 112 id. 378.

CUSTER v TOMPKINS CO. BANK (1848) 9 Pa. St. 27.

Debt, on promissory note, by indorsee against maker. Defendant offered evidence to show that R, one of the indorsers, who was also a director of plaintiff, had notice not to use the note as it was discounted for a special purpose. Refused. R was present when plaintiff discounted the note. Judgment for plaintiff. Error.

Per curiam. Notice to a corporator is not notice to the corporation, unless he has been constituted an organ of communication. Judgment affirmed.

Cited: 23 Pa. 445; 33 id. 403.

SPALDING v BANK OF SUSQUEHANNA CO. (1848) 9 Pa. St. 28.

Assumpsit, against indorser of a note. Defendant offered the deposition of C, the drawer, to show that he had no interest, and offered to prove that C had been released before the deposition was made, but that the paper was lost. It was shown that some search had been made for the release, but not an exhaustive search. The deposition and secondary evidence of the contents of the release were excluded. Defendant offered to prove declarations of the president of plaintiff, made after the event, that C had deposited \$1,000 in bank bills with S, a subsequent indorser, as collateral security; that the president received the collateral from S, claimed the note in his own right, and paid over the collateral to C, without consideration and without the assent of defendant. Overruled. The president and another had been authorized to settle with S. The president was subsequently authorized to take charge of the bank and its effects. Judgment for plaintiff. Error.

Coulter, J. 1. Defendant was bound to use only reasonable diligence, depending on the importance of the paper, in searching for the lost release, in order to become entitled to introduce secondary evidence of its contents. 2. The acts and declarations of the president were within the scope of his authority as an officer, and should have been admitted as evidence against the bank. 3. Plaintiff was bound to show what had become of the collateral securities. Judgment reversed.

Cited: 20 Pa. 457; 57 id. 343; 98 id. 84.

PHILADELPHIA SAV. FUND SOCIETY v YARD (1848) 9 Pa. St. 359.

Assumpsit, to recover money paid for taxes under a distress. Plaintiff was a corporation organized under the Act of 1819 for the purpose of receiving and investing small sums of money for mechanics, tradesmen, laborers and servants. The money deposited was to bear interest at 4.8 per cent. The assessments were: 1, for state and county purposes on mortgages; 2, on loans of corporations, municipal and others. Act of 1846, sec. 1, enacts that all property not taxed by existing laws, held, owned or invested by any person or corporation, in trust for other persons, except as should be held for religious purposes shall be taxed. Judgment for defendant. Error.

Coulter, J. These mortgages and stocks held by plaintiff in trust to make profit thereby, and for the use of other persons, are fairly included in the terms of the Act of 1846, as subject to taxation both for state and county purposes. Judgment affirmed.

Cited: 9 Pa. 414, 415, 416; 13 id. 328, 523; 49 id. 530; 91 id. 54; 101 id. 145; 112 id. 351; 144 id. 363; 151 id. 285.

BANK OF UNITED STATES v MACALESTER (1848) 9 Pa. St. 475.

Assumpsit. Plea, setoff. Defendant overdraw his account with plaintiff. To sustain his plea, defendant proved that he, as owner of 69 coupons of Illinois Canal stock of \$30 each, payable to bearer, and drawn on plaintiff, had presented them for payment while there was a balance on deposit with plaintiff in favor of the Illinois Canal Commissioners of \$10,000; and that payment was refused. Plaintiff proved that at the time the coupons were presented, another account of the State of Illinois with plaintiff, kept in the name of the Fund Commissioner, was overdrawn to the extent of \$28,000. The State of Illinois kept the two accounts for totally distinct purposes as plaintiff knew, and that of the Canal Commissioners was liable for payment of the coupons. Plaintiff claimed that defendant held the coupon as collateral security for a loan. Judgment for defendant. Error.

Rogers, J. 1. Where a tort is waived and an action brought in assumpsit,

defendant is entitled to setoff. 2. Plaintiff, having received the money for the purpose of paying the coupons, cannot divert it to the prejudice of the holders by applying it to a general balance against the state. 3. Plaintiff is not concerned with the rights existing between pledgor and pledgee of the coupons, and it is immaterial whether defendant is the legal or equitable owner of the subject matter of the setoff. Judgment affirmed.

Cited: 36 Pa. 234, 235; 37 id. 70; 42 id. 541; 55 id. 368; 65 id. 16; 66 id. 379; 99 id. 379; 108 id. 277; 149 id. 397; 15 Sup. Ct. 635.

WINGATE v MECHANICS BANK (1848) 10 Pa. St. 104.

Assumpsit. Plaintiff contended that defendant had agreed to collect a promissory note and certificate of deposit for 7 per cent. The amounts were entered in plaintiff's passbook, marked "7 per cent." Defendant sent them to its correspondent in Mississippi for collection, but they were returned as uncollectable except in funds 20 to 30 per cent below par. Defendant failed to notify plaintiff, though the latter frequently called with regard to the collections. Defendant had put up a placard in its banking house, offering to collect drafts in Mississippi for 7 per cent. Notice to produce not being complied with, plaintiff was allowed to prove the contents of the placard. He was also permitted to prove that the entries in the passbook meant that defendant was to collect and pay over the amount for 7 per cent. He proved by the Mississippi statutes that action on the note and certificate was outlawed. Defendant contended that it was prohibited from making the contract alleged by statute, forbidding it to trade in bills and notes. Judgment for plaintiff. Error.

Coulter, J. 1. Evidence of the contents of the placard was admissible after failure to produce on notice. 2. Parol evidence to explain the meaning of the entry in the passbook was competent, as technical terms in a writing which forms part or all of a contract, may be so explained. 3. Evidence of the statutes was competent as showing the results of defendant's negligence. 4. The placard and the entries in the bank book being merely evidence of a parol contract, the existence of the contract was properly left to the jury. 5. An agent for collection is held to the giving of notice of inability to collect within a reasonable time, whether the agent be an individual or a bank. 6. The collection of notes for a stipulated reward is not a trading in such notes. Judgment affirmed.

Cited: 90 Pa. 47.

JACKSON v BANK OF UNITED STATES (1848) 10 Pa. St. 61.

Foreign attachment, against W. Defendant bank was garnishee. After it was served with the attachment, defendant W deposited with it cash and bills in his own name, and the deposit was paid out on his checks. W in fact acted as agent for R in all transactions represented by the deposits. On the bank's plea of nul tiel record, the court rendered judgment against it. No bill of exceptions was sealed. A plea of nulla bona was then put in. Plaintiff objected to defendant's cashier as a witness, on the ground that he was an interested party. The court instructed the jury that if W was agent for R, the funds were not liable to attachment. Judgment for defendant. Error. Defendant claimed the right to have the judgment on the plea of nul tiel record reviewed on plaintiff's writ of error.

Coulter, J. 1. The record of the judgment on the plea of nul tiel record is not properly before the court, on a writ of error by the other party to review proceedings on another issue. 2. In general an agent is a competent witness. 3. A garnishee bank may plead to the scire facias everything which it could plead against the defendant. 4. Though a depositor in his own name be in fact an agent for trustee, the bank is bound to pay out the deposits on his personal checks, and an attaching creditor stands in the place of the depositor. Judgment reversed.

Cited: 30 Pa. 538; 42 id. 541, 542; 57 id. 207, 208; 95 id. 117.

COMMONWEALTH v EASTON BANK } (1849) 10 Pa. St. 442.
EASTON BANK v COMMONWEALTH }

To collect tax on dividends. The charter of the bank was granted in 1814 to expire in 1837. Sec. 24 of the Act of 1814 required the bank to pay to the state treasurer 8 per cent on the dividends declared the previous year in November. If payment were not made in two months, the bank was liable to 12 per cent

interest. The statute contained no provision by the state as to future taxation. The Act of April 1, 1835, provided for a graduated tax on the amount of the dividend declared. On April 7, 1835, the charter of this bank was extended 15 years from May, 1837. By sec. 2 the bank was required after May, 1837 to pay a tax similar to the one imposed by the Act of 1835. The dividends declared in 1835, 1836, and 1837 were over 10 per cent, and the bank paid 8 per cent to the state treasurer. Afterward the bank paid the tax under the Act of April 7, 1835. In 1847 a demand was made for the taxes claimed to be due under the Act of April 1, 1835. The court ruled that interest was chargeable under the Act of 1811 at 6 per cent. Judgment for the Commonwealth. Error.

Bill, J. 1. The ascertainment of balances due from banks for taxes imposed on dividends declared, is within the province of the auditor general and state treasurer under the Act of 1811. 2. The Act of April 1, 1835, was not unconstitutional as impairing the obligation of a contract, for no contract as to future taxation can be implied from the bank's charter. 3. Where the fact of non-payment is ascribable to mutual misapprehension, or to the laches of the creditor, interest is not demandable as of course. Judgment affirmed.

Cited: 17 Pa. 17, 18; 19 id. 155, 218; 21 id. 43, 390; 26 id. 237; 30 id. 31; 37 id. 346; 50 id. 408, 409; 51 id. 468; 65 id. 29; 66 id. 87; 74 id. 63; 99 id. 595; 101 id. 150; 103 id. 424; 104 id. 182; 147 id. 194; 150 id. 159, 288.

SMITH v PHILADELPHIA BANK (1850) 14 Pa. St. 525.

Assumpsit, against indorsers of negotiable note. Plaintiff discounted for payees a note collaterally agreed between them to be payable in funds current in St. Louis, and forwarded it to his correspondent in St. Louis for collection. Drawers duly offered payment in funds current in St. Louis, which was refused. Subsequently payees drew a draft "payable in current funds" indorsed by defendant on the drawers to cover the note, and gave it to plaintiff. The draft was not accepted or paid. Judgment for plaintiff. Error.

Gibson, C. J. 1. The refusal of plaintiff's correspondent to receive payment in current funds discharged the indorsers of the note. 2. The draft, being expressly payable in depreciated funds, was not negotiable. 3. If defendant's indorsement of the draft is viewed as evidence of a contingent promise, there was no consideration therefor, since plaintiff, having no right to sue defendant, surrendered nothing. Judgment reversed.

LLOYD v WEST BRANCH BANK (1850) 15 Pa. St. 172.

Assumpsit, for value of notes. Plaintiff deposited with the cashier of defendant a sealed package of notes. Some were taken from the package by defendant's cashier, who surrendered them to the maker, a corporation which had issued them without authority, and took in exchange a promissory note. This was duly paid and the proceeds were used by the bank. Subsequently, but without knowledge of their source, cashier exchanged the remainder of plaintiff's notes for similar notes payable in one year, which plaintiff refused to accept. By its charter, defendant was allowed to receive deposits of current money. It had never authorized its cashier to accept deposits of sealed packages, nor did it know of this transaction. Verdict for plaintiff for the amount to his credit on defendant's books, as a result of the first transaction. Error.

Coulter, J. 1. The authority to receive "deposits" does not empower the defendant to receive a sealed package of notes illegally issued by a corporation for circulation as money. 2. In the absence of the knowledge or permission of the directors, the cashier's act is not binding on defendant. Judgment affirmed.

Cited: 72 Pa. 477; 79 id. 117.

BANK OF UNITED STATES v COMMONWEALTH (1851) 17 Pa. St. 400.

To recover a bonus due the State. The Act incorporating defendant required it to pay into the State treasury certain sums annually. Defendant subsequently became insolvent and failed to make payments. It made an assignment without the co-operation or consent of the State, though in violation of no express law. The bank contended that the assignment relieved it from liability for the whole amount of the payments provided for by the charter. Verdict directed for plaintiff. Judgment thereon. Error.

Black, C. J. 1. The acceptance of the charter, with the stipulation contained in it, rendered the bank liable to an action for the money. 2. No corporation can discharge itself, by its own act of an obligation once assumed. Judgment affirmed.

LANCASTER BANK v WOODWARD (1852) 18 Pa. St. 357.

Assumpsit, for amount of a check. Defendant gave A his check on plaintiff, payable the next month. Before the check was payable, plaintiff paid A its amount in cash, but the check was not surrendered. A year later, A deposited it with his bank, and it was subsequently paid by plaintiff. At the time it was paid, defendant had no funds on deposit with plaintiff, and he was not notified of the payment, until five months later. Judgment for defendant. Error.

Woodward, J. 1. The indorser of overdue paper takes it exclusively on the credit of the indorser, and subject, even without mala fides, to all the intrinsic considerations that would affect it between the original parties. 2. Checks are always supposed to be drawn on a previous deposit of money, and defendant's failure to deposit funds to meet the check was sufficient notice to plaintiff not to pay the check. Judgment affirmed.

Cited: 18 Pa. 413; 36 id. 107, 289; 62 id. 91.

BANK OF PENNSYLVANIA v THE COMMONWEALTH (1852) 19 Pa. St. 144.

Settlement of tax account. Defendant's charter was given in 1810, and renewed in 1830, but it contained no provision exempting defendant from taxation. In 1835, the Legislature passed an act providing for a graduated tax on bank dividends. Defendant was not taxed until 1848, when an act was passed extending the provisions of Act of 1835 to all banks whose charters had been renewed, except in cases where there was an express exemption in the act renewing their charters. Defendant was taxed under this act. Defendant, to show the intention of the legislature, offered proof of the circumstances attending the passing of the act of incorporation. Excluded. Judgment for plaintiff. Error.

Black, C. J. 1. The right to tax is an incident of the highest sovereignty. 2. Defendant could not show the intention of the legislature by facts outside of its record. 3. A corporation takes nothing by its charter except what is plainly, expressly, and unequivocally granted. Judgment affirmed.

Cited: 26 Pa. 450; 27 id. 351; 37 id. 345; 47 id. 323; 82 id. 523; 154 id. 127.

ALLEGHENY CO. v SCHOENBERGER (1853) 1 Grant 35.

To determine validity of a tax. Defendant was taxed for county purposes on shares of bank stock owned by him in 1852. By the tax law of 1844, sec. 32, bank stock was made taxable for "state and county purposes." Laws of 1850, sec. 21, increased the tax on dividends, and sec. 46, added a direct tax on the shares themselves, with a proviso that the stock should not be subject to taxation for any other purpose. Supp. Law of 1852 repealed the direct tax, but not the proviso as to exemption. Judgment for plaintiff. Error.

Lowrie, J. Bank stock is not subject to taxation for county purposes. Judgment affirmed.

Cited: 54 Pa. 141.

HOGG'S APPEAL (1854) 22 Pa. St. 479.

Accounting, of assignees and trustees of insolvent bank. H held a note issued by U Bank, which subsequently suspended payment. The bank made an assignment to trustees, to secure payment of outstanding notes "commonly called post notes." H claimed that his note, which was for one year and payable in London, was a post note. Claim rejected by trustees. By the Act of 1841, which permitted the assignments, the trustees thereunder were authorized to receive in payment of debts due to the bank, at par, the notes or other evidence of debt issued or created by the bank. A and B, who had sold their right to collect the principal of notes held by them, presented claim for interest. Claim allowed by trustees. Account was referred to auditors to report distribution. Auditors called expert witnesses who testified that what are "commonly called post notes," are designed as part of the circulating medium, and not obligations under seal, payable abroad. Auditor's report confirmed. Appeal.

Lowrie, J. 1. The Act of 1841 did not alter the contract. Par means the amount really due, including interest. 2. If the article, or its name, is so new that the judges are not presumed to know it definitely, or to be able to learn it, as they do their law, from their books, then its definition becomes a matter of fact to be decided on the testimony of witnesses. Appeal dismissed.

Cited: 32 Pa. 476.

WILSON v McCULLOUGH (1854) 23 Pa. St. 440.

Ejectment. Plaintiffs claim under a marriage settlement, defendant as mortgagee. By articles of marriage settlement, A and wife deeded her property to trustees. Subsequently they mortgaged to defendant, and thereafter recorded the marriage articles. Loaning on mortgages was outside the usual business of the bank, which employed counsel to make the search. Defendant's cashier had heard vague rumors of the existence of the marriage settlement. Judgment for defendant. Error.

Woodward, J. 1. The burden of proving that the bank had actual notice was on plaintiffs. 2. In the negotiation of a loan so much out of the course of ordinary bank accommodations, where the bank was represented by an attorney, notice of an unrecorded marriage settlement to the cashier was not notice to the bank. Judgment affirmed.

MEIGHEN v BANK (1855) 25 Pa. St. 288.

On certificate of deposit, issued by defendant, bearing date March 19, 1853. The defense was that the date of 1853 was a mistake and that it should have been 1852, and that the amount had been paid on plaintiff's checks. To prove this, L, defendant's cashier was called. He had been a large stockholder in defendant, but the day before he was offered as a witness, he had transferred his stock to his son, and had been released by defendant. He testified over objection that the only certificate given to plaintiff was that given on March 19, 1852; that it was the invariable custom of the bank to balance the books daily, and that they showed no such transaction with plaintiff as was claimed on March 19, 1853. A deposition of P, who had been a clerk in the bank, identifying certain entries made in the books of the bank by him, was admitted over objection. Judgment for defendant. Error.

Knox, J. 1. The liability of a stockholder is too remote to disqualify him as a witness, unless there is evidence of the bank's insolvency. 2. Evidence of usage and custom was competent to corroborate or explain a fact already proved. 3. The entries in the bank's books, sworn to by the person who made them, were competent. Judgment affirmed.

Cited: 42 Pa. 433; 59 id. 82.

REESE v BANK OF MONTGOMERY CO. (1855) 31 Pa. St. 78.

Assumpsit. Defendant was incorporated under the Act of 1814 with a capital stock of 8,000 shares of \$50 each. Up to February 2, 1850, only 7,101 shares had been subscribed. On that day a resolution was adopted by the board of directors to fill up the authorized capital and to give the privilege to such stockholders as had paid their instalments in full, to subscribe for the new stock from May 13 to 31. On May 24, plaintiff went to the bank, paid up his arrears and demanded permission to subscribe for his proportion of the new stock, which was refused. Plaintiff sued for the premium on the stock. Judgment for defendant. Error.

Lowrie, J. 1. The unsubscribed stock belonged to the incorporators and they had a right to all the profits; the bank held the right in trust for all its members. 2. To deprive plaintiff of his share was legal injury, for which he is entitled to compensation. 3. Plaintiff may sue the bank directly, as the directors had no power to affect his rights, except as agents of the bank. Judgment reversed.

Cited: 54 Pa. 276; 200 id. 521.

HARRISBURG BANK v COMMONWEALTH } (1856) 26 Pa. St. 451.
COMMONWEALTH v HARRISBURG BANK }

Debt, for a penalty. The statute required defendant to keep its notes at par in Philadelphia, provided a penalty for failure to do so, and required annual ex-

hibits showing how the notes were kept. Exhibits were made for the years 1852-54 inclusive, and plaintiff brought suit for penalties for those years and years prior thereto. The defendant paid up for 1852-54, and set up the two-year Statute of Limitations as to the penalties prior to 1852. Defendant claimed that it could not keep an agency in Philadelphia to redeem its notes, as that would be in violation of the statute prohibiting its transacting business elsewhere than in Harrisburg. The court charged that defendant's paper was at par in Philadelphia, if it was equal to gold and silver coin there for all purposes for which paper of the banks of that city could be ordinarily used, but that notice was necessary to claim the statutory bar. The jury found defendant had given substantial notice in 1850-51. Judgment for \$1 for Commonwealth. Error by both parties.

Woodward, J. 1. The court's definition of the word "par" placed the notes of country banks on the same footing as those of city banks, and gave true effect to the legislative will. 2. The redemption of bank issues is not banking business for the sole benefit and profit of the bank or its officers, and so is not within the letter of the prohibition. 3. The right of a party to the repose secured by the Statute of Limitations cannot be suspended because the party does not turn self-accuser. Judgment affirmed.

MANDERSON v COMMERCIAL BANK (1857) 28 Pa. St. 379.

Motion for injunction by a stockholder to restrain the officers of defendant from discounting promissory notes except at regular meetings of the board, and from discounting the notes at a greater rate than one-half per cent for 30 days. The motion was heard, on the bill and affidavits filed. Plaintiff's affidavits charged the president and cashier with discounting notes at improper times and at unlawful rates. The officers of the bank joined in an affidavit which was not an explicit denial. The act of incorporation provided that the affairs of defendant should be conducted by 13 directors, a majority of whom, the president being one, should be a quorum for the transaction of business but that ordinary discounts might be made by the president and four directors; the rate of discount should not exceed one-half per cent for 30 days; these rules were declared to be among the "fundamental articles of the constitution," and had not been repealed by any subsequent legislature.

Lewis, C. J. 1. Neither the president nor cashier can lawfully discount notes in the manner charged in the bill. 2. Under no circumstances can the bank discount notes at a greater rate than that prescribed in its charter. 3. A stockholder has the right to the necessary means to prevent a course of practice which may put the continuance of the charter in doubt. 4. A reasonable ground has been shown for the injunction demanded, and it is not necessary that the charge should be conclusively established. Injunction granted on filing of bond.

Cited: 54 Pa. 452; 177 id. 228.

COMMONWEALTH v COMMERCIAL BANK (1857) 28 Pa. St. 383.

Quo warranto. Defendant moved to quash on the grounds: 1, of formal defects; 2, on the merits. Plaintiff proposed amendments charging defendant with making loans at rates of discount exceeding one-half per cent for 30 days, as prohibited by its charter, and thus usurious. The right to deal in bills of exchange was expressly granted by the charter, but the right to deal in promissory notes, otherwise than by loan and discount was not given.

Lewis, C. J. 1. Objections to matter of form which may be removed by amendment, do not furnish a ground for quashing the writ. 2. The Commonwealth has the right to amend, either on or at any time before the trial. 3. If the purchase of a bill of exchange is merely a device to obtain a greater rate of interest than the bank is authorized by law to receive, it is as much a violation of the act of incorporation as a direct loan at the prohibited rate. 4. Where there has been a misuser or nonuser with regard to matters which are of the essence of the contract between the corporation and the State, and the acts or omissions complained of have been repeated and willful, they constitute a just ground of forfeiture. Motion overruled.

Cited: 64 Pa. 342; 79 id. 156.

COMMONWEALTH v COMMERCIAL BANK (1857) 28 Pa. St. 391.

Quo warranto. The Act of May 3, 1850, vested in the district attorneys an independent authority to bring quo warranto proceedings instead of the authority

dependent upon the attorney-general which his deputies had before, and defendant demurred to the bringing of this action by the attorney-general. Defendant objected to several counts because they simply charged "discounting promissory notes at a prohibited rate," without averring that such discounts were made upon loans of money. Other objections were based upon a supposed want of definiteness in specifying the acts of which the several offenses consisted, defendant claiming that the counts were defective in not making any reference to the particular notes, with their parties, dates and amounts. The second count charged that defendant had been engaged in dealing in promissory notes, without charging the taking of unlawful discounts. Count 14 charged that defendant "has dealt in promissory notes by purchasing the same at rates of discount greatly exceeding the rate of one-half per cent for 30 days." Count 10 charged that defendant "discounted bills of exchange at rates of discount exceeding one-half per cent for 30 days." Defendant objected that it was not alleged that said discounts were upon loans made by defendants. Counts 12 and 13 charged that defendant, with intent to evade the law, discounted a certain domiciliary bill of exchange, at the rate of one and one-eighth per cent for 30 days.

Lowrie, J. 1. The Act of May 2, 1850, does not take away the authority of the attorney-general to institute this proceeding. 2. Discount has come to be used for loan. 3. The particulars which it is contended should have been given, are not the fact charged, namely, the diversion of its business out of the prescribed way, but the evidences of it are properly left out. 4. A bill of exchange is properly a means of transferring money from one place to another and collection expenses may be charged therefor, but the rate to be charged on a domiciliary bill is limited to the authorized discount rate. 5. The demurrers to counts 2 and 10 are sustained. All other counts are adjudged sufficient. Ordered that defendant answer.

Cited: 105 Pa. 487; 182 id. 334; 8 Sup. Ct. 614.

LEBANON BANK v MANGAN (1857) 28 Pa. St. 452.

Attachment, of bank deposit. Defendant bank gave a certificate that J had deposited "\$440, subject to his order on the return of this certificate." M, a creditor of J, attached the deposit. Afterward, J, knowing of the attachment, indorsed the certificate to D. It did not appear whether D knew anything about the attachment or what, if anything, he paid J. Defendant, with full notice that the indorsement was made after the attachment, paid D. Defendant set up that the certificate was negotiable. Judgment for plaintiff. Appeal.

Lewis, C. J. A promissory note cannot exist without an express and unconditional promise to pay. This certificate was destitute of both of these requisites. Judgment affirmed.

WILSON v BANK OF MONTGOMERY CO. (1857) 29 Pa. St. 537.

To recover value of shares of stock. Plaintiff was a stockholder in defendant. He made tardy payment of instalments on the old stock. Defendant then increased its capital stock. Plaintiff gave no evidence of a demand or offer to subscribe. This action is brought for the value of his share. Verdict directed. Judgment for defendant. Error.

Porter, J. Though plaintiff had a right of pre-emption, he neither offered to pay nor subscribe; and the law is too reasonable to force any man's rights on him against his will. Judgment affirmed.

CASE v MORRIS (1857) 31 Pa. St. 100.

On check against maker. Plaintiff was third indorsee. When the check was drawn, there were sufficient funds to meet it. There was a delay of seven weeks before presentation to drawee and notice of dishonor given to defendant. Drawee had in the meantime failed. Judgment for defendant. Error.

The Court. 1. Defendant was entitled to prompt presentment and notice of dishonor. 2. Notice of dishonor is dispensed with only where it could not benefit the maker. Judgment affirmed.

BANK OF CHAMBERSBURG v COMMONWEALTH (1858) 2 Grant 384.

To recover a penalty. Defendant failed to keep its notes at par. Defendant's charter was renewed in 1849, and was expressly subjected to such further regu-

lations as the legislature might enact for the regulation of the banks of the Commonwealth. The bonus paid for the charter was to be in lieu of all taxes. The Act of 1850 provided that all banks must keep their notes at par, or pay a forfeit based on their circulation. Defendant pleaded setoff in the amount of the bonus. Judgment for plaintiff. Error.

Woodward, J. 1. The Act of 1850 was intended to put all banks on the same footing and relates to the several banks of the Commonwealth, without regard to the dates of their charters. 2. A penalty for breach of the statute when sued for, is not subject to any manner of setoff; the claim is for a penalty, not a tax. Judgment affirmed.

COMMONWEALTH v MCKEAN CO. BANK (1858) 32 Pa. St. 185.

Quo warranto. By an Act of December 10, 1857, relators and three of defendants were appointed commissioners to organize a state bank, and they or any three of them were authorized to effect its establishment. The books were opened for subscription, and the stock not having been subscribed for, the commissioners adjourned. Defendants subsequently drew up a certificate setting forth that more than one-half of the capital stock had been subscribed for, and filed it in the office of the Secretary of the Commonwealth. Letters patent were issued constituting defendants a corporation under the name of defendant bank. Defendants alleged that they were empowered to complete the organization, and had not acted with relators because the latter had entered into an illegal and corrupt contract with R, a non-resident, for the sale and transfer of the said charter, and that relator's list of subscribers was largely fictitious. Demurrer.

Woodward, J. Neither the relator nor the Commonwealth has a right to oust incorporators who have come into possession of their franchises in the manner described in defendants' pleas. Judgment for defendants.

BANK OF PENNSYLVANIA v SPANGLER (1859) 32 Pa. St. 474.

Assumpsit, on promissory note. Defendant made a note for \$1,000, payable to D, who indorsed it to plaintiff. Plaintiff assigned for the benefit of creditors; this action was brought for the use of the assignees. On the trial defendant tendered and offered in evidence \$600 of plaintiff's notes held by him when the bank assigned, and \$400 of like notes acquired after the action was commenced. Under the Act of March 12, 1842, assignees were compelled to receive in payment of debts due a bank, its own notes and obligations, and the checks of its depositors at par. Judgment for defendant. Error.

Read, J. In all suits by the assignees, under a general assignment, they are bound to receive the notes in payment, whether held by the defendant at the time of the commencement of the suit, or acquired afterward. Judgment affirmed.

Cited: 48 Pa. 17.

IRON CITY BANK v CITY OF PITTSBURG (1860) 37 Pa. St. 340.

Debt, for the amount of a tax assessed on the profits of defendant's discount business. Defendant was organized under the Banking Law of 1850, as a bank of issue. The constitution provided that the bank's charter should contain clauses reserving to the legislature the right of alteration. The Act of 1852 provided "that the capital stock of such banks shall not be subject to taxation for any other than state purposes." The Act of June 4, 1859, authorized the councils of Pittsburg to assess and collect a tax on the banks for city purposes. Judgment for plaintiff. Error.

Woodward, J. 1. A tax on discount business is at least in part a tax on capital stock. 2. Defendant cannot plead an indefeasible right to be exempt from taxation general or local, which a legislature prescribes in the ordinary course of legislation. 3. The General Banking Law of 1850 forms a part of defendant's charter, and the Act of 1859 alters that charter, and because it is an ordinary tax law passed in pursuance of the reserved power it is constitutional. Judgment affirmed.

Cited: 47 Penn. 323; 55 id. 51, 454, 455, 456; 69 id. 143; 82 id. 523.

HAGERSTOWN BANK v LONDON SAV. SOCIETY (1861) 3 Grant 135.

Assumpsit, on a certificate of deposit. Defendants were co-partners carrying on a private banking business in which E, one of the partners, acted as cashier.

The original purpose of the association was to invest the savings of its members. Plaintiffs loaned to defendants through E, a sum of money, and received from him defendants' certificate of deposit. Defendants subsequently loaned the money to E at a higher rate of interest. E was called as a witness by plaintiffs, and testified that he believed the loan had been repaid. Judgment for defendants. Error.

Woodward, J. 1. If a bank engages in an unauthorized business, the acts of its cashier in pursuit of that enterprise are nevertheless binding on the bank; the sole question is whether the agent is acting in pursuance of authority from the bank. Judgment affirmed.

BANK OF DELAWARE CO. v BROOMHALL (1861) 38 Pa. St. 135.

Case, for negligence in protesting a note before maturity. Plaintiff left the note in question with defendant, a bank, for collection. At the time of the execution of the note, the date, December 11, 1857, had been altered by consent of the parties to December 15, 1857, in which condition it went to defendant. The date as altered was imperfect and obscure, and after a careful examination was read by the officers "December 5, 1857," marked as maturing February 6, 1857, on which day it was protested for non-payment. Judgment for plaintiff. Error.

Lowrie, C. J. 1. When defendant accepted the note for collection, it became its duty to use reasonable care and skill in attending to it. 2. If there was any doubt about the date, defendant should have refused the collection of the note, or have gotten the holder to state the true date, or have presented it on both days. Judgment affirmed.

GIRARD BANK v BANK OF PENN TOWNSHIP (1861) 39 Pa. St. 92.

Assumpsit, to recover the amount of a check drawn on the defendant, marked "Good" by the proper officer of that bank, and indorsed by the holder to plaintiff. The check was drawn and certified in 1852, and being mislaid by the plaintiff was not presented for payment until 1859. Defendant pleaded the Statute of Limitations. In 1854, defendant paid the money to the original depositor on his duplicate check, and took his bond of indemnity with sureties against the check. Judgment for defendant. Error.

Strong, J. 1. The holder of a check marked "good" stands in the position of the original depositor. The purpose of having it certified is not to obtain payment, but to continue with the bank the custody of the money. 2. He has no right of action until payment has been demanded and refused, and the Statute of Limitations begins to run only from such demand. Judgment reversed.

Cited: 86 Pa. 369; 99 id. 424, 490; 107 id. 360; 198 id. 71.

PENNSYLVANIA BANK ASSIGNEES ACCOUNT (1861) 39 Pa. St. 103.

Accounting. Appeal by creditors of the Bank of Pennsylvania and by the Commonwealth from decrees on the first account of the assignees of the bank. Creditors objected to the tax imposed by the auditor-general on the last dividend of the bank, because the dividend itself was a fraud upon stockholders and creditors, the bank being then insolvent. The tax was laid in proper form, with notice to the assignees, and no appeal was taken. The Commonwealth claimed a lien on the estate assigned for taxes due at the time of the assignment.

Lowrie, C. J. 1. As the dividend was actually made, that fact fixes the duty of paying the tax. 2. A creditor cannot attack the tax collaterally, and the assignees are precluded by failing to appeal. 2. By statute, noteholders are preferred to holders of certificates of deposit, in bank assignments for the benefit of creditors. 3. No statute gives the lien claimed by the Commonwealth. Appeals dismissed.

HOUSUM v ROGERS (1861) 40 Pa. St. 190.

On note, against indorser. N and C drew a promissory note to the order of defendant payable at P Bank, and procuring defendant's accommodation indorsement, had the note discounted by P Bank for their own use. The note was renewed by a similar note with the same parties. P Bank assigned it before maturity to plaintiffs as collateral. Plaintiffs, becoming entitled to collect it, demanded payment. Payment in the depreciated notes of the P Bank, which had failed, was tendered and refused. Defendant claimed that P Bank had no power under its charter to transfer the note. Judgment for plaintiffs. Error.

Woodward, J. 1. Plaintiffs, being bona fide holders, are entitled to payment in

constitutional currency, and defendant had no right to pay the P Bank. 2. Defendant not being interested in the assets of the P Bank, is not at liberty to raise the question of charter powers. Judgment affirmed.

WEST BRANCH BANK v ARMSTRONG (1861) 40 Pa. St. 278.

Assumpsit, to recover the value of stock. Defendant bank refused to comply with plaintiff's request to transfer it to his name on the books. M, another claimant, was allowed to interplead. Plaintiff and W were joint indorsers on a note held by the bank which was protested. W was a stockholder in defendant. The bank obtained judgment against W and the maker, and also against W and plaintiff; and levied on W's stock. After levy but before sale, plaintiff paid the debt and received an assignment of the judgments from the bank. There was nothing to show that plaintiff or the bank intended the assignment to operate as a satisfaction of the judgments. M claimed under a sale on execution of a judgment against W obtained after the protest of the note but before the judgment in favor of the bank. The Act of 1819, gave a bank a lien on stock for debts due it from the stockholders. Judgment for plaintiff. Error.

Thompson, J. 1. On protest of the note W and plaintiff became debtors of the bank and by operation of law, a lien existed on the stock of either in favor of the bank. 2. As M's debt and purchase accrued subsequently, they did not divest the bank of its lien. 3. The assignment to plaintiff carried with it all rights of the bank. 4. No principle of law will hold the judgments satisfied against the intention of the parties. Judgment affirmed.

Cited: 172 Pa. 628.

JONES v MILLIKEN (1861) 41 Pa. St. 252.

Assumpsit, on a draft, by the makers. Plaintiffs delivered a draft, indorsed in blank, to L & Co., their bankers, for collection, accepted by T. It was forwarded to defendants' bankers, indorsed "for collection," and paid to them by T. Defendants credited the amount to L & Co. who were indebted to defendants. L & Co. became insolvent and plaintiffs notified defendants not to pay L & Co. Defendants were willing to pay only the balance due L & Co. after deducting L & Co.'s indebtedness. Judgment for plaintiffs. Error.

Read, J. 1. As it does not appear that defendants made any advances or gave any new credits to L & Co on the faith of this draft, the real owners were entitled to recover from defendants its full amount. Judgment affirmed.

HALLOWELL v CURRY (1861) 41 Pa. St. 322.

Assumpsit. Plaintiff was owner of a note payable at defendant's bank. There were no funds of the maker to meet the note when it fell due. Defendant's clerk went three times to a notary's office between the hours of 4 and 10 p. m. before he found the notary in. The note was protested and actual though informal notice delivered to the indorser at 11 p. m. In a previous action by plaintiff against the indorser the latter was held released; the evidence in that action not establishing actual notice. No demand was made upon the maker. Judgment for defendant. Error.

Read, J. 1. Personal demand upon the maker was not essential, as there were no funds at place of payment to meet the note. 2. Actual notice to an indorser in due time dispenses with the ordinary formal requirements as to the mode of giving notice. 3. The issue is for negligence of defendant. The facts show that defendant was not chargeable with negligence. Judgment affirmed.

Cited: 59 Pa. 82.

BANK OF NORTHERN LIBERTIES v JONES (1862) 42 Pa. St. 536.

Attachment. Defendant bank was garnishee. J had long been a depositor with the bank as "J, agent." The court refused evidence to show that none of the money attached belonged to J. Judgment for plaintiff. Error.

Read, J. 1. The account is an agency account, and evidence that it was so understood by both parties should have been admitted. 2. No creditor of an agent can attach funds belonging to others whom he only represents. Judgment reversed.

Cited: 42 Pa. 536; 55 id. 368; 57 id. 205, 207, 208; 64 id. 238; 95 id. 117; 160 id. 269.

GARDNER v POST (1862) 43 Pa. St. 19.

Case, against the directors of a bank, to recover the amount of bills issued by the bank held by plaintiff, on the ground that defendants allowed the bills to be put in circulation, without requiring the capital stock to be paid in, and that the bills were worthless. The declaration alleged that the bank was chartered, but the charter was not put in evidence. Plaintiff offered an amendment during the progress of the trial, to the effect that the bank never existed, as it was never chartered. Not allowed. Verdict directed. Judgment for defendants. Error.

Read, J. 1. A charter being necessary under the incorporating act to create the bank a body corporate, it was incumbent on plaintiff to prove the charter. 2. As the amendment offered sought to introduce an entirely new cause of action, it was properly rejected. Judgment affirmed.

JONES v BANK OF THE NORTHERN LIBERTIES (1863) 44 Pa. St. 253.

Where a person, an agent for different persons, deposits the money of his principals in a bank to his account as "Agent," and a judgment creditor attaches the fund in the hands of the bank, the defendant in the action is a competent witness for the garnishee; and the money thus deposited is strictly an agency account, and in no sense the property of the agent.

Cited: 44 Pa. 253; 64 Pa. 238.

HAGERSTOWN BANK v ADAMS EXPRESS CO. (1863) 45 Pa. St. 419.

Trespass. A package of bills was sent by M Bank through plaintiff company to defendant bank, and more than \$3,000 were abstracted on the way. Plaintiff paid defendant the amount of the loss. It was afterwards ascertained that an agent of the company had taken them and afterward burned all but \$45. The suit was for the amount so destroyed. The question of the destruction was submitted to the jury. Judgment for plaintiff. Error.

Woodward, J. 1. The settlement by plaintiff with defendant transferred the property in the notes from defendant to plaintiff. 2. The bank was bound to redeem the notes when presented, and plaintiff is entitled to claim from the bank the amount of destroyed notes. 3. The question of the destruction of the notes was properly submitted to the jury. Judgment affirmed.

KLOPP v LEBANON BANK (1863) 46 Pa. St. 88.

Bill for subrogation. Plaintiff was accommodation maker of a note for M. M discounted the note at defendant bank. It was payable on May 21, which, with days of grace, made it due on May 24. M failed on May 23. On May 24 M assigned his stock in defendant to H to cover his liability on another note as surety. Notice of the assignment was given to defendant on May 25. By statute it was provided that a bank should have a lien upon the stock of any stockholder indebted to it, for a debt actually due and unpaid. Plaintiff paid the note upon which he was liable as surety and sought to be subrogated to the lien of the bank upon the stock. Decree for defendant. Appeal.

Agnew, J. 1. As regards the bank, the note was actually due and unpaid on May 24, as the right to demand and receive payment had accrued. 2. The lien having attached before notice of assignment the bank had the right to refuse to transfer and to hold the stock upon the debt. 3. The rights of the sureties also took precedence of the assignment, for the moment the lien arose, the duty of the bank also arose to hold the security of the stock for the benefit of the sureties. 4. The sureties, upon payment of the debt, became subrogated to all the interest of the bank in the stock. Decree reversed.

Cited: 72 Pa. 103; 172 id. 629.

LOYD v McCaffrey (1864) 46 Pa. St. 410.

Attachment. Defendant was indebted to W in the sum of \$10,000, it being a balance due in current transactions between them. Defendant had an account with L, a banker, and left with L a check for \$10,000 with instructions that if plaintiff should levy an attachment against his funds, the amount of this check should pass ipso facto to W. L was garnisheed and claimed to have none of defendant's money, having transferred the amount of the check to W and paid it to him. Judgment for plaintiff. Error.

Strong, J. 1. Defendant's check in favor of W, without more, did not amount

to an equitable appropriation of the funds in the hands of L. 2. The agreement of L and W and defendant did not amount to an assignment or raise any trust in favor of W; there was no present appropriation of the money for it did not interfere with defendant's right to withdraw it and apply it according to his pleasure. Judgment affirmed.

Cited: 132 Pa. 553; 2 Sup. Ct. 120.

HECKSHER v SHOEMAKER (1864) 47 Pa. St. 249.

Assumpsit, on promissory note, given by defendants to A, and indorsed to plaintiffs. A was a dealer, supplied with coal by plaintiffs. He turned over notes taken by him, and in case any were protested he credited them back to plaintiffs, who still held them as security, and when made good delivered them to A. The note in suit was presented to the bank where it was payable, in which defendants had funds to meet it. By mistake of the bank officers it was not paid, and went to protest. It was subsequently paid to A. A failed, largely indebted to plaintiffs. The court charged that the note was given to plaintiffs by A for an indebtedness existing at the time, and if that was paid the ownership of the note reverted to A and payment to him discharged defendants. Judgment for defendants. Error.

Strong, J. 1. Plaintiffs held the note as security for their whole account with A; and while any indebtedness existed plaintiffs were the owners. 2. As the bank officers by mistake failed to pay the note, presentment did not discharge defendants; the bank was as much the agent of the promissors to pay as it was of the owners to receive. Judgment reversed.

GUNKLE'S APPEAL (1864) 48 Pa. St. 13.

To settle assignee's account. The charter of L Bank as amended in 1824, made the directors individually liable should they declare dividends so as to impair the bank's capital; and gave a right to the assignee of the bank to enforce the liability. By the Act of 1849 the governor could declare the charter of the bank repealed, where the capital has been so impaired. The act also provided that the stockholders should be liable for the deficiency up to the par value of their stock if the bank should become insolvent, and that insolvency as used in the act meant a compulsory assignment. The bank made a voluntary assignment to B. G was a creditor and contended that the account of the assignee should not be received, he not having brought suit against the directors or stockholders for their liabilities under the Acts of 1849 and 1824. Decree for assignee. Appeal.

Read, J. 1. It was in the power of the directors of the bank, by a voluntary assignment, to evade and frustrate the salutary precautions under the Act of 1849. 2. As the Act of 1824 imposed a personal liability on the directors, when the bank made a general assignment these liabilities became vested in the assignee who was bound to collect them as well as any other assets of the institution. Decree reversed.

Cited: 48 Pa. 13; 85 Pa. 79.

SITGREAVES v FARMERS BANK (1865) 49 Pa. St. 359.

Assumpsit on a promissory note. Defendant was accommodation indorser. M was maker and had delivered to plaintiff numerous shares of stock as collateral for all present indebtedness and that "which might thereafter accrue." Defendant made an affidavit of defense, averring that the stock which M had pledged was worth more than the indebtedness of M to the bank, and that it had been wrongfully sold by plaintiff to one of its officers at private sale without notice to either M or defendant. Affidavit held insufficient as a defense. Judgment for plaintiff. Error.

Woodward, C. J. 1. The indebtedness evidenced by the note upon which defendant was an indorser was such a future debt as was within the contemplation of the parties and would be protected by the pledge after payment of the prior debt. 2. A pledgee, for an infinite time, cannot sell without giving notice to the pledgor to redeem his pledge. 3. If M transferred a security more than sufficient to pay his whole debt, and plaintiff has misused it, it is liable to account to him for all that the security was capable of yielding. 4. Defendant, as accommodation indorser, has the right to avail himself of the equities between the bank and M. Judgment reversed.

Cited: 52 Pa. 502; 83 id. 249; 103 id. 316; 105 id. 502; 197 id. 275.

COMMONWEALTH v COOKE (1865) 50 Pa. St. 201.

Settlement of auditor-general under Act of 1861. Sec. 1 of the act provides for a return, and sec. 2 for a report by bankers and brokers. Sec. 3 provided that every banker or broker who should refuse to make "the return and report" so required should for "every such neglect or refusal" be subject to a penalty. Defendant, a private banker, failed either to make the return or report, and the auditor-general made a settlement for a double penalty. On appeal by defendants, judgment was given for a single penalty without interest. The Act of 1811 provided that the balance of a settled account should bear interest after three months from the date of settlement. Error by Commonwealth.

Agnew, J. 1. The offenses of failure to make the return and failure to file the report being different in kind, independent in act, and distinct in time, each is liable to punishment. 2. Though in general a penalty does not bear interest until after judgment, the penalty in these cases becomes a debt by the settlement, and interest runs after three months. Judgment reversed.

PETERSON v UNION NAT. BANK (1866) 52 Pa. St. 206.

Assumpsit. Plaintiff indorsed to and deposited with defendant a check drawn by S on defendant. Plaintiff was credited with the amount. S had not sufficient funds on deposit to pay the check, and plaintiff was aware of this fact when the check was deposited. It was charged back to plaintiff on the next day. Plaintiff contended that defendant's act amounted in legal effect to a payment of the check. Judgment for defendant. Error.

Strong, J. 1. The drawing a check upon a bank in which the drawer has no funds, and uttering it is a fraud upon any holder and upon the bank. 2. A holder, who, knowing that the drawer has no funds presents the check for payment, becomes a party to the fraud. Judgment affirmed.

WAYNE v COMMERCIAL NAT. BANK
COPE v SAME
MILLER v SAME

(1866) 52 Pa. St. 343.

On bond of paying teller against sureties. C, the principal, was a defaulter and also raised money for himself by issuing due-bills which he was authorized to issue only for specific purposes. Plaintiff paid the due-bills. Defendants contended that the bond was invalid by reason of plaintiff's failure to inform them, at the time of the execution, that C was then a defaulter, although such fact could have been discovered by an examination of the books. It did not appear that plaintiff had any reason to suspect or actual notice of C's defalcation. Defendants further contended that the due-bills issued were void, because not in proper form, and not properly stamped. The bills were stamped properly at the trial, as allowed by statute. Defendants further contended that they were released by plaintiff's failure to prosecute an action against A, for conspiracy with C to defraud plaintiff. It did not appear that plaintiff, by continuing its action against A could have reached any property, or reimbursed itself in any way. Judgment for plaintiff. Error.

Thompson, J. 1. No positive duty rests on the officers of a bank to investigate with a view to inform the surety in the absence of any request by him to do so; no fraud is alleged, and failure to investigate, where plaintiff had no actual notice and no reason to suspect the defalcation, was not negligence per se. 2. Even if the due-bills were not in proper form, defendants cannot object to their validity or payment thereof by plaintiff; when the default of the principal would forfeit the bond as to him, it has the same effect as to the surety. 3. The stamping of the bills at the trial was allowed by statute and cured the defect. 4. As it did not appear that defendants were damaged by failure further to pursue A, they cannot claim a release on that ground. Judgment affirmed.

Cited: 195 Pa. 450.

MINTZER v COUNTY OF MONTGOMERY (1867) 54 Pa. St. 139.

To recover a state tax. Defendant was taxed as owner of shares of the National Bank. He claimed the stock was not liable for a state tax unless some act authorized it. The only statute that could affect the question was a statute of 1844, providing for taxation of "all shares or stocks in any bank, institution or company, now or hereafter incorporated, by or in pursuance of any law of this

Commonwealth or of any other state or government." The National Banking Act of 1864 provided for state taxation of shares in national banks. Judgment for plaintiff. Error.

Agnew, J. 1. The operation of the statute of 1844 was made prospective, and "other government" includes the United States. 2. As the National Banking Act permitted state taxation of shares in national banks, such shares are subject to the provisions of the Act of 1844. Judgment affirmed.

CITY OF PITTSBURG v FIRST NAT. BANK (1867) 55 Pa. St. 45.

Assumpsit, for state tax. Defendant was a national bank. By an act of 1859, the Councils of Pittsburg were authorized to collect an annual business tax upon all banks doing business in the said city. A tax was then assessed upon the average quarterly business of all banks of Pittsburg. But an act of Congress provided that, in lieu of all existing taxes, all national banks should pay the United States a duty upon the average amount of its circulation, deposits, and capital. Judgment for defendant. Error.

Read, J. 1. National banks are creations of the national government to whom alone they are responsible and they are entirely independent of a state legislation or interference. 2. The National Banking Act permits state taxation only as to shareholders and not direct taxation of national banks. If this bank be considered as embraced by the provisions of the Act of 1859, the act is unconstitutional. Judgment affirmed.

Cited: 151 Pa. 271.

STAIR v YORK NAT. BANK (1867) 55 Pa. St. 364.

Assumpsit, to recover deposit. Plaintiff proved that W at that time sheriff, was executor of the estate of S, and in the inventory named as one of the assets a deposit with X, banker; that thereafter W drew this deposit and deposited the amount with defendant; that though the amount was credited to W's official account as sheriff, the entry was marked "S's estate" at W's request; that upon W's death, plaintiff was appointed administrator de bonis non of S's estate. Plaintiff's offer to prove declarations of W that the money belonged to the estate of S, was refused. Defendant gave no evidence. Verdict directed. Judgment for defendant. Error.

Agnew, J. 1. The administrator de bonis non is the proper party to recover assets in the hands of a former administrator or his representative. 2. While the fund is still held by the bank, and it has not been misled by the apparent ownership to pay it out or to incur responsibility for it to others, the real ownership can be shown to be different from the apparent ownership. 3. The declarations of W were admissible not to bind the bank by a trust in favor of the estate, but to show the real ownership. 4. It is immaterial that the deposit was to W's official and not to his private account; such deposit was merely prima facie evidence that the money had come into his hands in an official capacity, but imported ownership in no particular person. Judgment reversed.

Cited: 57 Pa. 206, 207, 208; 95 id. 117; 100 id. 288; 153 id. 349; 1 Sup. Ct. 146; 4 id. 240, 241.

VENANGO NAT. BANK v TAYLOR (1867) 56 Pa. St. 14.

On bond. Defendant owed plaintiff \$35,024 on a bond, and R had \$43,743.24 on deposit with plaintiff, when it failed. R assigned his claim to defendant. Plaintiff then entered judgment against defendant on his warrant of attorney. Defendant secured a judgment against plaintiff for the amount of the deposit, which, after opening its judgment, he offered as a setoff thereto. A receiver was subsequently appointed for plaintiff. Secs. 50 and 52 of the Act of Congress, June 3, 1864, provided that when a national bank became insolvent a receiver should be appointed to take possession of its assets, that the general creditors should share ratably therein after the government and the note holders should have been satisfied, and that any transfer of the assets pending the appointment of a receiver should be void. Defendant contended that his prohibition extended only to voluntary transfers by the bank itself. Judgment for defendant. Error.

Strong, J. The language of the act is general and applies to legal as well as to voluntary transfers. Its primary object to secure the payment of the cir-

culating notes, would be defeated if depositors could transfer their deposits to the bank's debtors and thus enable the latter, by setoff, to extinguish their liabilities. Judgment reversed.

Cited: 56 Pa. 14, 87; 72 id. 461.

THORP v WEGEFARTH (1867) 56 Pa. St. 82.

Feigned issue to try whether or not a judgment was paid. Plaintiff was assignee of an insolvent bank. The bank had formerly been a state bank, but had become a national bank. Defendant then borrowed money from it. The bank reduced the debt to judgment and became insolvent. Subsequently defendant procured notes of the bank issued while it was a state institution and tendered them in satisfaction of the judgment. The tender was refused. Execution was issued. Defendant obtained a rule to show cause why the judgment should not be set aside. Judgment for defendant. Error.

Agnew, J. 1. To a judgment there can be no setoff of a debt not reduced to judgment. 2. The notes themselves were not a legal tender and capable of performing the functions of a legal satisfaction, unless accepted by the creditor. 3. The insolvency of the bank fixed the status of its debts and the rights of its creditors, preventing them from obtaining a preference. Judgment reversed.

Cited: 15 Sup. Ct. 415.

FARMERS NAT. BANK v KING (1868) 57 Pa. St. 202.

Scire facias. Defendant was garnishee in a foreign attachment in which C was defendant. C was plaintiff's agent for collecting rents, and absconded with his funds; C was also agent for the P Society and for an estate. C deposited his private funds with T Bank and his clients' funds with garnishee. When the attachment was served on the garnishee, there was a balance of \$1,100 to C's credit. C's other clients immediately notified garnishee that the amount standing in C's name belonged to them. The court refused to allow defendant to prove that C was an agent, and that the funds in its hands had been deposited by C's clerk after he had absconded, and belonged to his principals, the P Society and the estate. Verdict directed. Judgment for plaintiff. Error.

Strong, J. 1. Equity will follow a fund through any number of transmutations and preserve it for the owner as long as it can be identified, and it does not matter in whose name the legal right stands. 2. In regard to money, substantial identity is not oneness of pieces of coin or of bankbills. 3. Though a bank may assume authority in its depositor to draw out the money and must honor his checks, until warned to the contrary, the situation is different after the true owners have asserted their claim. The evidence rejected should have been received. 4. If the deposits were made after C's last check was drawn, the fund is sufficiently identified as the property of C's clients and not liable to attachment as the property of C. 5. The attaching creditor stands in the position of the depositor, and can recover only what the depositor could. Judgment reversed.

Cited: 71 Pa. 216; 100 id. 288; 147 id. 440; 160 id. 269; 161 id. 261; 166 id. 625; 1 Sup. Ct. 146; 3 id. 248; 4 id. 241; 17 id. 243; 18 id. 620.

ESTATE OF THE BANK OF PENNSYLVANIA (1869) 60 Pa. St. 471.

To distribute an insolvent's estate. The Act of April 26, 1844, provided that the creditors should be paid in the following order: 1, noteholders; 2, depositors. The noteholders had received the principal of their notes. Additional assets being discovered they asked for interest from the time of demand. The Act of March 22, 1817, provided for the recovery of interest from the time of demand. The notes themselves, however, bore no promise for the payment of interest. Decree allowing interest to the noteholders. Appeal.

Thompson, C. J. 1. The noteholders, in the absence of any showing that they knew their rights as to interest and intended a waiver of them, cannot be held to have waived these rights by accepting the principal of the notes. 2. The right to interest from the time of demand is not only incidental to the original contract, but is allowed by positive law. Decree affirmed.

Cited: 13 Sup. Ct. 444; 17 id. 240.

LANCASTER CO. NAT. BANK v SMITH (1869) 62 Pa. St. 47.

Case against bailee, for negligence. Plaintiff had delivered bonds to defendant to be kept without compensation. Defendant's teller delivered them to a stranger by mistake. The question whether there was or was not want of "ordinary care" in defendant was left to the jury. Defendant was not allowed to ask the teller whether, under the circumstances, he did or did not believe the stranger to be plaintiff; or whether he had or had not exercised the same care and diligence with regard to plaintiff's bonds as in the general transactions of defendant's business. Defendant sought to prove an agreement that it should not be liable for the loss of the bonds, "even if they were stolen." Judgment for plaintiff. Error.

Thompson, C. J. 1. In a bailment without compensation, liability for loss arises only from gross negligence. The same idea is expressed with sufficient precision by the words "want of ordinary care." 2. Whether there was or was not want of ordinary care was a question for the jury. 3. The gravamen of plaintiff's action was negligence, not willfulness, and the witness's belief as to the identity of the one to whom he gave the bonds was immaterial. 4. A bailee cannot stipulate against liability for his own negligence. Judgment affirmed.

Cited: 72 Pa. 478; 79 id. 117; 3 Sup. Ct. 347.

GETTYSBURG NAT. BANK v KUHN (1869) 62 Pa. St. 88.

Money had to use. Plaintiff requested L to draw a check in favor of defendant to plaintiff's use. L did so, but transmitted it not to defendant for plaintiff, but to N. There was no evidence to show what N did with it, though defendant's cashier had obtained the check in some way and received the money upon it. Plaintiff proved the check by a certified copy. Judgment for plaintiff. Error.

Sharswood, J. 1. Drafts or checks held by banks drawn in their favor, are prima facie presumed to have been received by them on deposit as cash from their customers, and not to have been deposited for collection merely; it was not, therefore, incumbent on defendant to show that it gave value for the check. 2. It was incumbent on plaintiff to show that the bank received the money to his use, and this he failed to do by merely proving the check and the receipt of the amount of it by the bank. Judgment reversed.

Cited: 189 Pa. 413.

FARMERS AND MECHANICS NAT. BANK v RYAN (1870) 64 Pa. St. 236.

Garnishment. Plaintiff garnished money deposited by a debtor corporation with the bank. The bank contended that the balance in its hands was not liable to execution, because: 1, the depositor was a domestic corporation and the money was necessary to the exercise of its franchises; 2, the balance was a special deposit distinctly appropriated to the payment of coupons on construction bonds issued by the debtor. Judgment for plaintiff. Error.

Read, J. 1. The deposit in a bank by a corporation is a debt by the bank to the corporation which is liable to attachment execution by a judgment creditor of the corporation. 2. As the corporation could at any moment draw the money out on its own check, it is not the property of another, so as to be exempt from this attachment. Judgment affirmed.

DIME SAV. INSTITUTION v ALLENTOWN BANK (1870) 65 Pa. St. 116.

Assumpsit, on an overdraft. Defendant sent specie to plaintiff with instructions to give it to defendant's agent for sale. Plaintiff did so. The agent wrote plaintiff that he had sold the specie and deposited "\$493.22" to plaintiff's credit with a third bank, as the proceeds of the sale. Plaintiff accordingly gave defendant credit for that amount. The agent had not made the deposit, but later deposited his checks with the third bank to plaintiff's credit. The checks were worthless when deposited, owing to the agent's insolvency, but defendant claimed to be entitled to credit for the amount. Judgment for plaintiff. Error.

Agnew, J. 1. The checks were not money, and nothing less than an actual and bona fide deposit of money to the credit of the plaintiff can charge it with the receipt of the coin. 2. The credit plaintiff gave was induced by the fraud of defendant's agent and defendant must bear the loss. Judgment affirmed.

BURKHOLDER v BEETEM'S ADM'RS (1870) 65 Pa. St. 496.

Assumpsit, to recover money paid under an illegal contract. Defendant's intestate, B, was cashier of a bank. The Act of April 16, 1850, prohibited cashiers from speculating in stocks, but not from acting as agent for their purchase. B's brokers held stock in their own name, which they had bought for him for speculative purposes. Plaintiff bought part of this stock. His knowledge as to B's real ownership did not clearly appear. B's actions in the transaction were consistent with the theory that plaintiff considered him merely as his agent. At the beginning of the trial, the court, though defendant had not objected, required plaintiff to elect between the counts in tort and those in contract joined in the declaration. Depositions merely denying any knowledge of material facts were excluded. Testimony as to B's representations to others relative to the value of the stock, and the appraiser's valuation as stated in the inventory of his estate, was also ruled out. The court charged that plaintiff could not recover in the absence of fraud and deceit on B's part. Judgment for defendant. Error.

Sharswood, J. 1. If defendant chooses to plead in bar and go to trial on such a declaration, there is no authority in the judge to put plaintiff to his election between a count in assumpsit and another in tort. 2. When a witness states in a deposition no material facts, but denies his knowledge of any of the matters inquired into, the whole may be rejected as irrelevant unless some special object is to be attained by showing his want of knowledge. 3. Representations made by B to others as to the value of the stock were inadmissible. 4. The valuation of the stock by the appraiser of B's estate was not relevant. 5. Where an act or contract is prohibited under a penalty, it is unlawful and void, though the statute does not expressly so declare. 6. Plaintiff could recover, even in the absence of fraud, and although the contract was executed, unless he was in *pari delicto* with defendant, for the contract was illegal under the Act; and he would not be in *pari delicto* if he was ignorant that B was his vendor. Judgment reversed.

WRIGHT v DAVENPORT (1870) 66 Pa. St. 148.

To try fraudulent insolvency of bank, on report of auditors. The issue was feigned. E Bank failed in 1856, and was reorganized in 1858 under the name of C Bank, and failed in 1860. In 1862 it made an assignment to plaintiff for the benefit of creditors. Under the Act of April 16, 1850, the court appointed auditors to make an investigation of the bank's affairs. The auditors reported that since the resumption in 1858 it appeared to have been carefully managed. Judgment for plaintiff. Error.

Read, J. The court is authorized to direct an issue only in a case when the report of the auditors finds the insolvency to have been fraudulent. There being no such finding here, the whole proceeding ended with the report, and the court had no power to direct the issue. Judgment reversed.

CHASE v PETROLEUM BANK (1870) 66 Pa. St. 169.

Debt, on a note against maker. Defendant gave his note for \$800 to plaintiff bank, and, with another depositor, promised that balances due them on their accounts should be applied in payment of the note. In consideration of this, plaintiff promised to and did pay \$800 to a creditor of defendant. It was agreed that the balances should be adjusted and the matter closed as soon as a certain event happened. Before it happened, plaintiff failed. Defendant and his co-contractor had never made out their checks for their balances in favor of the bank. Judgment for plaintiff for \$800 with interest. Error.

Williams, J. The transaction was a contract, and after plaintiff paid defendant's debt, defendant had no legal right to withdraw his balance. There was an equitable appropriation of the balances to the payment of the note and these should have been deducted from the judgment as entered. Judgment modified.

Cited: 156 Pa. 284; 161 id. 200; 186 id. 159; 10 Sup. Ct. 412.

TRADESMENS NAT. BANK v THIRD NAT. BANK (1870) 66 Pa. St. 435.

Assumpsit, to recover money paid on a forged draft. Defendants presented the draft at the clearing house on the 18th and it was paid by plaintiff. Plaintiff then discovered the drawer's name to be a forgery and returned the draft on the 20th. Defendants were in possession of the money at the time of suit, though they con-

tended that they were merely agents for collection and therefore not liable. Sec. 10, Act of April 5, 1849, provided that the drawee might recover money paid on a forged name of the drawer. A clearing house rule provided that errors in exchanges should be adjusted and checks not good returned to the bank depositing them before 1 p. m. of the day they were delivered to the drawee. Judgment for plaintiff. Error.

Read, J. 1. Plaintiff can recover under the act. 2. That defendants may have been agents for collection only, makes no difference, as the money is still in their hands. 3. The rule of the clearing house applied simply to ascertaining that the account was not overdrawn. Judgment affirmed.

Cited: 78 Pa. 209, 237; 159 id. 51.

BISSELL v FIRST NAT. BANK (1871) 69 Pa. St. 415.

Assumpsit, on protested drafts. Defendants were partners doing business as an unincorporated bank. The drafts were made payable to their order, and indorsed by their cashier, as such, and passed to plaintiff in due course. The question was whether the cashier had authority to make the indorsement for the firm. The bank, located at O, had a branch at P, and a cashier at each place, who had general charge of the business. Three of the partners resided in N, and one at O. Judgment for plaintiff. Error.

Read, J. The indorsement bound the firm. Judgment affirmed.

Cited: 169 Pa. 581.

KELSEY v NATIONAL BANK (1871) 69 Pa. St. 426.

Assumpsit, to recover an award. Defendant's cashier, at the instance of one of the directors and in the presence of three others, offered plaintiff a reward for the capture of a thief who had robbed the bank. The town was a small one, the sum stolen was large, and the offer of reward obtained wide publicity. At this time the bank was a state bank known by another name. Before suit it became a national bank under the Act of August 22, 1864, enabling state banks to become national banks subject to all the state bank's liabilities. Judgment for defendant. Error.

Williams, J. 1. If the directors were personally cognizant of the offer made by the cashier, it was their duty to call a meeting and disavow the act, if they were unwilling that the bank should be bound by it. 2. The evidence of the directors' knowledge of the offer was sufficient to go to the jury. 3. The act does not prohibit plaintiff from proceeding in the first instance against the national bank. Judgment reversed.

Cited: 13 Sup. Ct. 346.

FIRST NAT. BANK v BACHE (1872) 71 Pa. St. 213.

Assumpsit, for money had and received. Plaintiff agreed to allow S to cut and raft timber on plaintiff's land, plaintiff to have a lien upon it until the agreed price was paid. S sold the drafts without authority and received a note therefor. This he gave defendant for collection. Plaintiff notified defendant before it had delivered the proceeds to S, of his claim upon them, but defendant turned them over to S. Judgment for plaintiff. Error.

Thompson, C. J. 1. As the property itself was a trust for the benefit of plaintiff, the funds arising therefrom became a trust fund, and it could be followed through any number of transmutations wherever it could be identified. 2. The bank, having notice of the trust, paid its depositor at its own risk. Judgment affirmed.

Cited: 100 Pa. 288; 161 id. 261; 4 Sup. Ct. 241; 18 id. 620.

EVERITT'S APPEAL (1872) 71 Pa. St. 216.

Injunction, to restrain collection of taxes. Plaintiff complained that his national bank stock was not assessable for county purposes, under the law of the state; and that in assessing it, the Act of Congress of February 10, 1868, forbidding taxation of such stock "at a higher rate" than other moneyed capital in the hands of individuals, was violated because a tax of eight mills on the dollar was imposed. No appeal was taken by plaintiff to the auditor-general. Demurrer. Bill dismissed. Appeal.

Per curiam. 1. The assessment of national bank stock was authorized by the

Acts of April 12, 1867, and April 2, 1868. 2. If plaintiff was dissatisfied with the valuation of his stock, he should have applied to the auditor-general for an abatement. 3. The restriction of the act of Congress does not mean that stock in national banks shall not be liable to taxation at all, even if some other classes of moneyed capital are totally exempt from taxation. Decree affirmed.

Cited: 79 Pa. 163.

ARNOLD v MACUNGIE SAV. BANK (1872) 71 Pa. St. 287.

Assumpsit. Plaintiff, an unincorporated association, had three trustees, one of whom, H, deposited money with defendant to the credit of the three, describing them as trustees of plaintiff. H then declared that it was his own money, the profits of an excursion. Plaintiff subsequently notified defendant not to pay it out except on an order signed by an officer named. Defendant disregarded the notice and paid it to H. On cross-examination plaintiff proposed to ask H, "Did you receive one-half the profits of this excursion, a portion of which is the amount in dispute, and had you proposed before to plaintiff that it should have one-half of the profits?" Rejected. The court charged: that if plaintiff satisfied the jury by proof stronger than defendant's, that the funds deposited belonged to plaintiff, the verdict should be for plaintiff; otherwise, for defendant. Judgment for defendant. Error.

Williams, J. 1. Prima facie, the money belonged to plaintiff. The burden of proof was therefore on defendant to show that it did not belong to plaintiff. 2. As an answer to the question might have shed some light on the subject matter in controversy, the question was pertinent and should have been allowed. Judgment reversed.

Cited: 95 Pa. 117.

FIRST NAT. BANK v GISH'S ASSIGNEE (1872) 72 Pa. St. 13.

Assumpsit, to recover the amount of two checks. G, plaintiff's assignor in bankruptcy, had his note for \$6,000 indorsed by J, and discounted by defendant, the proceeds being placed to G's credit. The condition of the loan was that \$1,000 should remain in the bank to be applied to the note at maturity. J gave G a check for \$1,000, which G deposited. G then gave his check for \$1,000 to defendant's cashier on account of the note, and it was retained by the cashier, in the bank. After making various payments including part of his indebtedness to defendant, there remained in the bank the \$1,000 and \$260. Thereafter G drew a check for \$260 to O. Before presentation of this check G made a voluntary assignment, and thereafter plaintiffs were appointed assignees in bankruptcy. The last check was presented two days after the voluntary assignment. The action was for the amount of these two checks. The court held that the agreement as to the note was a violation of the act of Congress relative to national banks, and that J would be precluded thereby from any preference as to the \$1,000; that it was a violation of the Act of the State of May, 1858, relative to interest; and of the Bankrupt Act of March 2, 1857, with regard to giving preference to creditors, as to antecedent debt or liability. Judgment for plaintiffs for \$1,260. Error.

Read, J. 1. The Act of May, 1858, permits a contract for more than 6 per cent interest, which the borrower or debtor alone can reduce to the lawful rate. 2. The Act of Congress of 1864 forfeits only the interest and does not apply. 3. The Bankrupt Act does not apply, as there was clearly no antecedent debt or liability; the transaction merely reduced the original indebtedness of J. Plaintiffs were entitled to recover the amount of the check of \$260 presented two days after the assignment. Judgment reversed.

Cited: 92 Pa. 199; 132 id. 553.

MANUFACTURERS BANK v COMMONWEALTH (1872) 72 Pa. St. 70.

Debt, for tax on dividends, and for tax on capital stock. Defendant was a bank incorporated under the law of 1864. On October 24, 1864, under the Act of Congress of June 3, 1864, it made its organization certificate as a national bank. On December 15, 1864, it furnished the auditor-general of the state, evidence that it had complied with an act of the state called an enabling act, passed August 22, 1864. December 19, the auditor-general certified it to the governor, who caused notice of the same to be published December 21. The tax claimed was upon divi-

dends made after November 1, and on stock after that date. Judgment for plaintiff. Error.

Per curiam. The bank surrendered its charter and became a national bank on December 19, 1864, when the certificate of the auditor-general was made. Taxes were due until the surrender, and collectible by the State. Judgment affirmed.

BROWN v SECOND NAT. BANK (1872) 72 Pa. St. 209.

On promissory notes. The notes sued on were made payable to defendant B's order, by defendant T, and were discounted by B at the plaintiff bank at 9 per cent. They were given in renewal of other notes similarly discounted. The legal rate of interest was 6 per cent. Defendants set up that the whole amount was forfeited, or that the excess paid over the legal rate should be credited. Only legal interest was sought to be recovered in the present action. The National Banking Act provided that knowingly receiving, reserving, or charging a rate of interest greater than the legal rate worked a forfeiture of the entire interest agreed to be paid, and that if a greater rate of interest than that allowed by law had been paid, the party paying the same could recover twice the amount as paid. Judgment for plaintiff. Error.

Sharswood, J. It is actual payment on the usurious contract, either in part or in whole, which consummates the usury, but lawful interest may be recovered in an action for the principal. Judgment affirmed.

Cited: 78 Pa. 231; 82 id. 494, 495; 129 id. 582; 175 id. 499.

FOWLER v SCULLY (1872) 72 Pa. St. 456.

To foreclose mortgage. The mortgage was made to plaintiff in trust for a national bank, to secure notes thereafter to be discounted for defendants by the bank. The National Banking Act made it lawful for such a bank to hold real estate by way of mortgage to secure debts previously contracted, but declared others, except in certain cases, void. Judgment for plaintiff. Error.

Agnew, J. The contract was in violation of the law under which the bank was organized, and being so, there could be no recovery thereon. Judgment reversed.

Cited: 77 Pa. 101; 79 id. 120, 215; 83 id. 58, 59; 88 id. 164, 165, 166; 89 id. 327; 11 Sup. Ct. 532; 12 id. 417, 418; 14 id. 185.

SCOTT v NATIONAL BANK (1873) 72 Pa. St. 471.

For value of bonds, placed with the defendant bank for safe-keeping. The bonds were stolen by M, its absconding teller. The bonds were placed in an envelope, and deposited in the safe. M's reputation was good and he was implicitly trusted by the bank. After M absconded his accounts were found to be falsified. The plaintiff claimed that this fact was evidence of negligence on the part of the defendant. M was known by the defendant to have dealt once or twice in stocks, but was continued in its employment. Judgment for defendant. Error.

Agnew, C. J. 1. A mere depository, without any special undertaking, and without reward, is accountable for the loss of goods, only in case of gross negligence. 2. Under the circumstances of this case, the only ground of liability must arise in a knowledge of the bank, that the teller was an unfit person to be retained in its employment. 3. The accounts of M were false, but the bank was not bound to search the accounts for the benefit of a gratuitous bailor, whose loss arose, not from the accounts, but from a larceny outside of M's employment. The purchase and sale of stock is not evidence of dishonesty. Judgment affirmed.

Cited: 79 Pa. 117; 154 id. 304.

SEVENTH NAT. BANK v COOK (1873) 73 Pa. St. 483.

Money had and received. Plaintiff was a creditor of G's. G, in payment, gave a check on the defendant bank to B, plaintiff's clerk, payable to plaintiff. B indorsed it with plaintiff's name and his own, presented it to defendant, and received the money, which he applied to plaintiff's indebtedness to him for wages. Plaintiff procured the canceled check from G, presented it to the bank, and demanded payment, which was refused. Judgment for plaintiff. Error.

Read, C. J. The bank's acts amounted to an acceptance and bind it as a certified check does. Judgment affirmed.

Cited: 100 Pa. 27, 28.

DEQUESNE BANK'S APPEAL (1873) 74 Pa. St. 426.

Bill: 1, for discovery; 2, to restrain from proceedings on mortgages and judgment; and 3, reduction of judgment. B lent C on non-negotiable bonds and mortgages \$28,800, with condition to pay \$40,000 with annual interest until the principal was due. C gave a certificate of "no defense" to B with the mortgage. Judgment was entered upon the obligation. B sold and assigned to the bank, showing it the certificate. The bank claimed that C was estopped by the certificate. Circumstances tended to show full knowledge on the part of the bank officers of the terms of the contract between B and C. Plaintiff invoked the law of usury, Act of May 28, 1858. Decree that the bank reduce securities and mortgages to \$28,800 and restraining collection until the reduction was made. Appeal.

Agnew, J. 1. The judgment and mortgages were usurious. 2. The bank, as assignee, stood in no better position than B, the securities not being negotiable. 3. The bank could not claim estoppel of C from pleading usury, by setting up the certificate. 4. The decree shows that the court was convinced that the bank had notice of the transaction between B and C. Decree affirmed.

Cited: 93 Pa. 307; 100 id. 558; 112 id. 529.

O'HARE v SECOND NAT. BANK (1874) 77 Pa. St. 96.

Assumpsit, on notes. Defendant an indorser set up that, when the maker negotiated the note, he was indebted to the plaintiff bank in excess of one-tenth its capital, which was forbidden by the Act of 1864; and that he did not know of such indebtedness of the maker. Subsequently, another action of assumpsit was commenced between the same parties on notes drawn by G to defendant's order, and the same defense was offered. Judgment for plaintiff. Error.

Agnew, C. J. 1. The excess known to the bank only, is not such an unlawful act as will avoid the loan. 2. The intention of the limitation, being to protect the association from unwise banking, did not mean to injure it by forbidding the recovery of the injudicious loans. Judgment affirmed.

Cited: 79 Pa. 459; 80 id. 164; 88 id. 165; 127 id. 59.

CHAMBERS v UNION NAT. BANK (1875) 78 Pa. St. 205.

Assumpsit, to recover money paid on a forged indorsement. A draft drawn on plaintiff was stolen from the mail. The payee's name was forged. The forger took the draft to defendant, who sold him merchandise for part of the amount of the draft. The balance was paid to the forger by a check of defendant on plaintiff. Notice of the forgery was given to defendant by plaintiff as soon as it was discovered. Judgment for plaintiff. Error.

Per curiam. 1. The drawee is not supposed to know the signature of every indorser. 2. Each indorser is a guarantor of the genuineness of the immediate preceding indorsement. Judgment affirmed.

Cited: 159 Pa. 51.

LUCAS v GOVERNMENT NAT. BANK (1875) 78 Pa. St. 228.

Assumpsit, on notes and check, against indorser. The defendant set up usurious discount. An act of Congress provided that when usurious interest is knowingly charged by a national bank, it forfeited the entire interest. The Act of 1858 provided that where the debt and excessive interest have been paid, no action to recover such excess could be maintained, except within six months after such payment. Judgment for plaintiff. Error.

Gordon, J. 1. The bank was entitled to recover the face of the note and check, and no more. The excess the bank holds as trustee for defendant. 2. The limitation in the act of Congress applies only to recovery of the penalty. The claim of defendant can only be barred by failure to sue within six years. Judgment reversed.

Cited: 82 Pa. 494; 87 id. 94, 469; 96 id. 343; 107 id. 257.

CORN EXCH. BANK v NATIONAL BANK (1875) 78 Pa. St. 233.

For amount of forged check. S brought a check to defendant on Saturday and deposited it to his credit. It passed through the clearing house and reached plaintiff Monday. S drew from defendant part of the money he had deposited, and at noon the next day, plaintiff notified defendant the check was a forgery, demanded payment and was refused. By the rules of the clearing house, when a check was

found not good, it should be returned the same day before noon. The court charged that that did not relieve it from negligence, which question was submitted to jury. Act of 1849, which provided that a bona fide holder may recover the money paid on forged paper, was introduced. Judgment for plaintiff. Error.

Paxson, J. 1. The Act of 1849 gives a clear right to the holder of forged paper to recover the money paid by him to a previous holder. 2. There was error in admitting the rules of the clearing house in evidence. 3. There was no evidence of negligence. Judgment reversed.

Cited: 159 Pa. 51.

FIRST NAT. BANK v GRAHAM (1875) 79 Pa. St. 106.

Assumpsit, for refusal to deliver securities bailed. The plaintiff deposited bonds with the defendant bank's cashier, to be kept gratuitously. The directors knew of and acquiesced in their retention. The bank was robbed of the securities and subsequently failed. Plaintiff introduced testimony to show that the robbery was concealed by defendants from the public, "to rebut the presumption that there ever was any robbery, and to show that the bonds remained in the bank till its close." The judge charged that plaintiff could recover if the injury resulted from defendants' failure to give her notice of the loss, even though the presumption of negligence from want of notice was repelled by proof; and that if the loss was not the result of want of notice, then defendants were responsible, if the directors acquiesced in the deposit and if the defendants did not exercise the same care in keeping plaintiff's property as in keeping their own, or were grossly negligent of both. Judgment for plaintiff. Error.

Woodward, J. 1. The facts testified to were collateral and incapable of affording any inference as to the principal matter in dispute, and were improperly received. 2. The question as to whether the failure to give notice was or was not gross negligence should have been left to the jury. 3. If the deposit was known to the directors and they acquiesced in its retention, a contractual relation was created by which the defendants should be held bound. 4. The court's instructions as to the degree of care that the defendants assumed to exercise were not objectionable. Judgment reversed.

Cited: 89 Pa. 312; 150 id. 97; 154 id. 304.

STOCKDALE v KEYES BROS. (1875) 79 Pa. St. 251.

Assumpsit, on promissory note. The note in suit was made by D, by his attorney, payable to the order of defendants, as partners, and indorsed by D, by his attorney, and by defendants, by their attorney E. The plaintiff sued as trustee for the P Bank, which had discounted the note. D was at the time a director and stockholder in the P Bank. A power of attorney to E did not give him any authority to indorse notes; and it was in evidence that he had no such power, and that his act had never been ratified. The note was diverted from its original purpose to D's knowledge. Judgment for defendants. Error.

Per curiam. As D was a partner with the plaintiff, they were visited with his knowledge and consequently with his fraudulent use of the note. Judgment affirmed.

Cited: 169 Pa. 581.

FIRST NAT. BANK v GREGG (1875) 79 Pa. St. 384.

Assumpsit, for money had and received. Plaintiff sent a note to B for collection. B sent it indorsed to the defendant upon his own account. The defendant credited him with the amount upon his antecedent debt. When the note was paid, the plaintiffs demanded the proceeds. The cashier averred in his affidavit, on information and belief, that the plaintiffs were not the owners of the claim when due, but that B was. Judgment for plaintiffs. Error.

Williams, J. 1. The bank having incurred no liability and made no advances on the credit of the note, has no equity which entitled it to withhold the proceeds from its owners. 2. The affidavit is insufficient. It does not purport to be made on the affiant's personal knowledge, and it is defective in not setting forth the sources of this information, or asserting the ability to prove the facts alleged. Judgment affirmed.

Cited: 114 Pa. 334; 161 id. 261.

BLY v SECOND NAT. BANK (1875) 79 Pa. St. 453.

Assumpsit, on promissory note against an indorser. It was discounted for the maker by plaintiff. Defendant averred that he was an accommodation indorser; that part of the consideration was a balance for which the maker had become liable as accommodation indorser for a third party, who had borrowed money from the plaintiff in excess of 10 per cent of its capital contrary to its charter; that the note was given, except for the part stated, in renewal of other notes on which the maker was an accommodation indorser, and that plaintiff had taken usurious interest on the renewals. On rule to show cause why judgment should not be entered for want of statement of sufficient defense. Rule absolute. Error.

Per curiam. 1. No defense was set out by defendant. 2. The maker of the note in suit being an indorser on the notes claimed to be usurious did not negotiate the loan or pay the interest, and could not maintain an action on the account. 3. The right of action was in the maker of the original note alone. 4. The point of illegality of loan in excess of the amount allowed by charter was not open to defendant. Judgment affirmed.

Cited: 89 Pa. 330, 331; 101 id. 208; 107 id. 257; 109 id. 628; 126 id. 423.

MAPES v SECOND NAT. BANK (1875) 80 Pa. St. 163.

Assumpsit, on promissory notes. The plaintiff, a national bank, was the indorsee of notes on which the defendants were accommodation indorsers. The affidavit of defense averred that the notes were illegal because the maker had borrowed of the plaintiff an amount in excess of that allowed by the Currency Act; and that the cashier and a director in reply to defendants' question as to the solvency of the maker, said that he was good financially and that the defendants would be safe in indorsing for him. Judgment for plaintiff. Error.

Per curiam. 1. The contract was not illegal. 2. The representations made did not make the bank liable. Judgment affirmed.

Cited: 127 Pa. 59.

DEHAVEN v KENSINGTON NAT. BANK (1876) 81 Pa. St. 95.

Action on the case. The plaintiff deposited bonds with the defendant, a national bank, for safe-keeping. There was no evidence that the bank was a bailee for hire. Without negligence on its part, the bank was robbed and the bonds were stolen. Plaintiff was nonsuited. Error.

Per curiam. The bank, being a voluntary bailee without reward, was not liable for the stolen bonds. Judgment affirmed.

Cited: 150 Pa. 97.

OVERHOLT v NATIONAL BANK (1876) 82 Pa. St. 490.

Assumpsit, on promissory notes made and indorsed by the defendants to the plaintiff, a national bank. The notes were renewals of notes on which usurious interest had been charged, and knowingly taken and received. One usurious note made by the defendants and held by the plaintiff was not sued upon. The Banking Law provided that for taking interest at a higher rate than that allowed in the state in which the bank was located, the bank forfeited the interest, and was liable to a penalty of twice the amount of unlawful interest knowingly received. Judgment for plaintiff. Error.

Sharswood, J. 1. The bank having resorted to legal proceedings to recover its debt on the last of a series of renewal notes, and the original note having been usurious, defendants were entitled to a credit for all the interest paid from the beginning of the loan. 2. Interest on a note not in suit cannot be deducted, though usurious. Judgment reversed.

Cited: 86 Pa. 306; 87 id. 94; 88 id. 167; 96 id. 343; 100 id. 559; 110 id. 64.

WOODS v PEOPLES NAT. BANK (1876) 83 Pa. St. 57.

Assumpsit, on promissory notes. Defendant was the accommodation indorser of notes held by the plaintiff, a national bank. The maker's wife, to secure the above notes, some pre-existing claims of the bank, and future loans, executed a mortgage to the bank. The bank foreclosed the mortgage, and sued on the defendant's

notes. By statute a national bank could not take a mortgage to secure a loan. Defendant contended that the bank should have applied the proceeds of the mortgage to pay the notes indorsed by the defendant instead of applying it to the loan made to the maker when the mortgage was given. Judgment for plaintiff. Error.

Paxson, J. 1. In so far as the mortgage was given to secure future loans, it was ultra vires and invalid. 2. The mortgage was for the benefit of the defendant as well as the bank, and was valid as to the pre-existing claims of each. Judgment reversed.

SHAMBURG v RUGGLES (1876) 83 Pa. St. 148.

Assumpsit, to recover on deposits. The defendants were members of a banking association in which the plaintiff made deposits. One deposit was made before S, one of the defendants, became a partner, and the other was made after he had withdrawn, but before he had given notice of withdrawal or plaintiff knew of it. The court charged that the defendants, by becoming members of the association, assumed its debts, and that S was liable for deposits made after his withdrawal, but before it was known. Judgment for plaintiff. Error.

Gordon, J. 1. A member of a banking association is liable to persons who make deposits while he is a member, and until he gives notice of his withdrawal or the depositor has knowledge of it. 2. An incoming partner of a firm is not liable for the debts of the firm. Judgment reversed.

Cited: 93 Pa. 381; 96 id. 418; 112 id. 12; 131 id. 504; 143 id. 363; 153 id. 95; 190 id. 113; 2 Sup. Ct. 625, 628.

AHL v RHODES (1877) 84 Pa. St. 319.

Scire facias, on a mortgage. Defendants were assignees of a bank in which plaintiff's assignor was a director and a creditor. The bank took a mortgage on lands to secure a debt owed by B, and, to secure the debt of plaintiff's assignor, assigned B's mortgage to him. Later they induced plaintiff's assignor to release his interest in the mortgage and foreclosed it. Subsequently the bank gave plaintiff's assignor a mortgage on the same land to secure his claim against it, which mortgage the stockholders did not authorize. Defendants had commenced a suit in equity alleging negligence on the part of the directors, including plaintiff, in running the bank. The parties agreed that if the directors had power to execute the mortgage without the consent of the stockholders, and if upon the trial on said mortgage, the evidence in regard to the negligence of the directors should not be admissible as a setoff for defendants, judgment should be for plaintiff. Judgment for defendant. Error.

Woodward, J. 1. The mortgage was lawfully executed. 2. The set-off was not good. Judgment reversed.

Sited: 128 Pa. 118; 139 id. 31; 146 id. 632; 196 id. 55; 202 id. 591, 594; 14 Sup. Ct. 323.

BASEHORE v RHODES (1877) 85 Pa. St. 44.

Bill, to restrain collection of judgments. Defendants, the assignees of an insolvent bank, reduced to judgment two notes held by the bank against plaintiffs, as makers and indorsers. Subsequent to the rendition of judgment, the plaintiffs obtained a dishonored draft which had been drawn by the bank, and offered it in payment of the judgments. Defendants refused to accept it and plaintiff sought to restrain the collection of the judgments. By the Banking Law, the assignee of an insolvent bank was required to accept, in payment of the debts due the bank, the notes, bills and obligations of the bank. Injunction refused. Appeal.

Agnew, C. J. Drafts or orders of a bank drawn upon others are not bills, obligations or notes within the meaning of the Banking Law. Decree affirmed.

APPEAL OF MEANS (1877) 85 Pa. St. 75.

Bill, to enforce a stockholder's liability. By the Banking Law, a suit to enforce such liability was to be in the name of the assignees of the bank and was to be commenced after the assets of the bank had been exhausted, and in the county in which the bank was located. The assets of the bank were not exhausted, the suit was not commenced by the assignees or in the county in which the bank was located. Demurrer. Overruled. Decree for plaintiff. Appeal.

Mercur, J. 1. The proceeding was not commenced in the proper county. 2. The suit was not instituted by the proper parties. 3. The bank's assets were not shown to have been exhausted. Decree reversed.

Cited: 92 Pa. 400; 105 id. 58, 573.

FIRST NAT. BANK v GRAHAM (1877) 85 Pa. St. 91.

Assumpsit, to recover the value of bonds deposited with the defendant, a national bank. The bank gave a receipt for the bonds. The bonds were stolen. The defendant gave no explanation of the manner of the theft. Plaintiff learned of the theft from outside sources, and accepted interest on the bonds thereafter. Judgment for plaintiff. Error.

Per curiam. The bank, being grossly negligent in keeping the bonds, was liable. Judgment affirmed.

DORSEY v ABRAMS (1877) 85 Pa. St. 299.

Assumpsit, on a check. Defendant was an unincorporated banking association. M, without any funds in defendant bank, drew a check which contained the statement that the check was collateral for oil. The cashier of the bank certified the check, but the bank refused to honor it. Judgment for defendant. Error.

Paxson, J. The bank was not liable for certifying a check which appeared on its face to be collateral security, the drawer having no funds in the bank. Judgment affirmed.

CAKE v FIRST NAT. BANK (1878) 86 Pa. St. 303.

On draft and note. Plaintiff bank discounted the instruments sued on, which had been given in renewal of other similar paper, and received interest at the rate of 12 per cent. When the instruments in suit, which had been made by S and indorsed by defendant, became due, S gave new instruments of like tenor, also indorsed by defendant, which the bank retained. The court refused to submit to the jury the question whether the new paper had been received by the bank in payment for that sued on. Defense: usury. Defendant claimed credit for the interest paid from the original transaction. Judgment for plaintiff. Error.

Sharswood, J. 1. The refusal to submit the question, as to the reason for giving the new obligations, to the jury, was error. 2. The whole amount of usurious interest can be offset and credited on the amount due on the notes. Judgment reversed.

Cited: 88 Pa. 167.

LEWIS v JEFFRIES (1878) 86 Pa. St. 340.

Bill, to restrain the collection of a mortgage. Plaintiff was the assignee of a bank. All the directors and a majority of the stockholders assented to the bank's giving a mortgage on its banking house to the defendant to secure a loan. The bank was authorized to mortgage its real estate to secure a loan. Plaintiff contended that this was increasing the bank's capital, contrary to law. Decree for plaintiff. Appeal.

Per curiam. The injunction should have been refused. Decree reversed.

Cited: 139 Pa. 31.

LAUBACK v LEIBERT (1878) 87 Pa. St. 55.

Assumpsit, on promissory notes. Defendant was a depositor and debtor of the bank, of which plaintiff became assignee. Defendant was also the assignee of K. Prior to the failure of the bank, defendant gave his checks, reciting that they were in payment of the notes, and added the word "assignee" to his signature. Plaintiff refused to accept the checks in payment of the notes, and contended that the word assignee showed the checks were not drawn on the defendant's individual deposits. Judgment for defendant. Error.

Agnew, C. J. 1. The word "assignee" on the check did not earmark the fund or give it identity as belonging to a particular person or fund. 2. The bank was bound to apply the check in payment of the notes. Judgment affirmed.

GERMAN-AMERICAN BANK v AUTH (1878) 87 Pa. St. 419.

Debt, on bond. The bond was given by the defendants to the plaintiff bank, for the faithful performance by A of his duties as messenger. The bond was conditioned to account for and pay over all money coming into the messenger's hands. A stole some of the plaintiff's money after it had been placed in the vault. Defendants contended that A was not acting as messenger when he stole the money, and that the plaintiff was negligent in allowing him to have keys and the combination to the vault. Judgment for defendants. Error.

Gordon, J. The messenger was not honest and faithful, and the conditions of the bond were broken. Judgment reversed.

Cited: 139 Pa. 602.

FIRST NAT. BANK v GRUBER (1878) 87 Pa. St. 468.

Debt, to recover the penalty for receiving usurious interest. Defendant national bank had received interest at usurious rates, and contended that the National Banking Act, permitting a national bank to take interest at the rate allowed in the state where the bank was located, allowed it to take interest at the rate allowed state banks of issue, and that certain of such banks could have made a charge similar to that of the defendant. There was no proof that such banks could charge such interest. One count of the declaration was for money had and received, money paid out, and an account stated, and the court entered judgment as though there were three counts. Judgment for plaintiff. Error.

Sharswood, J. 1. It was erroneous to enter a judgment treating a count for money had and received, money paid, laid out and expended, and money due on an account stated as three separate counts. 2. The charters of the banks of issue, chartered by the state, not having been pleaded or put in evidence, the court cannot take judicial notice of the rate of interest they could charge. Judgment reversed.

Cited: 98 Pa. 73; 133 id. 571.

STEPHENS v MONONGAHELA NAT. BANK (1878) 88 Pa. St. 157.

On promissory note. Defendant was the accommodation maker of a note given to renew a note on which plaintiff bank had charged and received usurious interest since 1870. Plaintiff had released the real party. Defendant contended that the penalty for taking usurious interest could be set off. The statute fixed the limitation period for such actions, at six years. Defendant's offer to prove that the bank agreed to loan the indorser more than allowed by law, was refused. Judgment for plaintiff. Error.

Trunkey, J. 1. Defendant was not relieved from liability by the release to the indorser of the note. 2. The consideration of the alleged contract between the plaintiff and the maker of the note was illegal, and the evidence of such contract was properly refused. 3. The right to recover usurious interest, is personal and the Statute of Limitations commences at the first payment of the usurious interest. 4. On a note given in renewal of a usurious note, the maker is entitled to a credit of all the interest from the beginning. Judgment reversed.

Cited: 171 Pa. 650; 5 Sup. Ct. 505; 7 id. 221.

FIRST NAT. BANK v REX (1879) 89 Pa. St. 308.

Assumpsit, on a deposit of bonds. Plaintiff left the bonds with the defendant bank for safe-keeping. No charge was made for the service. The defendant's president, without its knowledge, appropriated the bonds to his own use, and said the bank had sent them to another place for safety. There was no evidence that the bonds had been sent away. The court charges that the plaintiff must prove that the defendant was guilty of gross negligence; that a bailee without reward is required to exercise only slight care; that the bank was liable if it knew of or assented to the president's sending the bonds to another place for safe-keeping; that the bank was negligent in failing to recover them under such circumstances, and that the bank would be liable if it sent the bonds away if but ordinary negligence were shown. Judgment for plaintiff. Error.

Gordon, J. 1. A bailee, without reward, is only liable for gross negligence. 2. The burden was on the plaintiff to prove that the bank was grossly negligent

in caring for the bonds. 3. There was no evidence to support the charge that the bank was liable, if it had knowledge that the bonds had been sent away. The charge was erroneous. Judgment reversed.

FIRST NAT. BANK v HOCH (1879) 89 Pa. St. 324.

On certificate of deposit. B was president of defendant national bank. The plaintiff gave him \$1,000, with which to buy bonds, and received from him a receipt signed by B, as president of the bank, stating that the money was received to buy the bonds, and was to bear interest. B deposited the money to his private account, and misappropriated a part of it. Judgment for plaintiff. Error.

Mercur, J. It is not a part of the business of a national bank to act as broker. The bank never received any of the money in question, and was not liable to plaintiff therefor. Judgment reversed.

THIRD NAT. BANK v MILLER (1879) 90 Pa. St. 241.

Debt, on promissory note. S bank delivered to plaintiff national bank the note, which was signed by defendants, officers of S Bank, individually as sureties. The note was to be held by plaintiff as security for any overdrafts upon it by S Bank. Accounts had been stated monthly between S Bank and plaintiff, and interest charged on the average daily balance of the former. The interest, thus charged on the overdraft, was illegal. Plaintiff also discounted notes taken by S Bank, at usurious rates. The court refused to charge that in this last transaction of discounting at usurious rates, the plaintiff was merely acting as agent of S Bank, and that no excess of interest having been charged on the note, there was no forfeiture of interest under the act of Congress on that subject. Defendant was allowed to recoup amount of excess interest on overdraft. Judgment for plaintiff. Error.

Per curiam. 1. This suit is actually a suit to recover overdraft. 2. Plaintiff, being a National Bank, by charging more than six per cent interest on these overdrafts, lost the right to recover any interest at all. 3. The monthly accounts stated do not preclude the setting up of usury as a defense. 4. The fact that parties to whose rights the defendants are subrogated, charged an illegal rate of interest, cannot affect defendant's right to set up usury. Judgment affirmed.

SAVINGS BANK v CUPPS (1879) 91 Pa. St. 315.

Case, to recover of a savings bank, money paid on forged orders. The by-laws of defendant savings bank provided that a depositor must sign his name and address in book provided by the bank; that an absent depositor could withdraw deposits upon orders properly witnessed; that notice must be given before a depositor could draw more than \$50; and that the bank would not be liable for money paid to persons presenting the passbook. Plaintiff was a non-resident, and the money was deposited for her by A, who signed plaintiff's name and a local address at the bank. Subsequently plaintiff left her passbook in the custody of B, who drew out entire deposit by forged checks. B gave no notice of his intention to draw, although amounts were over \$50 and checks were not witnessed. Judgment for plaintiff. Error.

Per curiam. 1. The depositors in a savings bank have a right to rely on the published by-laws as the mode in which the money can be drawn. 2. It is not a question of negligence, and the contributory negligence of the depositor was of no consequence. Judgment affirmed.

Cited: 122 Pa. 189.

PENN BANK v FRANKISH (1879) 91 Pa. St. 339.

Assumpsit, to recover proceeds of a check. Defendant bank issued to G, a depositor, its own check which was charged to his account. Subsequently, plaintiff notified defendant that G was his agent for making collections, and was in default to a large amount. Plaintiff further stated that he believed N was in collusion with G to defraud him, and asked defendant to hold the check, if it was presented or indorsed G or N. It was presented by and paid to N. The court charged that if the plaintiff had notified defendant not to pay to N, it threw upon defendant the burden of proving that N was a bona fide holder for value. Judgment for plaintiff. Error.

Paxson, J. The legal presumption is that the holder of commercial paper is a bona fide holder for value, and the burden of proving he is not, is on those who assert it. Judgment reversed.

FIRST NAT. BANK v GRUBER (1879) 91 Pa. St. 377.

To recover a penalty. Defendant bank charged usurious interest on notes, which were discounted for the plaintiff's benefit. Defendant pleaded specially the charters of other banks, which were allowed to take interest at any rate agreed upon by parties. Application to remove the cause to United States Court was refused. Evidence that the joint maker with plaintiff had brought another action for the penalty was excluded. The court charged that there could be a recovery of the interest paid in excess of 6 per cent, exclusive of the penalty, prescribed by the act of Congress. Judgment for plaintiff. Error.

Gordon, J. 1. Where the beneficial owner of notes, discounted at an illegal rate, brings suit for the penalty growing out of illegal discounts, the claim of his joint maker in another court is properly disregarded. 2. Powers not specifically granted to a corporation are deemed to be withheld from it. 3. Neither by setoff nor original action, can interest over the legal rate, paid to a national bank, be recovered except by the way of penalty, as prescribed by the Act of Congress of June 3, 1864. 4. The courts of Pennsylvania have jurisdiction of suits to recover penalties provided for in that act. Judgment reversed.

FOLL'S APPEAL (1879) 91 Pa. St. 434.

Bill, for specific performance of a contract to sell shares of stock in a national bank. A, who was a shareholder in N Bank, desired to purchase 15 more shares for the purpose of obtaining control of the bank. F agreed to sell them, and subsequently refused. Specific performance decreed. Appeal.

Paxson, J. A national bank is a quasi-public institution, and the end sought by this bill, is against public policy. Decree reversed.

Cited: 108 Pa. 558; 136 id. 78; 159 id. 646; 191 id. 304; 193 id. 214.

PARKER v HARTLEY (1879) 91 Pa. St. 465.

Assumpsit. Defendants were doing business as a savings bank. A had contracted to deliver oil within a certain time and requested plaintiff to become his security. Plaintiff thereupon drew his check upon defendants to order of its cashier, and A deposited with defendants the check, which showed upon its face that it was to be held as collateral, and a duplicate of his contract. A fulfilled his contract before maturity, and subsequently defendants, without authority from plaintiff, paid him the amount of the check. Judgment for plaintiff. Error.

Sterritt, J. The check acted as a specific appropriation, and the bank was bound to notice the limitation which the drawer had thus placed on the use to be made of his funds. Judgment affirmed.

BURRILL v DOLLAR SAV. BANK (1879) 92 Pa. St. 134.

Assumpsit, to recover deposit. Plaintiff, who could neither read nor write, opened an account with defendant. By-laws printed in the passbooks warned depositors to keep the passbooks in a safe place, and to notify defendant if they were stolen or lost. Plaintiff's passbook was stolen without his knowledge, and the money drawn by a forged check. Judgment for defendant. Error.

Per curiam. Depositors are bound by the rules of a savings bank. The bank must protect itself by reasonable rules, and the fact that a depositor is unable to read them, is no defense. Judgment affirmed.

COMMONWEALTH v KETNER (1880) 92 Pa. St. 372.

Indictment, charging A, while cashier of a national bank, with having misappropriated funds of the bank, contrary to the form of the Act of Assembly "in such case made and provided." A was arrested and confined in jail. Writ of habeas corpus.

Paxson, J. 1. Embezzlement by the cashier of a bank is not an indictable offense at common law. 2. There is no statute of Pennsylvania making embezzle-

ment by officer of a national bank an indictable offense. Congress alone has the right to define and punish embezzlement by such officers. Relator discharged.

Cited: 94 Pa. 87; 119 id. 197, 198, 199; 124 id. 48; 189 id. 542; 9 Sup. Ct. 538.

CRAIG'S APPEAL (1880) 92 Pa. St. 396.

Insolvency proceedings. An insolvent bank made an assignment for benefit of its depositors. At the time of assignment, A and B, officers and stockholders of the bank, purchased several outstanding claims at a discount. Subsequently, A and B presented these claims to an auditor appointed to adjust the accounts of assignee, and secured a pro rata distribution with the depositors. It was contended that the claims of A and B should be postponed, because shareholders were personally liable for an amount equal to the amount of stock they owned. Decree confirming auditor's report. Appeal by depositors.

Gordon, J. 1. Stockholders are not sureties. Their liability is special and is limited to an amount equal to their subscriptions, and accrues only when assets have been exhausted. Neither can it be enforced except by a judicial decree first had. 2. When a corporation makes an assignment, its officers do not become trustees. 3. Stockholders of insolvent corporations are as free to buy up outstanding claims against it, as outside parties. Decree affirmed.

Cited: 100 Pa. 104; 123 id. 507; 12 Sup. Ct. 59.

STECKEL v FIRST NAT. BANK (1880) 93 Pa. St. 376.

Assumpsit, to recover balance of deposit. B was president of defendant bank. B and directors carried on a banking business as B & Co. next door to defendant. Plaintiff, a depositor, requested defendant's teller to give him certificates of deposit, and gave him his check in payment therefor. Teller delivered to plaintiff certificates signed "B & Co." Plaintiff insisted that he wanted only certificates of defendant, whereupon the teller assured him they were on, and that they would be paid by, defendant. As a matter of fact they were certificates of deposit with B & Co. Plaintiff on discovering the fraud, tendered certificates to defendant, and demanded payment of his original deposit. The court refused to submit the question of fraud to the jury. Verdict for plaintiff for amount to his credit before this transaction. Error.

Paxson, J. 1. A bank is responsible for the safe-keeping of the money of a depositor, and it cannot set up the fraud of its own officers as an answer to a demand for repayment. 2. The question of fraud should have been submitted to the jury. Judgment reversed.

Cited: 93 Pa. 397, 399; 100 id. 126.

ZEIGLER v FIRST NAT. BANK (1880) 93 Pa. St. 393.

Assumpsit, to recover deposit. B was cashier of the defendant bank, and in the town was a private banking firm, B & Co., of which his father was a member; said firm was known by B to be insolvent. Plaintiff stated to B that he wished to open an account, subject to check. Plaintiff was unable to read. B informed him the bank would only issue a certificate of deposit, which, however, would be subject to check. Plaintiff then obtained a B & Co. certificate, which he supposed was on defendant bank. Subsequently plaintiff had a settlement, and a new certificate was given, which plaintiff supposed was on defendant bank, but which was in fact on B & Co., with whom he never dealt. When B & Co. failed, it was found that officers of defendant bank had credited this balance to the private bank, to redeem an overdraft of that concern on the defendant. Plaintiff was refused payment of his deposit. Judgment for defendant. Error.

Paxson, J. When plaintiff took his money to the defendant and handed it to the cashier, the bank became responsible therefor, and no trick or fraud of the cashier could change this liability. Judgment reversed.

Cited: 93 Pa. 399; 100 id. 126.

FOX'S APPEAL (1880) 93 Pa. St. 406.

For distribution of assets. Fox was a depositor in a savings bank, which had assigned for the benefit of creditors. Fox claimed a preference over other general creditors, under the Act of April 16, 1850, which regulated the distribution of

assets, first, to noteholders; second, to depositors, and third, to all other creditors, except stockholders. The act incorporating the savings bank, while calling the institution a bank, expressly declared that nothing therein contained should be so construed as to confer banking privileges; it also provided for a capital of not less than \$5, nor more than \$50,000 for the security of depositors. The court held that Fox was not entitled to a preference. Appeal.

Sterrett, J. 1. The Act of 1850 applied exclusively to banks of issue and discount, and did not include a bank like that in question. 2. The capital referred to was not exclusively for depositors, but for all creditors alike. Order affirmed.

Cited: 133 Pa. 571.

WINTON v LITTLE (1880) 94 Pa. St. 64.

To set aside a judgment. The plaintiff borrowed money from defendant, a national bank, and gave therefor a judgment note, payable to W, president, on which judgment was subsequently entered. Some of the land on which the judgment was a lien was afterward released by W, without authority of board of directors of defendant. On the trial the deposition of witnesses was objected to on the ground that the testimony failed to show that it was reduced to writing and subscribed in the presence of the justice. Plaintiff maintained that defendant, being a national bank, had no authority to take real estate as security. Decree for plaintiff. Appeal.

The court. 1. The bank was bound by the release, having for a long period failed to object to its president's acts. 2. No evidence being shown to the contrary, it will be presumed that the testimony was written and subscribed in the justice's presence. 3. Real estate security taken by a national bank is valid. Judgment reversed.

Cited: 102 Pa. 443; 151 id. 72; 163 id. 216; 171 id. 650.

COUNTY OF LACKAWANNA v NATIONAL BANK (1880) 94 Pa. St. 221.

To recover taxes. Defendant, a national bank paid into state treasury a tax of 1 per cent upon the par value of its capital stock. Plaintiffs levied the proportionate county tax upon the assessed value of banking building owned by defendant. Act of March 31, 1870, provided that shares of national banks located in this state may be taxed, but if banks collect from shareholders and pay into the state treasury a tax of 1 per cent upon par value of all shares, the capital and profits shall be exempt from all other state taxation. Judgment for defendant. Error.

Per curiam. 1. The Act of 1870 was not a law exempting property from taxation within the provision of art. 9, sec. 2, of the constitution. 2. The banking house was part of the capital of the institution represented by its shares of stock, and the tax which was imposed under the Act of 1870, with the consent of the bank, was a tax upon it, and a commutation for all other taxes under the laws of the commonwealth. Judgment affirmed.

Cited: 101 Pa. 145.

COMP v CARLISLE DEPOSIT BANK (1880) 94 Pa. St. 409.

Assumpsit, for value of bonds. Plaintiff left bonds with defendant for safe-keeping. The receipt declared they were received "for deposit in vault of this bank at risk of depositor." Defendant's cashier solicited the deposit of the bonds, and declared that the bank would "take as good care of them as it did of its own money." The bonds disappeared. They were presumably stolen by the cashier. He had always born an excellent reputation and the bank had no previous notice of his dishonesty. Verdict and judgment for defendant. Error.

Per curiam. 1. Parol evidence of declarations of the cashier was not sufficient to change the effect of the written receipt. 2. The bank was a bailee without hire and there is no evidence of any negligence in the way the bonds were kept. Judgment affirmed.

SPAHR v FARMERS BANK (1880) 94 Pa. St. 429.

Assumpsit, against indorser of promissory note. Plaintiff was organized under an act which provided that the exacting of usury should work a forfeiture of the entire debt. Subsequently, plaintiff's officers obtained a new charter from the legislature, under which usury would forfeit only the interest on the debt. The name of

the bank was changed and the stockholders agreed to cease to act under the original charter, but the old officers continued to act for the new organization. The note indorsed by defendant, was discounted at an usurious rate by plaintiff after the new charter was granted. Judgment for plaintiff for amount of note. Error.

Mercur, J. When a charter has been granted to certain persons to act as a corporation, and they are actually in possession of the corporate rights granted, such possession and enjoyment will be held valid as against one who has dealt with them in their corporate character. Judgment affirmed.

Cited: 104 Pa. 398; 108 id. 580; 159 id. 307; 193 id. 234; 4 Sup. Ct. 133; 13 id. 87.

FIRST NAT. BANK v MASON (1880) 95 Pa. St. 113.

Assumpsit, to recover deposit. Plaintiff opened an account with the defendant bank in his own name. The court refused to allow defendant to prove that plaintiff did not own the money and had stated, at the time of deposit, that it belonged to A & Co., his employers. A & Co. were insolvent and indebted to defendant, which endeavored to protect itself by setting up the title of A & Co. to the deposit made by plaintiff. A & Co. made no claim to the money. Judgment for plaintiff. Error.

Parson, J. It is against public policy to permit a bank that has received money from a depositor to allege that the money deposited belonged to some one else. The bank is estopped by its own act. Judgment affirmed.

Cited: 120 Pa. 483; 130 id. 431, 433; 132 id. 552; 135 id. 505; 201 id. 300, 301; 4 Sup. Ct. 647; 11 id. 457.

MONONGAHELA NAT. BANK v OVERHOLT (1880) 96 Pa. St. 327.

Debt against a national bank, to recover twice the amount of discount paid by plaintiff on notes discounted for him by defendant at an usurious rate. The notes had been renewed from time to time but never paid. Sec. 5181 of the National Banking Act provides that where an illegal rate of interest is actually paid to a national bank, double the amount may be recovered by the person who paid it or his personal representatives, if the action is brought within two years. This action was brought for usurious discount after plaintiff's discharge as a bankrupt. Verdict for plaintiff. Error.

Trunkey, J. A bankrupt has a vested interest under the statute, giving him the right to recover back twice the amount of interest paid, and this right passes to and vests in his assignee, by virtue of the adjudication of bankruptcy. 2. The action accrued on the actual payment of the illegal interest, whether the debt has been paid or not. Judgment reversed.

Cited: 175 Pa. 499.

NATIONAL BANK v DUSHANE, ADM'R (1880) 96 Pa. St. 340.

Assumpsit, to recover the balance due on a promissory note made by defendant's intestate. Defenses: usury and setoff. The defendant showed that the note was the last of a series of renewals of a loan for \$5,000, and the notes had been discounted at the rate of 10 per cent. The court charged, that if the plaintiff had charged and received more than 6 per cent, the interest-bearing quality of the notes was destroyed, and no interest could be charged; that the defendant was entitled to a credit against the face of the note for all payments made. Judgment for plaintiff. Error.

Gordon, J. 1. Usurious interest previously received by a national bank, though taken in the renewals of a series of bills of which the one in suit is the last, cannot be pleaded as a setoff. 2. The only remedy of the defendants was by a penal action to recover back double the illegal interest paid. Judgment reversed.

LEBANON NAT. BANK v KARMANY (1881) 98 Pa. St. 65.

Debt, to recover twice the amount of usurious interest paid. The declaration averred that within two years from the commencement of the action, the plaintiff paid defendant national bank a greater rate of interest than 6 per cent, the lawful rate of interest in Pennsylvania. Defendant pleaded specially: 1, non-jurisdiction; 2, that by the United States law and its charter it was authorized to take the rate allowed banks of issue by the laws of Pennsylvania, which was such rate as might be agreed on between the parties; 3, setoff. Judgment for plaintiff. Error.

Trunkey, J. 1. The state courts have jurisdiction in an action by the borrower against a national bank to recover for illegal interest penalties, taking in violation of the National Banking Act. 2. There is no bank of issue in Pennsylvania authorized to charge a rate of interest in excess of the legal rate. 3. The liability is incurred the moment the bank takes the illegal interest. 4. Setoffs do not apply in a suit where the claim is in the nature of a penalty for violation of a statute. Judgment affirmed.

Cited: 107 Pa. 257; 154 id. 136.

EGBERT v PAYNE (1881) 99 Pa. St. 239.

On deposit. Plaintiff made the deposit in his name and claimed ownership. He was the agent of defendant in other matters, and defendant claimed that the deposit was made for him, to be used in his business. The bank paid the money into court. The court instructed the jury that if the money was given to plaintiff for an illegal or improper purpose, it would be an executed gift, and could not be taken back. The court said it did not seem to be deposited for any specific purpose, suggested that if it were not, it might be "a gift in some mysterious way." There was no evidence of a gift. Judgment for plaintiff. Error.

Sterrett, J. 1. The deposit having been made in the name of the plaintiff, it was *prima facie* his, and the burden was upon defendant of proving that it belonged to him. 2. The evidence justified submitting the case to the jury. 3. The suggestion of a gift for an illegal or improper purpose, without any evidence of a gift, was in assumption of facts not justified in the instructions, and prejudiced the defendant. Judgment reversed.

Cited: 153 Pa. 575; 176 id. 33.

SAYLOR v BUSHONG (1882) 100 Pa. St. 23.

Assumpsit, on a check drawn on defendants, bankers, to the order of plaintiff. The check was presented, accepted and payment refused. Afterward the drawer settled with the bank, and obtained a note for the balance due him, less the amount of the check. Judgment for defendants. Error.

Trunkey, J. When a depositor settles his account with the bank and leaves the exact amount of an outstanding check expressly for its payment, and the bank tacitly retains the money and settles on that basis, it is liable to the holder on the implied acceptance. Judgment reversed.

Cited: 106 Pa. 465; 117 id. 101; 131 id. 364; 161 id. 200.

FIRST NAT. BANK v WILLIAMS (1882) 100 Pa. St. 123.

Assumpsit, to recover a deposit. Plaintiff gave B a deposit and got a certificate of B & Co., of which B was a member, which firm B said owned the bank. B & Co. owned a majority of the bank's stock. B & Co. failed and plaintiff sued the bank on the certificate. Judgment for plaintiff. Error.

Paxson, J. The plaintiff knew he was getting the certificate of B & Co. and not that of the bank. There was no evidence of a contract with the bank. Judgment reversed.

BENSINGER v WREN (1882) 100 Pa. St. 500.

Debt, on bond. Certain citizens formed themselves into an association under the name of "the Citizens Safe Deposit Bank" for the purpose of private banking. A charter was to be procured by the directors. The directors merged the association with a company authorized to do a life insurance and trust business, but prohibited from doing a banking business, and so continued to do a banking business. The same persons, with one exception, were officers of both. The name of the Trust Co. was then changed to the Citizens Safe Deposit Bank, of Mahanoy City. P acted as cashier of the corporation. His bond with sureties was given to the unincorporated banking company, and was sued on for his default as cashier of the corporation, by assignees of the Citizens Safe Deposit Bank, of Mahanoy City. Judgment for plaintiff. Error.

Trunkey, J. The bond in suit was not given to an incorporated company, but to a private association of persons that organized as a private banking company, and which intended thereafter to acquire a charter with banking privileges, and there can be no recovery in this suit. Judgment reversed.

Cited: 155 Pa. 439; 1 Sup. Ct. 12; 17 id. 93.

JOHNSTON v PARKER SAV. BANK (1882) 101 Pa. St. 597.

Assumpsit. The plaintiff, a depositor in the defendant bank, presented there the check of A, drawn upon the bank to his order, but was told that there were no funds to A's credit. He testified that the cashier promised to hold the check and pay it as soon as funds came in to A's credit, not otherwise appropriated. The check was returned to the plaintiff, two weeks later, unpaid. The court charged that if the testimony of plaintiff was found true, and if, while the bank held the check, there was any general deposit to A's credit out of which this check could have been paid, the bank would be liable for failure to pay it; but not if the funds deposited were, at the time, specially appropriated by A to some other purpose. Judgment for defendant. Error.

Trunkley, J. The case was fairly submitted to the jury. Judgment affirmed.

MERCHANTS BANK v SHOUSE, ADM'R'X (1883) 102 Pa. St. 488.

Amicable action to determine the right to dividends. Defendant, incorporated by a special act, having conducted a banking business for several years, but issuing no notes to circulate as money, went into liquidation and divided its assets among its stockholders. The plaintiff's intestate died insolvent, owning 556 shares in the defendant bank, but owing it a large sum. The bank claimed the right to apply the intestate's share upon distribution of its assets as payment or setoff upon his indebtedness to it, contending that the Banking Act of April 16, 1850, gave it a lien on the stock. Judgment for plaintiff. Error.

Gordon, J. The bank had no lien on this stock at the time of the intestate's death, hence can have none on the share in the assets passing to the administratrix as holder of the stock, but must come in with the other creditors. The act referred to applies only to banks of issue; no such lien was authorized by the bank's charter which is full and complete, and a corporation has no common-law lien on stock for a debt due it by a shareholder. Judgment affirmed.

Cited: 133 Pa. 571.

PEOPLES BANK v LEGRAND (1883) 103 Pa. St. 309.

Assumpsit, against indorser of a promissory note. The note was discounted by the plaintiff, duly protested for non-payment, and due notice given the defendant indorser. Suit was first brought against the maker, a depositor in plaintiff bank. Thereafter he made an agreement with the plaintiff's president for time to pay the note, undertaking to pay 10 per cent interest thereon, but no time was specified. At maturity of the note and at the commencement of this action, the maker had not sufficient funds in the bank to pay the note, but he had had at intermediate times. Judgment for defendant. Error.

Green, J. 1. The agreement made with the maker does not discharge the indorser, because, not being for any definite time, it did not prevent action against the maker at once. 2. Although in an action by a bank upon the note of a depositor the latter may set off his deposit, yet the bank is not bound to hold a deposit for the protection of an indorser of the depositor. Judgment reversed.

Cited: 105 Pa. 503; 110 id. 195; 153 id. 94; 176 id. 518.

BOYER'S APPEAL (1883) 103 Pa. St. 387.

Injunction, to restrain the levy of a tax upon national bank stock. The plaintiff owned shares in a national bank, but claimed exemption under sec. 5219, U. S. R. S., which prohibited taxation of national bank stock at a greater rate than is assessed upon other moneyed capital in the hands of citizens; and under the Act of the Pennsylvania Assembly of June 10, 1881, which exempted from taxation, except for state purposes, all mortgages, judgments, recognizances and money due upon contracts for the sale of real estate. Demurrer. Sustained. Decree for defendant. Appeal.

Gordon, J. 1. As long as a state restricts taxation of national banks to the same kind and degree of taxation as imposed upon the similar capital of its citizens or its own institutions, it does not discriminate against national banks or violate the act of Congress. 2. The exemption of mortgages, judgments and recognizances is only a partial exemption of moneyed capital and is not an improper discrimination against national banks. Decree affirmed.

COMMERCIAL NAT. BANK v HENNINGER (1884) 105 Pa. St. 496.

Assumpsit, on promissory notes. Defendant was payee and indorser of three notes given him by Y for stock and discounted by plaintiff bank. At maturity of the notes, which were payable at the bank, Y had them protested, because he claimed he had been defrauded by the defendant. The defendant, sued as indorser, after due notice, was allowed to prove an agreement by Y, that the indorsement should transfer the notes without liability—a custom among the banks in that city to charge notes, made payable at a bank, to the maker's account, without special direction from him; and also that at maturity Y had sufficient funds on deposit in plaintiff bank to pay the notes. The court charged that the bank was obliged to charge up the notes against Y's account in the absence of circumstances forbidding it. Judgment for defendant. Error.

Paxson, J. 1. The verdict establishes the absence of circumstances to prevent the bank's applying the deposit to the notes at maturity. 2. If rights of third parties did not intervene the bank could waive the right to make such application, although a note thus made payable at a bank is equivalent to a check if the party liable has funds to his credit there. But since Y had the clear right to set off his deposit to meet the notes, the defendant, as surety, was entitled to avail himself of this right and to demand that the notes be charged against the maker. 3. The testimony as to the agreement between Y and the defendant and as to the custom of the banks should have been excluded as irrelevant, but its admission is not ground for reversal. Judgment affirmed.

Cited: 110 Pa. 195; 114 id. 79; 138 id. 479; 150 id. 637; 176 id. 518; 17 Supr. Ct. 426.

FIRST NAT. BANK v McMICHAEL (1884) 106 Pa. St. 460.

Assumpsit, on checks. The N Co. had arranged that when the defendant bank received a check drawn by it the bank should draw on it at sight for the amount. N Co. gave two checks to the plaintiff in February, postdated March 5 and 10. The plaintiff deposited them in P Bank, which sent them to defendant bank with instructions not to hold, but to return promptly, if not paid. The defendant received them on March 6, when N Co.'s balance exceeded the amount of the checks, but, being pressed for money, held them; and, having received instructions from the drawer on March 9 not to pay them, protested both checks on March 10. The court left it to the jury whether the check dated March 5, had been accepted by the bank, and charged that the other check, was not accepted and could not be recovered on. Judgment for plaintiff on the check of March 5. Error.

Green, J. 1. Certification of a check and charging it to the drawer are not the only modes of acceptance binding the bank to the holder. If a bank does not pay or accept a check, it is bound to refuse and has no right to keep it indefinitely. 2. The court was right in submitting, and the jury in finding, the fact of acceptance. Judgment affirmed.

Cited: 117 Pa. 101.

GUTHRIE v REID (1884) 107 Pa. St. 251.

Rule, to show cause why an entry of satisfaction be not stricken out, and a judgment for principal, interest and attorney's fee, entered upon a judgment note, be not opened. The application set up that the note was the last renewal of a series given by the defendant to the plaintiff for his accommodation and discounted at a usurious rate by a national bank, for the benefit of which the judgment had been entered, and that the attorney's fee allowed was excessive. Rule made absolute and an issue awarded to ascertain what was due the plaintiff on the judgment. The cashier of the bank testified that on discounting, \$2,900 was paid the plaintiff upon the first note of the series for \$3,000. The court charged, that if when the original note was discounted more than 6 per cent interest or discount was charged and included in the note to be paid at maturity no interest could be collected on the renewal note. The amount of the attorney's fee was left to the jury. Judgment reducing the amount of the judgment on the note. Error.

Paxson, J. 1. Where a national bank charges more than the legal rate of interest on the discount of a note, the interest bearing power of the note is destroyed and the taint of the usury clings to the note until paid, so that no interest can be recovered on it from anybody. 2. The question as to the amount of the attorney's fee should not have been left to the jury, but the error is not sufficient to cause reversal. Judgment affirmed.

MCGOUGH v JAMISON (1884) 107 Pa. St. 336.

Assumpsit, on certificate of deposit. Defenses, Statute of Limitations, and that the defendants, after issuing the certificate, discontinued their banking business, transferring their accounts to an incorporated savings bank. The certificate, dated April 29, 1876, was payable to the plaintiff's order on return of the certificate, with 5 per cent, if left six months. The defendants kept up no form of organization after February, 1877. This action was brought in September, 1882, no demand having been previously made. Rule to show cause why judgment should not be entered for want of a sufficient defense was made absolute, the court holding that, without the consent of the plaintiff, the defendants were not discharged, that the Statute of Limitations was no bar, and that the bringing of suit was sufficient demand. Error.

Per curiam. Since this instrument was not payable on demand merely, but on return of the certificate, the Statute of Limitations did not begin to run until an offer to return the certificate had been made. Judgment affirmed.

Cited: 113 Pa. 421.

HILL, ADM'R'X v NATION TRUST CO. (1884) 108 Pa. St. 1.

Assumpsit, on certified check. A check drawn on defendant was presented by a bona fide indorsee, and marked "Good" by the assistant teller, who, thinking the drawer had a sufficient balance to pay it, though he had not, added his signature. The plaintiff's intestate later took the check as indorsee for value without notice. Afterward defendants failed without having paid the check. The assistant teller had no express authority to certify checks, but, under a general authority from the cashier, had done so for several years, and checks certified by him had been paid by defendant. Officers of defendant had seen this check after certification and merely explained the delay in paying it. Nonsuit. Error.

Sterrett, J. 1. If there was any evidence in support of the plaintiff's claim, the nonsuit was improper. 2. Since the plaintiff's intestate was a bona fide holder, it was only necessary to show that the certification was made by an agent authorized to thus bind the bank. 3. The testimony was sufficient to carry the case to the jury on the question of the assistant teller's authority. Judgment reversed.

Cited: 131 Pa. 297; 137 id. 429; 138 id. 206; 143 id. 478; 153 id. 575; 154 id. 328; 1 Sup. Ct. 51.

FIRST NAT. BANK v HIGBEE (1885) 109 Pa. St. 130.

Assumpsit, on a deposit. The plaintiffs drew a draft on G, which was accepted, payable at the T Bank in 30 days. The draft was sent to the defendant bank for collection, and not being paid at maturity, was returned. G later left the money with the defendant, receiving a certificate of deposit for the amount "to pay Higbee draft." Before return of the draft to the defendant, G returned the certificate and drew out the money. When plaintiffs later presented the draft to defendant, payment was refused. The court refused to charge that G had a right to revoke his direction to pay the draft at any time before its payment. Judgment for plaintiff. Error.

Paxson, J. 1. Until the money was actually applied in payment of the draft, an order or direction on G's part to so apply it was in its nature revocable. 2. There was no equitable assignment of the fund. It was G's money, and the bank was bound to pay it out on his check. Judgment reversed.

MERCHANTS NAT. BANK v GOODMAN (1885) 109 Pa. St. 422.

Assumpsit. A check, drawn by R & Co on the M Bank, was deposited by the plaintiff with the defendant for collection, and by it transmitted to the M Bank for payment. The cashier of the M Bank mailed to the defendant a draft of the bank on a New York bank, which the defendant received November 24, and on the same day presented for payment. On November 26, the draft was returned by the New York bank on account of no funds. The defendant notified the plaintiff of the facts and wrote to the M Bank to return the check. The receiver wrote back that it could not be returned as it had been charged to the drawer's account and canceled. Judgment for plaintiff. Error.

Sterrett, J. 1. It was the defendant's duty to have forwarded the check to a correspondent or sub-agent with instructions to present it for payment, and if

payment were refused, to have had it protested and returned at once to the defendant. 2. No firm, bank, corporation or individual can be deemed a suitable agent, in contemplation of law, to enforce in behalf of another a claim against itself. Judgment affirmed.

Cited: 123 Pa. 218; 167 id. 261; 183 id. 525; 18 Sup. Ct. 437.

FIRST NAT. BANK v SHREINER (1885) 110 Pa. St. 188.

Assumpsit, against S and others, executors of Z, who had guaranteed a note "without protest." Plea, payment. The note was discounted by the bank. The guaranty was given to save the note from going to protest, and it was not protested. A day or two after maturity, S, an accommodation indorser, was informed that the note was not paid, and two weeks thereafter he signed a guaranty, additional to the former one, as follows: "I hereby guaranty the payment of all notes drawn by D & G and indorsed by me, now held by the First National Bank, either matured or to mature." D & G became insolvent. Judgment for defendants. Error.

Trunkey, J. 1. If the note was not protested in consequence of the guaranty of Z, and if the guaranty of S was given at the request of the cashier of the bank, as an additional guaranty after Z's, the plaintiff is entitled to recover. 2. Z guaranteed the note without protest, and by acceptance thereof, the implied agreement was that the indorsers should be released. 3. No notice was given to S such as continued his liability as indorser. 4. Only in the event that S should be found liable as indorser, was it the right of the bank to appropriate any part of his account to payment of the note. Judgment reversed.

Cited: 110 Pa. 198; 176 id. 518.

HUGHES v FIRST NAT. BANK (1885) 110 Pa. St. 428.

Assumpsit. Plaintiff, as guardian, sought to recover the value of certain United States bonds deposited with the defendant bank as a special deposit. The bonds were fraudulently pledged by the cashier for a debt of the bank. The court held the action barred by the Statute of Limitations. Judgment for defendant. Error.

Paxson, J. 1. The bonds were fraudulently pledged by the cashier for a debt of the bank and subsequently sold to pay its debts. 2. The bank cannot retain the fruits of the crime and repudiate the fraud of its agent. 3. The concealment of the fraud prevented the running of the statute. Judgment reversed.

Cited: 184 Pa. 102; 189 id. 378; 198 id. 178; 13 Sup. Ct. 513.

APPEAL OF LIGGETT CO. (1885) 111 Pa. St. 291.

Bill, to obtain possession of negotiable securities. The plaintiff, a limited partnership, made a division of its profits at the request of M, a member, and gave him its note for his share. He agreed to repay the amount of the note at its maturity, and pledged as collateral security four negotiable warehouse certificates previously pledged to the defendant, a national bank, to secure a loan, and still in its possession. The bank discounted the company note, keeping the proceeds to discharge M's prior indebtedness to it, and subsequently made M a further loan, retaining the certificates as general collateral for all his indebtedness, not knowing of the plaintiff's claim upon the certificates. At maturity, the plaintiff tendered to defendant the amount thereof and demanded the certificates, which were refused. Bill dismissed. Appeal.

Gordon, J. 1. The doctrine of bankers' lien is not law in this state; and so the pledge of negotiable securities for an antecedent debt, not being founded upon a present valuable consideration, is subject to equities between the pledgor and third parties. The plaintiff had no equity in these securities. 2. The plaintiff is forbidden by statute to loan its credit to its members, and since the giving of the note to M was a division of profits and so a mere assignment to M of the share belonging to him, there was no consideration for the promise to repay the amount. Decree affirmed.

PENN BANK v HOPKINS (1885) 111 Pa. St. 328.

Case, by a bank, to the use of an assignee for its creditors, against its directors for negligence. Plea: that two bills in equity had been previously filed by creditors of the bank for the same cause of action, in one of which the assignee was joined as

a party defendant. The bills were brought for the benefit of all creditors who might join. It was contended that, since the right of action was in the corporation or its assignee, a demand upon and refusal by it to proceed must have been made and alleged. Demurrer overruled and writ quashed. Error.

Paxson, J. 1. Since the cause of action is the same in all three suits, all cannot go to judgment. 2. The creditors of a corporation have the right to proceed by bill against its directors for mismanagement of its affairs. 3. The bill joining the assignee as defendant brings all necessary parties before the court. 4. Where the wrong complained of was perpetrated by the managers of the corporation themselves, the creditors may come immediately into court without asking the wrongdoers to sue themselves. 5. The informality of the plea is not fatal. Judgment affirmed.

HUMPHREY v COUNTY NAT. BANK (1886) 113 Pa. St. 417.

Assumpsit, on promissory notes, against the maker. Pleas, non-assumpsit, payment, and setoff. In 1866 plaintiff bank discounted the notes of the defendant, having previously received from him notes of a third person as collateral security for discounts. In 1876, the bank brought this action upon the last of a series of renewals of the defendant's original notes. The defendant claimed that the notes in suit were paid by the collateral, and asked to have the balance of the proceeds thereof certified in his favor. The plaintiff relied upon the Statute of Limitations, and the court charged that the statute would bar the recovery of a balance on the collateral by the defendant, but not the setoff against the notes in suit. Judgment for defendant. Error by defendant.

Paxson, J. 1. When a deposit is made in a bank the Statute of Limitations does not begin to run until after demand is made. 2. When these collateral notes were paid the bank should have credited the proceeds to the defendant as a depositor. If it did not, then it continued to hold the proceeds of the notes as a pledgee; and in neither case does the statute apply. Judgment reversed.

Cited: 153 Pa. 533.

LANCASTER CO. NAT. BANK v HUVER, ASSIGNEE (1886) 114 Pa. St. 216.

Where a note was discounted at a bank and credited to the account of the maker, who thereafter assigned, Held, 1, there was a failure of consideration for the discount; 2, that the assignee, having no equities superior to the assignor, could not recover against the bank.

FIRST NAT. BANK v BRENNERMAN'S EX'RS (1886) 114 Pa. St. 315.

Where a committee provided for by the Act of Congress of July 12, 1882, sec. 5, to appraise national bank shares of stockholders who do not assent to amendments of the articles of association, made a mistake in fixing the value, Held, that the committee had no judicial functions, they have no controversy, they render no judgment, their proceedings are not of record, they are mere appraisers.

HACKETT v REYNOLDS (1886) 114 Pa. St. 328.

Assumpsit. F gave his note to plaintiff, who indorsed it in blank and delivered it to the P Bank solely for the purpose of collection. The P Bank sent it to the defendants, its correspondents, for collection. That same day the P Bank failed and the defendants took the note to F after banking hours, and had F execute to them as payees a note for the same amount. The original note was not then due. The P Bank was indebted to the defendants and they contended that they had the right to deduct the proceeds of the note from that indebtedness. Judgment for defendants. Appeal.

Clark, J. The P Bank did not become the owner of the notes by the plaintiff's indorsement and delivery of it to them for collection, and they had no right to pledge it, or direct its proceeds to be placed to their credit in payment of their indebtedness to defendants. The defendants, not having incurred any liability or become placed in a worse condition than they would have been had they not received the note for collection and credit, clearly have no equity which entitled them to withhold the proceeds from the owners of the note. Judgment reversed.

Cited: 161 Pa. 261.

CAKE v POTTSVILLE BANK (1887) 116 Pa. St. 264.

Assumpsit, promissory note. W was indebted to the plaintiff on several promissory notes upon some of which the defendant appeared as indorser. The president of plaintiff called upon W for a settlement and had him execute three new notes for the sum of all the others, including some on which the defendant was not an indorser. Defendant indorsed all the notes. As a defense, defendant was not allowed to show by parol evidence that the plaintiff's president induced him to place his name there, declaring it was necessary to have an indorser upon the paper, but that he would not be held liable thereon. Judgment for plaintiff. Error.

Trunkey, J. 1. The defendant in his relation with the bank does not stand as if the bank were an innocent holder who discounted or purchased for value. Nor is he an accommodation indorser for the purpose of enabling the maker to obtain money on the notes. 2. Whatever the president did within the apparent scope of his authority is binding upon the bank which accepted and holds the security. 3. A written agreement may be modified, explained, reformed or set aside, by parol evidence of an oral promise or undertaking material to the subject matter of the contract, made by one of the parties at the time of the execution of the writing, and which induced the other party to put his name to it. Judgment reversed.

Cited: 174 Pa. 498.

FIRST NAT. BANK v SHOEMAKER (1887) 117 Pa. St. 94.

Assumpsit, on check. Plaintiff S drew a check on defendant bank payable to the plaintiff D. The bank held sufficient funds of S to pay the check, which was presented by D and payment refused. Thereupon D commenced this action against the bank. On the trial the record was amended, under objection, by making S a party plaintiff. Judgment for plaintiff. Appeal.

Green, J. 1. The holder of a bank check has no right of action on the check against the bank, although there may be funds of the drawer, sufficient to pay the check, in the hands of the bank at the time of presentment with no other appropriation of them made. 2. An ordinary bank check is neither legal tender nor an equitable assignment or appropriation of a corresponding amount of the drawer's funds in the hands of the drawee. 3. S's right of action to recover damages for the dishonor of his check, or specifically to recover his deposit, was entirely different from any right of action possessed by D either on the check or any other cause and hence the amendment could not be properly allowed. Judgment reversed.

Cited: 128 Pa. 191; 183 id. 352.

GERMAN NAT. BANK v FARMERS BANK (1888) 118 Pa. St. 294.

Assumpsit. The G Bank drew a check on defendant payable to P Bank, which was not a member of the clearing house and so delivered it to the plaintiff for collection. The defendant received the check from the clearing house the next day, placed it on file and made entry of it. That day the P Bank closed its doors and the drawer of the check, having a defense to the check against the P Bank, ordered payment stopped. The check was thereupon returned to plaintiff before one o'clock and the amount that had been paid through the clearing house, returned. The receiver of the P Bank called upon the plaintiff to pay the amount of the check. By the rules of the clearing house all checks on one bank are deducted each day from the amount of the checks deposited by that bank and the difference paid in cash. The banks by such rules have until one o'clock to correct any errors or mistakes in taking checks. Plaintiff claimed that there had been a payment of the check and an implied promise to reimburse. Judgment for plaintiff. Appeal.

Paxson, J. 1. The holder of a check has no remedy against a bank upon which the check is drawn, for its refusal to pay. 2. The regulations of the clearing house, as between it and its associate members, have the force of law. 3. In the face of the clearing house rule, the placing of a check on file, and even entering it, is not per se payment. It becomes so after one o'clock, if the check is not returned to the bank depositing it. Judgment reversed.

ALLEN v CARTER (1888) 119 Pa. St. 192.

Bill for injunction, to obtain possession of a firm's assets for the purpose of closing the business, and to enjoin interference. The complainant, a cashier in a

national bank, was a member of a firm engaged in manufacturing machinery. His application was resisted on the ground that the contract of partnership had been made in violation of sec. 64, par. 399, of the Penal Code of 1860, which prohibited "any cashier of any bank of this commonwealth from engaging in any business or occupation other than that of cashier." The National Banking Law contained no such provision. Bill granted. Appeal.

Paxson, J. The national banks are the creatures of another sovereignty, and cannot be regulated or interfered with by the state legislature. Decree affirmed.

HARVEY v GIRARD NAT. BANK (1888) 119 Pa. St. 212.

Case, for negligence in presenting a draft. Plaintiff's agent drew a draft upon him payable at sight, without grace, at the S Bank. The holder transmitted it to the defendant bank for collection. Defendant received it May 27. The distance between the S Bank and the defendant bank was three miles, and the time required for a messenger between them did not exceed thirty minutes. Before May 27 plaintiff had deposited money with the S Bank to pay the draft. During May 27 and May 28 the S Bank paid all demands made upon it. Defendant sent the draft to the S Bank by mail but it was received after that bank had suspended payment. Plaintiff paid the draft under protest, to preserve his credit. He contended that he was entitled to damages either originally or by subrogation to the holder. Judgment for defendant. Error.

Paxson, J. 1. As defendants were the holder's agents, their negligence would be his and the plaintiff could not be held liable upon the draft; he is therefore in the position of a volunteer, the protest and payment to preserve credit having no legal importance. 2. A voluntary payment of money under a claim of right cannot in general be recovered. Judgment affirmed.

Cited: 131 Pa. 107; 136 id. 78; 194 id. 53; 16 Sup. Ct. 169, 170.

CITIZENS NAT. BANK v ALEXANDER (1888) 120 Pa. St. 476.

Assumpsit, to recover deposits. The plaintiff made deposits with defendants in his own name as "deputy treasurer." M, the county treasurer, had overdrawn his account with defendants. They applied part of the money deposited by the plaintiff to extinguish the overdraft. Judgment for plaintiff. Error.

Paxson, J. 1. That the money was deposited by plaintiff as "deputy treasurer" did not ear-mark it as county money, for it might have been deposited by him as deputy treasurer of a building association. 2. Even if the money belonged to the county as a matter of fact, as between the bank and the depositor it was the money of the latter. Judgment affirmed.

Cited: 130 Pa. 430; 135 id. 505.

SHAMBURG v ABBOTT (1888) 121 Pa. St. 443.

Assumpsit, for money paid on stockholder's liability. Plaintiff was a stockholder in a joint stock banking company. He sold his stock in 1872, but gave no notice of the sale and his withdrawal. The company became insolvent, and plaintiff was compelled to pay liabilities of the company which were incurred after he sold his stock, to recover which he brought this action against stockholders who remained such to the time of failure. All the defendants pleaded Statute of Limitations and payment with leave; some, a discharge in bankruptcy; and one a composition under the laws of the state. Others showed releases from plaintiff, leaving but one who had not either a discharge in bankruptcy or plaintiff's release. Judgment for defendants. Error.

Paxson, J. 1. All the defendants, except one, were entitled to a verdict in their favor, by reason of releases from plaintiff or by their discharge in bankruptcy. 2. The jury found for the other one, under what appears proper instruction. Not having been furnished with the pleadings, we can judge of the issue only in a general way. Judgment affirmed.

FIFTH NAT. BANK v ASHWORTH (1888) 123 Pa. St. 212.

Money had and received. Plaintiff, payee, deposited a check for collection with defendant bank. Defendant sent it to the P Bank on which it was drawn, and received a cashier's check for the amount thereof. P Bank failed before paying it.

The maker of plaintiff's check paid plaintiff a sum after this which defendant bank contended should be set off against plaintiff's demand, but failed to request a specific instruction to that effect. Judgment for plaintiff. Error.

Paxson, J. 1. The defendant bank fixed its liability by surrendering the check to the drawee and accepting its cashier's check, which, as between defendant and the plaintiff, amounted to payment to the defendant. 2. The defendant cannot take advantage of the court's failure to give an instruction not specifically requested. Judgment affirmed.

Cited: 165 Pa. 147; 183 id. 522, 524; 18 Sup. Ct. 437.

FARMERS D. N. BANK v PENN BANK (1888) 123 Pa. St. 283.

Assumpsit, to recover a balance for the use of the plaintiff's assignee. The plaintiff had a balance in its favor, with the defendant; but the defendant held for collection a cashier's check of the plaintiff's for a larger amount. The plaintiff made an assignment for the benefit of creditors. The court charged that defendant was not entitled to set off the amount of the unpaid cashier's check. Judgment for plaintiff. Error.

Paxson, J. As no defense was set up against the check, and as the defendant became the lawful holder thereof before the assignment, the setoff should have been allowed. Judgment reversed.

ANDRIESSEN'S APPEAL (1888) 123 Pa. St. 303.

Bill, for rescission of contract and the recovery of money paid thereunder. Defendants were members of an unincorporated banking association that had no surplus fund, but paid dividends out of the moneys deposited. When the capital stock was increased, the complainants, induced by false representations, became purchasers thereof. The new association failed; the fraud was discovered; but the complainants delayed bringing their bill for five years. Bill dismissed. Appeal.

Sterrett, J. 1. A bill in equity is the proper form of action, as the remedy at law would be inadequate and would involve a multiplicity of suits. 2. But the complainants slept too long on their rights and thereby lost their remedy against the defendants. Decree affirmed.

ALLEN v FIRST NAT. BANK (1889) 127 Pa. St. 51.

Assumpsit, on note. The note was made by the defendant, payable at the plaintiff bank, to the order of B & C, and indorsed by them. B was cashier of plaintiff, which was carrying for B & C a larger quantity of oil certificates than the law allowed. B requested the defendant to become maker of the note, which was to be secured by 5,000 barrels of oil that the plaintiff was carrying for B & C, with express agreement that defendant should not be liable for the note. Defendant offered to prove that, as the agreement was entered into by the cashier and within the scope of his duty, the bank was bound by his promise; that the object of the note was to screen the plaintiff from violating the law; that there was want of consideration; and that plaintiff had made loans to the firms in excess of one-tenth of its capital. Objections. Sustained. Verdict directed. Judgment for plaintiff. Error.

Paxson, C. J. 1. The offers of evidence were properly rejected. 2. That the bank had discounted paper for the firm in excess of one-tenth of its capital was no defense to the note. Judgment affirmed.

KEARNEY v FIRST NAT. BANK (1889) 129 Pa. St. 577.

Assumpsit, for penalty for usury under act of Congress. Plaintiff borrowed from defendant bank several sums for which he gave his notes. On one of these notes he paid defendant interest at the rate of 9 per cent per year, and paid interest on renewal. The other notes, on which 9 per cent was also paid, were merged in judgments, and on the settlements of them, defendant allowed plaintiff a rebate for the interest charged in the renewal notes. Plaintiff contended that the renewal notes were payments of the originals. Defendant proved that they were but a promise to pay, and that the renewals were not accepted as payments. The court charged that the penalty could only be incurred by actual payment of the notes, and that the burden was on the plaintiff to prove that defendant agreed

to accept them as such; and that the judgments were a bar to recovery. Judgment for plaintiff for \$36. Appeal by plaintiff.

Per curiam. 1. The acceptance of the new notes in lieu of the old ones was not payment in law. 2. The burden of proof was on the plaintiff to show that the defendant did agree to accept the renewal as payment. 3. As the usury was included in the judgments, it cannot be recovered back. Judgment affirmed.

Cited: 175 Penn. 499.

PENN BANK v FARMERS D. N. BANK (1889) 130 Pa. St. 209.

Where a bank receives commercial paper, either as owner, or for collection, under an agreement that the same shall be returned if not paid and the credit canceled, and the maker becomes insolvent, the bank can set off the check in an action by the maker's assignee to recover the maker's balance on deposit.

PATTERSON v MARINE NAT. BANK (1889) 130 Pa. St. 419.

On deposit. The plaintiff opened an account with the defendant in the name of "T, Agent," and made several deposits and checks against it. There was nothing to show on the face of the deposit for whom he was agent. After the lapse of more than a year, he drew his check on the defendant for the whole amount of his balance, which they refused to pay. At the time of opening the account plaintiff represented the estate of P as trustee, and later resigned. The defendant paid the money to the heirs of P on their giving a bond of indemnity. Defendant offered evidence tending to show that the agreement between plaintiff and the heirs was that the money belonged to them, and that the sources of the deposits were rents from the estate. Plaintiff proved that part of the money was agency money, part trusteeship, and part his own private funds. Judgment for plaintiff. Appeal.

Paxson, C. J. 1. Public policy will not permit a bank that has received money from a depositor and credited him on its books, to allege that the deposit belongs to some one else. 2. A bank receives its customers' deposits on an implied contract to pay their checks on demand. 3. A bank's refusal to honor its depositors' checks entitles the depositors to recover substantial damages. Judgment affirmed.

Cited: 150 Pa. 564; 152 id. 487; 201 id. 300; 12 Sup. Ct. 295.

OIL WELL SUP. CO. v EXCHANGE NAT. BANK (1890) 131 Pa. 100.

Negligence. D & M drew their note on the C Bank payable to the plaintiffs. The plaintiffs, after indorsing it, sent it to their agent E, in New York, who indorsed it and gave it to a broker for sale. The latter sold it, and E deposited the proceeds in a bank in New York, to the credit of the plaintiff. The note was discounted by the B Bank, New York, which sent it to the defendant for collection. On its receipt, a memorandum was made on the note by one of defendant's clerks, making it due one month later than its due date. When presented, the bank had failed and it was dishonored, and the defendant's cashier wrote to the cashier of the B Bank "owing to error of our clerk note was not presented till to-day and dishonored, the makers were notified, and they say arrangements with indorsers have been made for its renewal. If you can arrange it without loss to yourself, do so, if not send it back and we will credit your account for same." Without inquiry E paid the note and plaintiff paid E. Defendant contended that it was discharged from liability. Judgment for defendant. Appeal.

Green, J. 1. The failure to present the note for one month after maturity discharged the indorsers of all liability. 2. The payment was voluntary and could give them no right of action against the defendant. 3. It was the duty of E, either as agent of the plaintiff or indorsers, to inquire as to the truth of the facts suggested in the letter before making payment. 4. The memorandum was a mere statement that they had been advised that an arrangement for renewal had been made. 5. Such statement could not possibly deceive, since it asserted nothing as a fact except the advice. Judgment affirmed.

MAGINN v DOLLAR SAV. BANK (1890) 131 Pa. St. 362.

Assumpsit, on check. Plaintiff was payee of a check drawn on defendant for the full amount of the maker's deposit, \$631. The maker stopped payment before it was presented. There was some testimony that defendant had agreed orally to honor the check. A statute provided that no person should be charged as acceptor

on an instrument for the payment of money exceeding \$20, unless his acceptance was in writing. Judgment of nonsuit. Appeal.

Per curiam. 1. The holder of a check cannot maintain an action in his own name against the drawee if the latter refuse to accept the check. 2. Even if the check for the entire deposit be regarded as an equitable assignment, plaintiff cannot sue in his own name. 3. As this is an instrument for the payment of over \$20, and there was no written acceptance, the statute is a bar to recovery. Judgment affirmed.

Cited: 159 Pa. 611; 161 id. 200; 1 Sup. Ct. 148.

CHRISTY v SILL (1890) 131 Pa. St. 492.

Insolvency proceedings. The P Bank was a joint stock company, a partnership under Pennsylvania Laws. It became insolvent, the receiver sold the partnership property and an auditor was appointed to distribute the fund. The present controversy arose over the auditor's failure to allow G and B to share pro rata with other claimants. The articles of association provided for the transfer of stock by members not indebted to the bank. Art. 27 provided that all stockholders were individually bound to make good to all depositors the amounts of their deposits. G was trustee for certain former stockholders who had bought up claims on deposits against the P Bank. All of these claims except the one assigned by C had been reduced to judgment, and were for deposits made prior to the last transfer of stock. That of C was in suit and pending before a referee. B's claim also was based on judgments for indebtedness incurred by the P Bank prior to the last transfer of stock. The auditor refused to consider the claim assigned by C on the ground that he was deprived of jurisdiction by the pending reference; and to allow the other claims, on the ground that each transfer of stock dissolved the old and created a new partnership, in whose assets only creditors of the new firm were entitled to share. G and B contended that under the partnership articles, the firm was not dissolved by a transfer of stock, and the incoming partner became liable for its debts and former stockholders were in the position of sureties. Decree affirming auditor's report. Appeal by G and B.

McCollum, J. 1. An incoming partner is not liable for debts contracted by the firm before he entered it, unless made so by his contract with the retiring partner. 2. Mere continuance of the business without separation of past from future liabilities and profits, or payment of interest on antecedent debts, will not render the purchaser of stock in an unincorporated bank liable for its antecedent debts, or charge him with an assumption of them. 3. Art. 27 refers only to deposits made while the stockholder is a member. 4. The reference of a suit deprives the court of all power over it while the agreement to refer is in force, and what the court may not do directly, it cannot authorize its auditor to do. Decree affirmed.

Cited: 131 Pa. 508; 153 id. 95; 159 id. 174; 168 id. 335; 2 Sup. Ct. 623, 627, 628, 640, 642, 645; 5 id. 652; 10 id. 345.

HAZLETT v COMMERCIAL NAT. BANK (1890) 132 Pa. St. 118.

Assumpsit. Plaintiff drew his check on P Bank of Pittsburgh and deposited it for credit with defendant in Philadelphia. Defendant credited it as cash, sent it directly to P Bank and received P Bank's draft on N Bank in exchange. P Bank suspended on May 21. Defendant received its draft on May 22, and presented it to N Bank, which refused payment. Defendant thereupon telegraphed plaintiff that it had received P Bank's draft, which it held subject to plaintiff's orders. Plaintiff replied that P Bank was all right, and the draft would be paid in a day or two; and instructed defendant to hold it for a few days, and return it to him if not paid. Defendant presented the draft several times to N Bank, but it remained unpaid and was charged back to plaintiff. P Bank reopened on May 24, and closed again on May 26; during this period all checks presented were paid. Judgment for defendant. Appeal.

Paxson, C. J. 1. By the deposit of the check, defendant became plaintiff's agent for collection; the credit given was, according to custom, conditional upon collection. 2. Though sending the check direct to the drawee, and accepting a draft instead of cash in payment, was such negligence as would charge defendant with the loss, plaintiff's instructions given with knowledge of the facts amounted to ratification of defendant's acts. Judgment affirmed.

Cited: 183 Pa. 526.

SIEGER v SECOND NAT. BANK (1890) 132 Pa. St. 307.

Assumpsit. Defendant discounted for plaintiff a note indorsed by plaintiff, payable at another bank, upon plaintiff's agreement to pay the note if dishonored. The note was dishonored but plaintiff was not notified. Defendant charged the amount against his account. Plaintiff offered to prove that the maker had sufficient funds on deposit with defendant to pay the note at several times between its maturity and the time when it was charged to plaintiff. Refused. Judgment for defendant. Appeal.

Per curiam. 1. Plaintiff's liability, instead of being conditional as an indorser, became absolute by virtue of his agreement, and notice of dishonor was not necessary. 2. As the note was not payable at defendant bank, it could not be considered as drawn on the maker's deposit there. Judgment affirmed.

HEMPBILL v YERKES (1890) 132 Pa. St. 545.

To determine ownership of deposit. Case stated. M, as master in chancery, deposited with the C Bank, defendant Y's share of the proceeds of a partition sale. He gave a check to Y for the whole of this deposit, accepting a release in exchange. Y had previously agreed, for value, with defendant J, to give J the money represented by the account; and, in pursuance of such agreement, indorsed and delivered the check to J. Thereafter but before presentation of the check, plaintiffs as creditors of Y served C Bank with an attachment. Judgment for plaintiffs. Appeal.

Paxson, C. J. As the check was drawn against the whole of a specific fund which in equity belonged to the payee, it passed the legal title to the fund. 2. The parol assignment of the fund to J was consummated as soon as the check came into Y's hands; and the legal title passed by indorsement and delivery of the check to J. 3. The attaching creditor succeeds only to the rights of the debtor. Judgment reversed.

Cited: 154 Pa. 187.

DREISBACH v PRICE (1890) 133 Pa. St. 560.

To enforce stockholder's liability. The act incorporating the M Bank (not a bank of issue) declared that the stockholders should be individually responsible in double the amount of their stock. Plaintiff, as assignee of the M Bank, averred its insolvency and the necessity of an assessment. Demurrer on the ground that plaintiff had an adequate remedy at law under the Act of 1850. Two married women, codefendants, claimed they were not liable. Overruled. Decree for plaintiff. Appeal.

Per curiam. 1. Since the Act of 1806, a statutory remedy when given must be pursued; but the Act of 1850 applies only to banks of issue, and affords no remedy to plaintiff. 2. A stockholder is not only liable to the corporation for any unpaid balance, independent of the statute, but liable in addition, under the statute, to the creditors in double the amount of his stock. 3. A married woman takes the shares of such a corporation cum onere, as the liability is not contractual, but created by statute. Decree affirmed.

WILLIAMS v DORRIER (1890) 135 Pa. St. 445.

Foreign attachment in debt. Defendant had a deposit with C Bank, a partnership, of which B, the cashier, was a member. As a payment on his personal debt, B notified defendant by letter signed "B, cashier" that he had placed \$1,000 to his credit. Later B wrote defendant a similar letter. B credited the first \$1,000 on the bank's books, but not the second \$1,000. Defendant checked against both amounts, and his passbook was settled showing credits of \$2,000. Plaintiff, as receiver, took charge of the bank. The court charged that payment of B's personal indebtedness by giving defendant credit in the bank book without a corresponding charge against the cashier, was beyond the scope of B's powers as cashier or partner and did not bind the bank; but by the entry on its books to the credit of defendant, the bank was estopped from setting up want of authority as to the first \$1,000; it was not so estopped as to the second \$1,000, since nothing appeared in the books of the bank to indicate it was not an overdraft. Judgment for plaintiff accordingly. Appeal.

Per curiam. There is nothing in this record that requires a reversal. Judgment affirmed.

RAPP v NATIONAL SECURITY BANK (1890) 136 Pa. St. 426.

Assumpsit. Plaintiff deposited with defendant in Philadelphia, for collection, a check drawn on a New York bank, given him by S, a stranger. Defendant's cashier suggested that the check might be raised, not because of its appearance, but from the nature of the transaction between plaintiff and S. Plaintiff did not leave his bank book with him at the time, but two days later presented it and the amount was credited therein as cash. The check had been raised, but so skillfully as to avoid detection, and was paid by the drawee. Upon discovery of the forgery some time later, defendant reimbursed the drawee and charged the amount to plaintiff. Judgment for defendant. Appeal.

Paxson, C. J. 1. Defendant assented to and was chargeable with no duty except that of forwarding the check for collection in the usual manner. 2. As the check was returned as soon as the fraud was discovered, each bank or person who had received money thereon was bound to restore it. 3. When a bank credits a depositor with the amount of a check left for collection it may be charged back to him if worthless. Judgment affirmed.

IRON CITY NAT. BANK v McCORD (1890) 139 Pa. St. 52.

Assumpsit, on check, against drawer. Plaintiff discounted the check for the payee, a contractor, who procured it from the defendant in payment of the balance due him on certain buildings. He falsely represented to defendant that all material men had been paid. Defendant paid the amount of liens filed by unpaid material men and stopped payments on the check. The check was drawn on a savings bank, payable nine weeks from date. It was drawn on a printed form stating that the money would be paid only on production of the passbook and notice ticket. Judgment for plaintiff for full amount less the amount of the liens. Appeal by plaintiff.

Sterrett, J. 1. Anything written or printed on a negotiable instrument prior to its issuance, relating to the subject matter and tending to restrict or qualify it, is part of the contract; and if the instrument is thereby made conditional or subject to any contingency, its negotiability is destroyed. 2. As this order on its face was restricted and qualified by certain requirements, it was not negotiable; plaintiff, therefore, is in no better position than the payee. Judgment affirmed.

Cited: 148 Pa. 286; 171 id. 620.

GERMAN NAT. BANK v FOREMAN (1890) 138 Pa. St. 474.

Assumpsit, on note, against indorser. S made a promissory note payable at plaintiff, which was discounted by plaintiff. S notified plaintiff not to charge the note against his account at maturity, and gave plaintiff a bond of indemnity in case it failed to recover against defendant. At maturity, S had a general deposit with plaintiff more than sufficient to meet the note. Plaintiff did not charge the note against S's deposit. Judgment for plaintiff. Appeal.

Paxson, C. J. It was the duty of plaintiff to charge the note against the deposit, since it was not a special deposit; and by its failure to do so the indorser is discharged. Judgment reversed.

Cited: 150 Pa. 637; 176 id. 518; 18 Sup. Ct. 619.

NATIONAL STATE BANK v WEIL (1891) 141 Pa. St. 457.

Assumpsit, on check. The affidavit of defense stated that defendant drew a check on the S Bank, in which he had funds. The check, indorsed by payee to plaintiff, was presented for payment three days after it was drawn. The S Bank was then insolvent. All parties were residents of the city in which the S Bank was located. Rule to show cause why judgment should not be entered for want of a sufficient affidavit of defense. The court held that a check on a bank where all the parties are residents of the same city must be presented on the day upon which it bears date or on the next day, and if not, the risk of the solvency of the drawee is upon the payee. Rule discharged. Appeal.

Per curiam. The judge below has fully covered the case. Judgment affirmed.
Cited: 171 Pa. 72.

BARNDOLLAR v DuBOIS (1891) 142 Pa. St. 565.

To adjust partners' liability. A private bank purchased stock from withdrawing partners. M, one of defendants, bought and paid for some of this stock, at the time the bank was insolvent and the capital of the other partners exhausted. Subsequently the bank suspended. M contended that he should be allowed, as against the other partners, a credit for the sum which he paid for the shares. The master disallowed his claim. Decree confirming master's report. Appeal by M.

Per curiam. 1. By purchasing shares M did not put any money into the concern; the purchase money went to the vendor of the shares and the capital was not thereby increased. 2. The fact that the bank was the owner of the shares does not alter the case, as they were purchased from withdrawing stockholders, and there was no increase of shares or capital. Decree affirmed.

SHACKAMAXON BANK v YARD (1891) 143 Pa. St. 129.

Debt on bond, against executors of surety. The bond was conditioned for the faithful performance by plaintiff's cashier of his duties during the time of his employment, whether under his present or any subsequent election, or whether under the present or any amended or altered charter. The cashier, elected but once, and then for a term of one year, was held out by the bank as cashier and received the benefits of his office after his term expired. The default took place after the surety's death, and several years after the execution of the bond. Judgment for defendants. Appeal.

Williams, J. 1. The purpose to make the bond a continuing liability was lawful and sufficiently expressed; and the bond was in force so long as the principal was employed as cashier. 2. So far as liability on the bond is concerned, continuous service, beginning in a formal election and extended by mutual consent, is enough. Judgment reversed.

Cited: 150 Pa. 355; 178 id. 168; 7 Sup. Ct. 74.

HALLSTEAD v COLEMAN (1891) 143 Pa. St. 352.

Assumpsit, to recover a deposit. The action was against defendants as partners in a savings bank which failed. There was no evidence offered to prove it was a partnership, but there was evidence that the bank had a president, cashier and other officers; the certificates of stock contained the statement that the bank had been organized, but bore no corporate seal. The court charged that the burden was on defendants to show that the bank was incorporated or that it was a limited partnership; and that there was no evidence that the bank had been incorporated. Judgment for plaintiff. Appeal.

Williams, J. 1. The burden of proving that the bank was a partnership, was on plaintiff. 2. The evidence tended to show an incorporation of the bank. Judgment reversed.

Cited: 157 Pa. 68.

ESTATE OF LAW (1891) 144 Pa. St. 499.

On guardian's account. The guardian put his ward's money in Bank of A, a savings institution in good standing. The deposit was in his name as guardian, and could be withdrawn on two weeks' notice. It was understood that the money was temporarily there, awaiting an investment, and Bank of A was to pay interest thereon. The bank failed. The guardian claimed a credit for the amount deposited. Decree charging the guardian with the amount. Appeal.

Clark, J. 1. A guardian depositing his ward's assets temporarily in a bank, in the name of the trust estate, is not liable if the bank fail, if he has suffered them to remain there only for a reasonable time. 2. Though a guardian cannot invest his ward's funds on mere personal security, a deposit for safe-keeping with a bank for no fixed period, though interest is paid, is not such an investment. 3. The stipulation as to notice of withdrawal is customary with savings banks, and the reasonableness of the time is a question for the court. Decree reversed.

Cited: 160 Pa. 16; 7 Sup. Ct. 144.

FARMERS NAT. BANK v BRADEN (1891) 145 Pa. St. 473.

Petition, to open a judgment. Petitioning defendants S and P were sureties on a judgment note given by B, an officer of plaintiff. Plaintiff entered judgment

on the note. Defendants contended that at the time the note was given, B had overdrawn his account with plaintiff, that he and plaintiff, conspiring to get notes from responsible parties to make up the overdraft, took the note in question; and that the bank concealed B's overdraft from defendants. The note was discounted in the usual course of business, and put to B's credit. Plaintiff had no reason to expect a loss by B, and the allegation of conspiracy was not supported. Decree, discharging rule to show cause why the judgment should not be opened. Appeal by defendants.

Per curiam. 1. The bank was not required to disclose its financial condition or that of its officers or customers. Decree affirmed.

Cited: 145 Pa. 478; 195 id. 450.

SWENTZEL v PENN BANK (1892) 147 Pa. St. 140.

Bill, by assignee of a bank to charge directors for its failure. The directors had not examined the books of the bank, but relied on the weekly reports of the president and cashier, who had misappropriated the funds and falsified the accounts for a long period of time. The misappropriation would have been discovered only by an examination of the individual ledger which, according to the rules of the bank and of most banks, was not open to inspection by directors. The directors had no knowledge or suspicion that anything was wrong, and were not guilty of fraud. B, one of the directors, after he learned of the insolvency of the bank, withdrew his deposit, claiming it belonged to his firm. Decree for defendants, except as to B. Appeals.

Paxson, J. 1. Directors who are gratuitous mandatories are liable only for fraud or for such gross negligence as amounts to fraud. The facts do not support a charge of gross negligence. 2. The withdrawal of the money by B, even if regarded as the act of his firm, was upon information of the bank's insolvency obtained by him in his confidential capacity as director; a preference could not lawfully be obtained in that way. Decree affirmed.

Cited: 154 Pa. 304.

GOLDBECK v KENSINGTON NAT. BANK (1892) 147 Pa. St. 267.

Bill to rescind contract. Plaintiff C, being indebted to defendant on a note on which plaintiffs J and H were indorsers, confessed judgment in favor of J and H. Judgment was entered to the use of defendant and became a lien on C's property. The property was sold on execution and bought in by defendant at a nominal sum, who sold it for a large amount. Defendant's president had agreed with plaintiffs as part of the original transaction, and transfer of judgment, to give them credit for \$27,000, regardless of the sale price, and plaintiffs agreed to put in no bid and allow defendant to purchase at a nominal figure. Plaintiffs claimed to be entitled to a credit of \$27,000, and C and J claimed that a payment by H on the note should be credited to all the plaintiffs. The release given H at the time of said payment to which C and J were parties expressly stated that C and J were not thereby released from liability. Defendant contended that the agreement as to the \$27,000 credit was void under the Statute of Frauds, made without authority, and not supported by consideration. The master's report credited plaintiffs with \$27,000, sustained the contention of C and J as to H's payment, and found that defendant had been overpaid. Decree confirming report affirmed on the following grounds: 1, as the agreement was part of the original transaction and transfer of the judgment, there was sufficient consideration therefor; and, as the subject-matter was the judgment and not the real estate, the Statute of Frauds does not apply; 2, defendant's acts in purchasing the realty and selling it amounted to a ratification of the terms on which the judgment was transferred, and it cannot now question the authority of its officers; 3, the purpose of the reservation in the release to H was to preserve the liability of C and J for any balance due and not to require them to pay the debt a second time. Appeal.

Per curiam. Decree affirmed on opinion of the court below.

COLUMBIAN BANK'S ESTATE (1892) 147 Pa. St. 422.

To distribute assets of an insolvent bank. S threatened to sell his stock in C Bank. To prevent a public sale, the president of the bank induced him to sell his stock for the bank's certificates of deposit. No buyer was named, S signing a blank transfer. The bank was insolvent at the time. The stock was subsequently

transferred to the cashier of the bank for his worthless note. M, another director, sold his stock under similar circumstances. The president of the bank was also one of three executors authorized to invest estate moneys in securities approved by two of them. With the consent of one coexecutor he purchased stock of the bank and later, after its insolvency, sold the stock as S's was sold. Similar payment was made to X, the third executor, who was also the beneficiary, and who had no knowledge of the transaction. X claimed that the stock was bought with money formerly deposited to the credit of the estate and that the investment being unauthorized, the estate should be regarded as a depositor. The bank thereafter suspended payment. S, M, and X contended they should be allowed to prove their unpaid obligations given by the bank, and share in the bank's assets. Decrees denying S, M, and X the right to prove their claims. Appeal.

McCollum, J. 1. S and M were chargeable with knowledge that the bank was insolvent; and purchase by an insolvent bank of its own stock was invalid as against creditors, and the seller's right to the assets, as against creditors, was no greater than a shareholder's. 2. The investment, being assented to by two executors, was authorized; and the estate has only the rights of a shareholder. Decree affirmed.

WILKES-BARRE D. & S. BANK v CITY (1892) 148 Pa. St. 601.

To determine tax liability. Case stated. Plaintiff was a savings bank, holding interest-bearing city bonds issued by defendant. Plaintiff elected to pay, and did pay, into the state treasury, a tax on the par value of all its issued or subscribed stock. Defendant refused to pay the interest on the bonds, without deducting a state tax imposed by the Act of June 1, 1889. That act provided that the holders of bonds issued by public corporations should not include them in the return to the assessor, but that the tax should be collected by deducting the amount from the interest; that banks were taxable owners; and that all public loans were taxable; that where a savings bank elected to pay into the state treasury a certain sum, its shares, capital and profits, not invested in real estate, were exempt from "local taxation." Judgment for plaintiff for the interest due, less the tax claimed by defendant on the following grounds: 1, city bonds held by a savings bank are taxable under the Act of 1889; 2, the exemption secured by the payment to the state treasury is from local taxation only, and not from general state taxation; the term "local taxation" is not used to distinguish state from federal taxation, but in its more restricted sense. Appeal by plaintiff.

Per curiam. Judgment affirmed on opinion of the court below.

SHACKAMAXON BANK v YARD (1892) 150 Pa. St. 351.

On bond, against executor of surety. The bond was conditioned for the faithful performance by plaintiff's cashier of his duties, so long as he remained cashier. It expressly bound the surety's "heirs, executors, and administrators." Without the surety's consent, plaintiff permitted the cashier to assume the duties of book-keeper as well as those of cashier. Thereafter, and as cashier, he embezzled funds. The embezzlement was subsequent to the surety's death. Defendant contended that there was a permanent material alteration in the cashier's duty without the consent of the surety, which relieved the surety; and that the liability of the surety terminated with his death. Judgment for plaintiff. Appeal.

Williams, J. 1. To relieve the surety, the duties of the new office must be such as to interfere with or modify the old. 2. The bond expressly bound the surety's estate, and as the liability was expressly to continue during the cashier's term of employment, the surety's death did not terminate it. Judgment affirmed.

Cited: 197 Pa. 190.

MECHANICS AND TRADERS BANK v SEITZ (1892) 150 Pa. St. 632.

Assumpsit. Defendants gave their note in part payment for a debt, payable at plaintiff bank. The payee transferred it to H, who discounted it at the plaintiff, which placed the proceeds to his credit. At maturity, it was protested and returned to plaintiff, whose clerk charged it to the account of H. The cashier, on learning of the fact, directed the clerk to correct his act, and to credit the H account with the amount, so as to leave it as before. At the time H had enough funds in the bank to pay the check. Defendants contended that plaintiff was bound

to pay itself out of H's account, and that the clerk's act amounted to payment of the note. Judgment for defendants. Appeal.

Williams, J. 1. A bank may appropriate funds in its hands belonging to any previous party to the note in payment of it, but it is not bound to do so; except in so far as it is bound to protect indorsers by paying out of the makers' funds in its possession. 2. The charge by the clerk being unauthorized, did not amount to payment. Judgment reversed.

Cited: 176 Pa. 518; 6 Sup. Ct. 514; 9 id. 628.

OIL CITY v OIL CITY TRUST CO. (1892) 151 Pa. St. 454.

Assumpsit, for license tax, against state banks. Defendant was taxed for the years from 1886 to 1890, by plaintiff, a city of the third class. Defendant had paid a state tax on its capital stock. Act of 1874 provided that cities of the third class might levy a license tax on banks, and regulate the same by ordinance. A city ordinance of 1885, provided that banks should pay an annual license tax. Act of June 30, 1885, provided that as to any bank electing to pay into the state treasury, a tax upon the par value of all its shares, the shares and so much of the capital as was not invested in real estate should be exempt from all other taxation under laws of the commonwealth. Act of 1874 was suspended by Act of May 23, 1889, which provided that a license tax should be levied only for "general revenue purposes." Act of June 1, 1889, changed the exemption of corporations which paid the state tax from exemption from "taxation under the laws of this commonwealth" to exemption from "local taxation." The court held that the license tax was a mere fee levied under exercise of the police power, and not taxation within the meaning of the exemption. Judgment for plaintiff. Appeal.

Mitchell, J. 1. What business or occupations so far affect the public welfare and good order as to require to be licensed under police regulations is a matter of legislative consideration and control, which, when exercised in good faith are outside the jurisdiction of the court; and the license authorized by the Act of 1874 was properly an exercise of police power, and not a tax for general revenue purposes. 2. The word taxation in the Acts of 1885 and of May 23, 1889, is used in its ordinary and proper meaning of a charge for the support of the state or some of its subordinate municipal agencies, and does not refer to a charge merely incidental to the exercise of the police power; and the exemption from taxation does not include exemption from license fees under the police power. 3. As banks are only subject to license tax by municipalities by virtue of express legislative authority, and as only authority in cities of the third class since 1889, is to license as a tax for "general revenue purposes," since 1889 plaintiff had no power to require payment of a license fee under its police power and defendant was exempt from the license tax as a tax for general revenue. Judgment reversed, and judgment entered for plaintiff for years 1886, 1887, and 1888.

Cited: 172 Pa. 179; 195 id. 635; 1 Sup. Ct. 581; 10 id. 508; 16 id. 496.

PENN BANK'S ESTATE: WALTER'S APPEAL (1892) 152 Pa. St. 65.

To distribute funds of assigned estate. Claim by W, depositor. W's account with P Bank was balanced in May, 1884, and the book was returned to him. It showed a balance due the bank. Among the items charged, was a check for \$43,225. P Bank failed about this time, and the assignee made an account in 1885, and the fund collected by him was distributed. In 1890 the assignee filed a second account and an auditor was appointed to make distribution. In 1891 W appeared claiming to be a creditor for a large sum on the ground that the check of \$43,225, was improperly charged. The auditor reported that W's claim was improper on the merits and was barred by the Statute of Limitations. Decree confirming auditor's report. Appeal.

Williams, J. As the bank stated W's account and delivered it to him, and for more than six years he has acquiesced in its correctness, his right of action even if good in 1884 is now lost by lapse of time. Decree affirmed.

Cited: 181 Pa. 190; 188 id. 360.

OSBORN v FIRST NAT. BANK (1893) 154 Pa. St. 134.

Assumpsit, under Act of Congress of June 3, 1864, to recover double the amount of usurious interest, paid to a national bank. Defendant refused to file an affidavit of defense, claiming that the suit was for a penalty. Plaintiff con-

tended that the affidavit was necessary under the Act of 1887, P. L. 271, even in an action for a penalty. The Act of 1887 abolished the distinction between the different forms of action ex contractu and directed that assumpsit be brought for all demands theretofore recoverable in debt, assumpsit or covenant; and provided further that judgment could be taken for want of an affidavit of defense "in accordance with the present practice in debt or assumpsit." Plaintiff moved for judgment for want of the affidavit. Rule discharged. Appeal.

Green, J. 1. The sums sought to be recovered are penalties. 2. The former action, debt for a penalty, was not an action ex contractu like all other actions of debt, but was in its nature ex delicto, and the act did not abolish the distinction between actions ex contractu and ex delicto. 3. As it was never the practice prior to the act, to enter judgment in debt for a penalty for lack of an affidavit of defense, no affidavit is now required to prevent judgment. In an action to recover penalties, defendant cannot be required to give evidence against himself. Judgment affirmed.

Cited: 175 Pa. 498; 194 id. 519; 6 Sup. Ct. 276; 10 id. 238.

ROSENTHAL v EHRLICHER (1893) 154 Pa. St. 396.

Assumpsit, on check. Defendants drew their check to plaintiff's order on S Bank, and delivered it to plaintiff's agent in defendant's place of business, at Philadelphia, on the 5th. He delivered it to plaintiff in New York after banking hours on the same day. Plaintiff on the 6th deposited the check for collection; it was sent to Philadelphia on the 7th and presented about noon of the 8th; but S Bank had already failed, and it was not paid. Defendant contended that plaintiff had not used due diligence. Verdict directed. Judgment for plaintiff. Appeal.

Williams, J. The dates show the exercise of due diligence in the use, transmission and presentment of the check. Judgment affirmed.

Cited: 154 Pa. 586; 160 id. 122; 161 id. 326; 171 id. 72; 180 id. 163; 186 id. 495; 2 Sup. Ct. 400, 597; 6 id. 234, 508.

KERR v BANK OF McKEESPORT (1893) 158 Pa. St. 305.

Assumpsit for deposit. Plaintiff gave money at various times to his brother V to deposit for him in a bank. V deposited the moneys with defendant and received a passbook. Defendant indorsed the book on the back "in account with" plaintiff. The account on the inside of the book was opened: "in account with" plaintiff "by V." Each deposit was made by V, who kept possession of the book. V, without authority from plaintiff, drew out the whole amount. Subsequently plaintiff obtained possession of the passbook, presented it to defendant, and demanded his money, which was refused. The court refused to charge that if plaintiff placed his money in the hands of V to deposit in some bank, and V did deposit the money with defendant in the name of plaintiff, and under an arrangement with the bank that he should draw the money, and the bank had no knowledge of plaintiff, and the money was withdrawn by V under an arrangement made by the depositor V, then the verdict should be for defendant. Judgment for plaintiff. Error.

Dean, J. 1. The bank knew it was plaintiff's money and V had no more right because he carried it there to check it out without authority from plaintiff than one who had no connection with the matter. 2. The addition of the words "by V" was a statement only by whom the money was handed to the bank, and is without other significance. Judgment affirmed.

Cited: 201 Pa. 301.

IRON CITY BANK v FORT PITT BANK (1893) 159 Pa. St. 46.

Assumpsit, to recover money paid on a forged check. Defendant presented a check on plaintiff, purporting to be signed by D, which was paid by plaintiff and no further notice taken of the transaction for five days, when inquiry was made by defendant as to the check, and investigation disclosed that it was forged. Plaintiff then demanded repayment by defendant. Plaintiff claimed the right to recover under Act of 1849, P. L. 426, providing for the recovery of money paid on forged signatures, whether of drawers, acceptors, or indorsers. Judgment for plaintiff. Appeal.

Mitchell, J. Under Act of 1849, mere acceptance of payment of forged paper is no longer of itself a bar to the recovery of the money by the party paying,

even though it be a bank or other drawee; nor is such party absolutely bound, as at common law, to discover and give notice on the very day of payment. All that is needed is to give notice promptly according to the circumstances and usages of the business. But the statute does not dispense with the necessity of care and diligence on the part of the payer, and the facts of this case show negligence. Judgment reversed.

Cited: 196 Pa. 235.

GRANBY M & S CO. v LAVERTY (1893) 159 Pa. St. 287.

Assumpsit and attachment execution. Defendant were partners. They opened an account with F Bank, garnishee. There was an agreement between the partners that both should sign all checks of the firm, and this agreement was communicated to F Bank. Until a few months before dissolution of the partnership, all checks were so signed. During the last months of the partnership, a number of checks, signed by only one of the partners, were paid by the bank and charged to the partnership. They were drawn without the knowledge of the other partner and repudiated by him. Plaintiff contended that if the checks so signed were not paid for partnership purposes, the bank was liable as garnishee for the amount. The referee held that the application of the proceeds of the checks was not material in the present controversy, and found that the bank was not chargeable as garnishee. Judgment for garnishee. Appeal.

Williams, J. 1. If, as between the bank and the partnership, the payment of these checks was unauthorized, the bank is not entitled to a credit for them. 2. Checks drawn in violation of the partnership agreement of which the bank had knowledge were paid by the bank at the risk of their being for partnership purposes, and unless so applied, the bank is not entitled to credit for them as against the partnership account. Judgment reversed.

NATIONAL STATE BANK v LINDEMAN (1894) 161 Pa. St. 199.

Where the president of a bank verbally promised that a check for over \$20 would be paid if the holder would retain it a few days, the bank was not bound by such a promise under the Act of May 18, 1881, P. L. 17, which provides that an acceptance for an amount exceeding \$20 to be valid, must be in writing.

COMMONWEALTH v ROCKAFELLOW (1894) 163 Pa. St. 139.

Indictment, against banker, for fraudulently receiving money on deposit. The Act of May 9, 1889, P. L. 145, provides that any banker who shall receive money from a depositor, with knowledge that he, the banker, is then insolvent, shall be guilty of embezzlement. The indictment charged that defendant, being a banker and knowing that he was insolvent, received money from a depositor. Defendant convicted. Motion in arrest of judgment, on the ground that the indictment did not charge the offense embezzlement, in that it did not state that the money was unlawfully appropriated by defendant to his own use. Motion overruled. Appeal.

Fell, J. The indictment follows the language of the act and is in substantial compliance with the rules of criminal pleadings. The offense clearly and distinctly defined is the fraudulent receipt of the money of a depositor. The act is not to be nullified because this is called "embezzlement," and by a construction which reads into its provisions the definition of that offense. The word was not well chosen, but the intention is clear. Judgment affirmed.

Cited: 3 Sup. Ct. 592.

NATIONAL BANK v PHILA. AND READING R. R. (1894) 163 Pa. St. 467.

Trespass, for wrongful delivery of merchandise. K shipped goods through E, consigned to K's order and marked "notify H," receiving a bill of lading payable to K's order. K indorsed the bill, attached it to a draft on H and sent them to plaintiff for collection. H paid the draft by having plaintiff discount a draft on C, an intended purchaser of the goods, and attached the original bill of lading to the second draft. This draft and bill were sent by plaintiff to another bank for collection. Meanwhile, the car had passed into defendant's control as carrier. Defendant, having no knowledge of the existence of a bill of lading, diverted the goods from their original destination, on H's order, and delivered them upon presentation of an order from H to L, to whom H had sold them. It was customary to deliver

freight on written order, most goods being shipped without bills of lading. The draft on C was never paid, the proposed sale not being effected. Sometime later H failed. Plaintiff contended that as legal owner of the goods, it was entitled to recover. Judgment for plaintiff. Appeal.

Green, J. Even if plaintiff is regarded as continuing owner of the goods, it must also be regarded as authorizing H as its agent to direct their movements, after it allowed H to act as consignor in drawing on C. It allowed him to assume control over the goods and is responsible for his acts. Judgment reversed.

SECOND NAT. BANK v MORGAN (1895) 165 Pa. St. 199.

Assumpsit, on promissory note, by indorsee against makers. Defendants contended in their affidavits of defense: 1, failure of consideration; 2, that affiants believed and expected to be able to prove that plaintiff was not the bona fide holder of the note before maturity, but took the note under circumstances which were sufficient to put it upon inquiry, which would have shown that it was obtained by fraud, without consideration; and 3, that plaintiff, being a national bank, took usury in discounting the note for the payee. The note was given by defendants in payment for a horse. Rule for judgment for want of sufficient affidavit discharged. Appeal.

Green, J. 1. Mere averment of a belief without stating facts upon which it is founded is not sufficient. 2. Failure of consideration is no defense against a bona fide purchaser of negotiable paper for value before maturity. 3. And such a purchaser can recover, notwithstanding he took it under circumstances which ought to excite the suspicion of a prudent man, provided he had no actual notice of fraud, and there was no mala fides on his part. 4. The usury alleged afforded no defense available to defendants: (1), because a penal action to recover double the interest is the exclusive remedy therefor, and the amount cannot be set off in an action on the note; (2), because only the one who paid illegal interest or his legal representatives can recover it; and (3), because no illegal interest was charged or paid on a "sum lent." Judgment reversed.

Cited: 178 Pa. 98; 182 id. 30.

FARMERS BANK v THIRD NAT. BANK (1895) 165 Pa. St. 500.

Assumpsit, on check. Plaintiff on the day of its deposit sent a check to defendant for collection through the clearing house. Drawee bank had suspended, but on the following Saturday checks on it were paid through the clearing house. The check in question was not presented on Saturday, as defendant did not know that drawee would reopen. It was presented through the clearing house on Monday and dishonored. It was never presented directly to drawee. Plaintiff was later compelled by suit to pay the depositor for negligence in collection. Defendant's affidavit of defense set up that with full knowledge of the facts plaintiff's assistant cashier, the day after the dishonor, took up the check by giving defendant a cashier's check for the amount, and that for several years thereafter defendant acted as plaintiff's collection agent, and although accounts were frequently settled, plaintiff made no claim for the amount of the check. Verdict directed. Judgment for plaintiff. Appeal.

Fell, J. 1. Prima facie, no duty is imposed on a clearing house agent to present a check directly to drawee. 2. Without knowledge or the means of knowledge that drawee would reopen on Saturday, defendant was not bound to send the check to the clearing house that day. 3. The questions of the authority of plaintiff's assistant cashier and of ratification by plaintiff of his acts should have been left to the jury. Judgment reversed.

PENN BANK'S ASSIGNED ESTATE (1895) 165 Pa. St. 548.

To distribute assets of assigned estate. Claim for dividend. P Bank owed claimant \$88,000, to pay which it gave its check for that amount, and to enable the P Bank to pay this check, claimant was to lend it \$40,000, the proceeds of the discount of four notes made by the directors of P Bank, and look to the makers for payment. The plan failed, as claimant stopped payment on its check given for the proceeds of the notes on learning that P Bank was unable to pay its check for \$88,000. Claimant, however, retained the notes, which were later paid by the makers. P Bank made an assignment. Auditor refused to allow a dividend to

claimant on full \$88,000, but deducted therefrom the proceeds of discount of the notes. Decree confirming auditor's report. Appeal.

Mitchell, J. 1. As the loan for which the notes were to be security was never made, the retention of the proceeds by claimant can only be regarded as a direct partial payment of the \$88,000 debt. 2. The rule that a creditor is entitled to a dividend on the whole amount of his claim at the time of assignment, though he may have subsequently received partial payment from collaterals, does not apply, as the notes were collateral for the \$40,000 loan and not for the \$88,000 debt. Decree affirmed.

PHILLER v JEWETT (1895) 166 Pa. St. 456.

Assumpsit on note, against makers. Plaintiffs were the clearing house committee. S Bank was a member of the clearing house, whose members contributed cash and security to a fund to facilitate its business. S Bank having discounted the note in suit, deposited it before maturity as part of its share of the fund, to be used by plaintiffs, under the rules, first for payment of daily balances, and next as security "for other indebtedness due to members." S Bank becoming indebted to the clearing house, on its certificates, deposited additional security with plaintiffs. S Bank failed, and after payment of its daily balance out of its share of the clearing house fund, there was a surplus. This surplus plaintiffs claimed the right to apply to a deficit arising from the insufficiency of the additional securities to cover the debt on the certificate. Defendants claimed the right to set off a claim as depositor of S Bank. Judgment for plaintiffs.

Williams, J. 1. The title to the note passed from the bank to the plaintiffs as pledgees who are bona fide holders before maturity for value; and defendants could not redeem the note without payment to plaintiffs of S Bank's indebtedness. 2. Defendants' setoff cannot be made available, as the bank is not the owner. 3. The application of securities to payment of S Bank's indebtedness was within the terms of the contract. Judgment affirmed.

Cited: 166 Pa. 459.

LEBANON BANK'S ASSIGNED ESTATE (1895) 166 Pa. St. 622.

Claim, for preference. Proceeding to distribute assigned estate. L Bank, as trustee of P by appointment of court, received the money now claimed, which was placed in the general fund of the bank. It could not be traced into any specific investments. Thereafter L Bank became insolvent, and P's substituted trustee claimed a preference. The auditor disallowed the claim. Exceptions to report dismissed. Appeal.

Per curiam. As the trust fund had become incapable of identification, the obligation of the bank became simply a debt of the bank, and entitled only to the same recognition in the distribution as other unsecured debts. Affirmed.

Cited: 3 Sup. Ct. 248; 17 id. 243.

WAGNER v CROOK (1895) 167 Pa. St. 259.

Negligence. Case stated. Plaintiffs, payees of defendant's check, deposited it with X Bank for collection. G Bank, the correspondent of X Bank, sent it direct to drawees for collection. They laid it aside, doing nothing about it, and two months later failed. Defendant had sufficient funds on deposit to meet the check from the time it was drawn until drawees' failure. Shortly before the failure, plaintiffs requested a duplicate check stating that the original was probably lost and defendant complied with their request. The court held: 1, that as between plaintiffs and defendant, G Bank was plaintiff's agent; that it was negligence in G Bank to send the check to drawees for collection instead of to a suitable agent; and that plaintiffs were answerable to defendant for loss due to such negligence; 2, that the duplicate check, having been sent upon representations which proved to be untrue, did not affect the status of the parties. Verdict directed. Judgment for defendant. Appeal.

Per curiam. Judgment affirmed on opinion of the court below.

COMMONWEALTH v MERCHANTS NAT. BANK (1895) 168 Pa. St. 309.

Tax settlement. Defendant, a national bank, was taxed under sec. 7 of the Act of 1891, which imposed on every national bank, not electing to pay the tax provided by sec. 6, a tax on the actual value of its capital stock. Sec. 6 permitted

any bank to elect to pay a tax at a higher rate on the par value of its stock, and exempted banks so electing from all other taxation except upon real estate. The state constitution required that all taxes be uniform upon the same class of subjects, and be levied and collected under general law. The National Banking Act required that national bank stock should not be taxed by states at a greater rate than other moneyed capital in the hands of individuals. Many banks whose stock was very valuable, by paying under sec. 6 really paid a lower rate than if they paid under sec. 7. Defendant contended that the tax was unconstitutional. Judgment for plaintiff. Appeal.

Williams, J. 1. Inequalities in actual value of bank stock being due to causes which the legislature could not be required to foresee or provide against, cannot be charged to the law; and resulting inequality of burden will not render a tax law unconstitutional. 2. Every bank has the right and opportunity to be taxed at its election under sec. 6, and of a want of uniformity which is the result of their own deliberate action they cannot complain. Judgment affirmed.

PHILLER v PATTERSON (1895) 168 Pa. St. 468.

Assumpsit on note, against maker. Defendant gave K his note. K was president of G Bank which was a member of the clearing house association. The members of this association, to facilitate its business, deposited under agreement with each other, in the hands of plaintiffs, the clearing house committee, money or securities, at a fixed ratio upon their capital stock, to be used in payment of balances against them, and authorized plaintiffs to receive deposits, securities, and issue certificates therefor, as, in their judgment, might be advisable. The members of the association were national banks. Among the deposits made by G Bank was defendant's note, which was given to plaintiffs before maturity to secure an indebtedness of G Bank on clearing house certificates. Defendant denied the legal capacity of plaintiffs to sue under the evidence and the statutes governing national banks. He offered to prove that the note was an accommodation note and that plaintiffs had notice of the want of consideration between him and K. Refused. There was no evidence that the note was diverted from its intended use. Judgment for plaintiffs. Appeal.

Williams, J. 1. As the association is merely a device adopted by the banks to facilitate their legitimate business as banks and involves no element of speculation and no business undertaking by or on behalf of the associated banks, it is not in conflict with U. S. Statutes relative to national banks. 2. Plaintiffs became holders for value of the note which was used in the manner contemplated, and against a bona fide holder for value the offered evidence was inadmissible. Judgment affirmed.

Cited: 173 Pa. 578; 174 id. 548; 175 id. 164; 3 Sup. Ct. 62.

NATIONAL BANK v STEVER (1895) 169 Pa. St. 574.

Assumpsit on note, against maker. Defendant gave L a promissory note payable in six months, and L entered into an agreement in writing to use the money as a subscription for some stock, and to return the note if he, L, did not do certain things. L did none of these things, but two weeks later had the note discounted by plaintiff, of which E, L's brother, was cashier. When the note became due, defendant renewed it. Evidence to show that E, the cashier, knew all about the agreement between defendant and L, was excluded. Verdict directed. Judgment for plaintiff. Appeal.

Green, J. The knowledge of the cashier, if acquired in the course of the transaction which resulted in the discounting of the original note, is the knowledge of the bank. Judgment reversed.

Cited: 183 Pa. 267; 198 id. 632.

COMMONWEALTH v JUNKIN (1895) 170 Pa. St. 194.

Indictment, for embezzlement. Defendants J and S were private bankers, who, being lawyers also, left the management of the bank very much in the hands of W, the cashier. On September 24, R handed a deposit to B, W's assistant. The money, although mingled with the general funds of the bank, was afterward returned to R. Act of 1889, P. L. 145, provided that any banker who should take and receive money from a depositor, with knowledge that the bank was insolvent, should be guilty of embezzlement. Some days before, J and S knew the bank

was seriously embarrassed. On September 24, J being ill at home, told W not to take any deposits. W insisted that he would. J then told him if he persisted in taking deposits, to keep them separate, so that they could be returned. S was also ill, and his son, holding his power of attorney, gave W like instructions. R's deposit was received after this. The court refused to charge that if W was ordered not to take deposits on September 24, and if money was taken that it must be returned, and it was returned, the verdict must be not guilty. Verdict guilty. Appeal.

Dean, J. 1. If money is not mingled with and forms no part of the bank's funds, and is capable of absolute identification so that it may be returned, and is actually returned, it is not a real deposit, and there is no criminal receipt of money as a bank deposit within the meaning of the statute. 2. A principal is not liable criminally for the act of his agent, when the act is in direct disobedience to explicit instructions. Judgment reversed.

Cited: 2 Sup. Ct. 338; 3 id. 591, 592; 4 id. 8; 14 id. 374.

LOUX v FOX (1895) 171 Pa. St. 68.

Replevin. Case stated. Plaintiffs, for one month's rent, due in advance, sent one of defendants, F, their landlord, a check on P Co., after banking hours. The "check was accepted by him and a receipt in regular form given therefor." On the next day, "in the usual course of business," F deposited the check with his bank. The following day it was presented to drawee during banking hours, but after 11.30 a. m., at which hour drawee failed. At this time plaintiffs had on deposit with drawee more than sufficient funds to meet the check. Plaintiffs refused to make check good, and defendant F distrained. "If the court be of the opinion that the said check was a payment of the rent," then judgment for plaintiffs, otherwise judgment for defendants. Judgment for plaintiffs. Appeal.

Sterrett, J. 1. In a case stated nothing must be left to inference; and as there is no averment of fact or admission that defendant landlord accepted the check as unconditional payment and in satisfaction of the rent or in any manner waived his right of distress, these facts cannot be inferred. 2. As the check was received after banking hours defendant was entitled to as much time as if it had been received the next day; there was therefore no unreasonable delay in depositing the check and presenting it for payment. Judgment reversed.

Cited: 173 Pa. 30; 2 Sup. Ct. 308; 12 id. 227.

ERISMAN v DELAWARE COUNTY NAT. BANK (1896) 1 Pa. Sup. 144.

Assumpsit, to recover amount of a check. Plaintiff gave his check upon defendant to T, to be used in a special way for T's accommodation. T was indebted to defendant on an overdrawn account. He deposited the check, and defendant, ignorant that his ownership was qualified, forbore to take measures to enforce its right of action against T upon the strength of it. T became insolvent, and defendant applied the proceeds of the check to reduce his indebtedness on the account. Judgment for defendant. Error.

Rice, P. J. Where a bank has extended credit on the faith of a deposit without notice that it belongs to another than the depositor, its rights and equities are superior to those of the true owner. Judgment affirmed.

Cited: 4 Sup. Ct. 240.

APPEAL OF POWELL (1896) 2 Pa. Sup. 618.

For distribution of an insolvent bank's estate. A number of persons formed a copartnership to do a banking business. The articles of association provided that the stock might be transferred, and that the assignee should succeed, and become subject to all the rights and obligations of his assignor, and that the association should continue, until dissolved by a majority vote of the stockholders. P, one of the original stockholders, sold all his shares to C, another original stockholder. The business was continued as formerly, and some of the obligations theretofore contracted were paid. The association subsequently assigned for the benefit of creditors. Decree, permitting those who were creditors prior to B's transfer of his stock to share in the funds.

Rice, P. J. 1. The articles of association cannot be construed as binding the new firm, created when a change of membership took place, to pay the antecedent debts. 2. Those depositors who were creditors of the banking association after

B sold his shares, are alone entitled to share in the distribution of the fund. Decree reversed.

Cited: 6 Sup. Ct. 652; 10 id. 345.

MILLER v WESTERN NAT. BANK (1896) 172 Pa. St. 197.

Assumpsit, for deposit. Plaintiff sent the subject matter of the deposit by mail. Defendant admitted receipt of the communication, but contested the inclosures and always denied that any deposit had been made. The jury found that plaintiff had made the deposit claimed. Judgment for defendant, non obstante veredicto, for the reason that no formal demand was made by plaintiff before he brought suit. Appeal.

Sterrett, C. J. If the bank, by words or conduct, denied the depositor's right to his balance, it becomes presently liable to an action without formal demand. Judgment reversed.

Cited: 191 Pa. 423; 15 Sup. Ct. 76.

WILLIS v FINLEY (1896) 173 Pa. St. 28.

Where a check is received after banking hours, and deposited for collection on the next day, due diligence was exercised by presenting the check for payment on the day thereafter, and the principle of *Loux v Fox*, 171 Pa. St. 68, applies.

CRANE v FOURTH STREET NAT. BANK (1896) 173 Pa. St. 556.

Assumpsit, on a draft. Plaintiff, holder of a draft on defendant, indorsed it to K Bank specially for collection. K Bank and defendant were both members of the clearing house. Defendant paid the amount of the check to the clearing house, but it was not paid to K Bank, owing to the latter's inability to pay the balance against it for the day. The clearing house appropriated the proceeds to the payment of K Bank's indebtedness. Defendant set these facts up under an allegation of payment in its affidavit of defense. Judgment for plaintiff. Appeal.

Williams, J. 1. As K Bank's limited authority appeared by the indorsement, it could not confer title on the clearing house, and payment to the latter was made at defendant's risk. 2. As the proceeds were never paid to K Bank, the draft was never collected and plaintiff remained its owner. Judgment affirmed.

POOL v WHITE (1896) 175 Pa. St. 459.

To determine amount due on judgments. Plaintiff's assignors were bankers holding notes of defendant. Defendant's account being overdrawn, he gave judgment notes to cover the overdraft. Judgment was entered and opened up by order directing an issue on the plea of payment. Defendant contended that the judgment notes included the amount due on all prior notes. Plaintiff explained that dates on certain deposit slips were erroneous, and the court charged that the jury should consider all the circumstances connected with them, and the credibility of the witnesses; and that the burden was on defendant. The court gave its opinion, by commenting on several parts of the evidence. In computing the interest the banker's method was used. Judgment for plaintiff. Appeal.

Mitchell, J. 1. As the execution of the notes was admitted, and as the plea was payment, the burden was on defendant to prove that the judgment notes included the amount of the previous notes. 2. The charge of the court in regard to the deposit slips was proper, as they were prima facie, but not conclusive, evidence of deposits on the dates given. 3. The court can assist the jury in pointing out clearly the various points of difficult evidence, and may show its own opinion without prejudicing the case. 4. It was proper to assume that the method of computing interest in use with bankers was to be pursued. Judgment affirmed.

FIRST NAT. BANK v PELTZ (1896) 176 Pa. St. 513.

Assumpsit, on promissory note. Plaintiff, a bank, held a note on which defendant was second indorser. The court refused to allow defendant to prove that K, the prior indorser, some days after maturity, had sufficient funds on deposit with plaintiff to pay the note; that K was primarily liable as the note was an accommodation note, and that plaintiff had knowledge of this fact. The court further

refused proof that K had given plaintiff a judgment note for the account; and also proof that plaintiff had induced defendant to satisfy a judgment against K. Judgment for plaintiff. Appeal.

Mitchell, J. 1. A bank cannot be compelled to pay a note out of the deposit of the first indorser, even though it knows such indorser is primarily liable. 2. Nor is it compelled to pay a note out of deposits accruing after maturity. 3. A subsequent indorser is not discharged by a judgment note or other security given by the maker or prior indorser. 4. If by plaintiff's procurement defendant satisfied a judgment against K and so lost an indemnity with regard to the present claim, this would create an estoppel against plaintiff in favor of defendant. Judgment reversed.

Cited: 9 Sup. Ct. 628.

OYSTER v SHORT (1896) 177 Pa. St. 601.

To distribute assigned estate. E Bank presented a claim for the full amount of certain notes discounted by it for R Bank, the insolvent, and indorsed by the latter. R Bank was not the maker. None of the notes was due at the time of the assignment. Some were paid at maturity by the makers, and some, though dishonored, were wholly or partly paid thereafter by the makers. E Bank claimed to be entitled to dividends on the whole amount, on the ground that creditors of a voluntary assignor are equitable owners of the assigned estate, and their rights are vested as of the date of the assignment. The auditor allowed dividends only on the amount unpaid on the notes at the time of distribution. Decree confirming auditor's report. Appeal by E Bank.

Green, J. 1. As R Bank's indorsement created a mere contingent liability which did not become absolute prior to the assignment, it was not an actual creditor at the time of the assignment and had no interest in the estate assigned. 2. Dividends were properly allowed on the amount unpaid on notes falling due after the receivers were appointed. Decree affirmed.

Cited: 183 Pa. 468; 12 Sup. Ct. 434.

BROWN v PETTIT (1896) 178 Pa. St. 17.

Assumpsit, on promissory note. Plaintiff was a banker and defendants composed a firm depositing with them. One of the partners made his individual note payable to the firm, indorsed the firm name, discounted the note with plaintiff and had the amount credited to his individual account. The other partner knew nothing of the transaction and the firm received no benefit from the proceeds. Judgment for plaintiff. Appeal.

Green, J. 1. The apparent title to the note being in the firm, a request by the maker to have the proceeds placed to his individual credit was out of the usual course, and plaintiff became subject to a duty of inquiry. 2. A partner cannot give the indorsement of his firm upon his own note as security for his own debt. Judgment reversed.

COMMONWEALTH v STRICKLER (1896) 178 Pa. St. 148.

Assumpsit, on a bond. Defendants were principal and sureties on a bond, given for the faithful performance of his duties by plaintiff's teller. The pleadings treated the alleged default, as a conversion of \$1,000 by the teller. The evidence showed that the teller had made a mistake in adding his accounts. The court charged that a mere incorrect entry would not of itself impose an obligation on defendants, that it must appear that the bank suffered a money loss; and that the bank had the burden of proving conversion of the amount by the teller. Judgment for defendants. Appeal.

McCollum, J. Inasmuch as the default was treated by the pleadings and evidence as conversion, the charge was proper. Judgment affirmed.

FINK v FARMERS BANK (1896) 178 Pa. St. 154.

Injunction, to compel delivery of promissory notes. Plaintiff was surety on a bond conditioned for the faithful performance by defendant's cashier of his duties so long as he remained cashier. The cashier having defaulted, plaintiff knowing all the circumstances, gave his notes payable at a future date in payment of his present cash liability on the bond, and then sought to have the contract rescinded

on the ground that the liability was not a continuing one, and that there was consequently no consideration for the notes. The bond was surrendered to plaintiff upon his giving the notes, but its return was tendered by him. Defendant had been allowed, because of defendant's arrangement with plaintiff, to continue business by the superintendent of banking. The master held that plaintiff gave the notes under a mixed mistake of law and fact. Decree for plaintiff. Appeal.

Mitchell, J. 1. In this state equity will relieve from mutual mistake of legal rights only where it is possible to restore both parties to statu quo. 2. The surrender for the notes of the bond representing at least a doubtful claim by defendant was a compromise or settlement which in the absence of fraud, accident, or mistake of fact, should not be disturbed. 3. The credit given to the bank and the consequent permission of the superintendent of banking to permit business to continue were also sufficient consideration for the contract. Decree reversed.

ASSIGNED ESTATE OF SOLICITORS LOAN CO. (1897) 3 Pa. Sup. 244.

Distribution of assigned estate. Claim to amount of deposit as a trust fund. Money belonging to an estate was deposited with a trust company by the trustees appointed by court, with the understanding that it should be mingled with the company's moneys, and withdrawn only by checks drawn by order of court. The trust company made an assignment for the benefit of creditors. This petition was presented by those entitled, as cestuis que trustent, to the estate. Decree ordering the assignees to set aside, out of the assets of the insolvent, for complainant's benefit an amount equal to the sum due the estate before the assignment. Appeal.

Willard, J. The cestui que trust has no preference over other creditors, where moneys of an insolvent trustee for distribution are mingled, unmarked and undefined with his. Order overruled.

Cited: 17 Sup. Ct. 243.

ROBB v PENNSYLVANIA CO. (1897) 3 Pa. Sup. 254.

Assumpsit, to recover the amount of two forged checks. Plaintiff, who was the president of a corporation, had occasion to have a rubber stamp made, which was a facsimile of his signature. He kept a deposit with defendant. The stamp was carefully hidden away by plaintiff in his private safe with his valuables. It was feloniously extracted therefrom by A, who used it to forge two checks, which were paid by defendant. The question of plaintiff's negligence in the custody of the stamp was left to the jury. Judgment for plaintiff. Error.

Rice, P. J. 1. It is not negligence per se for a depositor to have in his possession a harmless and useful thing and one lawful for him to have, but which in the hands of a thief breaking into his safe may be used to forge his signature. 2. Where he has used due care in securing it against unlawful use by others, his mere possession of the thing was not the proximate cause of the mispayment of the money. 3. What constitutes negligence when the standard shifts, depends on the facts and circumstances developed at the trial and cannot be determined by the court, but must be submitted to the jury. Judgment affirmed.

FRANK v KURTZ (1897) 4 Pa. Sup. 233.

Attachment. Defendant was the agent of several insurance companies. He opened an account with garnishee in his own name for the purpose of depositing the companies' moneys. He was entitled to retain some of the money deposited as commissions. In this account he deposited a check drawn in his own favor on which he had no claim for commission; it belonged wholly to one of the companies. The next day K's creditors attached the deposit. He at once notified the drawers not to pay the check. They accordingly refused to pay it to garnishee. K satisfied the claims of the companies to the remainder of the deposit. Judgment for garnishee. Appeal.

Rice, P. J. 1. The company, being the true owner of the check, could make, even through K as its agent, any arrangement as to its payment they might see fit. 2. If after the attachment, K satisfied the claims of the companies as to the residue of the funds, it became his property and subject to the attachment. Judgment reversed.

Cited: 185 Pa. 509.

RENNYSON v PEOPLES NAT. BANK (1897) 4 Pa. Sup. 640.

Assumpsit, to recover deposits. Plaintiff was in the habit of making deposits to the credit of two accounts. One was under plaintiff's name, the other under the name "Daily Times, Limited." Defendant by mistake credited the latter account with funds which plaintiff had directed should be credited to the former. This action was for the amount of the items so miscredited. It was shown that plaintiff was in reality the owner of both accounts and had suffered no injury from defendant's mistake. Judgment for plaintiff. Appeal.

Reeder, J. Though a bank where a depositor has several open accounts, cannot divert funds from one account to another, the depositor cannot recover if he has suffered no injury thereby. Judgment affirmed.

GUNSTER v SCRANTON ILLUMINATING CO. (1897) 181 Pa. St. 327.

Assumpsit, on promissory notes. Plaintiff's assignor was S Bank, whose vice-president, I, attended to the drawing of drafts. J was also treasurer of defendant, and signed checks for it. J signed notes as treasurer of defendant and had them discounted by S Bank, who credited the proceeds to defendant. Thereafter J, as treasurer of defendant, drew a check payable to "Deft. New York." This check was charged to defendant. In payment of the check, J, as vice-president of S Bank, drew drafts on New York payable to himself, and converted the proceeds to his own use. Plaintiff sued on the notes. Referee held that the amount of the check should be deducted, as S Bank was charged with J's knowledge of the fraud. Judgment for plaintiff in accordance with report. Appeal by plaintiff.

Mitchell, J. 1. The fraud had its inception and its consummation in acts done by J in his capacity of treasurer of defendant, and it should bear the loss. Judgment reversed. Judgment for plaintiff for full amount.

Cited: 185 Pa. 600; 201 id. 111.

ESTATE OF TASKER (1897) 182 Pa. St. 122.

Executors' accounting. X made two notes of \$5,000 each, to order of T. X died. Both notes were indorsed by T. On the auditing of the accounts of X's executors, the receiver of G Bank presented his claim on the notes. T testified that the president of G Bank asked him to get two notes of \$5,000 each signed by X not to be used, but to accommodate the bank; that the notes in question were those given in accordance with that request; that one note was a renewal of the other; and that neither T nor X ever received any consideration. The auditing judge held that the renewals showed that the testimony that the notes were merely for temporary use, was untrue. Claim allowed. Decree for claimant. Appeal.

Green, J. 1. If the note was an accommodation note loaned to G Bank for its own use, the bank could not recover thereon against the maker. 2. The mere renewal of a note for a number of times does not prove that the original was not a loaned note. Decree reversed.

Cited: 6 Sup. Ct. 572.

NEWBOLD v BOON (1898) 6 Pa. Sup. 511.

Assumpsit, on note, against indorsers. Plaintiff, a banker, held a note for \$900, on which defendants were liable as accommodation indorsers. When it came due, defendants waived protest. On the same day the maker offered plaintiff his note for \$800, indorsed by defendants for accommodation, to renew the one for \$900. Plaintiff refused to receive it as offered though he retained it in his possession. No credit was then given the maker for the new note. At its maturity, plaintiff had it presented and protested. Subsequently he gave the maker credit for the \$800 note, and the balance remaining due on the \$900 note was paid by the maker. Plaintiff at all times knew defendants to be accommodation indorsers only. After the dishonor of the \$800 note, other notes of the maker were included by plaintiff in a settlement in which the proceeds of this note figured, by which other claims were paid; and resulted in continuing the liability of defendants. This action was brought on the \$800 note. Judgment for defendants. Appeal.

Orlady, J. 1. Plaintiff, discounting the \$800 note after maturity with full knowledge of its history, could only use it subject to the equities arising out of the transaction or connected with the note itself; he had no higher right of recovery than that of the maker. 2. When a bank holds funds of the maker at the maturity

of the note, it is bound to consider the interests of the indorsers as sureties, and if it allows the maker to withdraw his funds, after protest, and the indorsers are losers thereby, the bank is liable to them. Judgment affirmed.

PEPPERDAY v CITIZENS NAT. BANK (1898) 183 Pa. St. 519.

Assumpsit. Plaintiff gave defendant, a national bank, with which it was a depositor, shares of stock with the request that they may be placed on sale with T, in P, and be sold when plaintiff should direct. On December 17, plaintiff requested defendant to instruct T to sell, which was done, defendant receiving T's check in payment payable to defendant. Defendant credited the amount of the check to the plaintiff and he drew it out. Defendant sent the check on for collection. It was presented and payment was refused owing to T's failure. Defendant then charged the amount to plaintiff. Judgment for plaintiff. Appeal.

Green, J. 1. The check was the property of defendant and never that of plaintiff. 2. Defendant treated the check as cash at its own risk, and after crediting the amount to plaintiff and allowing them to draw it out, could not charge back the credit against the account. Judgment affirmed.

FLANAGAN v NASH (1898) 185 Pa. St. 41.

Assumpsit, for bank deposit. Plaintiff's decedent, G, deposited her own money in bank in the joint name of G and defendant. Defendant was with her at the time, and on the passbook was written "Either to draw," and "In case of death of either, the survivor shall have full power to draw." It did not appear that G requested these entries. G alone drew on the money during her lifetime, and after her death defendant drew out what remained. Act of 1887, P. L. 158, sec. 5, says, where a party to a contract is dead and his right has passed to a party on the record who represents his interest, a surviving party to the contract shall not be competent to testify against him. The court ruled out defendant's testimony in this action by G's administrator. Judgment for plaintiff. Appeal.

Green, J. 1. Delivery is necessary to complete a gift; as there was no delivery of the subject matter during G's lifetime, defendant acquired no title to the deposit. 2. The statement in the bank books that either might draw does not establish a title as owner in the defendant; it merely indicates a right to withdraw the funds. 3. The Act of 1887 is applicable to this case, and defendant's testimony was properly excluded. Judgment affirmed.

Cited: 199 Pa. 613.

ASSIGNED ESTATE OF NEFF (1898) 185 Pa. St. 98.

Distribution of estate of an insolvent. Claim on a judgment. Claimant N Bank held a bond or judgment note from X, the insolvent, providing that he would pay when required all notes and other indebtedness on which "he is liable." X subsequently stated to claimant that the note covered certain other debts which were in reality contracted after the note was given. This statement was made in the presence of N, another creditor, who made no comment. Judgment of record was afterward entered on the judgment note for an indebtedness contracted to claimant after its date. The auditor refused to allow the claim thereon. Exception to auditor's report overruled, on the following grounds: 1, as the judgment note bound X to pay debts for which he "is liable" it must be interpreted as restricted indebtedness existing at the time of its date; 2, though parties may alter the terms of a written contract by parol, the mere statement by X that the note covered other debts was not such alteration, but a mere expression of his opinion; 3, as N did not say or refrain from saying anything that induced action or inaction by the bank to its prejudice he is not estopped from setting up the true nature of the judgment note.

Per curiam. Judgment affirmed.

UNITED SECURITY CO. v CENTRAL NAT. BANK (1898) 185 Pa. St. 586.

Assumpsit, on checks. Plaintiff was a depositor with defendant. W, one of plaintiff's employees, forged the names of the payees on two checks drawn by plaintiff, and received the money. The forgery was committed while acting without the line of his duty. An examination of plaintiff's books would have led to a discovery of the forgery. It was W's duty to make such examination. Referee held that plain-

tiff was chargeable with W's knowledge, not as the author of the fraud, but as examiner of the books. Notice of the forgery was given to defendant as soon as actually known to plaintiff; this was two months after the forgery. Meantime plaintiff's bank book and vouchers had been received by plaintiff, without objection, though the forged checks were included. Judgment for defendant. Appeal.

Mitchell, J. 1. No agent who is acting in his own antagonistic interest, or who has committed a fraud by which his principal is affected, can be presumed to have disclosed such fraud, and such cases form an exception to the rule that the principal is charged with the knowledge of an agent acting within the scope of his authority. 2. The banker's contract with his depositor is to pay the latter's checks only to the payee or to one claiming through a genuine indorsement. Though a bank book settled and checks returned become an account stated as to amount, if not promptly examined and errors pointed out, the depositor is not bound to ascertain the genuineness of indorsements on the checks. Judgment reversed.

Cited: 193 Pa. 12.

FIRST NAT. BANK v PELTZ (1898) 186 Pa. St. 204.

Assumpsit, on note, made by B, payable to K, and indorsed by K, then by defendant. Defendant alleged that he had been indemnified by a judgment against K, and that he had satisfied the judgment on the procurement of plaintiff, whereby he lost his security. Defendant testified that he met plaintiff's president and said "Well, K didn't pay the note?" and that the president replied, "The matter is arranged." Verdict directed. Judgment for plaintiff. Appeal.

Per curiam. 1. As the statement could not warrant the inference that the note was paid, and would not therefore create an estoppel against plaintiff in favor of defendant, the court was justified in directing a verdict. Judgment affirmed.

ROBB v PENNSYLVANIA CO. (1898) 186 Pa. St. 456.

Assumpsit, on deposit. Plaintiff, a depositor with defendant, possessed, unknown to defendant, a rubber stamp made as a fac-simile of his signature. This stamp was stolen from plaintiff's safe, and used to forge certain checks cashed by defendant, the amount of which is now sought to be recovered. The court charged that possession of the stamp by plaintiff was not unlawful, but if the forger got possession of it through plaintiff's negligence, defendant was relieved from liability. Judgment for plaintiff. Appeal.

McCollum, J. 1. An act which is lawful in itself and had no relation to plaintiff's deposit with defendant, did not impose upon plaintiff the duty of notifying defendant of its performance; the mere possession of the stamp was not therefore negligence per se. Judgment affirmed.

Cited: 9 Sup. Ct. 237; 18 id. 43.

JACK v MOYER (1898) 187 Pa. St. 87.

Assumpsit. Plaintiffs were bankers and their assignees brought this action on an overdraft. The only disputed item was a credit claimed by defendants of the amount of the credit balance of G, deceased. Defendants alleged that this amount was due them under contract with plaintiffs. X, one of defendants, was offered as a witness to prove a contract made between himself and a member of plaintiff firm, now deceased, which contract, if established, would reduce defendants' liability. Rejected as incompetent under Act of 1887, P. L. 158, sec. 5, providing that where one party to a contract is dead and his right therein has passed to a party on the record, the surviving party to the contract is incompetent as a witness to any matter occurring before the death. Checks, drafts and bank books, covering items in the account between plaintiff and defendants were admitted in evidence, over objection. Judgment for plaintiff. Appeal.

Green, J. 1. In an action for an overdraft upon an entire account, plaintiff is entitled to have the whole account and vouchers sustaining it go to the jury. 2. Under the Act of 1887, P. L. 158, sec. 5, X was incompetent as a witness. Judgment affirmed.

CORN EXCH. NAT. BANK v SOLICITORS L & T CO. (1898) 188 Pa. St. 330.

To declare a trust. Plaintiff often accommodated defendant with currency. Defendant, by telephone, asked plaintiff for \$2,000 in two-dollar bills, and on a fav-

orable response sent its check for the amount on F Bank by messenger, who returned with the bills done up in packages. Defendant made an assignment the next day. The check was dishonored owing to defendant's failure and plaintiff was compelled to take it up. The money remained in packages, and was turned over to defendant's assignee. Plaintiff filed this bill to have the packages restored. Demurrer. Decree dismissing bill. Appeal.

Dean, J. 1. The title to the packages never passed from plaintiff, because the possession was obtained by a plainly implied misrepresentation. 2. As the packages can be plainly identified they are impressed with a trust, and a court of equity has jurisdiction. Decree reversed.

Cited: 18 Sup. Ct. 438.

WESTINGHOUSE v GERMAN NAT. BANK (1898) 188 Pa. St. 630.

To compel surrender of stock. L held plaintiff's stock in defendant, a bank, as security for other stock, which he, as broker, was carrying for plaintiff. Upon the back of the certificate plaintiff had given L absolute power to sell and transfer the stock. L delivered the certificate to defendant, as collateral security for his indebtedness, past and future. Defendant knew, when the stock was pledged, that it belonged to plaintiff. It did not inquire whether L had the right to repledge. Decree for plaintiff. Appeal.

Dean, J. When defendant actually knew, notwithstanding what appeared on the certificate, that plaintiff still owned the stock, it was bound to inquire of the owner whether L was authorized to repledge; not having done so, it cannot claim that the owner's right is barred. Decree affirmed.

Cited: 196 Pa. 253.

FARMERS NAT. BANK v MARSHALL (1899) 9 Pa. Sup. 621.

Assumpsit, on notes. Plaintiff, a bank, held two notes, indorsed by defendant, for \$200 each. After their maturity, plaintiff took a note for \$900, in part as collateral for these notes. This note was renewed from time to time. Defendant claimed that the acceptance of the collateral note was an extension of time to the maker without defendant's consent. Plaintiff introduced the protest of the notary to show that the notes had been dishonored and defendant notified thereof by mail, but there was no testimony that the notice was by "prepaid letter." Defendant denied receipt of notice of protest. There was testimony that the maker, subsequent to the maturity of the notes, had funds deposited with plaintiff. Verdict directed. Judgment for plaintiff. Appeal.

Smith, J. 1. In order to be binding, an agreement to extend the time of payment must have the essential elements of a contract. Such an extension of time to the maker cannot be implied from the fact that his note as collateral to those in suit was taken by the bank. 2. A bank holding commercial paper is under no duty to retain, for the benefit of the surety, funds of the principal debtor coming into its hands subsequent to the maturity of the note. 3. Though the protest of the notary was prima facie evidence under statutes, it may be contradicted, and the issue so raised is for the jury. Judgment reversed.

ESTATE OF STAIB (1899) 11 Pa. Sup. 447.

Distribution of decedent's estate. Decedent had funds on deposit with E Bank, in 1871. Interest was credited thereon, until 1883, but not thereafter. Decedent died in 1893, and the amount credited was paid to his administrator. The administrator made no demand for interest from 1883 to 1893. There was no evidence that it was customary for banks to pay interest during that period, or that decedent had objected to E Bank's failure to do so. There were two claimants for the amount of the deposit, 1, the next of kin, and 2, H Society. In 1871, decedent made a general assignment to the latter, and confirmed it in 1890. H Society was a partner in the firm conducting the business of E Bank; and one of its trustees in 1883 knew of the deposit. H Society had never claimed the deposit. It contended that it could not in any event be estopped by payment by E Bank to the administrator, as refusal by E Bank to pay would have been against public policy, and the payment could not therefore be regarded as voluntary. The auditor reported: 1, that the administrator should be charged with interest on the deposit from 1883 to 1893; and 2, that the fund belonged to the next of kin.

Exceptions to report sustained, and decree disallowing the surcharge of interest and awarding the fund to H Society. Appeal.

Rice, P. J. 1. A general deposit draws no interest unless by agreement. 2. Payment of interest for a period is not of itself evidence of an agreement to pay it in the future. 3. The burden of proof was on H Society, as the presumptive title to a deposit is in the person in whose name it stands. 4. As the assignment did not bind decedent to transfer property thereafter acquired, evidence that the relation was that of creditor and debtor, and not that of cestui que trust and trustee, does not necessarily impeach the assignment. 5. Partners in the bank are presumed, prima facie at least, to have had notice of the deposit. 7. Though in general it is against public policy to allow a bank to dispute its depositor's title, it is justified in refusing payment after notice by the true owner; and, as this qualification applies where the true owner is a member of the banking firm, payment by the bank cannot be regarded as compulsory. 7. One who voluntarily pays a fund to the administrator cannot on distribution deny the title of the estate. Decree reversed.

COMMONWEALTH v CHESTNUT ST. NAT. BANK (1899) 189 Pa. St. 606.

Rule to vacate attachment sur judgment. Plaintiff obtained a judgment against L. In attachment proceedings, C Bank was made garnishee. At the time when C Bank was served with the writ, it was indebted to L on a certificate of deposit, and also held stock belonging to L, as security for a debt due it from L. Thereafter C Bank paid the certificate. It became insolvent, and contended that the attachment was unlawful under U. S. R. S., 5242, prohibiting the issuance of attachment against an insolvent national bank before final judgment. Rule discharged on the following grounds: 1, that the statute prohibited attachments only in actions against the bank, and not in those in which it was merely garnishee; that plaintiff was entitled to the stock subject to the bank's lien; and that plaintiff was entitled to a dividend on the amount of the certificate. Appeal.

Per curiam. Judgment affirmed on the opinion of the court below.

SCHUYLKILL RY. CO. v GOVERNMENT NAT. BANK (1899) 191 Pa. St. 83.

Assumpsit, to recover the amount of a check. A check on defendant was given by C to G, president of plaintiff. The check was payable to G individually and was deposited to his own credit and collected. There was evidence that it was given for plaintiff's benefit, but no direct evidence that it was so used. Subsequently G gave C a check for the same amount, drawn by H on another bank. C deposited H's check with defendant for collection. The check was protested, and plaintiff, not G, was notified of its dishonor, plaintiff's treasurer assuring defendant that the latter would be protected. The amount was charged to plaintiff, and appeared in several settlements of its accounts with defendant without objection. The court charged that defendant was not liable if C's check was given and used for the benefit of plaintiff, and if H's check was given in consideration thereof and recognized by plaintiff as an obligation of its own. Judgment for defendant. Appeal.

Dean, J. The subsequent acts of plaintiff with regard to H's check were evidence of G's authority to receive the C check and give the H check in payment; and also evidence that plaintiff received the benefit of the C check. Judgment affirmed.

GUNSTER v JESSUP (1899) 192 Pa. St. 223.

Assumpsit, on cashier bond, against principal and sureties. T, the principal, was cashier of S Bank. He defaulted and was indicted. Defendants and others paid a large amount to S Bank. Defendants contended that the money was paid for the purpose of discharging T's entire indebtedness to the bank, which was in excess of the penalty of the bond, and came into the hands of plaintiff, S Bank's assignee in insolvency. There was no evidence of specific appropriation of any particular payments. The question as to whether the bond was paid was left to the jury. Judgment for defendant. Appeal.

Green, J. 1. If the payments were in excess of the penalty and actually applied to the extinguishment of T's indebtedness, the bond was paid. 2. These questions were properly for the jury. Judgment affirmed.

MYERS v SOUTHWESTERN NAT. BANK (1899) 193 Pa. St. 1.

Assumpsit, to recover a deposit. Plaintiff was a depositor with defendant. Plaintiff's clerk, who was intrusted with making deposits and comparing the paid checks and passbooks, forged checks which defendant paid. The clerk falsified plaintiff's books to conceal the forgery. Plaintiff did not personally examine his passbook and checks when they were returned. There was no evidence that the forgeries could have been detected upon ordinary inspection. Verdict directed. Judgment for defendant. Appeal.

Sterrett, C. J. 1. While plaintiff was not chargeable with the knowledge of the clerk that he committed a forgery, he was responsible for the clerk's negligence in failing properly to examine the accounts. 2. In the absence of evidence that the forgeries were capable of detection by ordinary inspection, negligence by defendant will not be presumed. Judgment affirmed.

CORNELIUS v THE BANK (1900) 15 Pa. Sup. 82.

Assumpsit, on deposit. Plaintiff, an executrix, alleged that X, the testator, died with a balance due him from defendant. The affidavit of defense averred that X had made a note, forged the payee's indorsement, and presented it to defendant for discount; that the apparent balance was the credit given X upon this transaction; that X died before the note came due; and that after his death, defendant, on discovering the fraud, promptly informed plaintiff thereof, and notified her that the credit was canceled. It did not tender the note. The affidavit was held insufficient. Judgment for plaintiff. Appeal.

W. D. Porter, J. 1. Defendant had a right to rescind the contract, to cancel the credit which it had extended as a result of the fraud, and to decline to pay over the balance which had not been checked out. 2. Failure to tender the note does not defeat defendant's right to allege a rescission, as a party rescinding a contract is not bound to tender that which is entirely worthless. Judgment reversed.

SAFE D. & T. CO. v DIAMOND NAT. BANK (1900) 194 Pa. St. 334.

Assumpsit, for money had and received. D was administrator of W, deceased. He had an account with defendant in his own name, but opened no account as administrator. He received checks payable or indorsed to him, as administrator, all of which he indorsed as administrator, and deposited to his personal account. Subsequently D checked out the entire account for his private purposes. He died, heavily indebted to the estate of W and plaintiff was substituted as administrator. Plaintiff contended that defendant was liable for the amount of all checks payable or indorsed to D, as administrator. Judgment for defendant. Appeal.

Per curiam. The administrator had a right to deposit the money to the credit of his own account; and, when thus deposited, it was subject to be drawn out on his personal checks, which the bank could not refuse to pay in the absence of prior notice of an adverse claim. Judgment affirmed.

PHILA. NAT. BANK v SMITH (1900) 195 Pa. St. 38.

Assumpsit, on implied warranty of title in the sale of bank stock. B presented to plaintiff a power of attorney to transfer to himself stock standing in the name of C. It was a forgery, but the transfer was made and certificate delivered to B, who delivered it the same day to defendants as collateral. Defendants procured a new certificate in their own name. B became insolvent, and plaintiff holding B's notes unsecured, bought defendant's notes against B, together with the certificate as collateral. The forgery was discovered, plaintiff was compelled to pay C the value of the certificate, and brought this action. Nonsuit. Appeal.

Per curiam. As the certificate sold by defendants to plaintiff was genuine, and was theirs, lawfully and in good faith acquired, they are not liable. Judgment affirmed.

JACK v KLEPSEK (1900) 196 Pa. St. 187.

Case stated. Defendants were makers of a note held by a bank of which plaintiff was assignee for the benefit of creditors. Defendants were depositors with the bank. W, one of defendants, was a member of another firm depositing with the bank and had received an assignment of all his partner's interest in their deposit.

The note was not due at the time of the bank's assignment. Defendants contended that both deposits should be set off against the note. Judgment for defendants. Appeal.

McCollum, J. 1. Though the note was not due at the time of the insolvency, this was no bar to defendant's right to set off the amount of their deposit. 2. One of two or more defendants may set off his individual claim against plaintiff's joint claim. 3. As W had the consent of his partner, he could set off the amount of their deposit against the claim of the bank against defendants. Judgment affirmed.

LAND T. AND T. CO. v NORTHWESTERN NAT. BANK (1900) 196 Pa. St. 230.

Assumpsit, to recover amount paid on check. By fraud, plaintiff was induced to issue and deliver its check drawn on itself to A, thinking him to be B. The check was payable to B, and indorsed by A in B's name. It was deposited with and paid by defendant, a bank, and subsequently paid by plaintiff. Defendant was promptly notified of the fraud when it was discovered, but refused to reimburse plaintiff. Judgment for plaintiff. Appeal.

Fell, J. 1. Plaintiff as drawer has no claim against defendant, as a drawer cannot maintain an action against one who collects on a forged instrument from the drawee. 2. Plaintiff's right as a drawee to charge defendant on its implied warranty of indorsement, is barred by the estoppel arising from its negligence in giving the check to A and so giving him power to perpetrate the fraud. Judgment reversed.

WISE v LOEB (1901) 15 Pa. Sup. 601.

To determine validity of judgment entered on note. Defendant when an infant gave a banking firm a note. Plaintiff was the firm's cashier and sole managing partner. Judgment on the note was opened on defendant's petition. Defendant was at that time of age, but did not set up infancy as a defense until the trial. Verdict directed for plaintiff, subject to opinion of the court on the following facts: Plaintiff, defendant, and L had arranged that defendant should be discharged from liability on the note and that L should be substituted for him; L was indebted to the bank on an overdrawn account at the time of this arrangement. No actual charge was made by the firm against L, and no new consideration passed. Judgment for plaintiff. Appeal.

Beaver, J. 1. If plaintiff was willing to accept L for the payment of the note, and did so, then, notwithstanding L's indebtedness to the bank, the transaction was complete and defendant was discharged. 2. Defendant's failure to disaffirm the contract on the ground of infancy, when he petitioned the court to open the judgment, amounted to a ratification. Judgment reversed.

COMMONWEALTH v HAZLETT (1901) 16 Pa. Sup. 534.

Indictment against a banker, for receiving deposits when insolvent. Defendant had been practically insolvent for two years, during which time he continued to receive deposits from different customers. He was once before indicted for having received certain deposits on designated days, but was acquitted. This indictment charged him with receiving deposits from persons, other than those specified in the former indictment. Act of May 9, 1889, P. L. 145, makes it unlawful for bankers, who know they are insolvent, to continue to receive deposits. Part of the punishment prescribed is a fine in double the amount so received. Demurrer to plea in bar of former acquittal overruled. Verdict guilty. Appeal.

W. D. Porter, J. 1. This legislation was not merely aimed at the carrying on of business by an insolvent bank, but it dealt with specific acts, and measured the punishment, in part, by the amount of money obtained by the offender, as the result of each specific violation. 2. Neither a conviction nor an acquittal, upon such an indictment, charging a deposit to have been made by one person, is a bar to a subsequent prosecution, charging a distinct deposit made by another person. 3. Whether the former acquittal was for the same offense, depended on the record pleaded, and not on the argument, or inference, deduced therefrom. 4. It is for the jury to determine what property is worth, in view of its character, condition and location, and from the opinions of those who are supposed to have an expert knowledge upon the subject. 5. A witness who has no knowledge upon the subject of market value, derived from the prices at which lands are held and sold

in the vicinity, is not competent to testify as an expert on such a question. 6. Where the stock of a corporation is not bought and sold in the open market, its secretary does not necessarily know the value of its properties. Judgment reversed.

STATE v FIRST NAT. BANK (1901) 17 Pa. Sup. 256.

Assumpsit, to recover money paid on forged draft. J S died leaving a legacy to his daughter R. R predeceased her father. Plaintiff was executor of J S. He did not know of R's death, and wrote informing her of the legacy. He received an answer from R's husband, who forged his wife's signature thereto. Plaintiff purchased of defendant, a draft made to R's order. The draft was mailed to her, and received by her husband. He forged R's name and collected the draft. Verdict directed. Judgment for plaintiff. Appeal.

W. W. Porter, J. 1. A bank is not liable for the payment of a draft, on a forged indorsement, where the person who committed the forgery and received the money, was in fact the person to whom the drawer delivered the check, and whom he believed to be the payee named. 2. The fact that the fraud was accomplished by correspondence to which plaintiff gave credence, does not remove the case from the application of this principle. Judgment reversed.

FARMERS NAT. BANK v CUYLER (1901) 18 Pa. Sup. 434.

Replevin, for checks. Case stated. Plaintiff, on January 2, held checks belonging to its depositors, drawn on S Trust Co. The same day the checks were presented; and a check, drawn by S Trust Co. on F Bank, was accepted by plaintiff in payment. S Trust Co. made an assignment to defendant before banking hours on January 3. The check was presented to the F Bank which held sufficient money to pay it, and payment refused because of the assignment. Defendant refused to return the checks surrendered by plaintiff. Judgment for defendant. Appeal.

W. W. Porter, J. 1. Plaintiff by accepting the check fixed its liability to its depositors for the amount of the checks surrendered to the same extent as if it had received cash for them; and became the direct creditor of S Trust Co. on the check. 2. The drawers of the check were entitled to have them canceled; and there was a substitution of the direct liability of S Trust Co. to plaintiff for its liability to the drawers on the checks surrendered. Judgment affirmed.

FIRST NAT. BANK v ROGERS (1901) 198 Pa. St. 627.

Assumpsit, on draft, against acceptors. The draft was drawn upon defendants by V. Plaintiff discounted it and applied the proceeds to an overdraft of V. Defendants' evidence tended to show that the draft was accepted to enable V to pay freight charges, and that the purpose for which it was drawn was known to plaintiff when it was discounted. Judgment for defendants. Appeal.

Per curiam. As plaintiff discounted the draft with full knowledge of the purpose for which it was drawn, and applied the proceeds to its own account against V. it cannot recover. Judgment affirmed.

MIFFLIN CO. NAT. BANK v FOURTH ST. NAT. BANK (1901) 199 Pa. St. 459.

Bill, for an account. Two firms, made up of the same partners, assigned for creditors to the same persons. Defendant, a bank, claimed to hold a deposit of one firm under special contract as security for a debt of the other firm. The assignee claimed the deposit, but upon defendant's refusal to pay, took no steps to collect it. Eleven years later, plaintiff, one of the creditors of the two firms, first learned of the deposit and demanded it. Defendant contended that the Statute of Limitations had run. Decree for defendant. Appeal.

Mitchell, J. 1. The cause of action accrued and the statute began to run, upon demand by the assignee and refusal of defendant. 2. Plaintiff's want of discovery or knowledge of the deposit, and of the assignee's acquiescence in the retention by defendant was wholly immaterial. Decree affirmed.

COMMONWEALTH v McKEAN CO. (1901) 200 Pa. St. 383.

Tax settlement. Defendants, county commissioners of taxes, omitted in their return to the state board for state taxes, judgments and mortgages held by a

private unincorporated bank, and included in the assessment list furnished by the bank. Defendants contended that the bank was exempt under the Act of 1891, which provided that bank notes or notes discounted or negotiated by any banking institution were not taxable; and that judgments, notes and mortgages, held as security were not taxable. Judgment for plaintiff. Appeal.

Brown, J. 1. Judgments and mortgages held by unincorporated banks are subject to taxation for state purposes as the exceptions under the Act of 1891 apply only to corporations. 2. The county is bound for the amount the bankers themselves fixed as their assessment. Judgment affirmed.

RHODE ISLAND

CROSS v PHENIX BANK (1840) 1 R. I. 39.

A provision in a bank charter that the stock of each stockholder shall at all times be pledged and liable for any debt due the bank, and be sold for default of payment thereof, is not for the benefit of the indorsers of a note given by a stockholder to the bank.

ATWOOD v R. I. AGRICULTURAL BANK (1850) 1 R. I. 376.

Creditor's bill, to enforce the liability of stockholders. Defendant's charter provides that stockholders shall be personally and individually liable for all losses, deficiencies and failures of the capital stock of the bank. Plaintiffs obtained judgment upon their claims. They alleged that a deficiency had been occasioned by mismanagement and that the receiver, though well knowing of the deficiency, had refused to proceed against the stockholders. The defendant set up the six-year Statute of Limitations. Submitted for consideration of the court as if upon demurrers.

Greene, C. J. 1. The charter created a personal and individual liability of stockholders to creditors for any deficiency in proportion to the amount of stock held by each. 2. A liability created by statute is a specialty, and an action thereon in equity is not barred by the Statute of Limitations, though not commenced within six years. 3. A request to the receiver to sue is not necessary before suit brought by creditors, when it appears that a request would be a useless ceremony. Decree for complainants.

Cited: 22 R. I. 615.

NICHOLS v SCHOFIELD (1852) 2 R. I. 123.

Attachment. The plaintiff garnished the defendant's deposit in a savings bank. The treasurer of the bank, as garnishee, testified as to the amount of the defendant's deposit, and that he had received no notice that it had been transferred. The bank's charter provided that a depositor or his representative could draw on the deposit only at certain specified times, and upon a week's notice. Deposits could be assigned by a transfer of the depositor's book with the assignment indorsed thereon. Defendants contended that this provision made the deposits negotiable, and therefore not attachable.

Per curiam. 1. These deposits are liable to attachment, like those of any other bank. 2. Until the bank has received notice of a transfer, it has a right to consider the deposit as still belonging to the original depositor. Judgment for plaintiff.

ATWOOD v RHODE ISLAND AGRICULTURAL BANK (1852) 2 R. I. 191.

Creditors' bill to enforce stockholders' liability. The charter of the bank provided that the stockholders should be personally and individually liable for all losses, deficiencies and failure, of the capital stock of the bank. The administrator of one of the stockholders set up as a bar to his liability, an act providing that no action should be brought against any executor or administrator in his said capacity, unless the same should be commenced within three years next after the will was proved or administration granted. The liability did not accrue until

after the expiration of the three years. The plea of the statute was held valid. Plaintiff excepted..

Greene, C. J. The statute is a complete bar. Exceptions overruled.

Cited: 6 R. I. 193; 15 id. 345; 19 id. 657. S. c.: 1 R. I. 376, ante p. 1249.

WILKINSON v PROVINCE BANK (1853) 3 R. I. 22.

Mandamus, to compel bank to transfer stock on its books to petitioner, a purchaser thereof for value.

Greene, C. J. The law restricts the application of a writ of mandamus as a remedy to enforce mere private rights of property, to cases where the applicant has no adequate remedy by action in the due course of the common law. The law regards bank stock as a subject of pecuniary value only, capable of being fully compensated for in damages. Petition dismissed.

Cited: 20 R. I. 385.

WESTMINSTER BANK v WHEATON (1856) 4 R. I. 30.

Assumpsit on bills of exchange against indorser. C, as agent of the S Co., drew several orders on plaintiff payable 60 and 90 days after date to the order of defendant. Defendant indorsed the orders and plaintiff paid the money to him. The orders were presented to the drawer and defendant for payment on the third day after the day fixed for payment. On payment being refused, notice was given to defendant on the same day. Defendant contended that the orders were checks and not bills of exchange; that days of grace are not allowed upon checks; that the orders not having been presented for payment within the time allowed by law, the indorser was thereby discharged; that plaintiff being the drawee and having paid the money, no suit can be maintained thereon; that the drafts thereby discharged their office and all parties to them became discharged. Case submitted.

Brayton, J. 1. The order was in effect a check or draft on the plaintiff. 2. The payment thereof amounted to an acceptance. 3. The liability of defendant as indorser became extinguished upon payment by the drawee. Payment by the drawee to the party entitled to receive the money thereon is a discharge of the bill whether made before or after its maturity. Judgment for defendant.

SEAGRAVES v RAILROAD BANK (1856) 4 R. I. 372.

Injunction, to restrain the transfer of stock. Complainant was assignee of S, who had two drafts discounted by defendant, of which he was a stockholder. The acceptor had neglected to pay them. S offered to pay these drafts, thereby releasing his stock in defendant from the lien. Defendant refused to accept payment of the drafts, unless S paid another draft drawn by him and discounted for C, a director of defendant. S refused to pay this draft claiming that C was the real creditor and that defendant had no real interest. Defendant, claiming a lien for the payment of this draft, sold S's bank stock. The draft was discounted in the usual way without any condition, except that C should guarantee the payment instead of indorsing it, as the draft had been forwarded for collection.

Bosworth, J. 1. The lien given to the bank upon the shares of its stockholders for the security of debts due from them is for the benefit of the bank. 2. It was not intended to enable the banks to wield this power for the benefit of others; thus interfering with the operations of the laws and fraudulently giving to its favorites advantages as creditors over other creditors. 3. As the proof made out by the plaintiff is not sufficient to establish fraud, and the proof offered by the defendant negatives the same, the cause is not made out. Decree for defendant.

AMERICAN BANK v MUMFORD (1857) 4 R. I. 478.

Assumpsit, for money paid for taxes, by means of a levy on plaintiff's property. The tax laws provided that all property, liable to taxation, should be taxed at its full and fair cash value; that every person and body corporate liable to taxation might be required to bring in a true and exact account of their ratable estate; that real estate should be taxed where situate, and all ratable personal estate in the town where the owner had his residence. The tax in question was assessed upon the capital stock of the bank. The bank was also assessed upon its real estate and the amount of this tax was tendered by it. Demurrer to the declaration.

Bosworth, J. 1. The shares of stock of the corporation were to taxed to the owners at the place where they reside, and to tax them again to the corporation, under the name of capital stock, would be double taxation. 2. The court will not infer an intention on the part of the legislature to impose a double taxation, without clear evidence of such intention, deducible from the language of the act. 3. The statute does not provide for the taxation of the personal property of the corporation, and the assessment was without authority of law and void, and may be recovered back in an action of assumpsit. Judgment for plaintiff.

Cited: 4 R. I. 485; 14 id. 310; 15 id. 236; 17 id. 78; 19 id. 578, 711; 22 id. 224, 225.

BANK COMMISSIONERS v CENTRAL BANK (1857) 5 R. I. 12.

Injunction, to restrain defendant from exercising its franchise and for the appointment of a receiver. Complainants were the state bank commissioners. By ch. 126, sec. 47, R. S., an injunction could issue where the mismanagement of a bank placed the billholders or depositors in danger of being defrauded. Sec. 28, ch. 126, R. S., provided that a bank's circulation should not exceed its actually paid-in capital stock. The greater part of defendant's stock had been paid for by notes, which had never been paid, and which were given by non-residents. The defendant's circulation exceeded this stock. During the pendency of this action the circulation was greatly reduced by law.

Ames, C. J. 1. It is not the fraud of the managers, but the danger that creditors may be defrauded by the management of the bank, that is mentioned in the section as a ground for the court's interference. 2. The circulation, being in excess of the actually paid-in capital, there is danger of fraud, which warrants the interference of the commissioners and the court. 3. The reduction of the circulation cannot atone for the state of things existing at the time the application was made. Decree for complainants.

CLARK v HAWKINS (1858) 5 R. I. 219.

On promissory note, receiver of the R Bank against the maker. Defendant set up: 1, that while he was indebted on the note, the bank agreed to pay him \$11.25 per share for 38 shares of its own stock, and that this agreement was an accord and satisfaction of the debt pro tanto; 2, that the bank was indebted to him in the sum of \$36 prior to the suspension of the bank's business; and that he was entitled to setoff for bills of the R Bank purchased by him, after injunction issued dissolving the bank. Defendant tendered the stock purchased by him, but the receiver refused the same. Case submitted.

Ames, C. J. 1. The agreement in regard to the stock lacks the essential characteristics of an accord, viz, that it must be executed. 2. The sum of \$36 is allowed to the defendant in setoff. 3. The injunction against the bank's doing business fixed a period, back of which claims against the bank cannot be purchased, and carry with them the equitable right of setoff. Judgment accordingly.

Cited: 17 R. I. 636.

BANK OF NORTH AMERICA v STURDY (1862) 7 R. I. 109.

Deceit. The plaintiff agreed with the defendants to discount and continue to discount their business paper to a certain amount. Under this arrangement, the defendants repeatedly offered and sold to the plaintiff, as the business paper of the firm, accommodation paper made by their irresponsible workmen, in such form and amounts as to simulate their trade paper. These notes were not paid. Verdict for plaintiff. Motion for new trial.

Ames, C. J. The successive offers under the arrangement were a recognition and reassertion of the representations contained in the original arrangement. They were affirmation of facts peculiarly within the knowledge of defendants, and the plaintiff having been damaged thereby, these defendants are liable for deceit. Motion overruled.

Cited: 18 R. I. 572.

HAYES, REC'R v KENYON (1862) 7 R. I. 136.

Assumpsit, for the value of securities fraudulently appropriated. Plaintiff was the receiver of a bank, of which defendant was president and principal stockholder. Defendant sold his stock to irresponsible persons, receiving their notes as pay-

ment; and substituted therefor the valuable assets of the bank. The court instructed, that the plaintiff represented the creditors of the bank, and refused to instruct: 1, that in order to recover, plaintiff should show that some billholder, depositor, creditor, or stockholder had been injured by defendant's act; 2, that, if the property of the bank came into defendant's possession in the course of an illegal transaction, both parties are in *pari delicto*; and 3, that plaintiff could not recover, without first offering to return the shares of stock sold by defendant. The court refused to admit memoranda of discounts, made on the bank's books at a meeting of defendant's purchasers, who were not shown to have been legally elected as directors, and made after defendant had left the bank. Verdict for plaintiff. Motion for new trial.

Ames, C. J. 1. The principal office of a receiver is to care for and represent the interest of creditors, and in such cases, he may take advantage of any fraud in derogation of the rights of creditors, to which the insolvent debtor is a party. 2. The first instruction was properly refused, because it wholly ignored the existence of the bank as a legal entity and confounded the corporation with its creditors and corporators. 3. In a suit between a bank and its principal officer for abstracting without warrant or value, all its assets, it is difficult to see how the parties can be in *pari delicto*. 4. The bank cannot be required to return shares sold by defendant to others, and for which he wrongfully took his pay out of the bank's money. 5. Memoranda kept by those who are not entitled to represent a corporation, are not evidence, in themselves, of its doings. Motion overruled.

OLNEY v CHADSEY (1862) 7 R. I. 224.

Assumpsit, on account, brought by the receiver of a bank against the former president. The books of account of the bank, accompanied with evidence that they were open to the inspection of the defendant, and that he made no objection to the account there entered, were admitted as proof of the implied admission by him of the correctness of the entry. The book of minutes of directors' meetings, regularly kept by the cashier, were admitted to prove who were present and what was done at the meetings. The defendant offered evidence of a settlement made with him by the president of the bank at the time, but no proof of the president's authority being given. Excluded. Verdict for plaintiff. Motion for new trial.

Ames, C. J. 1. The books of account were proper evidence, not in direct proofs of the charges in the account, but as an implied admission of them by the defendant. The minute books were properly admitted. 2. The president of a bank in Rhode Island has no authority, as such, to surrender or release the claims of the bank against any one. Such authority must be derived from the board of directors, by their vote or from their assent, express or implied. Motion dismissed.

Cited: 11 R. I. 381; 15 id. 137; 18 id. 638.

ATLAS BANK v BROWNELL (1869) 9 R. I. 168.

Debt, on a bond against the cashier of plaintiff and his sureties. Defendants offered evidence that the directors of the bank had been negligent in examining the books; that previous to the execution of the bond, the cashier had lost money by gambling; that the directors knowing it, increased his bond from \$10,000 to \$15,000 and required another surety. Excluded. These facts were not communicated to defendant S, the additional surety. The admission of the cashier that he had paid out large sums of money without the authority of the directors was admitted as evidence against the sureties. Verdict for plaintiff. Motion for a new trial.

Potter, J. 1. Mere laches of the creditor, unaccompanied by fraud, will not discharge the sureties. 2. The admission of a principal is admissible against the surety. 3. To avoid a bond on account of the concealment of the creditor, there must be a concealment of something material for the surety to know, and the concealment in this case does not come within the rule. Motion denied.

TOBEY v MANUFACTURERS NAT. BANK (1869) 9 R. I. 236.

Money had and received, to recover a deposit. T, at the time of his death, had a deposit with defendant. Plaintiff was appointed his executor, and drew out the deposit. He immediately redeposited it in his own name, as executor. Subsequently a bill of exchange and a promissory note, made by T in his lifetime, to

the defendant, fell due, and were protested for non-payment. Defendant claimed to be entitled to offset the amount due on the notes, against plaintiff's claim for the full amount of the deposit.

Brayton, C. J. 1. In order to sustain a setoff, defendants must have a claim in their own right, upon which an action is maintainable against the plaintiffs in the character in which the plaintiffs are suing. 2. The plaintiffs are liable for the amount received from defendant, to the estate, as for cash in their hands; but the subsequent deposit of the funds with defendant gave the bank no lien upon them. Judgment for plaintiffs.

LOCKWOOD v MECHANICS NAT. BANK (1869) 9 R. I. 309.

Tort, for refusal to transfer stock. The defendants were national banks in which plaintiffs held stock assigned to them by the owner of record, who had indorsed notes for the accommodation of A. When the plaintiffs took the stock they knew that the notes were in the possession of the defendants and were unpaid. Defendants refused to transfer the stock on the books, setting up by-laws which prohibited transfer while the owner was indebted to the bank, without the consent of the directors. The various charters gave power to regulate the transfer of stock. One defendant had informally passed the by-law regulating stock, but later had treated it as a valid by-law. The X Bank had a number of inactive directors, and only a majority of the active members were present when the by-law was adopted.

Potter, J. 1. The power to make by-laws is sufficient to justify a by-law creating a lien on the stock. 2. The power to regulate the transferring of stock is sufficient to authorize such a by-law, and to authorize a by-law making stock transferable, only on the books. Until such transfer, the purchaser will have only an equitable interest, subject to all defenses against his assignor. 3. A by-law, informally adopted, may subsequently be ratified by usage. 4. Where the number of members is fixed, and an act is to be done by that body, a majority is necessary to constitute a legal meeting. Though the active number of members be reduced, the number necessary to constitute a quorum remains the same. Judgment for defendants, except in the case of the X Bank.

Cited: 13 R. I. 298; 17 id. 556; 21 id. 13.

LAWRENCE v STAIGG (1874) 10 R. I. 581.

For rescission of contract of sale of land, on the ground of mutual mistake. At a former hearing, the court ordered the sale rescinded, unless defendant compensated plaintiff for the additional number of feet actually bought and conveyed. The master appointed a time within which the amount due should be paid by defendant. The master found that there had been no compliance with the decree, by the defendant. Defendant, on the last day upon which payment was to be made, obtained from a bank, legal tender, with which he went to the house of plaintiff to make tender. Plaintiff's son refused to receive the money in the absence of plaintiff. Defendant moved for further time within which to pay for the surplus land, on the affidavits of the teller of the bank and of the attorney for the respondent, to the effect that tender was made in United States notes.

Durfee, J. 1. The motion for extension of time should be entertained. Plaintiff's claim to a reconveyance rests upon a technicality, which did no harm and should not be allowed to prevail against defendant's motion. 2. Although the defendant's option was not a debt, and money which would have been legal tender for the purchase ought in equity to answer as legal tender for the rectification of the mistake. It was not necessary, therefore, to tender gold or silver. Motion granted.

Cited: 16 R. I. 163; 22 id. 431.

RAY v SIMMONS (1875) 11 R. I. 266.

Bill to establish a trust. B made a deposit in the F Bank in his own name, as trustee for plaintiff, his stepdaughter. After making the deposit, B gave the book to plaintiff who subsequently returned it to him. B then kept the book and went several times to the bank to have the interest entered, and made one withdrawal. Defendant, administrator of B's estate, testified that B told him that he had money deposited in the F Bank to as large an amount as he could deposit in his own name; and also in another person's name, but did not say in whose

name. Defendant contended that as B kept control of the book, no valid trust was created.

Durfee, C. J. 1. No particular form of words is necessary to create a trust. The property being personal, it is enough if the owner irrevocably declares, either orally or in writing, that he holds it in presenti in trust. 2. The declaration made after the creation of the trust could have no legitimate effect upon it. Decree for plaintiff.

Cited: 16 R. I. 415; 17 id. 149, 606; 18 id. 288; 21 id. 220; 22 id. 373; 23 id. 137.

BANK COMMERCE v FRANKLIN INST. FOR SAVINGS (1877) 11 R. I. 557.

Settlement of accounts of receiver. The master disallowed a charge of \$50, a gratuity paid to policemen for keeping order during the payment of a dividend. The master allowed \$7,500 for services. The receiver, who had been a broker before his appointment, procured new loans for some of the debtors of the bank. The master held that the receiver should account for the commissions so received. The receiver excepted.

Durfee, C. J. 1. A trustee has no right to make a present out of the trust funds without the consent of the beneficiaries. 2. It is not improper to allow a receiver compensation from time to time, before the close of the receivership. The receiver need not account for the commissions. Report confirmed except as to the commissions.

PALMER v PROVIDENCE INST. FOR SAVINGS (1883) 14 R. I. 68.

On deposit. Plaintiff was administrator of the estate of M, a depositor in defendant bank. Upon the death of M, plaintiff asked the mother and brothers of M for the bank book. They said it was in the possession of an uncle in Boston, who had paid the funeral expenses, and refused to give any further information. Defendant refused to pay the money without the production of the book which its charter and by-laws required. Plaintiff, without tendering a bond of indemnity, and without summoning the relatives of the deceased as permitted to do by P. S. ch. 185, secs. 18, 19, to examine them as to the whereabouts of the book, brought this suit. Verdict for plaintiff. Exceptions.

Matteson, J. 1. The plaintiff was entitled to recover, on accounting for the non-production of the book. 2. The deposit not being claimed by others, plaintiff should not be required to give a bond. 3. Plaintiff was not bound to go to the expense of summoning the relatives before the probate court. Exceptions overruled.

PETITION OF ATKINSON (1889) 16 R. I. 413.

Petition for an opinion. A father made a deposit as trustee for the benefit of three of his six children. He drew nothing from the deposit books during his life, told the three children that the money would be theirs at his death, and made no charge, memorandum or delivery in the presence of witnesses, as required by statute to evidence an advancement. A deposit under like circumstances was made in the name of another child. Subsequently the father withdrew this deposit with interest and invested it in his individual name. Petition by administrator to determine the ownership of the fund.

Durfee, C. J. 1. There was a completely constituted trust in favor of each of the children, who were entitled to the deposits on their father's death, and they should not be required to account for them as advancements from his estate. 2. There was a completely constituted trust also of the money drawn out by the father, and it could not be revoked.

Cited: 21 R. I. 220; 23 id. 137.

PECK v BANK OF AMERICA (1890) 16 R. I. 710.

To establish title to corporate stock. M was executrix of her husband's estate and, under his will, had a life interest in certain stock in defendant. Under defendant's charter, defendant had a lien upon its stock for any indebtedness of stockholders. In 1880, nine years after the death of the testator, defendant discounted notes made by W and indorsed by M. To support her indorsements, M transferred the stock in defendant bank from herself as executrix to her own name. Plaintiffs, the remainder-men, had no knowledge of the above facts until 1887, and contended

that defendant had no lien on the stock. Defendant contended that the plaintiffs were barred by the Statute of Limitations.

Matteson, J. 1. The circumstances were enough to put defendant upon inquiry, and failure to ascertain M's interest by looking at the will was negligence. 2. Defendant is entitled to a lien only upon the life interest of M. 3. The transfer of the stock was a fraud on the plaintiffs, and the Statute of Limitations began to run not at the time the fraud was perpetrated, but from its discovery. Order accordingly.

Cited: 17 R. I. 178, 279.

MECHANICS SAV. BANK v GRANGER (1890) 17 R. I. 77.

To recover tax paid under protest. Plaintiff was a savings bank and the tax was assessed on its reserved profits. The deposits and accrued dividends were subject to withdrawal by the depositors at such times as the bank might direct. The board of trustees could at any time divide the whole property among the depositors, on giving three months notice thereof. The bank made no return of its ratable estate as required by P. S., ch. 43, secs. 6, 7.

Durfee, C. J. 1. In contemplation of law, the reserved profits belong to the depositors, not to the bank, and the bank is not therefore taxable for them. 2. The case was not one of over-taxation, but of void taxation, and the plaintiff can recover although it did not make return of its ratable estate. Judgment for plaintiff.

HOLLAND v CITIZENS SAV. BANK (1890) 17 R. I. 87.

To compel transfer of mortgage. To show notice to a director of a bank, of facts given as reason for relief, the bill alleged that the circumstances occurred in the management of the bank. Demurrer. Sustained. Motion for rehearing.

Per curiam. The allegation that a respondent was a director, is not equivalent to an allegation that he knew of the matters alleged as reasons for the relief prayed for. Rehearing denied.

Cited: 23 R. I. 452.

INDUSTRIAL TRUST CO. v GREEN (1892) 17 R. I. 586.

Interpleader, to determine ownership of funds deposited in plaintiff bank. The president of an unincorporated voluntary association was illegally expelled from his office by a vote of the society. The society voted to dissolve, but the meeting at which the vote was taken, was held on a call which did not specify the objects of the meeting, and the call was not signed by the person recognized by the society as its president. The question raised was, should the funds be distributed among the members on the ground that there has been a dissolution.

Stiness, J. 1. Assuming that the society was a partnership, the legal action in expelling the president from his office is not sufficient cause to warrant a judgment of dissolution. 2. The meeting at which it was voted to dissolve the society was illegal. The fund must go to the voluntary association as now constituted.

NATIONAL PARK BANK v LEVY (1892) 17 R. I. 746.

Assumpsit. The plaintiff served a writ of garnishment, May 13, on, K as trustee of defendant. On May 11, K sent a check to defendant in New York in payment of a debt. May 12, defendant indorsed the check "for deposit" and placed it in the C Bank in New York. The C Bank credited defendant with the amount and sent the check to the M Bank in Providence, from which it was sent to the clearing house. K stopped payment, on being served with a copy of the writ, and the check was not paid until June 13, when the C Bank gave K a bond of indemnity. Motion to discharge the garnishee.

Tillinghast, J. At the time of the service of the writ, K was indebted to the C Bank, and not to defendant. Garnishee discharged.

GREEN v JACKSON BANK (1895) 18 R. I. 779.

Interpleader and for instructions. W, being indebted to the J Bank, placed certain notes with it for collection. W later became insolvent and made an assignment for the benefit of creditors, to plaintiff. The J Bank collected the notes and

held the proceeds, which were not sufficient to pay the whole of W's indebtedness to it. The bank demanded a dividend for the full amount of its claim.

Matteson, C. J. The bank has a lien upon the proceeds of paper left with it for collection; the presumption being that its advances were made on the credit of such securities. The bank is entitled to a dividend on the full amount of its claims, without deducting the amount of the proceeds of the notes.

WHITEHEAD v SMITH (1895) 19 R. I. 135.

To determine ownership of bank deposit. W placed a deposit in a bank to the account of W or S, to either, or the survivor of them. W intended that the deposit should be their joint property while he lived, and that S should have it when he died. W being dead, S withdrew the money claiming it as her own. The next of kin of W claimed it as part of his estate.

Tillinghast, J. The deposit was the joint property of S and W during their joint lives, and upon the death of W, title vested immediately and absolutely in S. Decree accordingly.

PROVIDENCE ASS'N v CITIZENS SAV. BANK (1895) 19 R. I. 142.

To cancel entry of withdrawal. Complainant had a fund on deposit in defendant and sought to withdraw it, but as the bank required notice of ninety days, it was unable to do so. Complainant then drew an order on defendant payable to B, F and J, or bearer, and it was taken to defendant by F, president of complainant, to operate as a notice of withdrawal. F took the order to W, who agreed to advance the money if defendant would transfer the deposit to his name. This, defendant did. F absconded, and the complainant received none of the money. The bill asked that defendant be ordered to cancel the entry of withdrawal, and that the transfer to W be declared null and void.

Stiness, J. Defendant did not violate its rules, there was no negligence on its part, and it is therefore not liable. Bill dismissed.

SHERRY v WAKEFIELD INST. FOR SAVINGS (1899) 21 R. I. 162.

To redeem a mortgage, and to be allowed a sum paid because of the fault of the mortgagee. E sold property to plaintiff, subject to a prior mortgage to H, which plaintiff agreed to assume. Plaintiff mortgaged the property back to E, with a verbal agreement that E should discharge the H mortgage. E failed to do this. Plaintiff then mortgaged the property to defendant for \$25,000 with the understanding that defendant should from this amount discharge all prior incumbrances. Defendant transferred to E's credit \$12,000 and E discharged the mortgage from plaintiff to himself. B, treasurer of defendant, and also agent of E, managed the whole transaction. Later B discovered that the H mortgage had not been discharged, but continued to receive interest from plaintiff for defendant without informing plaintiff. E finally became insolvent, and plaintiff was obliged to pay off the H mortgage.

Stiness, J. B was the authorized agent of defendant, and acting within the line of his office and employment. Defendant therefore made itself responsible by receiving payments from plaintiff without giving him notice that the H mortgage was not discharged. Allowance granted.

PROVIDENCE INST. FOR SAVINGS v DAILEY (1900) 22 R. I. 239.

To pay fund into court registry. The bill set forth that in 1869 the sum of \$500 was deposited in the complainant by D, as trustee, to the credit of P; that D died leaving a will disposing of this fund; that P cannot be found; and that there are several claimants. The bank asked to be allowed to pay the fund into the registry of the court, under P. L. of 1899, ch. 651, which provided that when any executor or other person holds money payable to another, and the one entitled thereto cannot be found, such executor, or other persons may pay the money into the registry of the court.

Stiness, C. J. The statute was not intended to cover any but official relations. The relation of the bank and owner of the fund is merely that of debtor and creditor, and the case is not within the statute. Bill dismissed.

TOLMAN v AMERICAN NAT. BANK (1901) 22 R. I. 462.

Assumpsit, to recover money paid on a forged check. P, representing himself to be H, induced the plaintiff to advance money on the security of a promissory note to which he had forged H's signature. The plaintiff delivered to P his check on the defendant payable to H. P forged H's indorsement on the check and gave it to A, who collected it from the defendant. P. L. 1899, ch. 674, sec. 31, provided that where the signature to an instrument is forged, no rights can accrue thereon against any party thereto. Judgment for defendant. Motion for new trial.

Stiness, C. J. The fact that the plaintiff had been imposed upon did not relieve the bank from its duty to see that the money was paid according to order. New trial ordered.

ELLIS v FIRST NAT. BANK (1901) 22 R. I. 565.

On deposit. R was treasurer of the A Co. and cashier of defendant. The A Co. made an assignment for the benefit of creditors to plaintiff. The A Co. had a large deposit in the defendant, which was also holder of three notes of the A Co., indorsed by R. Two of these notes were overdue, the third had not matured. R at the request of plaintiff transferred the account to plaintiff's name as assignee. After the maturity of the third note, plaintiff drew on the balance of the account, but defendant refused to honor the check. Judgment for plaintiff for a part only of the sum demanded. Petition by plaintiff for new trial.

Rogers, J. 1. The cashier of a bank in Rhode Island has no authority, as such, to release security held by the bank. 2. The assignee with his knowledge, was not justified in dealing with the cashier under such circumstances, but should have resorted to the board of directors. Defendant cannot repudiate the action of the cashier so far as the unmatured note was concerned, as it has not been injured as to this note. Judgment modified and affirmed.

SOUTH CAROLINA

STATE BANK v JOHNSON (1817) 1 Mill's Const. Rep. 404.

Debt, on official bond of teller. W, the teller, kept a book in which he daily stated his account with the bank. He settled up his account on June 19, showing the amount chargeable to him. The next day his account was checked up, found short, and he was dismissed. Plaintiff credited the amount actually found on hand on June 19, and sued the defendant, the bondsman, for the balance of teller's shortage. W was teller before the defendant went on his bond. There was evidence that he was a defaulter before the bond was given, but his cash was counted at regular intervals by the auditing committee and found correct. The court refused to admit in evidence an affidavit made by W as to the amount of his shortage, made after his dismissal. Judgment for plaintiff for amount particularly proved, and not for amount debited on the books against the cashier. Motion for new trial.

Cheves, J. 1. The books of the teller, kept in his own handwriting, were the very best evidence that could possibly have been adduced to charge him as well as the defendant. 2. The agent has authority to bind the principal, while acting as agent, by his acts, but never by his declarations, except as they form a part of the *res gestæ*. 3. This they cannot be, after the agent has ceased to act under the authority of the principal. The ruling of the court was correct. New trial granted.

STATE v TILLERY (1817) 1 N. & McC. 9.

Indictment, for stealing a note of a bank, payable to J. Defendant confessed his guilt, but it was not proved that the bill was genuine or how much, if any, was due thereon. 3 Stat. 470, sec. 3, provided that any person who steals a note, bond, or other evidence of indebtedness of a corporation, shall be guilty of a felony. Verdict, grand larceny. Motion for new trial.

Colcock, J. 1. To make the stealing larceny, the article must be shown to have value. 2. Unless a bank note is shown to be genuine, it has no value. 3. A note of a bank is the note of a corporation. New trial ordered.

Cited: 4 Rich. 363, 364.

BULOW v CITY COUNCIL (1819) 1 N. & McC. 527.

Writ of prohibition to restrain collection of taxes. Plaintiffs were residents in the city and were taxed by it on United States Bank stock owned by them. The city passed an ordinance, taxing all bank stock within its limits, except that which was exempted by the legislature. United States Bank stock was not exempted by the legislature. Order granted. Motion to reverse.

Johnson, J. 1. Sec. 4 of the defendant's act of incorporation gave it full authority to impose on its inhabitants a tax on legitimate subjects of taxation. 2. United States Bank stock is a legitimate subject of taxation. 3. The stock in the hands of the individual stockholders is taxable. Motion granted.

Cited: 5 Rich. 562; 3 S. C. 379.

LINING v CITY COUNCIL (1821) 1 McC. 345.

Writ of prohibition. The applicants are bank officers, whose salaries did not exceed \$1,300 per annum. Their incomes were assessed by defendants at \$1,600, and they were taxed on \$800. A city ordinance provides for a tax on all profits or incomes arising from the pursuit of any profession, but exempts the income of any person rated at a less sum than \$800. It also provides that in making the assessment on real and personal property, the assessor shall estimate the same at one half the value thereof. Writ granted. Motion to discharge.

Bay, J. The terms "profits or income" are included in the term "personal property" mentioned in the second clause, and make all property assessable at one-half its value only. Motion discharged.

Cited: 2 Supr. 85.

BILLIS v STATE (1822) 2 McC. 12.

Indictment, for forgery. The defendant was indicted for having passed a bill of the State Bank, knowing it to be forged. The United States Constitution provides that "no state shall coin money, emit bills of credit, or make anything but gold and silver legal tender." Verdict guilty. Motion for a new trial on the ground that one of the jury men was a director of the bank. Motion in arrest of judgment on the ground that the bill was void and not susceptible of forgery.

Huger, J. 1. Objections to a juror come too late after a verdict. 2. A bill of credit, within the meaning of the Constitution, is a promissory note or bill issued exclusively on the credit of the State. 3. As a note of the State Bank is a bill drawn on the credit of a particular fund, set aside for that purpose, it is not a bill of credit within the meaning of the Constitution. Motion dismissed.

Cited: 2 McC. 28; 12 Rich. 136; 3 S. C. 163; 48 id. 18; 56 id. 381.

BANK OF SOUTH CAROLINA v GIBBS (1825) 3 McC. 377.

A simple contract debt due the Bank of the State of South Carolina is not a public debt entitling the bank to a preference under the executor's act. (P. L. 494.)

STATE, EX REL. v TAX COLLECTOR (1831) 2 Bail. 654.

Suggestion for prohibition restraining the defendant from enforcing payment of a tax on dividends of stock in the Bank of the United States. Act of 1830, p. 6, provides that a tax of one per cent shall be paid on all dividends arising from stock owned by any citizen of the State in all banks not chartered by the State. The ground laid for the prohibition was that the tax was incompatible with the act of Congress incorporating the bank, and therefore inconsistent with the Constitution of the United States. Prohibition refused. Motion to reverse judgment.

Harper, J. The tax in question is not a violation of the United States Constitution. Motion refused.

Cited: 5 Rich. 569, 570, 574.

STATE BANK v CITY OF CHARLESTON (1832) 3 Rich. 342.

Writ of prohibition. Plaintiffs were taxed on their real property within the corporate limits of the city. Plaintiffs' charter declared that the payment of bonus should relieve the corporation and stock thereof from the payment of all taxes. The city council is authorized to make assessments "on the inhabitants of

Charleston, or those who hold taxable property within the same." Writ granted. Motion to reverse.

O'Neal, J. 1. By "taxable property" is meant that property which is liable to be taxed at the time the city council shall declare it liable to assessment. 2. The exemption extends to all property of the bank. Motion dismissed.

Cited: 5 Rich. 566; 10 id. 244; 15 id. 189; 13 Rich. Eq. 57; 39 S. C. 10.

BANK OF SOUTH CAROLINA v FLAGG (1833) 1 Hill 177.

On promissory note, against indorser. The note was made payable at plaintiff's branch bank, and indorsed to it by payee. W, a notary public, and bookkeeper of branch bank, mailed a notice to the maker that the note was due and demanded payment. He sent a notice of non-payment, by mail to the defendant. The note was then duly protested by W. Verdict for plaintiff. Appeal. Motion in arrest of judgment.

Johnson, J. 1. When one is told that he is to be paid money at a bank, he understands that the promisor will deposit funds there for that purpose. He has done all the implied undertaking on his part imposes, when he makes a demand at the bank. 2. When the bank at which a note is payable is the holder, it would be impracticable to make any other demand or inquiry, than by ascertaining that the note was there, and that the maker had no funds. If the note was there, it was a presentment, and if the maker had no funds, it was a refusal to pay. 3. A corporation can only act through agents; and the protest of the notary was sufficient notice to the bank that the maker had no funds. Motion dismissed.

THOMPSON v BANK OF THE STATE (1836) 3 Hill 77.

On promissory note. The plaintiff, by S, deposited a note with the defendant for collection. The notary having called at S's house when the note fell due, and finding him absent protested the note and gave notice to the depositor, but no notice was given to the prior indorsers, or maker, who were not residents of that town. The court charged that when a note is lodged with a bank for collection and is not paid at maturity, the bank is bound to give notice to the indorsers. Whether the defendant used due diligence in ascertaining their place of residence so as to enable it to give proper notice, was a question of fact for the jury. Judgment for plaintiff. Appeal.

Earle, J. 1. The bank was the agent of plaintiff. 2. Where a bank takes a note for collection, it is not a mere agent responsible for notice to the depositor alone, but is bound to demand payment of the maker and cause notice of non-payment to be given to all indorsers. 3. If the residence of an indorser is unknown, it is the duty of a bank to obtain the information at the time of receiving the note, to enable it to perform its duty. 4. Whether due diligence has been used to discover the place of residence of the person to whom notice is to be given is a question of fact for the jury, and was properly left to them. Judgment affirmed.

Cited: McM. Ch. 414.

STATE v BANK OF CHARLESTON (1838) 1 Dud. L. & E. 187.

Quo warranto. The stockholders of the defendant voted to increase its capital stock, and to divide the new stock among its stockholders. The State asked for quo warranto compelling the bank to show by what authority it so apportions the new stock. The charter, sec. 4, provided that the company, at any time before the expiration of its charter, by paying a bonus, might increase the capital stock subscribed, to "be paid in the same manner and subject to the same conditions with that already provided for." The act did not point out how the increase is to be made, either directly or by implication. Quo warranto refused. Appeal.

O'Neal, J. 1. The mode of the increase is left to the discretion of the company. 2. The right of the public to participate in the stock of a bank depends on the charter. 3. The bank has acted within the charter, and the stockholders have the right to divide the increased stock. Judgment affirmed.

HULL v BANK OF SOUTH CAROLINA (1838) 1 Dud. L. & E. 259.

Money paid under mistake of fact. H made and delivered to the defendant his check on the plaintiff. Defendant presented the check, which was paid by the plaintiff without referring to its ledger. Subsequently, it was discovered that H

had drawn out all his funds deposited with plaintiff, before this check was paid. Verdict for plaintiff. Appeal. Motion for nonsuit.

Butler, J. 1. A check has all the characteristics of a bill of exchange, and cannot be distinguished from it. 2. A check once credited in the books of the bank is an acceptance, and subjects the acceptor to payment. 3. When the check has actually been paid, in the absence of fraud, the bank must look to the drawer for redress and not to the payee. Motion granted.

STATE v BANK OF SOUTH CAROLINA (1843) 1 Sp. 433.

Scire facias, to vacate the charter of a bank for having suspended specie payments. The defendant in several pleas set forth that it suspended specie payments in 1837 and again in 1839; that between these suspensions and after the second, it resumed specie payments; that during these suspensions it carried on its customary business in all other respects; that these suspensions were not the result of inability to pay its debts, but were adopted because banks of other states had suspended specie payments. Judgment for defendant. Appeal.

Richardson, J. The penalty for suspension of specie payments is forfeiture; whether the refusal be through inability or willfulness, the consequence is the same. Judgment reversed.

Cited: 51 S. C. 131.

STATE v BANK OF CHARLESTON (1844) 2 McMull. 439.

Scire facias, to vacate the charter of a bank. The defendant suspended specie payments, and failed to pay the instalment due on its increased capital stock within the time required by its charter. Subsequently the legislature passed an act indefinitely extending its time to pay such instalment. Demurrer. Overruled. Judgment for defendant. Appeal.

Harper, J. 1. When a bank suspends specie payments it has forfeited its charter in contemplation of law. It may, however, still continue to exist *de facto* and perform valid acts. 2. When the legislature declares that a corporation shall continue to exist, this is a waiver of any previous forfeiture. Judgment affirmed.

BANK OF THE STATE v HAMMOND (1845) 1 Rich. 281.

Assumpsit on bond, against a guarantor. The bond and the guaranty or the back thereof were signed before the name of the plaintiff was inserted as obligee. No mortgage accompanied the bond. The charter of the plaintiff provided that it should have the usual power of banking corporations, and expressly provided for "the power to make loans on bonds secured by mortgage." The court charged: 1, that the bond was not void because no mortgage accompanied it; 2, that if the bond was complete when delivered to the plaintiff, it was not material in what order the various parts had been written; 3, that the plaintiff was not bound to give the defendant notice of non-payment as in case of an indorser of a promissory note; 4, that if no injury had ensued to the defendant, he was not discharged by the delay of the plaintiff of ten months before giving him notice of non-payment. Judgment for plaintiff. Appeal.

Wardlaw, J. 1. The law was correctly stated in the instructions below. 2. The provision of the charter concerning bonds secured by mortgage is a permission for an unusual course of dealing, and is not an inhibition of other loans; but if it were, only the State could raise that question. Judgment affirmed.

Cited: 10 Rich. 548; 13 id. 33; 25 S. C. 479; 28 id. 514.

UNION BANK v SOLLEE (1847) 2 Strob. 390.

Debt, on bond of cashier. Defendant was short in his account, and there was also a balance due the bank on his personal overdrafts. The bank's money was kept in sealed packages, the amount contained in each being marked upon its wrapper. When the defendant came into office, these packages were counted by a committee of the directors, according to the amount upon each wrapper. The defendant gave his receipt to the directors for the amount, as found by them. Subsequently the packages were opened and the bills themselves counted. A shortage was discovered, the packages having been tampered with. It did not appear that the defendant had ever taken any of the missing bills, or that the plaintiff

had ever redeemed them. The plaintiff did not discharge the bond of the defendant's predecessor in office upon receiving the receipt from the defendant. It did not change its position in any way on the faith of the receipt. Verdict for the plaintiff for the amount of the overdrafts computing interest from the time of overdraft. Motion for new trial by plaintiff. Denied. Appeal.

O'Neal, J. 1. The burden of exempting himself from the liability cast upon him by the receipt was on defendant. 2. The duty of a cashier is to keep the money; he is not liable for interest. When he goes out of office and fails to pay, the right to interest accrues. 3. Receipts are to be considered as admissions, and admissions which have been acted upon by others are conclusive against the party making them, in all cases between him and the person whose conduct he has thus influenced. Motion dismissed.

ROSS v BANK OF THE STATE (1848) 3 Strob. Eq. 245.

Bill to prefer a second mortgage, on the ground that the first was not recorded, and that the plaintiff, second mortgagee, had no actual notice thereof. The defendant maintained that under its charter mortgages taken by it were not required to be recorded. The charter contained a special provision for long-term loans, declaring that such loans must not exceed one-third of the real value of the property; that no individual should be permitted to borrow on his own account more than \$2,000; that mortgages taken pursuant thereto should be considered as recorded from the date thereof, and have priority over any mortgage of the same property not previously recorded. The defendant's mortgage was for more than the value of the property and for more than \$2,000. The chancellor held that the special provision was not applicable to this loan. Decree for plaintiff. Appeal.

Dunkin, Ch. Mortgages taken by the defendant for any other indebtedness than that contracted under the special provision are taken under the incidental and implied powers of a bank, and are on the same footing with other mortgages. Appeal dismissed.

JOHNSTON v SOUTHWESTERN R. R. BANK (1848) 3 Strob. Eq. 263.

Bill for accounting and general relief, against stockholder of a bank. The plaintiff took the bills from the O Bank to secure advances of specie, with the understanding that the bills were not to be put into circulation. At the time the O Bank failed, the plaintiff held the bills. He alleged that the defendant was a large stockholder; that it had, by fraudulent manipulation, secured possession of the principal assets of the O Bank. Sec. 9 of the bank's charter provided that stockholders should be liable ratably for the ultimate redemption of bills issued by the bank. The defendant contended: 1, that the stockholders were not individually liable for the redemption of the bills, because they had never been put into circulation as money; and 2, that the plaintiff was not entitled to a general relief under the pleadings, there being no relief sought for other creditors. Decree for plaintiff. Appeal.

Dunkin, Ch. 1. The liability of the stockholders for the redemption of the bills attaches only to those bills in actual circulation. 2. The stockholders become liable only when the assets of the bank are exhausted and it is insolvent. As a general creditor, the plaintiff is entitled to an account of all the assets of the corporation; but all parties interested should be represented, and he will be permitted to amend. 3. The attempt on the part of this defendant to secure a preference will not operate to prevent it from establishing its claim with other creditors. Decree modified and affirmed.

Cited: 17 S. C. 204; 22 id. 297.

BANK OF ST. MARY v CALDER (1849) 3 Strob. 403.

Debt, on bond of a cashier. V, while acting as cashier of the plaintiff, allowed D to make several overdrafts. W, the president of the plaintiff, had warned V not to allow D to overdraw. V obtained a judgment against D for the amount of four of the overdrafts. W had protested another of D's drafts. This suit was not commenced until after the death of the cashier. Judgment for plaintiff. Motion for new trial.

Wardlaw, J. 1. The payment of overdrafts by a cashier, appointed to keep money and pay it to the checks of persons entitled to draw, is, without some special excuse, a violation of duty. 2. By his own act, whether it be obtaining a

judgment in the name of his principal or any other act, an agent cannot discharge his liability. 3. The agent's right to loan being clear in this case, a suit between the principal and the borrower, has no necessary tendency in an inquiry between the agent and the principal, to show the principal's approval of the security. Motion dismissed.

STATE v CITY OF CHARLESTON (1852) 5 Rich. 561.

Writ of prohibition. Relators were stockholders in the S and S C Banks, and were taxed by the city council on dividends received on their stock. City council, in 1849, passed an ordinance imposing a tax on dividends received on bank and other stock, including stock of the S and the S C Banks. The charter of both banks contained an exemption from all taxation, upon the payment of a bonus into the state treasury. Writ refused. Appeal.

Whitner, J. The city council has no power to tax the dividends on the stock held by citizens of this state, as the banks are exempt by a contract founded on a valuable consideration. Judgment reversed. Writ issued.

Cited: 10 Rich. 244; 15 id. 188.

RANDOLPH v PLANTERS BANK (1854) 7 Rich. 134.

Assumpsit, for money had and received. F had an account against the plaintiff. The plaintiff purchased from the defendant's agent a draft for the amount due, and indorsed it to F. The draft was presented to the defendant by the assignee, but payment was refused on the ground that F was its debtor. F had drawn a draft payable to defendant 10 days after sight. It was protested for non-acceptance, and later, for non-payment. Verdict for plaintiff. Motion for new trial.

O'Neal, J. 1. F was not a debtor until the note was protested for non payment. 2. Even if F were indebted to the bank for a larger amount than the draft, the bank is not protected, for there is nothing like payment, without the consent of creditor and debtor, actual or implied. 3. The agent's draft on the bank was the same as the draft by the bank, and was an acknowledgment that so much money was in its hands which the plaintiff could apply. It was money received for his use and must be paid. Motion dismissed.

STATE v LEHRE (1854) 7 Rich. 234.

Mandamus and quo warranto. The act incorporating the P Bank provided that it should have the same rights as three other banks named; that in case of over-subscription to the stock, the subscription should be reduced pro rata, except subscriptions of five shares or under, and that no person should subscribe in the name of other persons. There being an over-subscription, the reduction fell upon the relators who had subscribed in their own names. The relators participated in the election of directors, after protest, but made no distinct demand for a reallocation. The commissioners turned over the subscription books and the money to the directors. Thereafter this application was made for a mandamus to compel the commissioners to reappportion the shares, and for a quo warranto to the directors. Rules discharged. Appeal.

Glover, J. 1. The mandamus cannot issue, because there is not shown a specific demand and refusal to reappportion. 2. The duties of the commissioners ceased when the books were closed and the money deposited. 3. As to the quo warranto, those who participated and acquiesced in an election are not competent relators to question the titles of those elected. Motions dismissed.

Cited: 2 S. C. 49; 15 id. 329.

BANK OF NEWBERRY v GREENVILLE R. R. CO. (1855) 9 Rich. 495.

Assumpsit, on promissory note. The plaintiff was nonsuited on the ground that the act incorporating it was not set forth in the declaration and was not a public act which the court can recognize judicially. Appeal.

Glover, J. 1. The distinction between a public and a private act does not depend upon the clause often inserted directing that it shall be deemed a public act, but upon the object and scope of the act. 2. By the act incorporating the plaintiff its bills were made legal tender. 3. This feature of the charter impresses itself on the whole community, and stamps a public character on the act of incorporation; and the court will take judicial notice of it. Nonsuit set aside.

PLANTERS BANK v. THE BIRMINGSVILLE M'F'G. CO. (1857) 11 Rich. 677.

On bill of exchange, against indorser. The bill was drawn in this state on New York, and, with 45 days to run, was discounted by plaintiff at the rate of one per cent a month. Plaintiff was authorized to discount inland bills of exchange, "for the purpose of facilitating the exchange between this and sister states." Verdict for plaintiff. Motion for new trial.

Glover, J. 1. The authority conferred was certainly not limited to bills drawn and payable in South Carolina, but was intended to embrace domestic exchanges. 2. Because the rate of interest exceeds the rate allowed by law is not per se evidence of usury. Defendant must also prove that it exceeded the rate of exchange. Motion denied.

STATE BANK v COX (1860) 11 Rich. Eq. 344.

Bill, to establish ownership of stock. S owned a certificate of stock of the plaintiff bank. She delivered it to B, with a blank power of attorney, authorizing him to sell the stock. B wrongfully hypothecated it with defendant. S and defendant both claim the stock. By custom, the stock was transferable only on the books of the bank. Decree awarding stock to defendant. Appeal.

Johnston, J. Whoever comes fairly by a security in the usual course of business, as in this case, is entitled to hold it against him who passed it, or enabled another to pass it. Decree affirmed.

Cited: 15 S. C. 388; 48 id. 130.

FOGARTIES v STATE BANK (1860) 12 Rich. 518.

Assumpsit on check, payee against drawee. When the check was presented for payment, the maker had on deposit with the defendant sufficient to pay the check. The defense was setoff, in that the defendant held several notes of the maker not yet due, which the defendant believed would not be paid. The court ruled that the plaintiff could not maintain an action on the check, but that if he could the defendant's setoff could not avail it. Nonsuit. Appeal.

Johnston, J. The plaintiff being entitled, as between the parties to the suit and to the instrument, to the money, an action will lie against the bank, as for money had and received on the implied promise to pay. Nonsuit set aside.

Cited: 35 S. C. 191; 41 id. 188; 43 id. 242; 45 id. 569; 54 id. 366; 56 id. 388.

THE STATE v BANK OF SOUTH CAROLINA (1860) 12 Rich. 609.

To recover a penalty, for suspension of specie payment. The Act of 1840 provided that every bank which should suspend specie payment or declare a determination to do so, should become liable at the expiration of every month, at the rate of five per cent per annum on its total circulation. The defendant suspended. Two months thereafter, an act suspending the operation of the Act of 1840 was ratified. Thereafter this action was commenced to recover the five per cent for two months. The defenses were: 1, that the Act of 1857 related back to the first day of the session, and therefore back to the time of suspension; 2, that the Act of 1840 being suspended as to the penalty provided therein, this action could not be maintained. Verdict for plaintiff. Appeal.

O'Neal, C. J. 1. No bill can have the force of law until ratified. 2. The Act of 1840 enforces a duty and punishes the non-performance. This is a penalty. The suspension of this act had the effect for the time, of a repeal. 3. The effect of a repeal on a penalty, incurred before the repealing act, is to discharge the penalty. Verdict set aside.

BANK OF CHARLESTON v BANK OF THE STATE (1866) 13 Rich. 291.

Assumpsit, for money had and received. J and C were tellers in the plaintiff bank. M was teller in the defendant bank. None of them had authority to borrow or lend money. M induced J to lend him \$15,000, for which he gave his check on the defendant. He also induced C to make a false entry in a passbook used between the banks, so as to give him the benefit of \$5,500 in his accounts. The \$15,000 in cash was mingled with the funds of the defendant and paid out in the course of business. M was found to be a defaulter. The court charged as to the \$5,500 credited on the passbook by the collusion of M and C, that the plaintiff

could not repudiate its teller's act, because M had received credit with his principal for that sum. Verdict for defendant for full amount. Appeal.

Wardlaw, J. 1. The defendant was a bona fide holder for a valuable consideration in due course of business, and without notice, and is therefore entitled to recover the \$15,000. 2. As to the \$5,500 the rule is different. Both clerks acted within the scope of their employment. The credit is nothing other than a mistake in accounts which can be corrected in an action for money had and received. The verdict in respect to the \$5,500 is wrong. New trial ordered.

Cited: 50 S. C. 291.

THE GRANITEVILLE M'F'G CO v ROPER (1867) 15 Rich. 138.

Mandamus, to compel tax collector to accept state bank bills in payment of taxes. Sec. 5 of the Act of December, 1866, directed that all taxes should be paid in certain kinds of money which did not include the bills in question. Sec. 16, of the charter of the bank issuing the bills, granted in 1812, provides that the bills or notes of the corporation, originally made payable or which shall have become payable on demand in gold or silver coin, shall be receivable by all tax collectors in payment of taxes. The Act of 1843 directed that all taxes should be paid in specie, paper medium, or in notes of specie-paying banks. The bills in suit were issued after the act. Defendant contended that the Act of 1866 was unconstitutional. Order discharging rule. Appeal.

Glover, J. 1. The Act of 1843 virtually repealed sec. 16 of the Act of 1812. 2. Although the act may be within the constitutional inhibition, still the prohibition applies only to bills in circulation before the passage of the act. Order affirmed.

Cited: 2 S. C. 556.

STATE v STATE BANK (1868) 1 S. C. 63.

Mandamus, to compel the officers of the defendant to deliver to the governor of the state all the bank's assets. The defendant was organized under an act of the assembly in 1812. The whole capital was furnished by the state, and the faith of the state was pledged for the support of the bank, and to supply any deficiency in the funds specifically pledged. In 1868, an act was passed to close the operations of the bank, and commanding the president and directors to deliver over to the governor of the state the assets of the bank, which should be sold at public auction. The proceeds of the sale were to be deposited in the state treasury. Sec. 10, par. 1, of the United States Constitution, forbids any state to pass a law impairing the obligation of contracts. Rule discharged. Error.

Moses, C. J. 1. When a state invests its funds, either alone or with others, in a banking company, it does not carry into it any of the elements of its sovereign powers, but occupies the bare position of any other stockholder. 2. To compel the transfer of the assets would leave the creditors remediless, as the state cannot be held liable, and the obligation of the bank to its creditors would thus be impaired. Order discharging rule affirmed.

Cited: 25 S. C. 426.

STATE v STOLL (1871) 2 S. C. 538.

STATE v GURNEY (1871) 2 S. C. 559.

Mandamus, to compel defendant to accept depreciated bank notes, in payment of taxes. The notes were issued by the Bank of the State of South Carolina subsequent to 1843. Sec. 16 of the bank's charter, granted in 1812, provides that the bills or notes of the bank originally payable, or which shall have become payable on demand in gold or silver coin, shall be receivable by all tax collectors. On December 19, 1843, an act was passed that all taxes should be paid in specie, paper medium or in the notes of the specie-paying banks of the state. (11 Stat. 246.) Rule dismissed. Appeal.

Moses, C. J. The Act of 1843 repealed so much of sec. 16 of the bank's charter as made the bills or notes of the bank receivable in payment of taxes. Order dismissing rule affirmed.

Cited: 12 S. C. 72.

DABNEY v BANK OF THE STATE (1871) 3 S. C. 124.

Creditor's bill, to terminate an insolvent bank, filed by billholders. Defendant was a bank whose capital had been supplied by the state, its sole stockholder. In

1838 the legislature authorized the issue of fire loan bonds and fire loan stock on the credit of the State, in the total amount of \$2,000,000. The money thus obtained was to be added to the bank's original capital. It was provided that the bank should open a separate account wherein it should debit itself with the profits arising out of the \$2,000,000, which fund with its annual accumulation, should be solemnly pledged and set apart for the payment of the interest on the loan and for its final redemption; and that the other profits of the bank should be devoted to the same purpose, after the payment of specified claims. The bank guaranteed the fire loan bonds. This guaranty was recognized by the state. No separate account of the profits was kept. The Act of 1865 directed the bank to hold its assets specifically appropriated to the payment: 1, of the fire loan bonds; 2, of the fire loan stocks; and 3, of outstanding bills. Before the creditors had done anything toward taking advantage of this act, it was repealed by the Act of 1868. The state withdrew most of its capital from the bank. The bank became insolvent, having insufficient assets to meet the claims of its creditors, the fire loan bondholders the fire loan stockholders, the billholders, and the depositors. Some of the deposits had been made in confederate money. Decree, that the claims of the fire loan bondholders and fire loan stockholders be preferred; the remainder of the assets, if any, to be divided ratably among the other creditors. Appeal by the bank, by the fire loan bondholders, and by the billholders.

Moses, C. J. 1. The assets of the bank constitute a trust fund which must be distributed among all the creditors of the bank in ratable proportion to the amount of their respective debts, before a stockholder, whether the state or an individual, may be permitted to share therein. The fire loan bondholders and stockholders are not entitled to a preference. 2. In regard to its creditors, the bank can occupy no other position than a corporation composed of private citizens. 3. The assets of an insolvent bank cannot, where they are inconsiderable when compared with its debts, represent either its capital or its profits. 4. Even if the bank's guaranty was originally without authority, its recognition by the state has placed its validity beyond dispute. 5. The Act of 1865 was not such an assignment as conferred a vested right on the creditors which it proposed to prefer. While a fund is in the hands of an agent, it is, unless affected by words sufficient to create a vested right, within the discretion of the principal to revoke the order for its disposition. No mere expression of willingness on the part of the creditor to accept the disposition intended by the principal will deprive the principal of the power to revoke the disposition. The Act of 1865, was, therefore, rendered inoperative by the repealing Act of 1868. 6. Furthermore, the Act of 1865 could not create a preference in favor of the fire loan stockholders, because these were creditors, not of the bank, but of the state. 7. The withdrawal by the state of the whole amount raised by the loan cannot release the bank from the obligation imposed by its guaranty. 8. The billholders are entitled to the full amount of the face of such bills as were issued on a specie basis. 9. If money deposited was not accepted by the bank with reference to a specie basis the depositor will be entitled, in national currency, to only so much as his deposit was worth in such currency at the time it was made. 10. The principals of law and equity which govern the relation between the guarantor and guarantee, cannot be exacted when the original debtor is the state, and beyond the reach of the process of the courts. Case remanded for modification.

Cited: 25 S. C. 426; 53 id. 595.

DONALDSON v JOHNSON (1871) 3 S. C. 216.

To obtain assets, of an insolvent bank. On March 13, 1869, the state passed an act to place insolvent banks in liquidation and providing for the appointment of receivers by the circuit judges to take charge of their assets. This act was to become operative, December 1, 1869. On April 17, 1869, defendants filed a bill to call in creditors to establish their claims against the Bank of C. Defendants made a report of the condition of the Bank of C setting forth these claims to the court. The court ordered certain payments by the defendants, "the president and cashier acting as receivers." By the terms of this order, defendants claim they were appointed receivers. On February 17, 1870, the plaintiff was appointed receiver of the Bank of C, in pursuance of the Act of 1869. Plaintiff demanded the bank's property of defendants. Refused. Judgment for plaintiff. Appeal.

Moses, C. J. The provisions of the Act of 1869 apply to a bank in liquidation, under a decree made before the time at which the act was operative by its terms. Judgment affirmed.

CAMPBELL v BANK OF CHARLESTON (1871) 3 S. C. 384.

To recover shares of capital stock of a bank, or their value. C, as executor of the estate of F came into possession of shares of stock of the defendant transferable only on defendant's books. He indorsed them over to his attorneys who were to manage the estate. In June, 1868, under a bill to which C and others were parties, the court made an order directing C to deliver to the master the cash and enumerated securities of the estate, which did not include this stock. Thereupon C was to be discharged of all further liability as executor. In October, 1869, bona fide holders of the certificates asked defendant to transfer the shares on its books. Defendant refused, until an executor's authority to sell was produced. A certificate of the probate judge that C might sell was produced, and the shares were thereupon transferred on the books of defendant. Thereafter plaintiff was appointed receiver of the estate of F. Judgment for plaintiff.

Wright, A. J. 1. Courts of equity have no power to discharge an executor from liabilities incurred, or to deprive him of rights which he has acquired in the discharge of the duties of an executor. 2. The bank exercised all the care and caution demanded by a due regard to its own interest, and that of the stockholders, in whose name the certificate had issued. Judgment reversed.

Cited: 30 S. C. 564.

AHRENS v STATE BANK (1871) 3 S. C. 41.

Assumpsit, on bills of exchange. Pleas: non-assumpsit and Statute of Limitations. The bills of exchange were made by the defendant, payable to the order of A, wife of the plaintiff. A died before the commencement of the action. The defendant contended that pursuant to an order of the court, under the Act of 1869, a receiver was in possession of the assets of the defendant, and that by the order, the defendant had forfeited all corporate rights, including the right to sue and be sued; that the court should grant a nonsuit upon the plea puis darrien continuance; and because the suit was brought by the husband of the payee, after her death, and not by her personal representative. Demurrer to plea puis darrien. Sustained. Nonsuit refused. Appeal.

Willard, J. 1. The appointment of a receiver under the statute in question, upon an ex parte application, does not dissolve the corporation, and the demurrer to the plea puis darrien was properly sustained. 2. The production of the drafts, indorsed in blank, was sufficient, prima facie, to establish the plaintiff's title, and he was entitled to recover as holder. And though he declared upon them as in the right of the wife as payee, the variance cannot be taken advantage of by nonsuit. Judgment affirmed.

Cited: 6 S. C. 138; 9 id. 196, 334; 10 id. 101; 21 id. 102; 33 id. 576; 51 id. 133, 418.

CHARLESTON v PEOPLES NAT. BANK (1873) 5 S. C. 103.

A tax on stock, issued pursuant to a note of the directory to increase the capital stock of the bank without obtaining the consent of the comptroller of currency is void, as by the act of Congress such a proceeding is invalid.

WHALEY v BANK OF CHARLESTON (1873) 5 S. C. 189.

To have account stated. The last account stated between the parties was in February, 1862, and showed a balance payable in gold due the plaintiff's testator. The defendant contended: 1, that prior to the war, it published a resolution that from and after that date all credits would be given and paid in confederate currency; 2, that the testator drew out all the money to his credit and the account was closed. The plaintiff offered in evidence two passbooks showing a balance due him. The defendant proved that its ledger was destroyed in 1864, and produced a book which was made up from other books in the bank. It did not contain any account with the testator. The court ruled that the passbooks were the best evidence of the transactions, and ordered an account to be taken of the balance in good money on the day the resolution was published, and a separate account of the subsequent entries, and that the balance found on the subsequent account be rated as a debt created in confederate notes, and carried to the account of good money, to be added or subtracted, as the case might require. The case was tried by the judge without a jury. Judgment for plaintiff. Motion for new trial.

Moses, C. J. 1. While the answer raised issues triable by a jury, yet as no ob-

jection was made to the judge hearing the case, we must assume that the jury trial was waived in the formal way provided by the code. 2. As to a charge against a bank by a depositor, the credit in the passbook is the highest evidence. 3. The resolution referred to cannot change the character of the money then on deposit; the rule that the first item on the debit side is reduced by the first item on the credit side applies, but the value of each deposit and check must be determined. Motion dismissed.

Cited: 29 S. C. 413.

GARVIN v STATE BANK (1875) 7 S. C. 266.

To settle the affairs of the bank. Defendant, for the privilege of overdrawing its account with the R Bank, agreed with the R Bank's agent to deposit with him certain state bonds. The bonds were left in the custody of the defendant. In 1861, defendant drew bills on the R Bank. These were not presented for acceptance till 1864. The R Bank failed and thereupon presented its account to defendant which showed a large balance due from defendant. The holders of the drafts demand a preference out of the proceeds of the bonds. Decree granting preference. Appeal.

Willard, A. J. 1. The deposit of bonds in the State Bank was a mere bailment not inconsistent with a special property in the R Bank under the agreement by which they were pledged. 2. The billholders have no better claims, legal or equitable, than the bank, which, under the agreement with the R Bank, had no authority to impose any charge or lien on the securities. 3. The R Bank is entitled to the proceeds of the securities to the extent that may be necessary to satisfy its claim under the original agreement. Decree reversed.

TERRY v MARTIN (1878) 10 S. C. 263.

On bank bills. Plaintiff held bills of the M and P Bank. Defendant was a stockholder of the bank, and a debtor on an unpaid subscription. Sec. 15 of the charter of the bank, granted by the State of Georgia, provides that the property of the stockholders shall be liable for the redemption of its bills and notes in proportion to the number of their shares. Demurrer, on the ground of defect of parties, alleging that all other creditors should have been made parties plaintiff, and all other stockholders parties defendant. Sustained, as to first ground. Judgment for plaintiff. Appeal.

Haskell, J. The plaintiff, either as billholder or as general creditor, cannot maintain this action against a single stockholder. Judgment reversed.

Cited: 22 S. C. 297.

TERRY v CALNAN (1879) 13 S. C. 220.

Action by billholder against the receiver and stockholders of a bank. Defense: Statute of Limitations. The action was commenced in 1870, and was founded upon the provision in the bank's charter that "in case of failure, each stockholder should be liable individually for any sum not exceeding twice the amount of his shares." The bank suspended specie payments in 1860. The court held that such suspension was a failure within the meaning of the charter, and that the plea of Statute of Limitations was a good defense. Appeal.

Willard, C. J. 1. The liability under the statute was incurred primarily for the bank; but creditors can enforce it. 2. The failure of the bank to pay the bills on presentation is presumptive evidence of insolvency. 3. The debt of stockholders under the contingent liability imposed by the charter is a simple contract debt, and therefore barred by the lapse of four years. Appeal dismissed.

UNION BANK v HEYWARD (1881) 15 S. C. 296.

On bond, of teller. Defendant N, the teller, was engaged by plaintiff at a certain yearly salary, and gave a bond that he would deliver to the bank, whenever required, all moneys, belonging to it. Plaintiff claimed that N's salary had been reduced at the beginning of the year, by resolution of the directors. A dispute arose as to his salary in March. N claimed that he was entitled to the same salary as in the previous year, as he had no notice of its reduction. N, at the time he was dismissed obtained a receipt showing that he retained out of the bank's funds in his hands a year's salary according to his claim. N does not attempt to set up a counterclaim, but in his answer alleges that he is entitled to retain the money.

Defendant requested the court to charge that if the jury believed the plaintiff intended to retain his salary, it could not recover. Judgment for plaintiff. Appeal.

Simpson, C. J. 1. If a party be dismissed, without cause, he becomes entitled to the full amount of the wages agreed upon; but in such case he should treat the contract as subsisting to the end of the year. He has a right, however, to regard the contract as rescinded but in such case he will be restricted to compensation on a quantum meruit. 2. The construction of the receipt was a matter of law for the court and not for the jury. Judgment affirmed.

Cited: 17 S. C. 480; 24 id. 497; 37 id. 488; 39 id. 460.

UNION BANK v WANDO MINING CO. (1881) 17 S. C. 339.

To enforce stockholder's statutory liability. Defendants were stockholders in the C Co., the charter of which provided that the stockholders should be liable for debts of the company only when actions should be brought against the company upon said debts within a year after the time they became due. Plaintiffs held notes given by the company, payable in one year. When they came due the C Co. was merged into the defendant, and new notes were given, and these in turn renewed. The defendant having failed to pay the notes when due, a judgment was obtained, and execution returned nulla bona. This action was to enforce the liability of the defendant's stockholders, among whom was the president of the plaintiff, on the new notes some years after the original notes became due. Judgment for plaintiff. Appeal.

Wallace, J. 1. The defendants are not liable until judgment has been obtained against the company; and they may interpose any defense that goes to the question of their liability. 2. The merger deprives the officers of the C Co. of the privilege to create any new obligations; and of this fact the plaintiff had notice. 3. The fact that one note is given for another is not sufficient to show satisfaction or payment, which is necessary to create a new obligation, and thus bring the debt within the statute. Judgment reversed.

Cited: 49 S. C. 11.

HOLMES v NATIONAL BANK (1882) 18 S. C. 31.

Attachment, of funds of a national bank. The action was brought by plaintiffs against the defendant, located in North Carolina, for a breach of warranty; the attachment was levied on funds in the hands of a local bank. Defendant claims that state courts have no jurisdiction over national banks except in suits brought in the state where the bank is located; and that no attachment can issue against such corporations. U. S. R. S., sec. 5198, provides that these associations may be sued in any circuit, district or territorial court of the United States, held within the district where the association is established. Sec. 5242 renders transfers of notes, in contemplation of insolvency, void, and by proviso attached thereto, inhibits attachments against these associations before judgment. Complaint dismissed. Appeal.

Simpson, C. J. 1. United States banks cannot be exempt from state process, when they break their contracts. 2. The proviso, prohibiting attachment proceedings, is to prevent discrimination between creditors in cases of bankruptcy, and this case does not fall under that section. Judgment reversed.

UNION NAT. BANK v ROWAN (1885) 23 S. C. 339.

To recover chattels. H shipped goods to defendant L, drew his draft on L for the price thereof, and attached the bill of lading. Upon the security of the bill of lading, the plaintiff bought or discounted the draft. On arrival of the goods they were seized by defendant R, sheriff, under a warrant of attachment sued out by L on a claim due from H on a previous transaction. The draft was dishonored. The defense was that, under the National Banking Law, the plaintiff had no authority to purchase the draft with bill of lading attached, and that therefore the transaction was ultra vires. Judgment for plaintiff. Appeal.

McIver, J. 1. National banks are expressly authorized to buy and sell exchange. This draft was a bill of exchange, and it is immaterial whether it bought or discounted the same. 2. Indorsements and delivery of the bills of lading passed the right of possession of the goods to the plaintiff. Judgment affirmed.

RICHARDSON v WALLACE (1892) 39 S. C. 216.

To recover dividends. B, a stockholder and cashier of a bank, absconded with a part of its funds. The bank attached his shares of stock, and the plaintiff purchased them at the sheriff's sale. The stockholders were assessed for the debts of the bank, and all the assessments were paid, except those on plaintiff's stock. The debts of the bank were paid out of its assets and these assessments, and the surplus which remained was paid to the defendant who was elected agent for the stockholders. Sec. 5151, U. S. R. S., makes shareholders individually responsible for the debts of an insolvent bank, to the extent of the par value of their shares. Sec. 5139 provides that the shares of national banks may be transferred, and that the transferee shall succeed to all the rights and liabilities of the prior holder. Act of 1876, sec. 3, authorized the comptroller, whenever all the creditors of an insolvent bank had been paid, except shareholders, who were creditors of such corporation, to allow the shareholders to elect an agent to whom the comptroller should pay over any surplus remaining in the hands of the receiver. The surplus was divided among the stockholders by defendant, who refused to recognize the claim of the plaintiff to distribution. Decree for defendant. Appeal.

Pope, J. 1. The liability of the stockholders is several, not joint. 2. A corporation is estopped to deny a purchaser's title to its shares, sold by the sheriff under proceedings instigated by it. 3. A shareholder whose stocks have not paid their pro rata assessment for debts, cannot participate in the distribution of a surplus of assessments, as such assessment surplus does not constitute an asset of the bank. He may, however, receive his proportionate share of assets of the bank after its debts are paid. Judgment affirmed.

BICKLEY v COMMERCIAL BANK (1892) 39 S. C. 281.

On certificate of deposit. A certificate signed "C, manager," and setting forth that plaintiff deposited with C, manager, \$800, payable to his order, to remain on deposit for one year, with interest, was admitted in evidence over defendant's objection. C was president of the defendant. Before the organization of the defendant, he had been manager of a private bank, and the plaintiff had been a depositor of that bank. C kept an account with the defendant as "C, manager." The plaintiff was permitted to testify to the conversation which passed between C and himself at the time the deposit was made, that C assured him that the money would be deposited with the defendant, and that the certificate was intended as evidence of that fact. Motion for nonsuit. Overruled. Verdict for plaintiff. Appeal.

McIver, C. J. 1. A certificate of deposit is not a receipt, which may be explained by parol evidence, but is like a promissory note. The evidence was therefore inadmissible. 2. It is the province of the court to construe written instruments. Judgment reversed.

Cited: 45 S. C. 567; 50 id. 291.

JUMPER v COMMERCIAL BANK (1892) 39 S. C. 296.

To recover deposit. A certificate in the usual form, and providing that the money should be on deposit for one year and draw interest, was offered in evidence over objection of defendant. It was signed "C, manager of the Commercial Bank, per J." C had been manager of a private bank known by that name, but, at the time this certificate was given, he was president of the defendant which had been incorporated under the same name. The plaintiff's witnesses were allowed to testify to conversations with C tending to affect the instrument sued on. Judgment for plaintiff. Exceptions. Appeal.

Gary, J. 1. The rule that parol evidence is not admissible to vary a written instrument applies to this case. A certificate of deposit is not a receipt which may be explained by parol evidence. 2. An exception which does not contain the statement of the proposition of law to be reviewed is too general and defective. Judgment reversed.

Cited: 45 S. C. 496; 51 id. 311.

SIMMONS v BANK OF GREENWOOD (1893) 41 S. C. 177.

On a check, by payee. The makers had two accounts with the defendant, designated as cotton account and merchandise account. The cotton account was often overdrawn, and the defendant had always paid checks drawn on the merchandise

account without regard to the condition of the other account. Payment of this check on the merchandise account was refused by the cashier on the ground that the account was overdrawn, though he stated there was on the books a sufficient balance to the credit of the merchandise account. The passbook was not produced. It was discovered after the commencement of this action that the merchandise account was incorrect, and that the balance was not sufficient to pay the check. The managing partner of the makers testified that the amount on deposit was sufficient to pay the check. Judgment for plaintiff. Appeal.

McIver, C. J. 1. The passbook is not always the best evidence. The testimony of a witness of his own knowledge is admissible. 2. The holder of a check on a bank can maintain an action for the amount specified therein, provided the drawer has sufficient funds on deposit. 3. An acceptance is not necessary to fix the liability. 4. The defendant could not depart from its long-continued habit of paying such checks without regard to the condition of the cotton account, without notice to the depositor. 5. The defendant is bound by the admissions of its cashier as to the balance of a depositor. Judgment affirmed.

Cited: 42 S. C. 474; 43 id. 242; 45 id. 569; 54 id. 366.

KNOBLOCH v GERMANIA BANK (1894) 43 S. C. 233.

To recover deposit. Plaintiff was an administrator, d. b. n. c. t. a. The complaint alleged that S, the surviving executor, had withdrawn the funds and converted them to his own use; that S was president of the defendant; that the defendant knew, when the money was withdrawn, that S intended to misappropriate it. The plaintiff placed the cause on the calendar for trial before a jury. The parties stipulated that the defendant's motion to place it upon the chancery calendar, and that his oral demurrer, on the ground that the complaint did not state facts sufficient to constitute a cause of action, should be heard in chambers. Motion to place upon the chancery calendar granted. Demurrer. Sustained. Complaint dismissed. Appeal.

Pope, J. 1. The act complained of amounts to a breach of trust, the liability for which can alone be enforced in a court of chancery. 2. An administrator d. b. n. c. t. a. cannot maintain an action to set aside a transaction between his predecessor and a debtor of the estate on the ground of collusion between them. 3. The bank had a right to assume that the trustee was lawfully performing his duty and was bound to honor its customer's check. Judgment affirmed.

Cited: 54 S. C. 366; 56 id. 337. S. c.: 50 S. C. 284.

BICKLEY v COMMERCIAL BANK (1894) 43 S. C. 528.

On deposit. The certificate was signed by "C, manager," and set forth that "B deposited with C, manager, \$800, payable to his order." C, who was the president of the defendant bank, had formerly been the manager of a private bank, where plaintiff was a depositor. When C became president of defendant, he deposited the funds of plaintiff in the defendant to his credit as manager, and issued the certificate in question. C had authority to receive deposits. Parol testimony was admitted against defendant's objection to show that C, in signing the certificate, acted as agent of defendant. Motion for nonsuit. Denied. Judgment for plaintiff. Appeal.

Pope, J. 1. Parol testimony was competent to show for what principal C signed the certificate "as manager." 2. This question of agency being one of fact, for the jury, a nonsuit was properly denied. 3. If C misstated his technical name, it will not be allowed to prejudice the rights of the plaintiff, a third party, against his principal. Judgment affirmed.

Cited: 48 S. C. 434. S. c.: 39 S. C. 281 (ante p. 1269).

LEAPHART v COMMERCIAL BANK (1895) 45 S. C. 563.

To recover a deposit. The complaint alleged that C, as president of the defendant, received the deposit in trust to be invested for the plaintiff, and returned with interest when called for; that C, in breach of the trust, deposited it with the defendant, which retained it. The proof was that C issued a circular setting forth that the "Depositors' Association" had been formed for the benefit of investors, and offering 6 per cent interest on money deposited for six months or longer. The deposit in question was in response to that circular, and the certificate recited

that the money had been deposited with "C, manager," and signed "C, manager." Judgment for defendant. Appeal.

McIver, C. J. 1. The contract being in writing was for the court to construe. 2. Neither in the circular nor in the certificate of deposit is there any indication of a trust. 3. An ordinary deposit creates the relation of debtor and creditor, and the same applies whether the deposit is made with a private person or a bank. Judgment affirmed.

THOMASON v COMMERCIAL BANK (1895) 45 S. C. 570.

To recover a deposit. The deposit was made with C, who was president of the defendant, and was in response to a circular signed by him, setting forth the organization of the Depositors' Association for the benefit of those having money to invest. The certificate of deposit recited that the money had been deposited with "C, manager," and was signed "C, manager." The money was deposited by B in the defendant bank to the credit of "C manager." The court held that the circular and the certificate of deposit were evidence of a trust relation. Judgment for plaintiff. Appeal.

McIver, C. J. The contract as set forth in the papers referred to shows that an ordinary deposit was made, which created the relation of debtor and creditor. Judgment reversed.

JUMPER v COMMERCIAL BANK (1896) 48 S. C. 430.

On certificate of deposit. The certificate recited that the money should be on deposit for one year and draw interest. It was signed "C, manager of the Commercial Bank, per J." C had been manager of a private bank known by that name, but at the time this certificate was given, he was president of the defendant, which had been incorporated under the same name. The amended complaint alleged that before and at the time the deposit was made, C was president and agent of the defendant to receive deposits, and as such advertised that the defendant would receive deposits and issue interest-bearing certificates; that the deposit was made with knowledge of that advertisement, and that the plaintiff, believing she was depositing the money in the defendant bank, delivered the same to C; that after she parted with the money, C fraudulently induced her to take the certificate sued on, representing it to be the obligation of the defendant. The by-laws of the defendant were introduced to show the authority of C. Judgment for plaintiff. Appeal.

Gary, J. 1. Testimony as to conversations with C, at the time of the deposit, was competent as tending to establish the fact of agency. 2. The construction of the by-laws, as showing the authority of C to receive the deposit, was a question for the court. 3. It was not incumbent upon a depositor to see that his deposit was actually entered upon the books of the bank. 4. The certificate, being the foundation of the action, was properly in evidence. 5. It is for the jury to decide by whom it was issued. Judgment affirmed.

S. c.: 39 S. C. 296 (ante p. 1269).

KNOBELOCK v GERMANIA BANK (1897) 50 S. C. 259.

To recover deposit. The money was deposited by executors, and misappropriated by the surviving executor, who was also president of the defendant bank. The money was withdrawn by check in the usual form and signed as executor. The complaint alleged that the money was converted to the executor's own use, with the knowledge of the defendant and without the knowledge of the cestuis que trustent. These issues of fact were submitted to a jury: 1, whether the executor draw the money with intent to convert the same to his own use; 2, whether the defendant bank have notice of such intent. The jury responded to the first question, yes; to the second, no. Complaint as to bank was dismissed. Appeal.

Jones, J. 1. The findings of fact by a jury are conclusive, unless a new trial is granted. 2. Knowledge of executor's fraudulent intent, with reference to the deposit, was not imputable to the bank, unless in the particular transaction he acted for the bank. 3. As he acted ostensibly as executor, but secretly for himself, he did not act for the bank. Judgment affirmed.

Cited: 55 S. C. 29. S. c.: 43 S. C. 233 (ante p. 1270).

POLLOCK v CAROLINA LOAN ASS'N (1897) 51 S. C. 420.

Money had and received. A subscriber to shares of a building and loan association paid her membership fee and several monthly instalments. She then borrowed from it, and mortgaged a house and land to secure the debt. She insured herself against loss of the house by fire and deposited the policy with the association as additional security for its loan to her. The association, however, was to advance the premium for her. She undertook to pay the interest on the sum borrowed, the premium for insurance, and the value of the stock, by monthly instalments, payable to the defendant in North Carolina, or to a branch office in South Carolina. On default in making a monthly payment the whole debt was to become due. The shareholder subsequently assigned all her interest in the premises to plaintiffs, who assumed her obligations to the association. They kept up the monthly payments until the house was destroyed by fire, when they tendered to the association a sum, with interest, equal to the mortgage debt of their assignor, including the balance due for insurance premiums, less payments made by her and themselves, and demanded the policy. The association contended the payments could not be credited upon the mortgage debt, and refused to surrender the policy. Plaintiffs agreed with the association and a bank, to deposit in the bank the amount claimed by the association, until the final adjustment of the matter. The bank, however, at once paid the entire amount to the association. Plaintiffs joined the bank and association as defendants, and sued for the amount by which the money so paid exceeded the sum conceded by plaintiffs to be due. The foregoing facts were found by the court. Judgment for plaintiffs. Appeal.

Buchanan, J. 1. Such a dealing as is here considered is a loan and not a partnership transaction. 2. It was a contract to be performed in North Carolina. 3. The findings of fact by the circuit judge will not be disturbed if supported by evidence, unless manifestly against the weight of evidence. 4. The bank is liable to plaintiff on the principle that the confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it. Judgment affirmed.

Cited: 55 S. C. 112.

PARKER v CAROLINA SAV. BANK (1898) 53 S. C. 583.

Creditor's action for an accounting and to enforce statutory liability of stockholders. The L Bank under a resolution by its board of directors made an assignment to defendant, C Bank, for the benefit of creditors. Plaintiff brought this action for himself and all other creditors against the assignee and all other stockholders. The complaint designated C bank, which was incorporated under a public act, by its corporate title without alleging its incorporation. Defendants A and B transferred their stock to K after the assignment. The L Bank was largely indebted to defendants, X, and the C Bank. It had deposited with the latter as security certain title deeds. The deposit was made by the president, without the knowledge or authority of the directors of the L Bank. The circuit court held that the C Bank thereby acquired an equitable mortgage. 19 Stat. 212, sec. 4, provides that the stockholders of a bank shall be liable for its debts to the amount of their respective shares, and 5 per cent in addition thereto. Demurrer. Overruled. Decree for plaintiff. Appeal.

Jones, J. 1. There was a sufficient allegation of corporate existence. 2. The court of equity has jurisdiction to entertain this suit, and the pleadings show a case for equitable relief. 3. The claims of creditors who came in under an order of the court and proved the same, are not barred under the two-years limitation of the General Corporation Act, 19 Stat. 540. 4. The defendant stockholders are liable to the creditors of the bank for a sum equal to the amount of their respective shares, and 5 per cent in addition thereto. 5. Sec. 4 is not unconstitutional, as it is not self-executing. 6. The C Bank and X cannot set off the claims due them by the L Bank, against their statutory liability. 7. A and B are not exempt from liability as stockholders, by reason of the attempted transfer to K. 8. The assignment is not invalid for want of the vote of the stockholders therefor. 9. The C Bank did not acquire an equitable mortgage on the land by reason of the deposit of the title deeds with it by the L Bank. 10. In the absence of legislation prohibiting the same, a corporation may make an assignment as other natural persons. Judgment modified.

Cited: 55 S. C. 86, 540; 57 id. 55.

MERCHANTS AND PLANTERS BANK v CLIFTON CO. (1899) 56 S. C. 320.

To recover for an overdraft. The defendant kept an account with the plaintiff solely for the use of the defendant's agent F, who made all the deposits and drew all the checks. F frequently overdrew the account in buying goods for the defendant. The defendant counterclaimed damages sustained by reason of the plaintiff's allowing F to overdraw, alleging that the bank knew that F was diverting the money to his own use. One of the checks which made up the overdraft was given by F, dated one month ahead, and was in payment of goods received by defendant. Another check was dated December 24, and was not paid until December 30. The defendant contended that authority to draw postdated checks could not be assumed from authority to draw present-dated checks, and that the check of December 24, not having been presented until the 30th, was stale and sufficient to put the plaintiff on inquiry. Certain letters were offered in evidence which seemed to negative knowledge by the defendant of the overdraft. Testimony was adduced to prove directions limiting F's power, which were never brought to the notice of plaintiff. Objection. Overruled. Decree for plaintiff disallowing the postdated check. Appeal.

Pope, J. 1. The letters were admissible to show knowledge by the defendant. 2. The testimony was inadmissible as the directions did not reach the plaintiff. 3. The check was not stale. 4. Plaintiff was bound to honor F's checks. 5. The defendant cannot escape liability for the postdated check, because it actually received the goods for which it was given. 6. The evidence does not sustain the counterclaim. 7. The checks drawn by an agent within the scope of his duty, are presumed to be authorized. Decree modified.

WHITE v COMMERCIAL BANK (1900) 60 S. C. 122.

Motion for preference, in an action for appointment of a receiver. The claimant, R, alleged that he had sent four drafts to the defendant for collection; that three of them had been collected in money and the fourth by a check on itself; that these collections were made before the appointment of the receiver, and that none of the collections had been remitted. Upon these facts, R claimed to be a cestui que trust for the amount of the three drafts collected in money, and a creditor for the amount of the other draft. The referee's report sustaining this contention was overruled by the circuit judge. Appeal.

McIver, C. J. To entitle the claimant to priority, he must show that his so-called trust fund, in some form, has gone into the assets of the bank now in the hands of the receiver. This he has not done. Judgment affirmed.

MATHEWS v BANK OF ALLENDALE (1900) 60 S. C. 183.

Action by stockholder for appointment of a receiver, and against the bank and the directors for an accounting. The complaint alleged that the stockholders resolved to wind up the bank; that the cashier's statement showed that the bank had a surplus of \$5,000; that 60 per cent of the capital stock was returned to the stockholders; that no part of the remaining 40 per cent of the surplus had been returned; that the plaintiff had made repeated demands for a settlement, but the defendant directors had refused; that it would be useless to make further application to the defendant corporation or to directors, for the reason that officers and directors were the wrongdoers. Demurrer: 1, that the complaint did not state facts sufficient to constitute a cause of action; 2, that several causes of action were improperly joined. Sustained. Appeal.

Pope, J. 1. A stockholder may sustain a suit in equity in his own name, on a cause of action existing in the corporation, where the directors are acting for their own interests, in a manner destructive of the corporation itself. 2. If one good cause of action is alleged, together with others that are not good, they may be separated. 3. The complaint does not present two causes of action. Judgment reversed.

SOUTH DAKOTA

FARMERS BANK v KIMBALL MILLING CO. (1890) 1 S. D. 388.

Accounting and injunction, and to impress a trust on defendant's property. G and F were respectively, president and cashier of the plaintiff, and president and secretary of the defendant. They used money of the plaintiff's for the benefit of the defendant, and traded on the credit of the plaintiff, to benefit defendant. The capital of the defendant was almost wholly composed of money fraudulently taken from the plaintiff. By sec. 3920, Comp. Laws, one who gains a thing by fraud, the violation of a trust, or other wrongful act, is an involuntary trustee of the thing gained for the benefit of the person who would otherwise have had it. Demurrer. Overruled. Appeal.

Corson, P. J. 1. Under sec. 3920, the goods purchased in the name of F were impressed with a trust in favor of the plaintiff, and were in equity the property of the plaintiff. All gains and profits arising therefrom inured to the benefit of the bank, and should be impressed with a like trust. 2. The knowledge of G and F was presumptively the knowledge of the company; hence it was chargeable with notice of the frauds. 3. It was not incumbent on plaintiff to allege notice, as want of notice was an affirmative matter. 4. One whose property has been fraudulently obtained and invested, and stock of the company received therefor, ought not to be compelled to follow the stock, but should have the option to pursue the property itself. Judgment affirmed.

Cited: 3 S. D. 127, 242; 4 id. 312; 9 id. 550.

NORTH STAR BOOT CO. v STEBBINS (1891) 2 S. D. 74.

Goods sold and delivered. Defendants were engaged in a general partnership banking business. M, a traveling salesman for the plaintiff, sold goods to the defendants on the order of C, their cashier. The plaintiff made no attempt to show any actual authority in C, but relied wholly on such authority as might be implied from his position as cashier and managing agent of a banking house. Verdict directed. Judgment for defendant. Appeal.

Bennett, J. It was incumbent on the plaintiff to show that C had authority to buy the goods, before it could bind the defendants by C's acts, or to show that such transactions came clearly within the powers of such a cashier by general usage and custom. Affirmed. Rehearing granted and judgment reversed on other questions. (54 N. W. R. 593.)

Cited: 3 S. D. 541; 8 id. 478.

WYCKOFF v JOHNSON (1891) 2 S. D. 91.

On promissory note, receiver of a national bank against the maker. Pleas: alteration of the note; that the note sued on was not his note. The alteration was made by the cashier of the bank, but the plaintiff contended that such act did not bind the bank. Defendant's offer to show that the note had been carried on the books of the bank as a discount for the amount to which it had been altered, was overruled. The note was given in payment of stock sold by the bank to defendant. Defendant offered to show that the bank and defendant had not agreed at the time of the sale, that the note should be surrendered on demand therefor and return of the stock, and that he had made such tender and demand, and the bank had refused. Rejected. Judgment for plaintiff. Appeal.

Kellam, P. J. 1. The court erred in refusing to allow the defendant to show that the bank had treated the note as a note for the amount to which it had been altered, thus at least tending to show assumption and ratification by the bank, of the act of the cashier. 2. The plea was not such a controversion of the complaint as raised any issue. 3. The burden of proof was on defendant as to the new matter. 4. The bank's books are competent to show what it had done as to the alteration. 5. Seeking to recover on the sale of the stock was a full recognition by the bank of the cashier's authority or of its ratification of it. The bank could not ratify the sale without adopting this condition. Reversed.

Cited: 7 S. D. 227.

SYKES v FIRST NAT. BANK (1891) 2 S. D. 242.

Money had and received. P, a depositor in defendant, having a contract with the trustees of the D Hospital, to erect a building, made a subcontract with plaintiffs and, by a written agreement, assigned to them a sum to become due. The trustees refused to accept the assignment and the order made on them by P. G, defendant's president, also a trustee, wrote plaintiffs that vouchers would be payable to and indorsed by P, and that defendant would remit to plaintiff as the vouchers came in. P gave G a power of attorney to indorse them. Verdict directed. Judgment for plaintiffs. Appeal.

Corson, J. 1. The assignment was not conditional. Evidence to show alteration was only competent to show notice to defendant. 2. The letters were only competent to show notice to defendant. 3. Because the assignment could not be enforced against the trustees, did not make it invalid as between the parties. 4. This amounted to an equitable assignment, which could be enforced when the fund came into being. 5. The court, under the reformed system of pleading, will entertain an equitable cause though the action is framed as one of law. 6. The bank was bound by such an agreement. Affirmed.

Cited: 4 S. D. 420; 10 id. 191; 15 id. 89.

STATE v FIRST NAT. BANK (1892) 2 S. D. 568.

Indictment for usury. The defendant was indicted under a state law, making it a misdemeanor to take or accept more than the legal rate of interest. Defendant contended that the state law was not applicable to a national bank, and that the court had no jurisdiction. Verdict of guilty. Error.

Kellam, P. J. 1. A bank organized under the acts of Congress is liable to an indictment under a state law for any violation of the law which is not expressly within the business and powers of a national bank. 2. A national bank has no power to take interest beyond the rate allowed in the state or territory in which it exists. Affirmed.

Cited: 3 S. D. 54.

STATE v SCOUGAL (1892) 3 S. D. 55.

Information, for violation of state banking law. The defendant was a banker and continued to carry on a general banking business, without having complied with the provisions of the Banking Act of March 10, 1891. Sec. 27 of the act provided that any individual who continued to transact a banking business more than six months immediately after the approval of the act, without first having complied with its provisions, would be guilty of a misdemeanor and subject to fine or imprisonment. Demurrer. Sustained. Judgment for defendant. Error.

Corson, J. 1. The legislature had no power to create a franchise out of the natural and common rights of citizens. Banking privileges, except the power to issue bank bills to circulate as money, have always belonged to the citizens of the country generally. 2. It was not competent for the State, under the police power, to prohibit the citizen from carrying out any trade, occupation, or business, that is not offensive to the community or injurious to society. 3. The citizens' right to pursue any lawful business was more than a mere right; it was property that cannot be taken away without due process of law. 4. The legislature exceeded its powers, and, so far as the act affects individual citizens, is unconstitutional. Judgment affirmed.

Cited: 3 S. D. 244.

PLYMOUTH CO. BANK v GILMAN (1892) 3 S. D. 170.

On promissory note against the maker. Counterclaim, that at the time of giving his note to plaintiff, the defendant delivered to it, six other notes of double the amount and a mortgage securing the same, executed by M, as collateral security; that at the time, the mortgaged premises were of greater value than the notes; that the plaintiff agreed to collect the notes and mortgage for a commission of 10 per cent, and to pay his notes out of the proceeds; that by reason of the plaintiff's neglect, the notes and mortgage became worthless. Plaintiff procured a defective judgment upon these notes in 1867, which stood until 1881, when a new judgment was obtained and the collateral was sold for \$60. This property was worth \$1,400 when the notes were deposited with plaintiff. Defendant testified that the cashier

told him that it was through the fault of plaintiff that these notes had not been collected. Exception. Overruled. Judgment for defendant. Appeal.

Corson, J. The declarations did not relate to the collection or non-collection of the notes, but were a mere expression of opinion, not in the line of his duty. Reversed.

Cited: S. D. 265, 476, 487, 593; 10 id. 263, 402; 11 id. 94; 13 id. 95, 301; 14 id. 42.

BLACK HILLS NAT. BANK v KELLOGG (1893) 4 S. D. 312.

On promissory note. Defendants executed a promissory note to H, plaintiff's cashier, in payment of land, for which H agreed to convey a perfect title. The only title H held, was a deed made by the guardian of the legal owner, without authority of any court. H transferred the note to the plaintiff; and, when it became due, had the defendants renew it, but made the plaintiff payee instead of H. The original note was given up. H never perfected his title. Plaintiff's offer to prove that H was acting as defendants' agent, was refused. Verdict directed. Judgment for defendants. Appeal.

Corson, J. 1. All the facts pertaining to the contract, being known to the cashier, were in law known to the bank, and the question must be considered precisely as it would be if the renewal note had been made to H instead of to the bank. 2. The bank cannot maintain an action unless H had title reasonably free from doubt. 3. H did not have a good title, and could not recover the consideration. 4. The partial failure of title is a good defense to the note. Judgment affirmed.

Cited: 7 S. D. 363; 9 id. 550; 12 id. 632.

NATIONAL BANK v TAYLOR (1894) 5 S. D. 99.

On promissory note. The president of the plaintiff bank, by false representations, induced the defendant to purchase 90 shares of its capital stock, for which defendant gave the note. After the purchase, defendant was made cashier of the bank, but did not strictly perform his duties, nor become acquainted with the real financial conditions of the bank during the two years he acted. While he was cashier and also a director, he signed statements showing the condition of the bank as required by the National Banking Act. The bank had knowledge of all the facts. Plaintiff offered to return the stock and demanded a return of the purchase price. Judgment for plaintiff. Appeal.

Kellam, J. 1. Plaintiff owed defendant no duty of active vigilance in the discovery of the fact that the representations were false. 2. Mere want of diligence, without knowledge of the fraud was insufficient to deprive plaintiff of his legal right to rescind the fraudulent contract. 3. The fact that defendant was cashier would not, as a matter of law, make him chargeable with a knowledge of such facts as would demonstrate the falsity of the representations. 4. Defendant has a right to rescind the contract. Reversed.

Cited: 6 S. D. 376; 6 id. 511; 10 id. 576; 12 id. 529.

KIMMEL v DICKSON (1894) 5 S. D. 221.

To recover trust funds. The plaintiff delivered to the D Bank \$265, to be paid to W, on his delivering a deed and abstract of title. The bank gave a receipt for the money, specifying the purpose of the deposit. The bank failed with \$259, cash on hand, and defendant was appointed receiver. Defendant contended that the plaintiff should only recover as a general creditor of the bank, and alleged that the money had been mixed with other funds and treated as any other deposit of money, merely crediting plaintiff with the amount. Judgment for plaintiff. Appeal.

Killam, J. 1. The bank could not, without the acquiescence of plaintiff, charge its relation to him from that of bailee or trustee, to that of general debtor. 2. The transaction constituted a trust, and the subject or title of such trust did not pass to the assignee as assets of the bank. Affirmed.

Cited: 14 S. D. 512; 15 id. 196.

TAYLOR v NATIONAL BANK (1895) 6 S. D. 511.

To rescind a contract. The plaintiff alleged that by fraudulent representations made by the defendant's president S, and with full knowledge of the defendant,

plaintiff was induced to purchase shares of the defendant's capital stock, and in part payment thereof, executed his promissory note; that at the request of S, he made it payable to defendant; that he gave notice of his intention to rescind, as soon as he discovered the fraud. Demurrer. Overruled. Appeal.

Kellam, J. 1. The facts alleged, being unexplained, place the bank in *pari delicto* with S. 2. On discovery of the fraud within a reasonable time plaintiff could rescind the contract, or affirm it, and claim damages for the injury sustained. Affirmed.

MARTIN v MINNEKAHTA STATE BANK (1895) 7 S. D. 263.

To recover money deposited in defendant. In an action by H against the defendant and another, judgment was taken by default, and execution levied, and thereafter satisfied by the sheriff from funds in defendant. The sheriff deposited the amount seized and received a certificate of deposit which came into plaintiff's hands, and was deposited in defendant, subject to check. Thereafter defendant refused to honor plaintiff's check on the deposit. Judgment for plaintiff. Appeal.

Fuller, J. The defendant, having received and placed the deposit to the plaintiff's credit generally, became liable on an implied contract to pay his checks drawn thereon, when presented. Affirmed.

Cited: 15 S. D. 26.

NORTHWESTERN L. & B. CO. v MUGGLI (1895) 7 S. D. 527.

To restrain collection of taxes. The plaintiff was a banking corporation owning real estate. A tax was levied against its stock without deducting the amount of its real property. The assessment of the shares was against the stockholders individually. The plaintiff paid the tax less the amount covering the real property, and sought to prevent the collection of the remainder. Demurrer. Sustained. Appeal.

Kellam, J. The law neither required nor authorized the bank to pay the taxes of its individual stockholders. 2. The wrong was against the stockholders severally, and not against the independent incorporated company, and it could not maintain an action on a grievance in which it had no corporate interest. Affirmed.

Cited: 13 S. D. 108; S. c.: 8 id. 160.

FIRST NAT. BANK v SMITH (1895) 8 S. D. 7.

On note. Defendant executed the note to D, who indorsed it for value to the plaintiff bank, "without recourse." Defense: that the purchase of the note by the bank was *ultra vires*. Judgment for plaintiff. Appeal.

Kellam, J. 1. The plea of *ultra vires* was not available to defeat a recovery by a national bank on negotiable paper purchased by it. 2. The presumption, notwithstanding the pleadings, is that the plaintiff gave value, and it devolved on the defendant to show that it did not. Affirmed.

NORTHWESTERN BANKING CO. v MUGGLI (1895) 8 S. D. 160.

To restrain collection of taxes. Motion for rehearing. An assessment was made against the individual stockholders of the plaintiff, a bank, computed on the full value of the plaintiff's stock, without deducting the amount invested in real estate. Plaintiff contended that the court should take cognizance of the suit in the name of the plaintiff, in order to avoid a multiplicity of suits.

Kellam, J. A court of equity will never interfere to avoid a multiplicity of suits, in behalf of a party who is in no danger of being sued. Motion denied. (See 7 S. D. 527.)

Cited: 13 S. D. 103.

FARMERS BANK v BANK OF CANTON (1896) 8 S. D. 210.

On bill of exchange. N negotiated with M for the exchange of \$5,000 and real estate for a stock of merchandise, and arranged with the defendant to accept and pay his sight draft or \$5,000 with a bill of lading attached to make this cash payment. Plaintiff was informed of this arrangement by N. In order to pay his deposit, N delivered a sight draft for \$1,000 to plaintiff drawn on defendant. Defendant telegraphed that it would honor N's draft for \$1,000. The draft for \$1,000 was forwarded for collection. Defendant notified plaintiff that on the delivery of the

bill of lading of the merchandise to plaintiff, to be forwarded to it with the \$4,000 draft payable in 90 days, defendant would accept and certify the \$4000 draft, and at once pay the \$1000 draft now here, but that before the money was advanced, the goods must be in defendant's possession by virtue of the bill of lading, or receipt from the railroad company. Plaintiff subsequently credited N with the \$1,000 draft and paid his check for \$1,000, relying on this telegram. Judgment for defendant. Appeal.

Fuller, J. 1. The deposit of the sight draft for collection did not vest the title thereof in the plaintiff. 2. If subsequent to the defendant's letter, the plaintiff, by some unauthorized act became liable to pay M the amount of the draft in suit, that fact created no liability on the part of the defendant. Affirmed.

DAVEY v FIRST NAT. BANK (1896) 8 S. D. 214.

Statutory action, to recover penalty for usury. Plaintiff had a running account with defendant, a bank, which was overdrawn. Defendant charged on its books an illegal rate of interest, but none of the account had been paid. Sec. 5198, U. S. R. S., provided that a bank charging or receiving illegal interest, forfeited twice the amount of interest. Judgment for plaintiff. Appeal.

Kellam, J. Simply charging interest against plaintiff's account, would not entitle the plaintiff to recover the penalty, for such is recoverable only in case the greater rate of interest has been paid. Reversed.

SHERMAN v PORT HURON ENGINE CO. (1896) 8 S. D. 343.

To recover commissions. Plaintiff was defendant's agent for the sale of its machines, and was to receive specified commissions of the sales, when payment was made. Plaintiff sold a machine to T, who gave his notes to defendant. Defendant sent the notes to the S Bank, at which they were payable, for collection. The S Bank sent them to the H Bank, and the H Bank collected them. Plaintiff attached the proceeds in the hands of the H Bank and commenced this action. No commission was due, until the proceeds of the note had been received by defendant in cash. Plaintiff contended that the H Bank was a sub-agent, and that a receipt by it, was a receipt by defendant. Judgment for plaintiff. Appeal.

Haney, J. 1. Where the note is payable at the bank to which it is sent, without any express authority to employ a sub-agent, such bank, under our statute, cannot delegate its powers. 2. If the collection is intrusted to another bank, the latter is the agent of the former bank, and has no connection with the owner. Reversed.

Cited: 13 S. D. 95.

FALL RIVER CO. v MINNEKAHTA STATE BANK (1896) 8 S. D. 538.

Mandatory injunction. The complaint alleged that the plaintiff had deposited \$5,000 in the defendant for the purpose of paying warrants issued and judgments obtained thereon, for the erection of a jail; that the president of defendant had erected the jail and the defendant had obtained judgment against the plaintiff for \$5,053 for said work, the claim having been assigned to it; that the defendant, on plaintiff's demand, had refused to discharge said judgment, by applying such deposit toward payment of the judgment. Demurrer. Sustained. Appeal.

Fuller, J. The transaction amounted to a payment of \$5,000 by a judgment debtor to a judgment creditor, with the understanding that it should be applied, as far as it would go, to the discharge of the indebtedness evidenced by the judgment to which the agreement related, and action may be maintained to enforce such contract, without any previous demand. Reversed.

ALLIBONE v AMES (1896) 9 S. D. 74.

On bond. Defense, unlawful contract between principal and obligee. Defendants were sureties on a bond given by a bank as the depository of public funds. The deposits were general and subject to check by plaintiff as county treasurer. Deposits were made before and after the bond was given. The bank failed. Statutes made it unlawful for the county treasurer to use or loan public money. The court struck out all of the defendant's evidence. Judgment for plaintiff. Appeal.

Haney, J. 1. The general deposit of public money in the bank, was not a loan and was not unlawful. 2. The sureties were liable for funds deposited before the bond was given. Affirmed.

PLYMOUTH CO. BANK v GILMAN (1896) 9 S. D. 278.

On note. Counterclaim, that plaintiff, a foreign corporation, failed to collect notes left by defendant for security. Defendant left the notes with plaintiff to secure property located at a distant point, but said nothing about their collection. Through the negligence of plaintiff's attorney, the notes were not collected. Plaintiff proved by deeds, that defendant bought in the mortgaged premises before the mortgage could be foreclosed. The bank used diligence in employing the attorney. Judgment for plaintiff. Appeal.

Fuller, J. 1. The duty of the bank was discharged when the notes were forwarded by it to a reputable attorney with directions to institute suit for their collection. 2. Plaintiff was properly allowed to introduce the deeds in evidence, in mitigation of damages. Judgment affirmed.

ALLIS CO. v M. E. L. AND P. CO. (1897) 9 S. D. 459.

To foreclose mechanic's lien. Defendant agreed to pay plaintiff's assignor in bankable paper. He gave him a note signed by a bank and its cashier, as sureties. The code provided that one could not have a mechanic's lien and collateral security on the same contract. Defendants proved the paper by bankers, who knew the conditions of the securities, but who had refused to discount the same paper. Judgment for defendant. Appeal.

Corson, P. J. 1. Bankable paper means high-credit paper, which if the time of payment is reasonable and the bank has loanable funds would be discountable paper. 2. Accepting a note with third parties as securities, is taking collateral security, and waives the right to file a lien. 3. Refusal to discount the paper of a bank does not render the bankers, so refusing, incompetent to testify as to the conditions on the paper of that bank. Judgment affirmed.

Cited: 13 S. D. 352.

MACOMB v LAKE CO. (1897) 9 S. D. 466.

To restrain collection of taxes. Plaintiff held stock in a banking company, which had most of its stock invested in real estate, and was without a surplus or reserve fund. Statutes required shareholders to be assessed on the difference between the capital stock and surplus, and the amount invested in real estate. Plaintiff paid taxes on this basis. Defendant, the tax collector, threatened to sell all plaintiff's property, to collect the tax as levied. Demurrer. Sustained. Appeal.

Fuller, J. 1. As the taxing power has been exercised with apparent authority, but in fact illegally, plaintiff could resort to a court of equity. 2. The tax appeared to be a legal charge constituting a lien on plaintiff's land, creating a cloud on the title. Reversed.

Cited: 13 S. D. 103.

NATIONAL BANK v FEENEY (1897) 9 S. D. 550.

Claim and delivery. Defenses: setoff and breach of warranty. Defendant gave plaintiff's assignors a chattel mortgage to secure notes. The notes provided for the payment of attorney's fees. E, one of the assignors was also the cashier of plaintiff bank, but E had nothing to do with the discount. The sheriff seized part of the property and afterward withdrew his papers and under a new affidavit and order, seized the balance. The value of the property exceeded the amount due. Defendant gave a re-delivery bond and retained possession of the property. Judgment for plaintiff. Appeal.

Corson, P. J. 1. It was proper for the sheriff to make a second seizure, under the original affidavit and order. 2. The provision for attorney's fees is void, and does not affect the negotiability of a note. 3. The assignee of a chattel mortgage is not liable for a breach of warranty by the assignor. 4. A bank is not affected by knowledge of one of its officers, obtained in his individual capacity. 5. Alternative judgment should be given for the amount due, and not for the value of the property itself. Modified and affirmed.

S. c.: 11 S. D. 109; 12 id. 156.

CHURCH v FOLEY (1897) 10 S. D. 74.

Claim and delivery. R owed money to the W Bank. At the direction of the other officers of the bank, plaintiff, the cashier, bought R's stock of goods, and,

besides canceling the indebtedness to the bank, paid some cash and some of R's debts. After plaintiff took possession, defendant, the sheriff, seized the goods. Demurrer. Overruled. Motion by both parties for direction of verdict. Verdict directed. Judgment for plaintiff. Appeal.

Corson, P. J. 1. The plaintiff, having the legal title, was the party to sue, and the bank was not a necessary party plaintiff. 2. Both parties having moved for direction of a verdict, and there being evidence to sustain the verdict as directed, the judgment will not be reversed. 3. When both parties move for the direction of a verdict, the unsuccessful party cannot raise the point on appeal, that there were questions for the jury, unless it was requested by him that the case go to the jury. Judgment affirmed.

Cited: 11 S. D. 289.

DAVEY v FIRST NAT. BANK (1897) 10 S. D. 148.

To recover penalty for taking usurious interest. At the time the note was made, it was lawful for the bank to contract in writing for any rate of interest in the counties where the note was executed. Plaintiff contended the interest could not be collected unless the contract on which interest was paid was expressed in writing. Judgment for plaintiff. Appeal. Reversed.

Haney, J. The bank could contract for any rate of interest, either at the time the note was made or afterward, and such contract did not have to be in writing. Judgment modified, so as to reverse and render judgment for defendant with costs.

FIRST NAT. BANK v PEAVY ELEVATOR CO. (1897) 10 S. D. 167.

Conversion. D bought of plaintiff, a national bank, seed grain, and gave his note with 12 per cent interest. Plaintiff filed a lien on the crop to enforce payment of the note, but failed to describe the property as required by statute, and to allege when the grain was furnished, that the account was filed, or when it was filed, or that the grain converted was raised from this seed. Demurrer. Sustained. Appeal.

Haney, J. 1. A national bank may sell grain of which it is the owner, on credit, and avail itself of the security offered by a state statute. 2. To enforce a lien, all the statutory requirements must be complied with. 3. The omitted allegations were necessary in stating a cause of action under the statute. 4. The absence of such allegations is not cured by recitals in the notice or account. Affirmed.

MINNEHAHA NAT. BANK v TORREY (1897) 10 S. D. 379.

On note. Defense, extension of time. Defendant told the president of the bank he was going away, and the president said the time would be extended. There was nothing said about the time of extension and there was no consideration. Judgment for defendant. Appeal.

Corson, P. J. No valid or binding agreement for an extension was shown. Judgment reversed.

Cited: 10 S. D. 548.

CUSTER COUNTY v WALKER (1898) 10 S. D. 594.

To recover a deposit. T, the county treasurer, borrowed money of a bank, defendant's assignor, and the bank credited it to him "as treasurer." The bank then applied part of it to pay T's individual note. Plaintiff accepted the treasurer's accounts. The bank exhibited written statements showing the money belonged to plaintiff. Judgment for plaintiff. Appeal.

Corson, P. J. 1. A bank could not apply deposits made by one in an official capacity to pay his individual debts. 2. The bank was estopped by its written statements from denying that the money belonged to plaintiff. Judgment affirmed.

CAMPBELL v MINNEHAHA NAT. BANK (1898) 11 S. D. 133.

To recover dividends on bank stock. The complaint alleged that plaintiff owned 15 shares of the defendant's stock for the year 1897; that the taxing officers assessed his shares at \$390 and equalized it at \$330, which was more than the cash value; that the state board of equalization increased the assessment on bank stock

throughout Minnehaha county, by adding 80 per cent thereto, and did not make any material change in the assessed value of other shares and other classes of personal property. Plaintiff's tax amounted to \$26.78 instead of \$14.85, the amount assessable at the previously equalized valuation. Plaintiff tendered to the county treasurer \$14.85, as payment of the tax in full, and, on his refusal to receive it, that amount was deposited to that officer's credit in a bank. Demurrer. Sustained. Appeal.

Fuller, J. For the purpose of equalizing values, the state board was limited to the corrected abstracts returned by the county auditors, and was without power to divide a class for the sole purpose of increasing the assessment of a part thereof. Order reversed.

Cited: 11 S. D. 140.

COLER v STERLING CO. TREASURER (1898) 11 S. D. 140.

To set aside an assessment on bank stock. Plaintiff was the owner of bank stock. In 1896, the State Board of Equalization raised the valuation of bank stock without raising the valuation of other stock. Judgment for plaintiff. Appeal.

Per curiam. The action of the board, so far as it affects the plaintiff's assessment, was unauthorized and cannot be sustained. This action is ruled by the decision in Campbell v Bank, 11 S. D. 133. Judgment affirmed.

DUNN v NATIONAL BANK (1898) 11 S. D. 305.

On certificate of deposit. Defendant issued its certificate of deposit to K. Plaintiff claimed it as indorsee. Defense, title in K. K intervened and set up fraud by plaintiff. Verdict directed. Judgment for plaintiff. Appeal.

Corson, P. J. 1. It was the right of K under the statute to intervene. 2. As the burden of proof was on plaintiff to establish good faith and valuable consideration, his title became a question of fact. Judgment reversed.

Cited: 15 S. D. 454.

MEAD v PETTIGREW (1899) 11 S. D. 529.

On promissory note. The note was made by defendant and delivered to the F National Bank. Before maturity, the bank made an assignment of its property to plaintiff for the benefit of creditors. The answer denied "each and every material allegation in the complaint, except as hereinafter specifically admitted." Special defense, want of consideration; that the note was given for stock in the F National Bank; that the defendant had not received any dividends or paid any assessments; and that when the note was given, the president of the bank told the defendant he would never have to pay it. Judgment for plaintiff. Appeal.

Haney, J. 1. The denial of "every material allegation" was bad, and every material fact alleged must be taken as true. 2. S was not authorized to make the agreement. Judgment affirmed.

GRISSEL v BANK OF WOONSOCKET (1899) 12 S. D. 93.

To recover a deposit. Defendant applied plaintiff's deposit to the payment of a note executed by plaintiff to defendant, on which part payment had been made. Defendant averred that he and plaintiff had had a settlement; that a sum was due defendant on account of the note; that plaintiff drew out the amount of his deposit in excess thereof, and the balance was applied to the note and the account closed. Plaintiff alleged that the note was given by him for the accommodation of his brother C, and that C paid the balance of his debt by giving the defendant a new note, secured by a mortgage. Defendant was not allowed to prove, by its cashier, conversations between himself and plaintiff relative to the note. The court charged that if his words, as commonly understood in relation to the subject-matter, imported an agreement, the jury must find an agreement from these words, and not what he secretly intended and meant; but refused to charge that the burden of proof was on plaintiff to show that it was the mutual understanding at the time of the giving of the new note that plaintiff was to be released from the old note. Judgment for plaintiff. Appeal.

Corson, P. J. 1. It was proper for defendant to show what conversation took place between plaintiff and the cashier relative to the matter. 2. The charge as

to what the cashier secretly intended was not justified, and was calculated to make a wrong impression upon the jury. 3. The last instruction requested by the defendant should have been given. Judgment reversed.

CORNWALL v MCKINNEY (1899) 12 S. D. 118.

On certificates of deposit. Plaintiff held four certificates of deposit in the bank of M & S, all signed "M & S," except the first, which was signed by B, a clerk, and all were payable to plaintiff. The partnership of M & S was dissolved and notice thereof published. S then continued to transact business under the style of M & S, without the knowledge of defendant. Plaintiff had dealings with the partnership during its existence, and did not receive personal notice of the dissolution, until after the certificates were issued. S died before the commencement of this action. The complaint alleged that M & S were partners and continued to do business under the style of M & S until S died, leaving the defendant sole surviving partner. The certificate signed "B" was signed by B, acting as cashier, and the one signed "M & S," was signed by a brother of S, who was also employed in the bank. At the commencement of the action, the certificate had not been indorsed by the plaintiff. Judgment for plaintiff. Appeal.

Haney, J. 1. The acts of B, the cashier, were binding on defendant, as were the acts of the brother of S, who was acting under authority from S. 2. As to plaintiff, S was a member of the firm when the certificates were issued. 3. No indorsement was necessary. Affirmed.

Cited: 14 S. D. 52.

LIEN v SIOUX FALLS SAV. BANK (1900) 12 S. D. 317.

Conversion. The complaint alleged a conversion by the defendant of a secured note and bank stock. Defense, that plaintiff and two others became sureties for the payment of a note executed by S, as principal, and secured by the deposit of the note and bank stock; that the note, not having been paid, defendant herein sued S and the sureties, and recovered judgment; that plaintiff herein paid the judgment, and demanded the surrender of the collateral, which was refused on the ground that it was claimed by K; that on the service of complaint in this action, defendant caused the collateral to be deposited with the clerk of the circuit court, and served on plaintiff and K due notice thereof. Plaintiff demurred. Sustained. Appeal.

Fuller, P. J. 1. When the plaintiff as surety paid the debt of his principal, evidenced by the judgment, he was, in equity, subrogated to all the rights of the defendant, upon whom the law has imposed the duty of surrendering on demand the property in question, and the defendant stood charged with knowledge of the duty. 2. Chap. 65, Laws of 1895, which provides for disposition of property in hands of a bailee when claimed by two or more persons, and the bailee is unable to determine to whom it rightfully belongs, does not embrace a case like the one before us. Order affirmed.

Cited: 14 S. D. 410; 15 id. 33, 551.

SMALL v ELLIOTT (1900) 12 S. D. 570.

On promissory notes. Plaintiff was the receiver of the A Co. Defendant was the guarantor of the notes, which were given by the G Co. to the A Co. The guarantee indorsed on the notes, was "For value received, we hereby guaranty the payment of the within note at maturity or at any time thereafter, with interest, waiving demand, notice of non-payment and protest," and was signed "E. J. E. Pt." Defendant averred that he was president of the D Bank and signed the guaranties in that capacity; that he never received any consideration for the guaranties in his individual capacity, but signed for accommodation only. Plaintiff objected to the testimony because it was parol evidence, and failed to allege that defendant was authorized by his principal to execute the guaranties, and that his principal had power to execute them. Judgment for defendant. Appeal.

Haney, J. 1. Parol evidence could not be received to contradict a written instrument. 2. Defendant could not be permitted to prove that no one was obligated by the signature. He could not escape liability unless he established the liability of his principal. 3. It could not be inferred from the mere fact that the defendant was president of the D Bank, that it had power to guaranty negotiable paper for accommodation. Judgment reversed.

CITIZENS NAT. BANK v ELEVATOR CO. (1900) 13 S. D. 1.

On contract, to recover on warehouse receipts. Plaintiff was described in the complaint as "Citizens National Bank." The original certificate of the comptroller of the currency, which was offered to prove incorporation, described it as the "Citizens National Bank of Watertown." At the maturity of the note, for payment of which the warehouse receipts were pledged as security, the warehouse was closed so that no demand could be made. Judgment for plaintiff. Appeal.

Corson, J. 1. As sec. 885, U. S. R. S., provided that copies of the organization certificate duly certified should be evidence in all courts of the existence of national banking associations, the certificate offered here was sufficient. 2. The omission of the words "of Watertown" in the name of the bank in the complaint was not a fatal objection. 3. That the receipts were fraudulently issued by one of the defendant's agents, was no defense. 3. Under the circumstances, it was not necessary to show a demand. 4. Plaintiff was entitled to maintain an action in its own name. Judgment affirmed.

SCHULER, SHERIFF v CITIZENS BANK (1900) 13 S. D. 188.

Attachment, on execution, by a sheriff, to recover money deposited in defendant bank by C. C executed his promissory note to the defendant for a loan. Before the note was due, C deposited with defendant a sum, part of which it applied in part payment of the note. A judgment was thereafter recovered against C by M; the sheriff levied thereunder on C's deposit and served on defendant, a notice of levy, and a copy of the execution. Defendant offered evidence of conversations between C and the bank officers to prove an agreement as to the application of any money deposited by C. Objection that it tended to vary the terms of a written instrument, and that it was not admissible under the issue raised by the pleadings. Judgment for defendant. Appeal.

Corson, J. 1. The evidence was properly admitted, as it did not tend to vary the terms of the note, but was an authorization to defendant to apply money to the payment thereof. 2. It was clearly admissible under the pleadings, because the issue raised was whether or not anything was due to C at the time the levy was made. 3. The judgment must be sustained on the theory that C constituted the bank officers his agents to apply his deposits to the payment of the note. Affirmed.

MORRIS v UNION NAT. BANK (1900) 13 S. D. 329.

Damages, for delay in protesting a promissory note. Plaintiffs owned a note payable on Sunday. Before maturity, they left it at the defendant for collection. It was protested for non-payment four days after it was due. In an action against the indorser, he was discharged. At the time of such discharge the law in this state as to such notes was involved in uncertainty. The bank officers acted in good faith under a mistake as to the law applicable to Sunday notes in this state. Verdict directed. Judgment for defendant. Appeal.

Haney, J. The defendant was bound to use ordinary care and diligence and to exercise a reasonable degree of skill, but it would be unreasonable to hold a banker personally responsible for an error of judgment regarding a question of law upon which able lawyers and judges disagreed before its settlement by the State Supreme Court. Judgment affirmed.

TOBIN v MCKINNEY (1900) 14 S. D. 52.

On certificate of deposit, against the surviving partner of M & S. Defendant was a partner in the firm, in the banking business in Y. The partnership was dissolved, and the business was continued in Y by S, using the old firm name. The plaintiff alleged that she had been a customer of the firm and deposited \$500 with it and received a certificate therefor signed "M & S," after actual dissolution, though that fact was unknown to her. Notice of the dissolution was published in a newspaper in Y, but plaintiff had no actual notice of the dissolution until the death of S. Defendant asked for direction of verdict on the grounds: 1, that the plaintiff had not shown that she was a customer of the bank, or had given credit to it prior to dissolution, or that she continued such business upon the faith that the defendant remained a partner; and 2, that the claim was barred by the Statute of Limitations. Verdict directed. Judgment for defendant. Appeal.

Corson, J. 1. If plaintiff in good faith believed when she made the \$500 deposit, defendant was still a member of the firm, and she had no personal notice to

the contrary, her previous transactions would entitle her to recover. 2. As action on a certificate of deposit could not be maintained until payment has been demanded, the action was not barred. Reversed.

PLANO M'F'G CO. v AULD (1901) 14 S. D. 512.

To impress a trust upon the assets of a bank in the hands of the receiver. Plaintiff sent a note to the bank for collection, the proceeds to be remitted. The maker paid the note, and the money was mingled with funds of the bank. On January 22, 1900, when defendant took possession as receiver, he found claims similar to that of plaintiff amounting to more than the cash on hand. The court ordered that the cash on hand be distributed pro rata to plaintiff and other claimants who had sent claims to the bank for collection. Cross appeals.

Fuller, P. J. 1. The money collected never belonged to the bank, and the relation of bailor and bailee continued after the mingling of the funds, and general creditors are not entitled to any share in its distribution. 2. The trial court was fully justified in its plan of distribution among those whose claims of like character were established without objection. Judgment affirmed.

Cited: 15 S. D. 196.

TENNESSEE

BELL v BANK OF NASHVILLE (1823) 1 Peck 269.

On promissory note against maker. The plaintiff bank discounted a note of the defendant, which was not paid when due. The defendant demurred on the ground that the State could not create a banking corporation, and that the bank had no power to discount the note. Overruled. Judgment for plaintiff. Appeal.

Haywood, J. 1. The legislature may establish a banking corporation with a capacity to sue and to be sued. 2. The bank had power to discount the single bill, and to sue on it. Judgment affirmed.

Cited: 102 Tenn. 69.

HAYS v STATE BANK (1827) 1 Mart. & Y. 179.

On promissory note. Judgment was taken by confession against defendants, makers and sureties, for the amount due with interest. Defendants claimed that the judgment so obtained was irregular and not in compliance with the terms of the bank's charter, which directed a 10-day notice before confession of judgment on power of attorney. Judgment for plaintiff. Appeal.

Peck, J. Parties dealing with a bank are presumed to be cognizant of the provisions of its charter, and will be bound thereby. The bank had a right to proceed against defendants and there was no error in proceeding to judgment, without the notice of 10 days, insisted upon by them. Judgment affirmed.

NASHVILLE BANK v HENDERSON (1833) 5 Yerg. 104.

Debt. Defendant issued certain notes held by plaintiff payable at branch banks. The declaration averred that the branch banks had been called in by the principal bank, and that therefore the principal bank was liable upon demand, that the plaintiff had made such demand and had been refused payment. Demurrer to declaration overruled. Judgment for plaintiff. Appeal.

Peck, J. 1. The branch banks having been called in, it was proper to make demand upon the main bank. 2. Debt will lie for a sum certain, regardless of whether the sum be claimed on several notes or on one. Judgment affirmed.

STATE v UNION BANK (1836) 9 Yerg. 119.

Bill to recover bonus and dividends which had accrued in defendant bank on the stock owned by the State. The bank resisted payment, alleging that under its charter the funds sued for were to be appropriated to the extinguishment of the bonds of the State and the balance to be applied to the common schools, and that the State could not withdraw them until its bonds were paid. Decree dismissing bill. Appeal.

Green, J. Under the section relied on, the right of the State to receive and dispose of these funds unquestionably existed, unless some other section of the charter relinquishes it. We find no section creating a trust in favor of the bank. Decree reversed.

Cited: 5 Hump. 239; 100 Tenn. 572.

UNION BANK v STATE (1836) 9 Verg. 490.

Assumpsit, to recover taxes. The defendant bank in its charter agreed to pay the State annually one-half of one per cent on the amount of its capital stock. Subsequently the State Constitution was amended so as to allow the passage of an act making bank stock subject to an additional tax, and the act in question was passed under which the State sought to recover. Judgment for plaintiff. Appeal.

Turley, J. 1. The Constitution of the United States provides that no State shall pass any law impairing the obligation of contracts. 2. The charter of the bank was a contract, the act relied on is a violation of that contract, and neither the legislature nor a constitutional convention can pass a law in violation of the Federal Constitution. 3. Bank stock can only be taxed in the county where the owner resides, and non-resident stockholders are not subject to the taxing power of this State. Judgment reversed.

Cited: 1 Sneed 119; 2 Baxt. 47; 6 id. 529, 555; 8 id. 118; 9 id. 447; 1 Heisk. 284, 287; 7 id. 404, 406; 3 Lea 34, 408; 91 Tenn. 550, 561, 578; 95 id. 226, 656; 97 id. 88; 99 id. 692, 701; 101 id. 161; 104 id. 342.

BRIGHTWELL v MALLORY (1836) 10 Verg. 196.

Bill, for recovery and injunction to prevent transfer of stock belonging to defendant in the T Bank, also made a party. The bill alleged that the complainant had obtained a judgment against defendant; that execution thereon had been returned nulla bona; and prayed a decree ordering defendant's stock to be sold. Decree for plaintiff. Appeal by bank.

Green, J. 1. A stockholder in a bank has entire ownership over his stock, and may sell and transfer it to whom he pleases, and the bank has no power to restrain him. 2. Before bank stock can be sold in equity under the Act of 1832, ch. 9, to satisfy a debt, there must be a judgment and execution against the debtor, but the bank has no right to call in question the validity of the judgment. Decree affirmed.

BLAKE v HINKLE (1836) 10 Verg. 218.

Bill, for penalty. Complainant alleged that the defendants are stockholders of F Bank, of which he owns notes; that they have never elected a board of directors; that no legal process can be served upon the bank; that if judgment could be recovered at law, nothing could be obtained; and prayed that the defendants be decreed to pay twice the amount due. The Act of 1821, ch. 197, sec. 5, provided that in event of the failure to elect directors or officers, demand shall be made and process served upon the late cashier, president, or any director. Demurrer. Sustained. Appeal.

Reese, J. 1. The failure to elect directors or other officers could not produce a dissolution of the corporation, nor could it prevent the institution of an action at law. 2. It is the duty of a party, before he sues the stockholders of the bank, to obtain a judgment at law, if he can, against the bank, and to ascertain by execution if there is no corporate property out of which judgment could be satisfied. Decree affirmed.

CRAIGHEAD v STATE BANK (1838) 1 Meigs 199.

Assumpsit, on open account. Defendant admitted the items of the account to be correct but denied that he owed the bank anything. He also alleged that the bank had been established for the purpose of emitting bills of credit, and that all its other powers were subsidiary to the main purpose, which was contrary to the United States Constitution. An original surety for the prosecution of the suit was discharged by the court and another substituted. Judgment for plaintiff. Appeal.

Turley, J. 1. The exercise by the court of this power in discharging sureties does not impair the obligation of contract, for there is no contract on the part

of the person intended to be benefited by the taking of the surety. 2. The Supreme Court in *Briscoe v Bank*, 11 Pet. 257, has decided that the state legislature is not prohibited by the United States Constitution from granting a charter similar to that of the plaintiff bank. 2. Where one admits the justice of an account but contends that he had paid it, yet if he gives no reason for his belief, the jury may give judgment on the admission. Judgment affirmed.

Cited: 10 Yerg. 517.

BURTON v SCHOOL COMMISSIONERS (1838) 1 Meigs 585.

On promissory notes. Ptea, usury. By the Act of 1826 the directors of S Bank were authorized to loan out the bank notes of the N Bank, which it received, payable in sound funds at 6 per cent interest. The defendant borrowed money of the N Bank, when its notes were at par, and in order to pay his indebtedness to that bank, borrowed from the S Bank a sufficient amount of the N Bank notes, which had depreciated, to pay off this indebtedness. The defendant gave the S Bank as security, notes at 6 per cent, which he renewed by giving the two notes in suit. By the Act of 1827 all the assets of the S Bank were appropriated to the support of the school fund, and these notes came into the hands of the plaintiff. Judgment for plaintiff. Appeal.

Turley, J. The legislature had the power to pass this law, and it clearly makes that lawful which otherwise might have been unlawful. It would involve an absurdity that the legislature had required the directors of the S Bank to perpetrate a crime for which they might be indicted, by pronouncing a loan of the N Bank paper usurious. Judgment affirmed.

Cited: 2 Heisk. 125.

IRWIN v PLANTERS BANK (1839) 1 Humph. 145.

Bill for relief. Complainant sought to recover from defendant bank the value of six of its fifty-dollar notes, which were his property, and which were alleged to have been destroyed by the burning of complainant's steamboat. There was no description of the notes by date, number or letter. Decree, that the complainant recover \$300, and that he give the defendant a bond in case said notes had not been destroyed. Appeal.

Reese, J. 1. A court of chancery exercises jurisdiction in such cases on the ground that it can give a remedy more adequate and ample than that given by a court of law. 2. The court will not grant relief in such a case where the testimony does not clearly trace the notes to the bank, and enable it to see that it has issued such notes. Decree reversed.

WILLIAMS v UNION BANK (1841) 2 Humph. 339.

Assumpsit on promissory note, against the makers and indorsers. Defendant set up that there could be no recovery by plaintiff bank because the amount required by its charter had not been paid in before the commencement of business. The court charged that the plaintiff must prove its corporate existence. Judgment for plaintiff. Appeal.

Green, J. 1. The charter of the U Bank of this state is a public law, and need not be given in evidence. 2. Evidence of user under the charter is prima facie proof of the performance of the conditions precedent, required by the charter. 3. Repeated recognitions by the legislature, in various public laws, of the U Bank as a legally existing corporation, are so far as third persons are concerned, conclusive evidence of such legal existence. Judgment affirmed.

MCNEIL v WYATT (1842) 3 Humph. 125.

Assumpsit on bill of exchange, against indorser. The bill was negotiated by plaintiff at a branch of the P Bank, to whose president, W, it was then sent, and by him indorsed for collection to B, cashier of the M Bank. It was protested, of which fact B advised W by letter immediately; on the same day, W sent S, cashier of the branch bank, a similar notice. The day after S received this notification, he gave notices to G, to be served on all parties. Plaintiff received notice on that day, and defendant, a prior indorser, received it on the next. G had instructions from plaintiff to notify all parties of protest of any bill on which he was indorser. Plaintiff has paid the bill. Judgment for plaintiff. Appeal.

Green, J. 1. A branch bank is the owner and holder of bills purchased, and notes and bills discounted by it. 2. A banker presenting a bill for his customer, has the same time to give notice to his customer, as if he, the banker, were the holder for his own benefit, and the customer has the same time to transmit the notice to the former parties. The notice to plaintiff was in time. 3. G was plaintiff's agent to notify defendant. Affirmed.

Cited: 5 Humph. 420; 1 Coldw. 625; 90 Tenn. 125.

BUDD v STATE (1842) 3 Humph. 483.

Indictment. Sec. 22 of the Act to charter the U Bank enacted, that if any of its officers, agents, or servants should defraud the bank, they should be guilty of a felony. Defendant was clerk in the U Bank and made false entries to defraud the bank. The indictment set forth that he was clerk of the individual ledger, a book of the bank, and also set forth the false entries. There was no direct averment that the defendant was employed by the bank. Verdict of guilty. Appeal.

Reese, J. 1. The defendant was not properly charged under the statute, and the judgment must be arrested, as we cannot hold that "clerk" is equivalent to officer, agent, or servant. 2. Sec. 22 creates a new felony in relation to the officers of the U Bank, and to them only. It is therefore partial and void. Judgment reversed.

Cited: 8 Humph. 481; 1 Sneed 121; 2 id. 120; 5 Coldw. 560; 3 Heisk. 71; 4 id. 363; 96 Tenn. 703; 99 id. 707.

NASHVILLE BANK v PETWAY (1842) 3 Humph. 522.

On bill of exchange. Plaintiff's charter ended in 1818, but was extended through 1838. No directors were elected after January, 1838. Defendant executed a bill in September, 1840, to president and directors of plaintiff for \$10,000, payable July 1, thereafter. The charter provided that "the powers and obligations of the corporation shall in all respects continue, for the purpose of bringing the affairs thereof, which shall be depending on January 1, 1838, to a final settlement and determination," and that old directors should act till new ones took their seats. Judgment for defendant. Appeal.

Reese, J. 1. The corporation is not extinct, for the subsequent acts of extension gave the same operation and effect to the provisions continuing the power of the corporation with reference to the period of 1838, that it had when enacted with reference to that of 1818. 2. The directors are in office for the purpose of maintaining this suit. Judgment reversed.

Cited: 4 Coldw. 101; 12 Lea 252.

GREER v PERKINS (1845) 5 Humph. 588.

On promissory note. Plaintiff held a note of an unincorporated banking company, in which defendant was a partner. The defendant relied on the Statute of Limitations. The court charged the jury that the statute did not operate, unless defendant proved that payment of said note had been demanded and refused more than six years before suit was brought, and that said note had not been reissued within that time. Judgment for plaintiff. Appeal.

Green, J. The cause of action did not arise until demand was made. The defendant must show that the cause arose more than six years before suit was brought. Judgment affirmed.

Cited: 2 Sneed 484.

DOCKERY v MILLER (1849) 9 Humph. 731.

Debt. Two single bills, discounted at the F Bank and assigned to the plaintiff, had more than twelve months to run after discount. The bank's charter prohibited it from discounting any paper which would not fall due within twelve months. The Act of 1841 empowered the bank to take paper having longer to run, from any debtor, for better security for the debt. The plaintiff alleged that the defendant was such a debtor to the bank. At a subsequent term of the court, defendant was denied leave to amend his pleas. Demurrer. Overruled. Judgment for plaintiff. Appeal.

Green, J. 1. The defendant's pleas should have averred that the party for whom the bills were discounted was not at the time of discount a debtor to the

bank. For want of this averment the pleas were bad upon demurrer. 2. The right of a party to amend is addressed to the discretion of the court, and there was no error below, as the amended plea was not offered. Judgment affirmed.

Cited: 4 Heisk. 424.

MAXWELL v PLANTERS BANK (1850) 10 Humph. 507.

Assumpsit, on promissory note, against drawer. Defendant, with indorsers, executed a note to the F Bank, whose cashier indorsed it to plaintiff, P Bank. The charter of the F Bank provided that all bills, notes, bonds, and all contracts of the bank, to be binding, should be signed by the president and countersigned by the cashier. Defendant contended that there had not been a valid transfer. Judgment for plaintiff. Appeal.

Green, J. 1. To indorse commercial paper is within the ordinary scope of a cashier's duties. 2. The section of the charter referred to, does not refer to the ordinary duties of a cashier, such as indorsing bills, and the court below properly so ruled. Judgment affirmed.

INGRAHAM v TARRY (1851) 11 Humph. 572.

Injunction to restrain collection of judgment. A note made by plaintiff was part of the funds of the S Bank, which the legislature appropriated to the use of the common schools. Defendant, as superintendent of schools, acquired the note and obtained a judgment on it in favor of the S Bank. Complainant enjoined the collection of the judgment. The bank's charter then expired, and subsequently the injunction was dissolved. Decree that the amount collected by defendant on the dissolution of the injunction be refunded to plaintiff, on the ground that the expiration of the charter abated all suits. Appeal.

Turley, J. The case being in chancery, the nominal party at law is no longer necessary for the carrying on of the suit, and its death can in no wise affect the interest of him who is the party really interested. Judgment reversed.

Cited: 5 Lea 583; 6 id. 732.

MAYOR v BANK OF TENNESSEE (1851) 1 Swan 269.

Debt, to recover municipal taxes. Defendant was in nature and character a public corporation, acting upon the funds and credit of the state in conformity to its charter for the public advantage, but its charter contained no express exemption from taxation. Judgment for defendant. Appeal.

Totten, J. The rights and powers of a municipality are subordinate to the general policy and laws of the state, and it cannot be permitted to obstruct the general policy by the exercise of its taxing power. Judgment affirmed.

Cited: 11 Lea 173; 2 Pickle 213.

HAZEN v UNION BANK (1853) 1 Sneed 115.

Injunction, to restrain collection of a note. The general law of Tennessee made the legal rate of interest 6 per cent. The charter of the defendant bank provided that certain kinds of paper could be discounted at 7 per cent. Plaintiffs, the maker and indorsers of a note discounted by defendant at 7 per cent, filed a bill in equity to enjoin the collection of the note by the bank. Decree for defendant. Appeal.

Totten, J. 1. The right to incorporate belongs to every sovereign state, and the act of incorporation is a contract. 2. The charter is not a partial law in the sense of the constitution and repugnant to its provisions. 3. The grant allowing the bank to take interest at the rate of 7 per cent per annum is a valid franchise. Decree affirmed.

Cited: 5 Heisk. 530; 12 id. 120; 89 Tenn. 282.

BANK OF MEMPHIS v WHITE (1855) 2 Sneed 482.

On bank notes. Bank notes were issued by defendant, payment on which defendant refused. Plea: Statute of Limitations, the suit having been brought more than six years after defendant suspended payment. No demand was made until shortly before the bringing of this action. Judgment for plaintiff. Appeal.

McKinney, J. 1. The bank was not in default until payment had been de-

manded and refused. 2. The suspension of payment by the bank cannot be regarded as a refusal, which would set the statute running. Judgment affirmed.

Cited: 5 Baxt. 56, 97, 114.

BANK OF TENNESSEE v DIBRELL (1855) 3 Sneed 379.

Injunction, to restrain the state comptroller from paying defendant's salary. Defendant, treasurer of the state, was indebted to plaintiff bank, which was the property of the state. A statute required the retention of money due persons indebted to the state until such debts were paid. Plaintiff claimed that debts due to it were debts due to the state, and thereby sought to have defendant's salary applied in satisfaction of his indebtedness. Demurrer. Sustained. Decree for defendant. Appeal.

Caruthers, J. 1. The fact that the bank is the creature and property of the state, does not make it identical with, or even an integral part of the state sovereignty. 2. The relation of debtor and creditor in the sense of our attachment laws, does not exist between the state and its employees. The salary of a public officer, therefore, is not subject to attachment, in the hands of the disbursing officer of the state. Decree affirmed.

Cited: 5 Baxt. 99; 7 Heisk. 547; 8 id. 853; 4 Lea 482; 9 id. 353; 11 id. 150; 95 Tenn. 493.

UNION BANK v WARREN (1856) 4 Sneed 167.

Assumpsit, for the value of bank notes. Plaintiff was the holder of two bank notes issued by defendant bank. For the purpose of transmission by mail, he cut the notes in half and forwarded the parts by different mails. Those sent in one mail were lost. Upon presentment of the other halves, and demand, the bank refused payment. Demurrer. Overruled. Judgment for plaintiff. Appeal.

McKinney, J. Half a bank note is not negotiable; and where such note is divided for transmission, and one half is lost, the owner or bona fide holder of the other half, after demand and refusal at the bank where it is payable, may recover the amount in a court of law upon the common counts in assumpsit or debt. Judgment affirmed.

BANK OF TENNESSEE v BARKSDALE (1857) 5 Sneed 73.

Bill, to establish liability of defendants under contract. Defendants, directors of a branch of the plaintiff bank, acknowledged in a writing, signed and sealed by them, that they had transcended their duty in discounting a note, and agreed to be individually bound for equal proportions thereof. Plaintiff bank was unable to collect the amount of the note and finally accepted from K, one of the indorsers, a partial payment of the amount, released him from liability on the note, and brought this suit for the balance. Defendants claimed that they were discharged from liability by the act of the bank, in compromising with K. Decree for defendants. Appeal.

Caruthers, J. The undertaking of these defendants is neither a guaranty nor suretyship, but an original, independent contract, by which they are bound for any loss which may fall upon the bank in consequence of their trust. A release of one of the indorsers of the note in question did not discharge the defendants from their liability under their contract. Decree reversed.

KING v DOOLITTLE (1858) 1 Head 77.

Bill to annul contract. The M Bank was incorporated by an act of the legislature, which contained a clause reserving the right to repeal the charter. Shortly afterward defendants, owners of all the stock, sold the bank to plaintiff, exhibiting to him a copy of the charter, certified by the secretary of state to be full and correct. In this copy the clause reserving the right of repeal was omitted, neither plaintiff nor defendants knowing of its existence. In 1856 the legislature annulled the charter, and plaintiff sued to annul the contract. The purchase money notes were assigned by one defendant to another defendant as security for a pre-existing debt. Decree for defendants. Appeal.

McKinney, J. 1. The complainant cannot be repelled on the ground that as the charter was a public act, the law imputed to him knowledge, at the time of the contract, of the entire contents of the charter, and the rules and principles of law applicable to each and all of its several provisions. 2. The mistake was

one of fact, and in cases of mutual mistake, going to the essence of the contract, it is not necessary that there should be any element of fraud to warrant the interposition of a court of equity. 3. The complainant is entitled to a surrender of the notes, as the holder, having taken them as security for a pre-existent debt, remains subject to all equities. Decree reversed.

Cited: 94 Tenn. 180; 103 id. 365; 105 id. 530.

JOHNSON v CHURCHWELL (1858) 1 Head 146.

Bill to enforce statutory penalty. Plaintiff held \$5,750 worth of bank notes of defendant bank, when the bank failed and payment was refused. Plaintiff filed this bill against the directors, on the ground that the corporation had violated its charter. The bill did not allege that the assets were exhausted, nor that any direct proceeding had been instituted to have the violation of the charter declared, as provided for by sec. 12 of the charter. Demurrer. Sustained. Decree for defendant. Appeal.

McKinney, J. 1. No right or cause of proceedings against the directors arises until the alleged violation of the charter is established in a direct proceeding against the corporation for that purpose, in some court of record in this state. 2. The individual liability of the directors cannot be enforced so long as there remains any property or effects of the corporation to redeem its notes or discharge its debts. Decree affirmed.

Cited: 92 Tenn. 603.

NEIFFER v BANK OF KNOXVILLE (1858) 1 Head 162.

Debt on check. Plaintiff was the holder of a check drawn by the president of the defendant bank, as president, in the absence of the cashier. The check was protested for non-payment. Defense, want of authority in president to draw the check. The charter and by-laws were silent on the subject. It was proved to be the custom of this bank, and other Tennessee banks, to have checks signed by the president in the cashier's absence. Judgment for defendant. Appeal.

McKinney, J. It was sufficient to vest the president with authority to do the act, that the regular, permanent officer, known as cashier, was absent from the bank at the time the official act was required to be performed. Judgment reversed.

WETMORE v BRIEN (1859) 3 Head 723.

On promissory note, against the maker and the indorser. The Bank of C, organized under the Free Banking Act, discounted the note at the rate of 15 per cent, which was a greater rate than other banks were allowed. Plea: Act of 1855, ch. 250, sec. 11, prohibiting banks from discounting notes at a greater rate than other banks were allowed under penalty of forfeiting all banking rights. Plaintiff sued for C Bank. Judgment for defendants. Appeal.

McKinney, J. A violation of the provisions of this section amounted to an avoidance of the contract, and to a forfeiture of the debt in toto; and no recovery can be had upon a note thus illegally discounted. Judgment affirmed.

Cited: 3 Coldw. 21, 172, 462; 2 Baxt. 187; 1 Heisk. 260; 2 id. 343; 7 id. 501; 9 id. 804; 6 Lea 288.

HANNUM, ADM'R v BANK OF TENNESSEE (1860) 1 Coldw. 398.

On deposit and for interest. In April, 1855, plaintiff deposited with defendant \$59,000, upon which defendant agreed to pay interest. On May 1, 1859, an act was passed providing that no bank should pay any interest on deposits. In 1860 the defendant notified plaintiff it would only pay interest up to May 1, 1858. Judgment for defendant. Appeal.

McKinney, J. 1. To give the enactment such a construction as to make it operate upon past contracts, would be to bring it directly in conflict with the constitutional provision that "no retrospective law, or law impairing the obligation of contracts, shall be made." 2. The operation of the Act of May 1, 1858, is confined to deposits made after it went into effect. Judgment reversed.

BANK OF TENNESSEE v BURKE (1860) 1 Coldw. 623.

Debt on promissory note. Defendant made a note to the "President and Directors of the Branch Bank of Tennessee, at Shelbyville," and was sued on the same in the name of the "President and Directors of the Bank of Tennessee." Defendant objected to the reading of the note on the ground of variance. Objection sustained. Appeal.

Wright, J. 1. The bank is a public corporation, and we can take judicial notice of it and its branches. 2. The misnomer of a corporation in a grant or obligation does not destroy or defeat the obligation, or prevent a recovery upon it in the true name, if the same be shown by proper and apt averments and proof. Judgment reversed.

Cited: 16 Lea 666.

OCOEE BANK v HUGHES (1865) 2 Coldw. 52.

Debt on bank notes. Plaintiff held \$8,000 in notes of defendant bank, some of them payable at the banking house at C, and some at the branch at K. Both houses closed. A notary went to both places and certified that "he found no officer there to represent the bank," whereupon the notes were protested for non-payment. Plea: insufficient protest under sec. 10 of the charter, providing that its notes should be treated as foreign bills of exchange. Judgment for plaintiff. Appeal.

Milligan, J. Where a place of payment is stated on the face of the bill, as at a bank, it will be sufficient to present the bill for payment at the place specified, and if no one can be found there, the protest may be made without demand, or further inquiry. Judgment affirmed.

Cited: 98 Tenn. 424; 101 id. 365.

MILLER v ANDREWS (1866) 3 Coldw. 380.

On promissory note, against indorser. Defendants had due notice of the protest of a note payable at and discounted by the P Bank. Afterward it was assigned to plaintiff, who paid its nominal value to the bank in the bank's notes. Pending this action, defendant paid into court the amount due on the note in bank notes, procured since the assignment of the note. An Act of 1860, passed before execution and assignment of the note, provided "that in all cases of insolvency of any bank, the billholders thereof shall be entitled to preference in payment; and no transfer or assignments of any note or other evidence of debt by the bank, shall prevent the debtor from paying the same in the hands of the assignee, in the currency of the bank." Judgment directing plaintiff to receive the bank notes deposited in court. Appeal.

Milligan, J. 1. The first clause of the Act of 1860 applies to an insolvent condition of a bank. 2. The second clause does not refer exclusively to a general assignment, made by a failing or insolvent bank, but to all transfers or assignments, made at any time of a note, or other evidence of debt, as well as a general assignment made in insolvency. Judgment affirmed.

FURMAN v NICHOL (1866) 3 Coldw. 432.

Mandamus. Defendant, clerk of the court, refused to issue a license to plaintiffs because they had not paid a state tax. Plaintiff's petition alleged that they had tendered defendant the amount of the tax in T Bank notes; that the tendered notes were issued by the bank as provided by sec. 12 of its charter. Sec. 12 provided that the bank's notes should be received by public officers in payment for taxes or other money due the state, and an Act of 1865 expressly repealed this section. Thereafter, the indebtedness due the state in this case accrued. Defendant demurred on the ground that plaintiffs failed to show that they became the holders of the notes before the passage of the Act of 1865. Judgment for plaintiffs. Appeal.

Hawkins, J. To entitle a party to pay his taxes in the notes of the bank, he must have become the bona fide holder of such notes before the repeal of sec. 12 of the charter. Judgment reversed and demurrer sustained.

Cited: 5 Coldw. 180; 8 Lea 285.

WOOD FORK v UNION BANK (1866) 3 Coldw. 488.

Bill, for withdrawal of stock. Plaintiff owned stock in defendant bank, which was incorporated in 1832, to exist until 1863. In 1860, an act was passed extending the term of existence until 1878, which act was accepted by a large majority of the stockholders. An act had been passed in February, 1860, making every bank subsequently incorporated subject to more stringent provisions than were imposed upon the defendant bank by its original charter. Plaintiff claimed that the acceptance of the extending Act of 1860, with the Act of February, 1860, constituted a new charter, under which the bank was doing business, and that he had a right to withdraw his stock. Bill dismissed. Appeal.

Milligan, J. 1. The acceptance of the Act of March 1, 1860, could not, if the changes in the charter thus wrought were even radical and fundamental, have the effect, ipso facto, of defeating the right of the corporators to continue their organization under the original charter, up to the time of its expiration. 2. So long as the action of the corporation, in the administration of the trusts imposed upon it, was limited to the scope of the original charter, the complainant could have no just grounds on which to sustain his bill. 3. A stockholder will not be allowed to withdraw his stock before the business of the corporation is wound up, and its liabilities ascertained and discharged. 4. The appropriate remedy in such a case is by injunction to restrain the corporation from all illegal departures from the essential articles of its constitution. Judgment affirmed.

MARR v BANK OF WEST TENNESSEE (1867) 4 Coldw. 471.

Bill, to subject assets to satisfaction of plaintiff's judgment. Complainant held a number of the bills of defendant bank, upon which he obtained a judgment for \$27,321. Execution was returned "nulla bona." The bank was insolvent; its assets amounted to \$25,000. An act of 1860 provided that in case of insolvency of any bank, the billholders thereof should be entitled to preference in payment over all other creditors. Plaintiff contended that he had acquired a lien on the assets by virtue of his judgment. Defendants contended that the assets should be distributed pro rata among all the billholders. Decree for plaintiff. Appeal.

Milligan, J. By the insolvency of defendant bank, its assets became a common fund for the creditors of the corporation. A single creditor cannot, by a pretended legal technicality, be allowed to destroy the fund, or appropriate it all to his benefit, and thereby totally defeat all the others. Decree reversed.

Cited: 6 Coldw. 477; 7 id. 322; 5 Baxt. 67, 109, 112, 117; 5 Heisk. 286; 1 Lea 345, 412; 2 id. 672; 6 id. 567; 7 id. 131; 10 id. 491; 95 Tenn. 186, 644; 99 id. 177; 105 id. 292.

NORTHERN BANK v JOHNSON (1867) 5 Coldw. 88.

On draft of cashier. Defendant drew two drafts as cashier of the B Bank, which were indorsed to plaintiff. Payment was demanded and refused, and the drafts protested. The charter of defendant's bank provided that all contracts on behalf of the company should be signed by the president and cashier. The drafts in question were not signed by the president. Judgment was recovered against the indorser, the bank, and defendant. Defendant brought error, claiming he was not individually liable. Judgment for defendant. Error.

Milligan, J. The cashier of a bank must be deemed to have authority to transfer and indorse negotiable securities held by the bank, and no specific authority need be proved. The provisions of the charter requiring the signature of the president do not extend to, and comprehend, such contracts as the drawing and indorsing of bills of exchange, drafts, and checks. Judgment affirmed.

BANK OF TENNESSEE v WOODSON (1867) 5 Coldw. 176.

Bill to recover notes and enforce lien. Plaintiff held notes of defendant, secured by a conveyance by T. In 1862 the cashier removed the assets of a branch bank, including two notes against defendant, to C, to prevent their falling into the hands of federal troops. An agent of defendant and T, who resided in a place held by federal troops, went to C, held by confederate troops, and paid the notes in confederate bills, receiving a receipt from cashier. Congress forbade commercial intercourse between citizens of districts in insurrection and of districts not in insurrection. Decree for plaintiff. Appeal.

Shackelford, J. 1. The removal of the assets of the bank was illegal, as it is a public corporation and could be removed only by the power that located it. 2. The cashier of the bank being at the time of the alleged payment a resident of an insurrectionary district, the payment was unlawful and in direct violation of the act of Congress, and a violation of the laws of war, and is not binding on the bank. 3. The case does not fall within the principles of an executed contract. Decree affirmed.

MAYOR OF NASHVILLE v THOMAS (1868) 5 Coldw. 600.

To recover taxes on bank stock. Defendants owned national bank stock in N, which was taxed by an ordinance of the city, but payment was refused. Conditions prescribed by Congress, as essential to the exercise of the power of the state to impose taxation on national bank stock, are, that the assessment for taxation of such stock shall be "at the place where the bank is located," and the municipal corporations of a state are not authorized to tax properties or privileges other than such as are taxable by the statutory law of the state. Sec. 541 of the Tennessee code provided that "all stocks" are taxable and also all investments by inhabitants of the state in stocks out of the state, but did not provide that the tax should be assessed where the bank was located. Judgment for defendant. Appeal.

Smith, J. 1. The words of sec. 541 of the code embrace the shares of all banks located in the state. 2. The revenue law of Tennessee, in respect to the taxation of shares of national bank stocks, is not in conformity with the first condition prescribed by the act of Congress, and is, so far as it purports to tax such stock, void. Judgment affirmed.

Cited: 6 Baxt. 529; 7 Heisk. 404, 406, 408, 411; 8 id. 535; 10 Lea 477; 12 id. 538, 554; 16 id. 282; 3 Pickle 407; 91 Tenn. 557, 561, 578.

McCREE v BANK OF WEST TENNESSEE (1869) 6 Coldw. 474.

Bill in equity. Plaintiff recovered judgment at law against defendant bank, and sued out execution which was returned nulla bona. He then filed this bill, alleging that defendant V, a non-resident, who was not served personally, owed the bank \$10,000; and prayed that the debt owing by V might be subjected to the payment of his judgment; and that a writ of attachment might be had against V. Demurrer by V. Sustained. Decree for defendant.

Smith, J. 1. The allegation of nulla bona to a fi. fa. is not an allegation of insolvency; nor equivalent to such allegation in the sense of the insolvency, designated by the laws regulating banking. 2. A non-resident debtor of a resident judgment debtor may be subjected to the payment of the judgment debt, by bill in chancery, upon judgment against the resident debtor and an execution returned unsatisfied. Such non-resident may be brought in without personal service, by publication. 3. In such case the non-residence is adequate ground for an original or auxiliary attachment, at the beginning or in the progress of the suit. Judgment reversed.

Cited: 2 Baxt. 302.

CLARK v STATE (1869) 7 Coldw. 306.

Bill, for general relief. An act of 1852 provided that Tennessee Banks, upon depositing with the comptroller of the State certain bonds, should be entitled to receive circulating notes to an equal amount. The comptroller was forbidden to issue to any bank an excess of circulating notes above the value of securities deposited. Upon failure of any bank to redeem its notes the comptroller was required to sell the bonds and apply the trust fund to the payment pro rata of all such circulating notes. An amendatory act of 1856 provided that any bank might increase or decrease its circulation at pleasure, by increasing or withdrawing its bonds in the hands of the comptroller, provided the amount of bonds was never diminished below \$100,000, and that the securities should be deposited by the comptroller in defendant bank, subject to its order only for the purpose of carrying into effect the Acts of 1852 and 1856; but the State assumed no express liability as guarantor of the notes. Under the acts of 1852 and 1856, the E Bank issued its circulating notes. In 1858 it was discovered that through some mistake it had on deposit only \$93,000 worth of bonds, while its outstanding circulation was largely in excess of this amount. Defendant bank had accumulated \$125,000

of the E Bank's circulation, and was pressing the latter to redeem these notes. Under these circumstances, S, president of the E Bank, gave his promissory note to defendant bank, with C as security, and defendant bank delivered to S the notes of the E Bank which it held. S presented \$93,000 of the notes to the comptroller, and received an order on defendant bank for the \$93,000 in bonds, which S delivered to C, together with other bonds, who sold all to defendant bank, and with them took up the note of S on which he was security. Plaintiffs, the holders of the notes of the E Bank, sought: 1, to hold the State liable for the deficiency in the amount of bonds deposited for the bank's circulation; 2, to hold defendant bank liable for that part of the \$93,000 worth of bonds which would have been plaintiffs' share in a pro rata distribution of that amount. Decree for the State, and against defendant bank. Appeal.

Andrews, J. 1. The State is not liable to its citizens, in the absence of express guaranty or undertaking to that effect, for the loss of bonds, or to make good a deficiency in their amount caused by the fraud or negligence of its officers or agents. 2. The withdrawal of the bonds by S was clearly illegal. The securities required to be deposited with the comptroller were trust funds for the benefit and protection of the noteholders, who are entitled to share pro rata in their proceeds. Defendant must be held to have taken them charged with the trust, and to have become itself a trustee with regard to these bonds for the benefit of all persons entitled to share in the proceeds thereof. Decree affirmed.

Cited: 5 Baxt. 57, 58; 9 Heisk. 127; 12 id. 136.

ROGERS v LEFTWICH (1871) 2 Heisk. 480.

Assumpsit, for the value of legal bank notes given in exchange for a bank note subsequently declared illegal. Defendant gave plaintiff a \$500 bill issued by the Bank of Tennessee subsequent to May 6, 1861, and received in return a promissory note for \$150, owing by defendant to plaintiff, and \$350 in small notes issued by the Bank of Tennessee prior to May 6, 1861. At the time of the transaction, the bank's bills issued after May 6, 1861, circulated as freely, and had as much commercial value, as those issued before. The Constitution of 1865 declared that the bills issued after May 6, 1861, were illegally issued. Judgment for plaintiff under instruction of the court. Appeal.

Nicholson, C. J. The transaction was, in all respects, fair and legal on both sides, and no liability could be subsequently created by the act of the legislature or the convention declaring the issue illegal and void. Judgment reversed.

MOSEBY v WILLIAMSON (1871) 5 Heisk. 278.

Debt, brought by the receiver of an insolvent bank. Defendant was indebted to the G Bank for \$781. The bank suspended February 5, and on February 10, a bill was filed to have its insolvency determined. J held a certificate of deposit of the bank for \$1,000, which he transferred to defendant between February 5 and 10. Defendant offered the certificate as a setoff, which was allowed by the court. Judgment for defendant. Appeal.

Nicholson, C. J. The insolvency of a bank cannot be assumed until some such step as filing a bill to have its solvency determined has been taken. Defendant, therefore, became the owner of the certificate of deposit before the bankruptcy of the bank occurred, and is entitled to his setoff. Judgment affirmed.

Cited: 2 Lea 672; 7 id. 660; 12 id. 87; 91 Tenn. 14, 347; 95 id. 187, 644; 99 id. 177; 105 id. 292.

PRYOR v BANK OF TENNESSEE (1871) 6 Heisk. 442.

Payment of a note in Confederate money at the place to which the bank had previously removed its assets, is not invalid because such removal was unlawful.

PLANTERS BANK v MERRITT, ADM'R (1872) 7 Heisk. 177.

On bank check. In 1862, plaintiff's intestate received from defendant, its check on the U Bank, which check was not presented till 1864, when it was dishonored. In 1863 defendant drew for its balance on the U Bank, but the draft was dishonored. Afterward defendant sued for this balance, and pending the suit in 1868, amended its declaration so as to embrace the amount of the check in question, among others, which had been credited to the U Bank when drawn, but had not been paid. These outstanding checks amounted to \$11,000. Subsequently, the U

Bank admitted its indebtedness to defendant bank to the amount of \$26,000 and paid that sum to the latter. Judgment for plaintiff. Appeal.

Nicholson, C. J. The action of defendant in amending the declaration in its suit against the U Bank was a distinct recognition of plaintiff's check as a subsisting claim on the deposit sued for. The subsequent payment by the U Bank to defendant negatives the idea of any injury caused the latter by the negligence in presenting the check in question. Judgment affirmed.

Cited: 12 Heisk. 344; 4 Pickle 279, 380; 93 id. 365, 415.

PLANTERS BANK v KEESEE (1872) 7 Heisk. 200.

On bank check. Plaintiff received a check of defendant drawn on the U Bank. The check was never presented for payment, but the defendant had express knowledge of all the facts connected with the failure to make presentment. After the institution of this suit, the declaration in a case of defendant against the U Bank was so amended by the defendant as to include as part of its claim against the U Bank the amount of plaintiff's check. Judgment for plaintiff. Appeal.

Nicholson, C. J. The defendant bank has waived any right it may have had to claim a release on account of the laches of the check holder in presenting it for payment. Judgment affirmed.

Cited: 12 Heisk. 344; 4 Pickle 380.

McLAUGHLIN v CHADWELL (1872) 7 Heisk. 389.

To have assessment annulled. Defendant was tax commissioner and assessed the stock of national banks. Act of Congress of February 10, 1868, provided that the taxation upon the shares of national banks should not be at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens. A Tennessee statute provided that all state, county or corporation bonds, owned by citizens of the state, should be exempt from taxation. Plaintiff claimed that this taxation resulted in a greater rate of taxes being imposed upon stock in national banks than upon other moneyed capital in the hands of individual citizens. The act provides that nothing therein shall be construed to prevent all the shares from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed under state authority. The stock was owned by persons residing elsewhere than where the bank was located. Judgment for defendant. Appeal.

McFarland, J. Properly construed, the act of Congress does not prohibit the state from making such exemptions as its civil policy may demand within the power of its own constitution, and the act of Congress was certainly enacted with regard to this power of the state legislatures. 2. It was not the intention of Congress to exempt these stocks from taxation for municipal purposes. 3. Congress has power to enact that shares shall be taxable at the place where the bank is located. Judgment affirmed.

Cited: 3 Lea 34; 12 id. 555; 3 Pickle 407.

CHAFIN v LINCOLN SAV. BANK (1872) 7 Heisk. 499.

On promissory note. Plaintiff discounted a note which was tainted with usury. Defendant, one of the makers, pleaded that plaintiff had full knowledge of the usury when it discounted the note, that it was made to be sold at a usurious rate of interest, and that therefore the contract was illegal and void. Demurrer to the plea. Sustained. Judgment for plaintiff for amount claimed less the usurious interest. Appeal.

Nicholson, C. J. If a note is discounted or a loan made at a greater rate than 6 per cent, the transaction is not void as to the entire contract, but only as to the excess over legal interest. Judgment affirmed.

ANDREWS v GERMAN NAT. BANK (1872) 9 Heisk. 211.

On a certified check, against drawer. Plaintiff held a draft on defendant which the latter paid with a check drawn by him on the C Bank, and certified by the cashier thereof. The check was presented for payment the day succeeding its date, and notice immediately given defendant of the refusal of the C Bank to pay. Defendant recognized his liability and asked till the close of banking hours to settle.

At the expiration of that time, plaintiff had the check protested and due notice given defendant. The C Bank having failed, plaintiff sought to hold defendant liable for the amount of the check. The court instructed the jury that it was for them to determine whether the check was received by the plaintiff as an absolute payment or only as a conditional discharge of the debt. Judgment for plaintiff. Appeal.

Nicholson, C. J. The certification of a check ordinarily makes the bank primarily liable thereon, and the drawer a surety for the bank. It is a question of fact for the jury, whether, under all the facts and circumstances, the check was received as an absolute payment or only as a conditional payment. Judgment affirmed.

Cited: 4 Pickle 279.

JACKSON INS. CO. v CROSS (1872) 9 Heisk. 283.

On deposit. Plaintiff presented a check to defendant for \$1,297. He received in cash \$297 and left on deposit \$1,000, but received no evidence of the deposit from defendant's clerk. By mistake the \$1,000 was entered to the credit of another customer and the money paid to him. Defendant's rules required a deposit to be evidenced by a "deposit ticket," a "certificate of deposit," or "passbook." Defendant claimed that the loss was caused by the negligence of plaintiff in not requiring a voucher for the deposit. Plaintiff drew a check against the deposit which he failed to account for. Judgment for plaintiff. Appeal.

McFarland, J. 1. After the receipt of the deposit the failure of defendant's clerk to observe its rules and give the usual vouchers cannot be allowed to absolve defendant from liability. 2. The mistake of defendant in paying out the money, cannot, in a legal sense, be chargeable to the negligence of the plaintiff. 3. The drawing of the check cannot prejudice the defendant, which had not accepted it. Judgment affirmed.

BANK OF CHATTANOOGA v BANK OF MEMPHIS (1872) 9 Heisk. 408.

For appointment of receiver. Both plaintiff and defendant became insolvent. Under the assignment of defendant, a large debt due plaintiff was provided for, but this debt was postponed until after payment of billholders and depositors. Plaintiff accepted the provision in its favor, but filed this bill. During the insolvency of both banks, defendant obtained, by an arrangement with plaintiff, a large number of the latter's notes marked "Redeemable at the Bank of Memphis," and paid them out in business in lieu of its own notes. H and J filed crossbills asking to be adjudged billholders of defendant, their claims being founded on the fact that they were holders of a large number of the above notes. By the charter of defendant, its circulation was based upon and secured by bonds deposited with the comptroller of the state, and its notes could not be lawfully issued until countersigned by the comptroller. Judgment dismissing the crossbills. Appeal.

McFarland, J. 1. It cannot be maintained that the defendant has ever assumed to pay the notes of the plaintiff held by H and J. 2. There is nothing inconsistent in a bank's issuing its own notes marked payable at the counter of another bank as well as at its own counter; and the bank paying out such notes of another does not assume their payment. If payment be refused, it is the default of the bank making the notes. Judgment affirmed.

LANE v BANK OF WEST TENNESSEE (1872) 9 Heisk. 419.

On promissory note, against indorsers. Plaintiff, a bank located at M, discounted for defendants a note which matured June 20, 1862. Before that date the assets of the bank were moved by order of the Confederate authorities, and were not returned to M till June 6, 1865. The note was then protested and defendants notified on the following day. The federal forces took possession of M, June 6, 1862, and during the period between that date and the date of the protest of the note, the defendants and the maker of the note were residing at M. A quorum of the directors of plaintiff and a majority of the stockholders were also within the city at the time of the maturity of the note, and during the entire period of the war, and the president and cashier were occasionally there during the war and after the maturity of the note, for the express purpose of transacting bank business. Defendants contended that they had been discharged from liability as indorsers by the laches of plaintiff. Judgment for plaintiff. Appeal.

Sneed, J. 1. The facts disclose a case of gross and inexcusable negligence on the plaintiff's part, which the law will not tolerate, to make absolute the contingent

contract of an indorser. 2. Notice cannot be dispensed with merely because the indorsers have personal knowledge of the non-payment. This is so although the indorser is also a director of the bank holding the note. Judgment reversed.

Cited: 9 Lea 744; 1 Pickle 196; 3 id. 350; 89 Tenn. 659; 98 id. 426.

JONES v PLANTERS BANK (1872) 9 Heisk. 455.

On bill of exchange. Plaintiff discounted a bill for defendant who used the proceeds to manufacture arms for the State of Tennessee. Plaintiff had full knowledge of the purpose for which the money was borrowed. Defendant claimed that the bill was void because he borrowed the money for the illegal purpose of enabling him to perform a contract with the State of Tennessee for the manufacture of arms to be used in the military service of the Confederacy. Judgment for plaintiff. Appeal.

Sneed, J. The loan to defendants was a private one for his individual profit and not a loan to the Confederate States. It was made in the interest of the plaintiff bank and for its profit and benefit. The discounting of the bill in controversy was, therefore, only a legitimate banking operation. Judgment affirmed.

Cited: 2 Lea 135; 4 id. 232.

PURYEAR v MCGAVOCK (1872) 9 Heisk. 461.

On promissory note, against makers and indorsers. The note was discounted by the P Bank. At maturity it was protested, and defendants duly notified. Subsequently, it was assigned by the bank to R, plaintiff's intestate. Defendants alleged illegality of consideration. Upon the face of the note there was no illegal consideration expressed, nor was there evidence of any collateral agreement between the bank and the borrowers, setting out any different consideration than that appearing in the note. The bank, however, had knowledge that the makers of the note intended to apply the proceeds of it to equipping a volunteer force to aid the Confederacy. Verdict directed. Judgment for defendants. Appeal.

Deaderick, J. 1. If the whole of the contract by the bank was to loan the money, and on the part of the defendants that they would pay it back at a specified time, such contract is a legal one and its performance must be enforced. 2. The knowledge of the lender of the illegal use to which the money is intended to be applied by the borrower, or the motives of the lender, if neither enter into the contract or consideration for the loan, cannot impair its validity. Judgment reversed.

Cited: 2 Lea 135; 3 id. 746; 6 id. 171.

TAGG v TENNESSEE NAT. BANK (1872) 9 Heisk. 479.

On promissory note, against maker. The note was made by defendant, payable to himself, and indorsed to plaintiff. It was delivered to R, president of the plaintiff, for the purpose of making plaintiff's assets appear larger than they were. It was agreed that the note was not to be used. R caused the note to be discounted by plaintiff. Defendant contended that plaintiff was affected with the knowledge of R and bound by his agreement. The plaintiff contended that the note was executed in consideration of 50 shares of bank stock, which defendant held until the bank failed, and then fraudulently surrendered. Judgment for plaintiff. Appeal.

Nicholson, C. J. 1. Fraudulent representations or a fraudulent concealment of material facts by an agent, when engaged in the transaction of the business of the principal, will charge the principal. 2. There was such constructive fraud as, between the bank and an innocent party, prevents the bank from recovering. 3. When the bank is affected only with constructive notice of fraud, and the defendant combined with the president of the bank in perpetrating the fraud, the defendant is not in a condition to claim the protection of the rule applied to parties in *pari delicto*. 4. The court erred in instructing the jury that if the president acquired his knowledge of the defect in the note while acting in his individual capacity, and afterward, when the note was discounted, failed to communicate his knowledge, and thereby perpetrated a fraud on the bank, his concealment of his knowledge would not operate as constructive notice to the bank, but that the bank could recover on the note against the defendant, although he were innocent of the fraud. Judgment reversed.

Cited: 5 Lea 63.

SMITH v MOSBY (1872) 9 Heisk. 501.

On promissory note, against makers, brought by the receiver of an insolvent bank. Defendants admitted their liability on the note, but claimed a setoff of a certificate of deposit. The certificate had been issued by the bank to C and indorsed by him to defendants. There was no evidence indicating the time when the transfer was made. The court ruled that defendants were not entitled to the setoff. Judgment for plaintiff. Appeal.

Nicholson, C. J. 1. Defendants are not entitled to the setoff, unless they were holders of the certificate prior to the filing of the bill to determine the insolvency of the bank. 2. The law raises no presumption as to the time when they received the certificate; and the affirmation being undertaken by them of alleging setoff, the onus probandi is with them. Judgment affirmed.

Cited: 12 Lea 87; 91 Tenn. 347.

PERKINS v WATSON (1872) 2 Baxt. 173.

On bill of exchange, against indorser. It was alleged that defendant was an accommodation indorser. The bill in question was discounted by the T Bank at a greater rate of discount than was allowed by its charter. Being unpaid at maturity, it was regularly protested. Afterward suit was brought thereon by plaintiff, the assignee in trust of the T Bank. The bank's charter provided that it should not discount at a rate exceeding 6 per cent, but prescribed no penalty for a violation. The court instructed the jury that the transaction was void only to the extent of the excess had by the bank by way of interest over and above 6 per cent. Judgment for plaintiff for amount claimed, less the usurious interest. Appeal.

Burton, J. 1. In case the charter is violated, and the charter affixes no penalty for such violation, we can look only to the general statutory law to ascertain the consequences of such violation. The act of the bank in taking excessive interest can be viewed and treated only as the act of a natural person would be for a similar infraction of law. 2. For a principal to discount a note at a greater than the legal rate of interest is not such a fraud upon an accommodation indorser as will relieve him of liability. Judgment affirmed.

Cited: 6 Lea 288; 3 Pickle 46.

CHEEK v MERCHANTS NAT. BANK (1873) 10 Heisk. 618.

On promissory note, against indorsers. Defendant pleaded in bar of the note, that plaintiff received therefor a greater rate of interest than it was allowed by law to receive, and contended that it was therefore void. Demurrer to plea. Sustained. Appeal.

Burton, J. As a usurious contract is not void in toto, but only for the excess of the usurious interest, if a defendant who is sued on such a contract plead the usury of an answer to the whole demand, it is bad on general demurrer. Judgment affirmed.

GATES v UNION BANK (1873) 12 Heisk. 325.

To enjoin proceedings on a judgment. In 1860 the defendant discounted for plaintiffs a note payable in three months. At maturity the defendant discounted another note for the same amount, the first note being on that day paid. This process was repeated every three months until February 26, 1862, when the note in question was discounted and plaintiffs' note, due on that day, paid and taken up. The parties to all the notes were the same. Upon the last note defendant obtained a judgment by default. Plaintiffs claim that the transaction of February 26, 1862 was an independent discount, and that the consideration for the note of that date was confederate notes, which were illegal. Defendant claimed that the note was the last of a series of renewals, the first of the series being for the consideration of the lawful currency of the bank. Injunction dissolved. Judgment for defendant. Appeal.

Nicholson, C. J. The conclusion is irresistible that the several transactions in this case were intended by the parties to be renewal discounts, the consideration for the first discount running through and entering into all the successive renewals and discounts. The note discounted on February 26, 1862, was therefore a renewal, and was based on the consideration of the notes of the defendant. Judgment affirmed.

DE SOTO BANK v CITY OF MEMPHIS (1873) 6 Baxt. 415.

To enjoin collection of a tax assessed upon real property of plaintiff. Plaintiff's charter authorized it to "purchase and hold a lot of ground for the use of the institution as a place of business," and provided that it should pay a tax on each share of its capital stock, "which shall be in lieu of all other taxes whatever." The bank invested \$100,000 in a lot and building. It used a part of the building for its banking purposes and leased out the rest. The tax provided for by the charter was levied on the stock and paid. Judgment for defendant. Appeal.

Freeman, J. The exemption can only reach and cover so much of the building as is necessary for the use of the bank. The rest must be held subject to taxation as other property, and is not covered by the exemption clause of the charter. Judgment affirmed.

Cited: 6 Lea 705; 8 id. 410; 13 id. 406; 2 Pickle 615; 91 Tenn. 55, 582; 97 id. 89.

FRENCH v IRWIN (1874) 4 Baxt. 401.

On certified checks against drawers. Plaintiffs received checks of defendants in payment of an indebtedness, and had them certified by the bank on which they were drawn. When the checks were afterward presented for payment, the bank had become insolvent and payment was refused. Verdict directed. Judgment for defendants. Appeal.

Freeman, J. When the holder of a check presents it, it is his own fault if he takes the certificate of the bank, that the check is "good," instead of the money. The contract then becomes the holder's, for which the drawer is in nowise responsible, and he must take all the risk and responsibility of his own act. Judgment affirmed.

SPRINGFIELD v GREEN (1874) 7 Baxt. 301.

Creditor's bill. G, defendant's intestate, drew a check upon the branch of the T Bank to W, to whom he owed money. On that day the assets and books of the bank were turned over to the mother bank in Alabama. W was president of the bank. He never presented the check, and the bank subsequently became insolvent. The chancellor allowed W the amount of his check, with interest. The proof showed that G had on deposit more than enough to pay the check. Decree allowing claim against the estate. Appeal.

Nicholson, C. J. 1. The presumption is that acceptance of a check by a creditor is an appropriation of that amount of his deposit, by the debtor to his creditor. 2. The facts do not show that the check was received other than as a payment. Decree reversed.

BANK OF LOUISVILLE v FIRST NAT. BANK (1874) 8 Baxt. 101.

Negligence, in not protesting check. The M Bank of New York was the holder of a bill of exchange payable at the defendant bank, and sent it to plaintiff for collection, which forwarded it to defendant for collection. Defendant failed to protest the bill for non-payment at maturity, whereby the amount was lost. Plaintiff paid the M Bank. Judgment for plaintiff. Appeal.

Deaderick, J. 1. A bank receiving a bill for collection payable at a distant place, discharges its liability by transmitting it in due time to a proper agent at the place of payment. 2. Authority from the holder to send it to the defendant must be implied. 3. In an action on the case for negligence the payee or holder only can maintain the action, and a voluntary payment by one under legal liability to pay, can give him no right to maintain an action against the negligent or defaulting agent. Judgment reversed.

Cited: 89 Tenn. 618.

STEADMAN v REDFIELD (1874) 8 Baxt. 337.

To recover usury. The code, sec. 1955, provides that usury paid, may be recovered, and the remedy is extended to the judgment creditors of the party paying it. Plaintiff's bill alleged that he was a judgment creditor of R, that the F National Bank had received from R an amount of usury sufficient to pay plaintiff's judgment, and prayed judgment against the bank. The bank pleaded that it was organized under the acts of Congress which provided that double the amount of usury

paid could be recovered by the person paying it. Demurrer to plea. Sustained. Appeal.

McFarland, J. The act of Congress was not intended to preclude the state courts from compelling the usurer to do simple justice according to its own laws by restoring the usury to the party from whom it was received, or his creditor. Decree reversed.

STATE v BANK OF TENNESSEE (1875) 5 Baxt. 1.

To compel proof of claims and for an accounting brought by trustee of an insolvent bank. In 1866, the legislature passed an act to wind up the business of the bank. In pursuance of the requirements of the act the bank made an assignment to the complainant W, in trust: 1, to secure the amount of common school fund deposited in the bank, which shall be a preferred claim, and to place certain designated bonds with the state treasurer as part of the school fund originally deposited with the bank; 2, to distribute the remaining assets pro rata among the creditors, excluding all claims and demands after May 6, 1861. C, a creditor of the bank, filed a crossbill insisting upon his right to a distributive share in the assets of the bank, and attacking the act of the legislature, and the assignment made thereunder as unconstitutional. McK filed a crossbill containing the same allegations as C's, and in addition prayed for relief against the State as to her bonds transferred to the bank for money to obtain military supplies, and also for her failure to furnish capital to the bank as required by its charter. A and D, holders of notes issued by the bank after May, 1861, claimed that these notes were legally issued, and the bank was liable therefor. H, trustee of M Co., filed a petition claiming priority of satisfaction out of the assets for the common school fund. The original bill was in the name of the State and W, but there was no allegation that the State was a party, and the bill was subsequently dismissed as to it. Decrees sustaining demurrers to C's crossbill, overruling demurrers to McK's crossbill, and in favor of A and D on their answer. Appeals from all decrees.

Nicholson, C. J. 1. The State was not a party to the suit. McK's answer filed as a crossbill was demurrable in that it sought to bring into contestation matters not involved in the original bill. 2. The common school funds became part of the assets of the bank, to which its creditors had a right to look for the bank's debts. 3. The Act of the Legislature of 1866, impaired the obligation of the contract between the bank and its creditors and was therefore null and void. 4. The assignment made in pursuance of the Act of 1866 was null and void, so far as it gave preference to the school fund. 5. C and McK are valid creditors of the bank. 6. The acts by which it was attempted to declare the State independent, and to dissolve her connection with the Union, had no effect in changing the character of the bank. 7. Such counties as deposited school land funds in the bank are entitled to receive from the bank such state bonds as can be identified, as bonds bought with such school funds in pursuance of law; but as to so much of those funds as cannot be traced into state bonds now held by the bank, the counties entitled to such funds are creditors of the bank, having no priority over other depositors or general creditors. 8. The notes of the bank issued after May, 1861, held by A and D, are legal and subsisting debts of the bank, having the same priority of payment out of the assets of the bank as the notes issued before 1861. Remanded.

Cited: 5 Lea 582; 8 id. 710; 103 Tenn. 528.

STATE v BANK OF TENNESSEE (1875) 5 Baxt. 101.

Bill for injunction, and to carry out an assignment. The legislature on February 16, 1866, ordered the defendant bank to make an assignment, for the benefit of the school fund and for all creditors of the bank whose claims arose before May 6, 1861, excluding all claims after said date as null and void. The assignment was made May 4, and the bill was filed on May 16, 1866. The trustee was subsequently appointed receiver. In 1875, M and others filed their petition claiming to be holders of the notes of the bank issued since May 6, 1861. The complainants pleaded the Statute of Limitations. Sec. 2779 of the code provides that all notes issued or put in circulation as money are excepted from the operation of the Statute of Limitations. Decree for petitioners. Appeal.

Lea, S. J. 1. The intent of the legislature was to exempt bank notes from the statute whether still circulating as money or not, whether the bank is in operation or has suspended, or its charter has expired. 2. The property having been in custodia legis, the receiver is estopped from setting up title under the Statute of

Limitations either for himself or any one other than those who may be declared entitled to the fund under the decrees by which his possession was acquired and continued. 3. Upon the dissolution of a corporation the assets became a trust fund for the benefit of creditors and stockholders. A court of chancery has ever had the right to take charge of the funds and apply them to the benefit of those entitled. Decree affirmed.

Cited: 6 Lea 733; 9 id. 696.

NATIONAL BANK v THE MAYOR (1875) 8 Heisk. 814.

To enjoin enforcement of a distress warrant. The charter of Chattanooga authorized its municipal authorities to levy taxes on all privileges taxable by the laws of the state. An act of 1873 provided that among the occupations deemed privileges was banking, and that it should be taxed and should not be pursued without license. By virtue of these provisions, a privilege tax of \$100 was levied on plaintiff. Plaintiff claimed that, being a national bank, it was not liable to the tax. Judgment for defendant. Appeal.

Nicholson, C. J. The legislators have no power to prohibit the exercise of the privilege granted to national banks by acts of Congress, and it will not be presumed that it was in their contemplation to include national banks among the privileges to be taxed. Judgment reversed.

Cited: 104 Tenn. 320; 105 id. 435.

ADAMS v CITY OF MEMPHIS (1875) 3 Shann. 392.

Garnishee proceedings. The plaintiff held a judgment against the defendant, and garnisheed a sum of money on general deposit in the E Bank, standing to the credit of the city treasurer. The E Bank had issued a certificate of deposit therefor, payable to the city treasurer, on the face of which was written "subject to the garnishment of A," plaintiff "from the Supreme Court," and had retained the fund to meet any judgment on the garnishment. The plaintiff moved for judgment against the bank upon its answer as garnishee, alleging these facts.

Nicholson, C. J. 1. The relation existing between a general depositor and a bank is that of creditor and debtor, and the money is in effect loaned to the bank to be mingled and used with its own money. 2. A bank is subject to the process of garnishment although not "a person." The word "person" as used in the code includes a corporation. 3. A debtor of a municipal corporation is no more exempt from the process of garnishment than any other debtor. Judgment against garnishee.

AMES v BROWN (1875) 3 Shann. 577.

On promissory note against indorser. The defendant was indorser of a note discounted by the T National Bank. The bank, about the time of becoming insolvent, assigned the note to the plaintiff, as agent of the state, for its use. In an action on the note, profert was made in the declaration, but the note was lost or mislaid at the trial. The court refused to charge the jury that a transfer of the note to the state for its use, made by the bank when insolvent or on the eve of insolvency, was null and void, and conveyed no title to the paper sued on. Judgment for plaintiff. Appeal.

Nicholson, C. J. 1. Profert of a note in the declaration and the accounting for it at the trial is sufficient to authorize the reception of evidence of its contents. 2. There was no error in refusing to give the instruction asked. The bank had the right, as between the defendant and the state, to transfer and deliver the note to the officers of the state; and as between them, the assignment was effectual. Judgment affirmed.

HORRIGAN v FIRST NAT. BANK (1877) 9 Baxt. 137.

For deceit. Plaintiff applied to the cashier of defendant bank for information as to the solvency of P & Co. The cashier gave information which was false, and thereby plaintiff suffered loss on certain paper which he purchased relying on the accuracy of the information. On the day the paper fell due, plaintiff granted an extension on the paper. Had this not been done, the notes would have been paid. Judgment for defendants. Appeal.

Freeman, J. 1. Answering questions as to the solvency of persons is no part

of the business of the cashier of the bank, nor fairly included within the scope of such business. 2. Had not plaintiffs given the extension of time, there would have been no loss; he cannot complain of the result of his own voluntary act. Judgment affirmed.

Cited: 11 Lea 343.

MOSES v OCOEE BANK (1878) 1 Lea 398.

Creditors' bill, against an insolvent bank, its stockholders, trustees, and directors. The charter of defendant required that the capital stock be paid for in gold and silver or in notes or bills equivalent to or better than specie. Certain persons acquired the charter, became president and directors of the bank, and purchased capital stock thereof, paying for it in part by their individual notes indorsed by each other. Books were opened for subscriptions and the amount of stock taken by each stockholder was there set forth, but no formal call was made for payment. The stock note of one subscriber was paid by a third party, and other stockholders paid for their stock, in notes of the bank. The stock notes of some subscribers were allowed to become barred by the Statute of Limitations. The capital stock of the bank was increased under a discretionary power given by the charter, though there still remained stock subscribed for and not paid. Later the capital stock was reduced, though the charter gave no authority for a reduction. The bank became insolvent, and assigned for the benefit of its creditors. The trustees became grossly negligent in the discharge of their duties to the creditors. An officer of the bank purchased a house and lot at an execution sale held by the bank, using bank funds. He sold the property at a profit, but returned to the bank only the amount he had taken, without any ratification of the transaction of the bank. Decree for complainants. Appeal.

Heiskell, Sp. J. 1. Notes of stockholders and directors of a bank indorsed by each other and accepted in payment of stock, cannot be regarded as payments. They are valid obligations for the protection of noteholders and creditors. 2. The Statute of Limitations will not commence to run on notes given for the payment of stock subscribed for, but unpaid, until a call on the stock is made. 3. Directors of a bank who accept, in payment of its stock, notes not authorized by the charter, are personally liable. Subsequent directors who suffer these securities, however inferior to coin, to be lost by the Statute of Limitations, are subject to the same liability. Trustees in charge of the bank are similarly liable for securities lost by their negligence. 4. Where the minutes of a corporation show an order directing the opening of subscription books and the amount of stock taken by the stockholder is distinctly set forth, and where such stockholders were at some time directors of the corporation and had access to its books, they are bound by the record to the amount of stock thus shown, though no actual subscription of stock is produced. 5. A person paying for the unpaid stock of a stockholder stands in his shoes, and becomes the owner of the whole stock, entitled to its benefits and subject to its burdens. 6. In the absence of a clause in a bank's charter authorizing a reduction of its capital stock, no power to reduce it exists. 7. Insolvent trustees of a bank are not entitled to compensation, where they have mismanaged their trust. 8. An officer of a bank buying in property at an execution sale for the bank's debt for which it was sold, and using the bank's money, will not be allowed to claim the benefit of the purchase for himself. 9. In the adjustment of equities between stockholders of a bank, those who have paid stock in notes of the bank will be allowed only what they paid for the notes. 10. In the distribution of the assets, when realized, noteholders are entitled to be first satisfied, then the creditors. 11. For the prosecution of the bill and amended bill to wind up the affairs of a bank, and for services rendered in the general litigation, counsel should be paid out of the aggregate recovery, all petitioning creditors contributing pro rata; counsel representing petitioning creditors solely, must be paid by their own clients. Decree affirmed.

Cited: 9 Lea 741; 13 id. 499; 15 id. 50; 2 Pickle 252; 94 Tenn. 64; 95 id. 518; 99 id. 389.

COMFORT v PATTERSON (1879) 2 Lea 670.

On promissory note. The defendant was clerk and master of the chancery court and kept an account in his name with the letters C & M after it with an insolvent bank, of which plaintiff was trustee. The deposits consisted of the defendant's individual money, partly of costs earned to which he was entitled, and partly of

funds received officially. On March 17, 1877, the bank discounted his note for \$1,000, the proceeds of which were passed to his credit. On March 19 he deposited \$1,500 of his individual means. He was in the habit of checking against this account for his personal expenses. When the bank suspended payments, the defendant held certificates of deposit against the bank which had previously assigned to him. The defendant claimed a setoff of the deposit against the residue of the note. Decree for defendant. Appeal.

Cooper, J. 1. So much of the deposit as belonged to the defendant individually could be setoff against the residue of the note. 2. In the absence of proof that the individual share of the fund was withdrawn, it may be assumed that the defendant's share was sufficient to satisfy the residue of the note. Decree affirmed.

Cited: 7 Lea 131, 659; 91 Tenn. 347; 95 id. 644; 96 id. 315; 99 id. 177.

HAMBRIGHT v CLEVELAND NAT. BANK (1879) 3 Lea 40.

To recover usury. The plaintiff filed a bill against the defendant, a national bank, to recover usury, under the state law. Demurrer, on the ground that it was not subject to state regulations on this subject. Overruled. Appeal.

Freeman, J. The provisions of the National Banking Act imposing penalties on national banks for taking usury, superseded the state law on that subject. The states can exercise no control over them, except in so far as Congress may see proper to permit. Decree reversed.

Cited: 1 Pickle 426.

TROUSDALE v THOMAS (1879) 3 Lea 715.

Trover. In 1865 the federal troops seized the contents of the vaults, including the special deposits of individuals of the Bank of Tennessee. Subsequently, by agreement, these effects were delivered to the Governor of Tennessee, and in 1866 were by him turned over to the newly elected president and directors of the Bank of Tennessee. Plaintiff's intestate, O, claimed that three bonds for \$1,000 each deposited with the bank had never been returned to him, and he brought this action against the president and directors of the bank, and against the governor and other state officers. Plaintiff moved in 1873 to amend his declaration, seeking to hold defendants liable for negligence. Denied. Judgment for defendants. Appeal.

Cooper, J. 1. If the amendment had been allowed, the Statute of Limitations would have been a good defense to the new action, and the refusal was but the exercise of sound discretion. 2. Neither simple asportation nor refusal to deliver on demand necessarily establishes a conversion. 3. Each is only prima facie evidence of conversion. 4. The officers of the state in accepting the bank's property from the militia were under the circumstances performing a public duty, and the act was not a conversion. Judgment affirmed.

Cited: 11 Lea 89; 95 Tenn. 612.

MARR v BANK OF WEST TENNESSEE (1880) 4 Lea 578.

To enforce stockholder's liability. The defendant was chartered in 1854. In 1860, it was reorganized; the old issue of stock was burned, and a new issue was transferred to subscribers. After it became insolvent, a bill in equity was brought by the creditors to compel the payment of unpaid stock, and for other relief. A crossbill was filed to bring all stockholders before the court to settle their respective liabilities. Certain of the original stockholders had assigned their stock before it was paid up; other stockholders had been discharged in bankruptcy pending the action; some had paid for their stock in depreciated issues of the bank, and some were assignees of judgments rendered in favor of noteholders of the bank. Certain stock had been transferred to an alleged stockholder without his knowledge. The Act of 1859-60 provided that an original subscriber should be liable until his subscription was paid up. Appeal from decree of chancellor.

Deaderick, C. J. 1. By the General Banking Act of 1859-60, an original stockholder is liable until his subscription is paid up whether he retains or assigns the stock, even where the charter of the bank antedates the act and contains no such provisions. 2. The act is not unconstitutional, but is within the police power of the state, and tends only to regulate the transfer of stock. 3. The assignees of original stockholders whose stock is unpaid are first liable, and if the amount due cannot be collected from them, then their assignors will be liable. 4. Where payments on stock have been made in depreciated issues of the bank, their value should

be estimated at the time of payment and credit given for their value as compared with legal tender notes. 5. A stockholder's liability is provable under the bankrupt law; and the same cannot be revived at the instance of other stockholders. 6. Where shares of stock are transferred to a person without his knowledge or consent and never accepted or claimed by him, such persons will not be held liable on the stock. 7. The Statute of Limitations does not begin to run until a call for the payment of stock is made. 8. Stockholders, who are assignees of any judgments rendered in favor of noteholders, will have a pro tanto credit given them for said judgments. Decree modified.

Cited: 4 Lea 723; 94 id. 611.

KEITH v CLARKE (1880) 4 Lea 718.

To recover taxes paid under protest. The charter of the Bank of Tennessee provided that its bills or notes payable on demand in gold and silver coin should be received in payment of taxes due the state. The plaintiff offered in payment of taxes certain notes of the bank, forming part of the "Torbett issue," which were issued subsequent to May 6, 1861, the date of the secession of the state from the Union. The defendant refused to receive them, whereupon the plaintiff paid, under protest, the tax in money of the United States, and brought suit before a justice of the peace to recover the money so paid. The case was appealed to the county court where judgment was for the defendant, which was affirmed on appeal. The Supreme Court of the United States (97 U. S. 454) reversed this judgment and the case was remanded. A judgment was rendered for the plaintiff on a special finding of the jury, wherein they failed to find whether or not the "Torbett issue" had been issued in aid of the rebellion against the United States. Pleas: Statute of Limitations; and to the jurisdiction. Demurrer. Sustained. Appeal.

Patterson, J. 1. The Statute of Limitations does not apply to bank notes. 2. This action falls within the class of actions provided for by the acts approved March 21, 1873. 3. It is obligatory on the state, under sec. 12 of the bank's charter, to receive in payment of taxes all bills of the bank issued for a lawful purpose. 4. The inhibition of the constitution is without reservation to innocent holders, and if within the provisions, the notes are void. 5. The burden of proof is on the defendant to show that the identical bills tendered by the plaintiff, or the class of notes to which they belong, were issued in aid of the rebellion. 6. As the jury failed to agree upon the exact question upon which this case must be determined, the judgment will be reversed.

Cited: 10 Lea 471; 14 id. 156, 363; 96 Tenn. 278. S. c.: 97 U. S. 454; 8 Lea 703.

KYLE v EWING (1880) 5 Lea 580.

On promissory note, against maker. Defendant K made a note on May 6, 1870, to W, trustee of the Bank of Tennessee. W subsequently died and E was appointed receiver of the bank. The charter of the bank expired on January 1, 1868. An action on the note was brought in the name of "The Bank of Tennessee, for the use of R E, acting trustee and receiver." The Act of March 24, 1875, provided that the consideration of the note having been sold by the state to secure a lien, the makers should be released, and the defendant could take no steps to collect the state's interest. The defendant demurred on the grounds, that the charter had expired before the note was made, and that the corporation was not in existence when the action was brought. Demurrer. Overruled. Appeal.

McFarland, J. 1. The note was not payable to the bank, and it was not a party to the contract. R E was the real plaintiff and the action could be maintained in his name alone. The unnecessary use of the nominal plaintiff might have been stricken out as surplusage. 2. The Act of March 24, 1875, did not release the debt due the trustee, which he was bound to collect, and appropriate to payment of creditors. Judgment affirmed.

JONES v KINCAID (1880) 5 Lea 677.

Where bank notes had greatly depreciated in value, and at the time and place of maturity, United States currency was unknown, the value of such bank notes must be estimated according to the gold standard. A judgment taken after a consent to an order of continuance may properly be set up as surprise.

BANK OF COMMERCE v MCGOWAN (1881) 6 Lea 703.

To recover taxes, paid under protest. The charter of plaintiff bank provided that it should pay to the state an annual tax of one-half of one per cent on each share of its capital stock, in lieu of all other taxes. It further provided that plaintiff might hold a lot of ground for its own use as a place of business, and might hold real and personal property conveyed to it in security of debts. Plaintiff held a lot of ground and improvements as a place of business, but only used a part of it as such, renting out the rest. It also became the owner of other lots, conveyed by a debtor of the bank to a trustee to secure the loans due by him to the bank. The lots were purchased by the plaintiff at a sale under the trust deed to save a part of the debt, with the intention to resell them as soon as a reasonable price was offered. The banking house and the lots were assessed for state and county taxes, which the bank paid under protest, and then filed a bill to recover the money. Demurrer. Sustained. Appeal.

Cooper, J. 1. The exemption from taxation, other than the specific tax prescribed, only extends to as much of the building as is necessary for the use of the bank and actually so used. Any part of the building used for other purposes is subject to taxation. 2. Land held as security is liable to taxation, for it is not a part of the capital stock of the bank. Decree reversed.

Cited: 91 Tenn. 553, 582; 95 id. 231; 97 id. 89.

FIRST NAT. BANK v MCCLUNG (1881) 7 Lea 492.

On promissory note, against maker and indorsers. Defendants M and T were respectively, the maker and indorser of an accommodation note for the benefit of the C Bank. The C Bank indorsed the note, and had it discounted by plaintiff. The C Bank was the correspondent and collecting agent of plaintiff, and they had mutual running accounts. The note was sent back to the C Bank for collection, and, at its maturity, it was charged to bills payable and the amount credited to plaintiff. The C Bank was then insolvent, but was still operating. It suspended two days afterward and had sufficient money to pay the note, but did not do so. Decree for plaintiff. Appeal.

Cooper, J. Since the C Bank had the money to pay the note and, even though insolvent, did actually appropriate it, by passing it to the credit of its correspondent on its books, it is a payment of the debt and a release of the accommodation sureties. Decree reversed.

Cited: 12 Lea 86; 92 Tenn. 456.

COMFORT, TRUSTEE v MCTEER (1881) 7 Lea 652.

To recover an overdraft. On April 2, the C Bank gave a credit on its books to defendant's firm for the sale of bonds deposited with it as collateral to secure the notes of B, a member of the firm. The proceeds of sale were for the credit of the firm. The bonds had been procured from McK. Two days thereafter, the bank made an assignment to complainant for the benefit of creditors. The defendants at the time had overchecked their account at the bank. Complainant alleged that the credit of April 2 was without consideration; that it was given with knowledge of the insolvency of the bank, and was procured by B for his individual benefit. McK, who had supplied the bonds, was allowed to intervene as a defendant, and to file an answer and crossbill, in which he attempted to hold the bank liable as his debtor for the bonds or their proceeds. He also claimed an interest in upholding the credit of April 2, on the strength of a subsequent contract made by him to purchase the interest of a member of the firm. Complainant's bill and defendant's crossbill dismissed. Complainant appealed.

Cooper, J. 1. The assets of a bank as they exist when the insolvency of the bank becomes known to its officers, do not at once become a trust fund for the creditors of the bank. There must be some positive act of insolvency. It is only that which remains after a settlement of the mutual debts between a bank and its customers, that constitutes the trust fund. 2. The transactions of the bank during the two days preceding the execution of the general assignment were valid. 3. The crossbill of McK had no connection with the original suit, and it was error to allow him to intervene. Decree affirmed.

Cited: 9 Lea 166; 12 id. 87; 14 id. 250, 252; 95 Tenn. 187, 644, 700; 96 id. 109; 99 Tenn. 177; 101 id. 666; 105 id. 292.

CLARKE v KEITH (1882) 8 Lea 703.

This case was formerly before the court and is reported in 4 Lea 718 (ante p. 1304), where the facts are stated in full. The decision of the court below was there reversed, because the jury failed to determine whether the notes in suit were issued in aid of the rebellion. The only questions before the court on the appeal are: 1, did the court below instruct the jury in accordance with the principles laid down in the former trials of this case (97 U. S. 454 and 4 Lea 718); and, 2, whether or not the Act of January, 1861, suspending specie payments, had the effect of making notes issued after its passage payable differently from those issued before that date.

Randolph, S. J. 1. The instructions were in accordance with the principles laid down in the former decisions. 2. The notes of the bank, lawfully issued after May 6, 1861, notwithstanding the act suspending specie payment, have always been payable on demand in gold or silver coin within the meaning of sec. 12 of the bank's charter, and therefore receivable for taxes due the state. Judgment affirmed.

Cited: 14 Lea 363.

HUME v COMMERCIAL BANK (1882) 9 Lea 728.

To enforce stockholder's liability. All of the stock of defendant bank was owned by McC, B and H, who were also officers of the bank. An advertisement published continuously in the newspapers until the suspension of the bank, gave the names of the officers and of certain other persons as directors. The directors, so called, saw the advertisement, but never authorized it. They had never received notice of their election as directors, nor had they accepted the office nor assumed any of its duties. The names of the directors appeared on the stockbooks as stockholders, but they denied their ownership of any of the stock. The funds of the bank were misappropriated and it became insolvent. The creditors filed a bill against the officers and trustees of the bank and the nominal directors to hold the latter liable for their neglect to discharge their duties as directors. The administrator of a deceased director was also made a party. Decree, holding defendants liable as directors and stockholders. Appeal.

Cooper, J. 1. Where persons are not in fact stockholders of a bank, and are only nominal directors, they will not be held liable as stockholders, although their names appear as such on the stockbook. 2. Directors are not estopped to deny they are stockholders, by the fact of being directors. 3. The liability of a director, who is not a stockholder, terminates at his death. 4. No action will lie against them, merely because they negligently allowed their names to be published as directors. Bill dismissed, so far as holding defendants liable as directors or stockholders.

Cited: 13 Lea 498; 89 Tenn. 637; 96 id. 102; 100 id. 468, 470; 101 id. 553.

WEISINGER v BANK OF GALLATIN (1882) 10 Lea 330.

To recover deposit. The plaintiff claimed he had, through his son, acting as his agent, deposited in defendant \$845, while the defendant insisted the amount was only \$745. In an action to recover the balance claimed to be due, the plaintiff offered verbal testimony tending to prove his claim. The bank offered in evidence a deposit ticket signed by the son showing the deposit of \$745 and objected to the admission of parol testimony of the amount of the deposit. The objection was overruled. The court charged the jury that "if the agent of the plaintiff signed a paper usually used by the bank showing the deposit, that would be a strong fact showing the amount deposited." Verdict and judgment for plaintiff. Appeal.

Freeman, J. 1. The deposit ticket is a memorandum and is not an engagement in writing, nor does it on its face contain the contract of the parties so as to bring it within the rule excluding parol evidence. 2. A deposit ticket makes out a prima facie case. To charge the jury that the deposit ticket is "a strong fact" is not the same thing as a prima facie case, and does not state the law correctly. Judgment reversed.

Cited: 96 Tenn. 153.

MARR v STATE (1882) 10 Lea 470.

On bond of surety. D, as clerk of the supreme court at Nashville, collected in United States currency certain taxes on law suits, due the State, which he failed to account for and pay over. The defendant was surety on D's bond. He pleaded a

tender of the sum due, in Tennessee Bank notes of the "New Issue" or "Torbett Issue," issued since May 6, 1861. He filed the sum due in that issue in court. Judgment for plaintiff. Appeal.

Garner, S. J. The proof shows that the notes tendered were genuine notes of the Bank of Tennessee and there is no proof that they were issued in aid of the rebellion; therefore, on the authority of *Clark v Keith*, 4 Lea 719, and 8 id. 707, we must hold that the tender of the defendant was good and the court erred in holding to the contrary. Judgment reversed.

Cited: 14 Lea 363; 89 Tenn. 333.

MORGAN v MERCHANTS NAT. BANK (1884) 13 Lea 234.

To recover advances made to defendant. Plea: Statute of Limitations. Agreed case. A firm, of which D was a member, guaranteed to M & Co of New York certain advances which the latter firm made to defendant bank, more than six years before this action was brought. D having become president of the bank, and being in New York on other business within the time, saw M & Co., who threatened to sue the bank. D, the president, admitted the claim to be just and due by the bank but requested time; and promised, in case of delay to sue, that the bank would not plead the Statute of Limitations. M & Co. waited as requested. After verdict the court granted a new trial upon defendant's motion, and plaintiff tendered his bill of exception. Appeal.

Deaderick, C. J. 1. The action of the president revived the debt against the bank and prevented it from being barred by the Statute of Limitations. The fact that this was done in New York, and that D, the president, was guarantor of the debts, there being no antagonism between him and the bank, made no difference. 2. An appeal does not lie under the Act of 1875 until after final judgment. Judgment reversed.

Cited: 91 Tenn. 379; 94 id. 223; 98 id. 120, 548.

UNION & PLANTERS BANK v PARRINGTON (1884) 13 Lea 333.

On note, against maker. The defendants, F and W, executed a note to complainant, and deposited with it as collateral security, certain certificates of gas stock, indorsed with a blank power of attorney, authorizing the transfer on the books of the corporation. The note provided that in case the collateral should decline in value, the makers would deposit additional collateral, a failure to do which would authorize the bank to sell the collateral. The bank had the stock transferred to its name on the books of the gas company, with no intention to prejudice the right of the defendants to a return of the stock on payment of the note. It also claimed the dividends declared on the stock and the right to vote it, but tendered a proxy for this purpose to the defendants. Decree for defendants. Appeal.

Deaderick, J. 1. The title to the stock was transferred to the complainant, and a claim by a bank to dividends on pledged stock, and of the right to vote it, does not of itself show a conversion. 2. Where a debtor delivers to a bank certificates of stock as collateral security for a loan, with a blank power of attorney for its transfer on the books of the corporation, the title to the stock, both legal and equitable, passes to the bank. 3. The bank must account for the amount of dividends declared by the gas company, because it claimed to be entitled to them, and prevented the defendants from receiving them. Decree modified.

Cited: 91 Tenn. 379; 98 id. 17.

IMBODEN v PERRIE (1884) 13 Lea 304.

On check. D was indebted to the plaintiff and also to the defendant P. On May 27, D had about \$1,000 in the bank, and on that day transmitted by mail a check for \$750 to the plaintiff. On the same day, P commenced an attachment suit against D and on June 1, the attachment was levied by garnishing the bank. The plaintiff presented the check to the bank on June 6 and payment was refused because of the attachment. Judgment for defendant. Error.

Turney, J. 1. Banks are debtors to their customers for the amount of deposits. 2. A check is a request of the depositor to pay the whole or a portion of such indebtedness. It vests no title or interest, legal or equitable, in the payee to the

fund. 3. The bank owes no duty to the holder of a check until it is presented for payment. P is entitled to the fund. Judgment affirmed.

Cited: 4 Pickle 380; 93 id. 365.

STATE v LINCOLN SAV. BANK (1884) 14 Lea 42.

To collect privilege tax. Defendant was incorporated as the "Lincoln Savings Bank," with a capital stock divided into shares, and given all ordinary powers usually accorded to regular banking institutions. Females covert and minors, when their deposit, reached \$100, could convert them into stock. It was made liable to the same tax as was imposed on similar institutions. The Acts of April 7, 1881, and March 30, 1883, declared that the privileges and franchises granted to savings banks should be personal property and liable to taxation as such, to an amount not exceeding the gross sum of the surplus earnings in their possession. But the same legislature made banking a privilege without exception. The state claimed the privilege tax from defendant. Defendant claimed that it was a savings bank, and was taxable, as a privilege, only on its surplus earnings, of which it had had none in its possession. Judgment for defendant. Appeal.

Wilson, S. J. 1. A bank is not constituted a savings bank by a mere designation of it as such in the charter. Its character is determined by its organization, powers, and mode of doing business, as provided in its act of incorporation. The power given to females covert and minors did not constitute defendant a savings bank. 2. Even if defendant is a savings bank, it is liable to taxation even though it have no surplus earnings, because the privileges and franchises granted to a savings bank are personal property. Judgment reversed.

Cited: 16 Lea 121.

NOTEHOLDERS v FUNDING BOARD (1885) 16 Lea 46.

Bill to determine whether certain notes of the Bank of Tennessee should be funded under an Act of 1885, authorizing the funding of all "legitimate outstanding postnotes." The notes in controversy were genuine issues of the bank regularly put into circulation, but they had defects apparent on their faces. Some were slightly burned, some were not dated, some had the same number, and on some the number had been altered. Judgment directing the notes to be funded except those in which the number had been altered. Appeal.

Cooper, J. 1. The mutilation of the bank notes does not affect the holder's right of recovery, if enough remains to identify them. 2. A date is not essential to a bank note. 3. The figures denoting the number of a bank note are not an integral part of it. Judgment in favor of all the noteholders.

STATE v NASHVILLE SAV. BANK (1885) 16 Lea 111.

Bill to recover a tax imposed on defendants by its charter, a broker's privilege tax, and also a banker's privilege tax. The defendant contended that it was liable only by the first tax. Defendant bought and sold public stocks and bonds for others, but in all such cases sold stocks or bonds which it then owned or bought itself for the customer. Its charter authorized it to deal in public and private securities, and provided that in consideration of its franchise, it should pay a certain annual tax to the State. By sec. 10, the power to alter or amend was reserved to the legislature. The charter was granted in 1866. The Acts of 1881 and 1883 imposed a privilege tax on banks and banking. After all the evidence had been taken, an amended bill was filed in which additional parties were made defendants. No further proof was taken. The amended bill was dismissed. Judgment holding defendant liable only for the tax imposed by its charter. Appeal.

Cooper, J. 1. No deposition can be read against a party brought in after it was taken, or too late to exercise the right of cross examination. 2. Defendant cannot be charged with a broker's privilege tax. 3. The requirement of the bank's charter fixes the rate of taxation to be paid for the privilege of exercising its franchise. This will continue until the legislature sees proper to change it by action disclosing a clear intention to that effect. 4. The Acts of 1881 and 1883 do not show such intention. Judgment affirmed.

Cited: 3 Pickle 406; 93 Tenn. 685; 104 id. 682.

BARRETT v NATIONAL BANK (1886) 85 Tenn. 426.

Statutory action to recover forfeiture for usury. The complainant, B, was a judgment creditor of B, L & Co, who were insolvent. The defendant, a bank, had collected usurious interest of B, L & Co. Complainant filed a bill against defendant to subject the forfeiture for collecting usurious interest, as provided for in sec. 5198, U. S. R. S., to the satisfaction of his judgment. Sec. 5198 provides that the person by whom the usurious interest has been paid, or his legal representatives, may recover back in an action in the nature of an action of debt, twice the amount thus paid. Bill dismissed. Appeal.

Snodgrass, J. The relief granted by the section is confined to the debtor or his legal representatives. A creditor of the debtor has no action in equity to subject the forfeiture to the satisfaction of his debt as he is not the debtor's legal representative. Decree affirmed.

STATE v BUTLER (1888) 86 Tenn. 614.

To enforce taxes on bank stock and real estate. In 1856 C and others were incorporated under the name of "Chattanooga Savings Institution." Sec. 3 of the charter provided: "The institution shall pay to the State an annual tax of one-half of one per cent on each share of capital stock, which shall be in lieu of all other taxes." The charter was sold by the incorporators to W. In 1859 an act of the legislature authorized the corporation to move its location. An Act of 1866 changed the name to "The Savings Bank of Memphis." The Constitution of 1870 provided "no corporation shall be created or its powers increased or diminished by special laws." In 1873 the stockholders sold all their stock, with the franchises, to the stockholders of the Merchants Insurance Co., who transferred to the bank stockholders all the assets of the insurance company for 85 per cent of the purchase price, and paid the balance in cash. The business of the insurance company was wound up, and the stockholders thereof received for each share they held a share of the bank stock. On March 12, 1873, the bank's name was changed to "The Bank of Commerce." The new directors increased the capital to \$200,000, and issued certificates therefor. No certificates had been previously issued. Previous to the assignment to the insurance company, all the assets of the bank had been assigned to a trustee for the benefit of creditors. This bill was filed to collect taxes, assessed after 1873, on the real estate used by the bank for banking purposes, and on its capital. The bill alleged there had been no organization of the corporation until after the transaction between the bank and the insurance company which transaction was alleged to be illegal. It was claimed, therefore, that the exemptions in the charter did not pass to the transferees. Defendant relied upon the above facts and an Act of 1873, providing "that capital stock in a bank shall not be assessed against the bank, but against each shareholder for the shares held by each." Bill dismissed. Appeal.

Folkes, J. 1. The issuance of certificates of stock is non-essential either to the validity of the original organization, or to the transfer of same to purchasers. The subscription and payment for stock is all that is necessary. The weight of proof establishes the fact of organization. 2. The criticisms made upon the defect in the proof as to such organization and succession are met by the legal effect of the repeated legislative recognition of this corporation by the several acts mentioned. 3. If the bank had no existence prior to 1870, it could acquire none by the Act of March 12, 1873, because of the constitutional provision of 1870. 4. The mere insolvency of a corporation will not work a dissolution, nor will the assignment of all its property, nor the appointment of a receiver, extinguish the franchises with which the company has been invested, where there have been no proceedings for forfeiture inaugurated by the State, nor a surrender by act of the stockholders. 5. There is no principle of law that would prevent the stockholders in an insurance company from becoming at the same time stockholders in a bank, even where the same stockholders own all the stock in the two corporations. 6. The change of name by special act does not fall within the inhibition of the constitution referred to. 7. No recovery can be had upon an assessment against the bank on the capital thereof, since the Act of 1873. 8. Defendant was successor of the Chattanooga Savings Institution, with whatever exemptions and privileges were possessed by that institution. The charter impliedly exempts so much of the real estate owned by it as is actually used for the purpose of its banking business. Decree affirmed.

Cited: 91 Tenn. 553, 583; 95 id. 216, 226; 99 id. 692; 101 id. 160; 104 id. 344.

GRISSOM v COMMERCIAL NAT. BANK (1889) 87 Tenn. 350.

On deposit. Defendant claimed the balance sued for had been applied by it to the payment of a note drawn by plaintiff to the order of C & Co., and payable at defendant bank. Defendant sought to prove a custom, unknown to complainant, to so pay such notes, by four bank officers of different banks, all of whom agreed as to the existence of the custom, but differed as to the mode of carrying it out. Defendant did not notify complainant of the payment, whereby complainant lost his recourse over against persons liable to him on the note. Defendant sought to take advantage of the payment by way of setoff. Decree for defendant. Bill dismissed. Appeal.

Folkes, J. 1. To be binding a custom must be certain and uniform, and there must be reasonable ground to suppose that the custom was known to both parties. The defendant cannot justify its payment of the note in question on the ground of custom. 2. A bank has no implied authority to pay to a third party a note made payable at its place of business, simply because of the fact that the maker has funds sufficient for that purpose, in the absence of any course of dealing or previous instruction to so apply the deposits. 3. Defendant was not entitled to a setoff. Decree reversed.

BANK v CARTER (1889) 88 Tenn. 279.

On check against indorsers. Defendant E drew a check on the defendant Bank of A, payable to defendant G, who presented it to plaintiff bank to cash. Plaintiff communicated with the Bank of A, which said the check was good, and then plaintiff cashed it. It was duly presented to the Bank of A for payment, was dishonored and was protested. Defendant C claimed he was discharged by the certification. The Bank of A and E were non-residents. Their property had not been attached. They were served for publication, C by personal service. Judgment for defendants. Appeal.

Folkes, J. 1. When the drawee bank has, before an opportunity for presentment for payment, agreed with the holder who advances value thereon to pay it, such drawee becomes as to such check in legal effect the acceptor of a bill of exchange, and the drawer and indorsers become sureties. 2. When no property of parties severally liable on a check has been attached, they cannot be brought before the court by publication. 3. The service of process upon one defendant will not warrant a personal judgment against a non-resident not before the court. Judgment reversed as to C.

PEOPLES BANK v FRANKLIN BANK (1889) 88 Tenn. 299.

Money paid on forged check. Defendant bank, without identifying the holder, cashed a check purporting to be drawn on plaintiff bank by G, a depositor in plaintiff, to M's order. Both G's name as maker, and M's as indorser, were forged. Defendant bank indorsed it and plaintiff bank paid the amount thereof to defendant. The forgeries were subsequently discovered. Decree for defendants. Appeal.

Folkes, J. The bank can recover of a person to whom payment has been made on a forged check, indorsed by the person to whom paid, where the person to whom paid has been guilty of negligence in receiving and indorsing the check. Decree reversed.

PICKLE v MUSE (1890) 88 Tenn. 380.

Bill to recover money due. Defendant M, being indebted to plaintiff, drew a check on defendant bank to M's order and transmitted it to M in payment. Plaintiff alleged and proved that he had never received the check or presented it in person or by agent, and that he had never received the proceeds. The bank had paid the check to some one on presentment. Though its officers had no recollection of the incident, they testified that it was their custom to require indorsement from any one presenting a check other than the payee; and argued that as the check was not indorsed, the presumption arose that it had been presented by, and paid to, the plaintiff. The bank had charged M with the amount. Decree for defendants. Appeal.

Lurton, J. 1. The possession of an order by the person on whom it is drawn is prima facie evidence that the things specified therein were delivered or paid according to the order. 2. The presumption may be rebutted. 3. If a bank mistake the identity of the payee or pay on a forged indorsement, it will be responsible.

4. The holder of a check cannot recover on it against the bank unless he can show an acceptance. 5. That the defendant bank assented to the payment of this check is to be inferred from the retention of the check when presented and the subsequent charge to M. 6. By suing the bank, complainant ratified the receipt of the check from M. He does not, however, ratify the wrongful collection. An agency to receive a check payable to order implies no authority to indorse or collect it. Decree reversed.

Cited: 92 Tenn. 158; 100 id. 189, 192.

STATE, EX REL. v LOOKOUT BANK (1890) 89 Tenn. 278.

Statutory action to recover a penalty for taking usury, under the Act of 1859-60, ch. 129, entitled "An Act to encourage the use of private capital." Defendant was a corporation. The bank contended that the act did not apply to it. Demurrer to declaration. Sustained. Appeal.

Lea, J. The act in question does not apply to incorporated banks. Its manifest purpose is to restore the common-law right of private banking in the form of a licensed privilege. Judgment affirmed.

BANK v CUMMINGS (1890) 89 Tenn. 609.

Crossbill for negligence in collecting drafts. C & B shipped wheat to T at A. The bills of lading were drawn to the order of C & B and by them indorsed to the cashier of the bank at C. C & B drew drafts on T payable three days after sight, attached them to the bills of lading, and left them with the bank at C. The drafts were indorsed: "For deposit only to credit of" C & B. "By request of parties, draw through" the bank at A. The bank at C entered them as having been received for collection and transmitted them, with the bills of lading unindorsed by the cashier, to the bank at A. The latter presented the drafts to T, and on their being accepted delivered the bills of lading to him. T obtained the wheat and disposed of it. The drafts were unpaid at maturity. T was insolvent. After two of the drafts had been returned to the bank at C, T sent a check for the amount on the bank at A to the bank at C, requesting a delivery of the drafts. The bank at C credited C & B with its amount, sent it, with the drafts, to the bank at A with instructions to deliver the drafts on payment of the check. The check was not paid. The drafts were returned to the bank at C, which charged the check back to C & B. Crossbill dismissed. Appeal.

Lurton, J. 1. The fact that the bills of lading were taken to the order of C & B, the consignors, and indorsed by them to the cashier of the bank at C, conclusively shows an intent to hold the title as security for payment of the drafts drawn against the shipment. The bank at A, therefore, was negligent in surrendering the bills of lading before receiving payment on the drafts. 2. But the bank at C is not responsible for such negligence, since the bank at A was designated by C & B as the agent for collection. 3. Though the bank at C received the check in payment of the two drafts, yet, not having surrendered the drafts, it was justified in charging the check back to C & B. Decree affirmed.

Cited: 99 Tenn. 444.

WALLACE v LINCOLN SAV. BANK (1890) 89 Tenn. 630.

Creditor's bill against the corporation, its board of directors, and the trustee under a general assignment. The bill made charges of negligence and mismanagement by the directors. The trustee of the corporation refused to bring the action. The action was predicated upon losses sufficiently indicated in the opinion. Certain of these losses were barred by the Statute of Limitation. The Tennessee statute operated on all causes save suits between cestuis que trust and express trustees under pure technical trusts. One of the alleged losses was because a well-secured note included usury. Numerous assignments of error were made by both parties. Decree for complainants. Appeal.

Lurton, J. 1. The complainant was entitled to bring suit on the trustee's refusal so to do. 2. A stockholder cannot be allowed to recover money already paid him in the shape of dividends. 3. If the cashier is not chargeable with want of care or skill in making loans, defendants are not liable, for they can be liable only for losses resulting from his failure to exercise reasonable skill, care and diligence in the discharge of his duties. 4. An action by the corporation against the directors for damages for negligence in office may be brought at law; and the

limitation applicable to the suit of the corporation at law is equally applicable to the suit of the stockholder on the corporate right of action in equity. 5. The burden was on complainant not only to prove losses, but to show that such losses were the consequence of the negligence of the directors. 6. The diligence required from directors is that exercised by prudent men about their own affairs—ordinary diligence. 7. It is not negligence per se, in the absence of a by-law or order to contrary, for a cashier to pay the overcheck of a responsible customer. Decree reversed. Bill dismissed.

Cited: 92 Tenn. 318; 95 id. 147; 96 id. 101; 100 id. 463, 469; 104 id. 389.

SAHLIEN v BANK (1891) 90 Tenn. 221.

On negligence of collecting agent. L sent a draft on W to defendant for collection. Defendant failed to collect it. The court, sitting as a jury, found that plaintiff failed to prove negligence on defendant's part and loss to plaintiff. Judgment for defendant. Appeal.

Snodgrass, J. The onus is on the plaintiff to show negligence in defendant and loss resulting to himself in consequence. Having selected an agent for collecting its claim which it seeks to hold liable for non-collection, it must show that the claim was good and collectible. Judgment affirmed.

Cited: 92 Tenn. 379, 456; 95 id. 379; 98 id. 340.

VANCE v MOTLEY (1892) 92 Tenn. 310.

To recover for breach of duty as cashier. M, the cashier of the N Bank, employed a clerk on his own account. The clerk embezzled the funds of the bank to the knowledge of M and V, the teller, who was also one of the directors. M and V, by agreement, concealed the defalcation by means of false entries and sworn statements. M also lent money to insolvent persons without security. M was the principal stockholder and manager of the bank. The bank's charter expired and it was reorganized as the Bank of M T, with the same officers and stockholders. The new bank assumed the liabilities of the old bank. The conduct of M and V was not known to the other directors and stockholders until M's death. A bill was brought to wind up his estate. The trustees of the old and new banks filed a crossbill, seeking to hold M's estate liable for the losses occasioned by his conduct. Decree, holding M's estate liable for the loss resulting from the bad loans, but holding the claim on account of the defalcation barred by the Statute of Limitations. Appeal.

Bright, S. J. 1. The money was lost by the gross negligence of M. 2. The Statute of Limitations did not begin to run in favor of M until the loss was disclosed to the stockholders. 3. The fraudulent concealment by B and M of the condition of the accounts of the old bank, accomplished by agreement between them, prevented actual notice, and took the case out of the rule of constructive notice to the other directors. 4. A cashier is bound to exercise reasonable skill, care and diligence in the discharge of his duties; if he fails in such skill, or omits such care, and the bank suffers damage as a consequence, he is liable. 5. The tort may be waived, and action for value maintained against the wrongdoer or his representative. Decree modified and affirmed.

BOBO v PEOPLES NAT. BANK (1892) 92 Tenn. 444.

Statutory action to recover under U. S. R. S., secs. 5197 and 5198, the penalty prescribed for the wrongful discount of notes by the bank at a greater rate of interest than is allowed by the laws of Tennessee. The law provides that such an action must be brought within two years from the time the usurious transaction occurred. Plea, Statute of Limitations. Decree for complainant. Appeal.

Wilkes, J. 1. The action must be brought within two years from the time when the usury was actually reserved. 2. Under the statute the measure of recovery is twice the excess of interest reserved or paid over and above legal interest, and not twice the amount of the entire interest. Decree reversed and cause remanded.

JACKSON v BANK (1893) 92 Tenn. 154.

Bill to recover proceeds of check. G, a traveling salesman for J, sold goods to M and received from him a check, payable to J, on the defendant bank, where

M kept an account. G indorsed the check without authority, and the bank paid it to him and charged the account of M, who had sufficient funds to pay it, and who subsequently lifted the check on settlement with the bank. G absconded and failed to pay over the money to J. J filed this bill to hold the bank liable, alleging that G had no right to indorse the check. Bill dismissed. Appeal.

Holman, S. J. 1. The drummer was not authorized by implication to sign his principal's name to the check. 2. The authority to execute and indorse bills and notes as agent will not be implied from an express authority to transact some other business, unless it is absolutely necessary to the exercise of the express authority. 3. The bank must see that the check is paid to the payee therein named upon his genuine indorsement, or it will remain responsible. 4. The circumstances establish an acceptance by defendant on which complainant may sue. Decree reversed.

HOWARD v WALKER (1893) 92 Tenn. 452.

On draft. B drew on defendants in favor of plaintiff. The plaintiff indorsed the draft and deposited it in the F National Bank for collection. On the same day the F National Bank sent it to its correspondent, the C Banking Co., indorsed "for collection." The C Banking Co. presented it to the defendants, who directed that it be taken to the Bank of C for payment. The draft was presented to the Bank of C, where the defendants had funds more than sufficient to pay it, and where the draft was charged to the defendants' account. No money was actually paid out, but in the settlement between these banks the C Banking Co. was credited with the amount of the draft. Both the Bank of C and the C Banking Co. became insolvent, the latter being indebted to the Bank of C. The C Banking Co. never remitted the proceeds of the drafts to the F National Bank. Judgment for plaintiff. Appeal.

Snodgrass, J. 1. The collection was, according to bank custom, as effectual as though the money had been handed over the counter by each bank to the other. It was a money settlement under the reasonable custom adopted by banks as a necessity, and as such recognized. Judgment reversed.

Cited: 93 Tenn. 364; 95 id. 583; 98 id. 340.

IRVINE v DEAN (1893) 93 Tenn. 346.

Bill to rescind sale of bank stock, purchased by complainant from defendant, and to recover the purchase money. Defendant was cashier of the bank, and complainant relied on his good faith. The stock proved to be worthless, and shortly after the sale the bank made an assignment. Plaintiff garnished all choses in action of defendant in the hands of the bank, including funds on deposit, and certain notes claimed by M. The bank sought to set off an unliquidated claim against defendant. Decree for complainant for the purchase money, but that the funds in the bank belonging to defendant were not subject to attachment, and that the notes due defendant in the hands of the trustee properly belonged to claimant M. Appeal.

McAlister J. 1. The complainant, by virtue of his garnishment, served upon the trustee of the bank, fixed a lien on defendant's deposit, and this fund is subject to the payment of complainant's demand. 2. It is not necessary to make the bank a party, since the trustee is the representative of the bank. 3. The notes were properly awarded to the claimant upon the proof. 4. An unascertained and unliquidated claim against defendant cannot be set off by the bank. Decree reversed as to the deposit and affirmed as to the notes.

AKIN v JONES (1894) 93 Tenn. 353.

Bill for settlement. M & Co, defendants, sent a draft and note to the Bank of C, of which plaintiff is assignee in insolvency, with instructions to remit in New York exchange. The draft and note were paid by checks on the Bank of C. In one case the drawer, M & Son, had on deposit less than the amount of this check; in the other the drawer, S, had no deposit, but had theretofore overdrawn. The Bank of C remitted to defendants by checks on other banks which remained unpaid, though the drawees had sufficient funds of the Bank of C, which were afterward turned over to plaintiff. The Bank of C became insolvent. Plaintiff collected the amount of M & Son's overdraft, and compromised that of S. Decree, giving defendants a preference only as to the overdraft collected by plaintiff from M & Son. Appeal by both parties.

McAlister, J. 1. Unless there is some agreement or course of dealing, whereby the funds are to be held separate, the owners of the draft and note stand upon no higher ground than the other creditors of the bank in a case where the bank collects them prior to making a general assignment. 2. The payment of the overdraft did not amount to a payment of the papers themselves to the assignee. 3. The delivery of a check against a deposit is not a legal or equitable assignment of any portion of that fund. Decree reversed.

Cited: 95 Tenn. 582; 97 id. 537, 543, 549, 553, 559; 98 id. 230.

LOOKOUT BANK v AULL (1894) 93 Tenn. 645.

On promissory note. Defendants were sureties on a note given in renewal of a note held by complainant bank. The renewal note was made payable to "J. O. Rice, cashier," with the understanding that it would not be delivered to the payee until B signed as a cosurety. B did not sign the note. Complainant accepted the note without notice of the agreement. The note was not indorsed to complainant. Decree for complainant. Appeal.

Beard, J. 1. As the payee was the cashier of complainant when the note was taken, as well as when suit was brought, and as the complainant's money was the consideration for it, it was the complainant's property and can be sued upon without indorsement. 2. Though the note is the property of the payee, the rule protecting the title of a bona fide holder of negotiable paper applies. 3. The surrender and extinguishment of the older note, and the release of defendants, make complainant a bona fide holder for value. Decree affirmed.

Cited: 99 Tenn. 290.

MILLER v HOWARD (1895) 95 Tenn. 407.

To hold bank directors for a deposit. The D Bank suspended payment. The directors then issued a circular announcing that they hoped to resume business, and that in the meantime the bank would receive special deposits and keep them subject only to check of the depositors. Complainant, relying on this circular, made several deposits. Subsequently, a receiver was appointed for the bank, who took charge of these special deposits and declined to honor the checks of the special depositors. Decree for complainant. Appeal.

Wilkes, J. This is a case of positive active misconduct of the directors in turning over the deposits to the receiver, resulting in injury to the complainant, and for which they are liable to him. Decree affirmed.

SAYLES v COX (1895) 95 Tenn. 579.

Bill for a preference. Complainant sent a note to the F Bank for collection with the direction to "forward draft to me for balance" less the fee. F Bank collected the note and went into the hands of defendant, as receiver, before the balance was remitted. Its officers knew its hopelessly insolvent condition when it received the note. Decree directing complainant to share pro rata with the other creditors. Affirmed by Court of Chancery Appeals. Appeal.

Wilkes, J. 1. After the collection of the note, the relation of the parties was that of debtor and creditor, and the complainant cannot impress any trust character upon the proceeds. 2. The question of fraud in receiving the note to collect when the bank was insolvent cannot alter the rule. Decree affirmed.

Cited: 97 Tenn. 537, 543, 549, 553, 559; 98 id. 235; 107 id. 501.

AKIN v WILLIAMSON (1895) 35 S. W. Rep. 569.

Bill for instructions in regard to the payment of dividends by insolvent banks. When the Bank of C, of which complainant was receiver, failed, it was indebted to the S Bank for \$2,730. The complainant, as receiver, deposited its trust funds with the S Bank. The S Bank became insolvent and the defendant was appointed receiver. When the S Bank failed, complainant, as receiver, had on deposit with it the sum of \$2,400. The defendant refused to pay to the complainant his pro rata share of the dividends, on the ground that the debt due him was a setoff for the debt due from the Bank of C to the S Bank. The complainant claimed the right to withhold dividends due the S Bank in payment of the deposit. Decree for complainant. Appeal.

Neil, J. 1. No setoff can be allowed to the defendant on the debt he owes to

the complainant as receiver, for the debt due him as receiver, and he must pay the complainant the pro rata, and all other pro ratas, that may be declared upon the indebtedness of the Bank of C without any deduction for what it owes. 2. The complainant must pay to the defendant the pro rata due the S Bank on its claim against the Bank of C. Decree accordingly.

MINTON v STAHLMAN (1895) 96 Tenn. 98.

To enforce statutory liability, of officers and stockholders of a bank. The declaration alleged: 1, that defendants, having knowledge of such facts, as, by ordinary diligence, would have shown them the condition of the bank, and keeping open thereafter, were liable to the plaintiff for the loss of his deposit; and, 2, that defendants wrongfully, negligently and knowingly failed to comply with the articles of incorporation. By statute, bank directors, guilty of fraud or willful mismanagement, were individually liable, and by sec. 1716 of the code, intentional fraud in failing to substantially comply with the articles of incorporation or in deceiving the public, made officers, directors, and stockholders liable for a misdemeanor. The court instructed that a bank is insolvent when it is unable to meet its liabilities as they become due in the ordinary course of business; and that the conduct of the officers should be considered in determining the officer's knowledge of the insolvency. Judgment for defendants. Appeal.

McAlister, J. 1. There is no liability to creditors or depositors under this statute, without fraud or willful mismanagement. The allegation in the first count did not amount to a charge of intentional fraud or willful mismanagement. 2. The charge that defendants wrongfully, negligently, and knowingly failed to comply with the articles of incorporation is hardly equivalent to a charge that such failure was the result of an intent to defraud. 3. Although the liabilities of a corporation may greatly exceed its assets, it is not insolvent in such sense that its assets become a trust fund for pro rata distribution among its creditors, so long as it continues to be a going concern, and conducts business in the ordinary way. 4. Knowledge of insolvency by the officers is a question of good faith, based upon knowledge of the affairs of the bank, and a reasonable expectation of redeeming all deposits and discharging the liabilities as they mature in the ordinary course of business. Judgment affirmed.

Cited: 98 Tenn. 581; 100 id. 470; 103 id. 153.

CHISM v FIRST NAT. BANK (1896) 96 Tenn. 641.

Bill, for a wrongful appropriation. The complainants purchased a draft of the M Bank, payable to their order, drawn on the defendant. They indorsed it to H or order and delivered it to W to give to H. H was not a real person, but was a fraud perpetrated by W, who sold the draft to the M Bank for full value. The draft was presented to the defendant drawee, which paid it in ignorance of the fraud of W. Decree for complainants. Appeal.

Beard, J. Where a drawer, guilty of no wrong, innocently indorses his check or bill to a fictitious person, believing him to be real, and a third party without authority writes the names of the fictitious payee or indorsee upon it, and by this fraud succeeds in collecting it, the drawee, by the payment of such indorsement, cannot discharge himself from liability to the drawer. Decree affirmed.

Cited: 100 Tenn. 190.

BANK v SNEED (1896) 97 Tenn. 120.

On promissory note. Defendants S and M were the maker and accommodation indorser of the note, which had been duly protested. N, executor of M, defended the action on the ground that his testator was non compos mentis at the time he indorsed the note. The note sued on is a renewal note. At the time of indorsing the original note, M was of sound mind. The plaintiff had no knowledge of his insanity when he indorsed the renewal note. The president, who was a member of the discount committee, knew of M's insanity, but was not present when the committee received and canceled the old note. Decree for complainant. Appeal.

Beard, J. 1. The contract, renewing the note, having been entered into in good faith, without fraud or imposition, for a fair consideration, without notice of the infirmity, and having been so far executed that the parties cannot be restored to their original positions, will not be set aside. 2. Under the circumstances the knowledge of the president was not the knowledge of complainant. Decree affirmed.

COX v ELMENDORF (1896) 97 Tenn. 518.

To collect an assessment, on bank stock. Complainant was the receiver of a bank, in which defendant had held stock. An assessment was made on all stock. The provision in the by-law, providing that transfers of stock could be made only on the books of the bank, was indorsed on the certificate of stock. Defendant sold her stock to P, indorsed the transfer of the certificate to him, and visited the bank and told its president of the sale. The president promised to attend to the transfer, but failing to record it on the books, the stock stood in defendant's name at the time of the failure. The indorsement on the certificate contained a blank power of attorney, authorizing the transfer on the books of the bank. Decree for defendant. Appeal.

McAlister, J. Defendant, having sold her stock in good faith and surrendered the certificate to the president of the bank, with a blank power of attorney attached, upon the promise of that officer that he would attend to the transfer, is absolved from any liability incident to the subsequent ownership of that stock by other persons. Decree affirmed.

KLEPPER v COX (1896) 97 Tenn. 534.

Bill, to recover the proceeds of a draft, and a deposit. Complainant delivered to the J Bank, of which defendant became receiver, a draft of the L Co. of New York in exchange for its check on the L Bank for the same amount. He also made a cash deposit. The J Bank transmitted the draft of the L Co. to its New York correspondent, and it was placed to its credit on November 12. On the same day the J Bank failed. The L Bank draft was not paid. The New York Bank subsequently paid to defendant a balance due his bank. The officers of J Bank at the time of the transaction knew the bank was insolvent. There was no evidence as to whether the credit was given by the New York correspondent before or after the failure of J Bank. Decree allowing the relief as to the check, but denying the relief as to the deposit. Reversed by Court of Chancery.

Wilkes, J. 1. The customer cannot follow and reclaim the proceeds of the check or money, if it was collected before the bank closed. 2. In the absence of proof as to the exact time, we must presume that the credit was given before the J Bank failed, and this being so, the proceeds of the check cannot be identified or separated, and the right to reclaim them is lost. 3. The rule applying in cases of fraud, which allows a recession and recovery, does not apply when the funds cannot be identified. Decree affirmed.

BRUNER v FIRST NAT. BANK (1896) 97 Tenn. 540.

Bill, to recover the balance of a deposit. The complainant, a depositor with the defendant bank, on November 10 and 12, made several deposits of checks and cash. The defendant suspended payment on November 12. It was insolvent for some time, which fact was known to its officers. Among the checks deposited on November 12 were several government checks, which were forwarded for collection by the defendant on the same day to its New York correspondent. When the New York bank received these checks, it credited the defendant's account for so much cash. It was not proved that the checks were received and credited by the New York bank before defendant bank's failure. The complainant contended that the deposits were fraudulently received, and that the money in the hands of the receiver was impressed with a trust in his favor. Decree for complainant. Reversed by Court of Chancery. Appeal.

Wilkes, J. 1. The cash deposited went into the general fund of the bank, and as it cannot be identified and separated from the other funds, the right to reclaim it is lost. 2. Crediting the defendant with complainant's checks after the defendant had failed, could not prejudice the complainant's right to rescind his contract for fraud and recover back the proceeds not credited when the defendant failed. Decree reversed as to the checks credited after defendant bank's failure and affirmed as to the balance.

Cited: 99 Tenn. 404, 406.

SHOWALTER v COX (1896) 97 Tenn. 547.

Bill, to recover deposit. Complainant delivered to the J Bank a check on V Bank without any special instruction. The J Bank was at the time hopelessly insolvent. The check was sent to the V Bank with instructions to remit in New

York exchange. The J Bank failed and defendant was appointed receiver. The check was sent in a letter commenced by the president of the bank and finished by the bank examiner. The proceeds were remitted by the V Bank to defendant, who put them on open account. Decree for complainant. Affirmed by Court of Chancery Appeals. Appeal.

Wilkes, J. When the proceeds were sent to the receiver, he took them for the complainant, and not as assets or property of the bank; and the complainant had the right to recover these proceeds as his property from the receiver. Decree affirmed.

FRIBERG v COX (1896) 97 Tenn. 550.

Bill, to recover the proceeds of a check. Complainant delivered a check to the J Bank, of which defendant was receiver, and received a credit to her account for the amount. The bank at the time was hopelessly insolvent and was known to be so by its officers. The check was collected by the New York correspondent and placed to the credit of the J Bank, on the day the J Bank failed. Decree for complainant. Reversed by Court of Chancery Appeals. Appeal.

Wilkes, J. 1. If the check was credited to the J Bank by the New York correspondent before the former failed, then the right to follow and reclaim it is lost. 2. We presume, in the absence of proof, that the credit was given and entered before the J Bank failed. Decree affirmed.

WILLIAMS v COX (1896) 97 Tenn. 555.

Bill, to recover a deposit. Complainant sent a check for \$167.50, with an unrestricted indorsement, to the J Bank, of which defendant became receiver, directing it to be placed to his credit, which was done, and notice of the credit was sent to complainant. On the same day the bank failed. The New York correspondent of the J Bank collected the check, and, after the latter's failure, remitted to defendant a balance due it, including the amount of the check. Complainant checked out all but the balance claimed, prior to the bank's failure. Decree for complainant. Reversed by the Court of Chancery. Appeal.

Wilkes, J. The relation of creditor and debtor arose out of the deposit, and the customer is not, therefore, entitled to recover the proceeds of the check as his own money. Decree affirmed.

Cited: 97 Tenn. 553. S. c.: re-hearing, 99 Tenn. 403.

SAVINGS BANK v COMMERCIAL NAT. BANK (1896) 98 Tenn. 337.

Bill, to recover for negligence of collecting agent. Complainant sent to defendant for collection a note for \$940 and a draft for \$1,352. On the day of maturity the defendant accepted in payment of the note and the draft two certified checks on the N Bank, and surrendered the note and draft marked paid to the proper person, and the checks were left for examination. This was done in accordance with an established usage. Upon demand the N Bank declined to pay the two checks and subsequently failed. Complainant had no notice of such usage. Decree for complainant. Appeal.

Beard, J. 1. A principal, who selects a bank as his collecting agent, in the absence of special directions, is bound by any reasonable usage prevailing and established among the banks where the collection is made, without regard to his knowledge or want of knowledge of its existence. 2. The usages existing among the banks were reasonable and proper and not in contravention of the general law, and the plaintiff was conclusively affected by them, although actually ignorant of their existence. Decree reversed.

ALEXANDER v BAUMMETT (1896) 42 S. W. Rep. 63.

Bill, to foreclose a mortgage. The note, to secure which the mortgage was executed, was made payable to A, who was at the time cashier of the plaintiff bank. Subsequent to taking the note, the bank made a compromise settlement in cash with A and his sureties for irregularities of A as cashier, and also for his indebtedness to the plaintiff. Under this settlement, A was to receive from the bank his individual notes and bank stock, and he and his sureties were to be released in full. A's administrator contended that this note was included in the settlement and that it belonged to the estate of A. The note was taken in A's name

as an individual, instead of A as cashier, by mistake; the money loaned was the plaintiff's money, and the note was always recognized by A and the plaintiff as belonging to the bank. The statute provides that a bank shall not own real estate more than sufficient for the conduct of its business, unless taken in payment of debts. The bank, in the name of A, instituted proceedings to foreclose the mortgage. Decree for complainant. Appeal.

Noil, J. 1. The note was the property of the bank and did not pass to A under the compromise agreement. 2. The statute cannot cover the case of real estate security taken by banks for money loaned. Decree affirmed.

POLLARD v WELLFORD (1897) 99 Tenn. 113.

Bill, to recover the amount of notes and checks. Plaintiff purchased at a discount three notes, purporting to be signed by W and defendant J, payable to defendant T, and indorsed by him. Plaintiff gave in payment for each note a check on the defendant U Bank. The checks were made to T, indorsed in his name, and paid by the U Bank upon demand. At maturity the three notes were not paid, and plaintiff discovered that the names of defendants J and T had been forged by W, and that T's name had likewise been forged to the checks on the U Bank. W absconded. If plaintiff had not been negligent in the examination of canceled checks, the forgeries could not have been committed. Bill dismissed as to defendants J and T. Decree against the U Bank for the amount of the checks paid on the forged signature of T. Appeal by U Bank.

McAlister, J. 1. A check drawn in favor of a particular payee or order is payable only to the actual payee or upon his genuine indorsement, and if the bank mistake the identity of the payee, or pay upon a forged indorsement, it is not a payment in pursuance of its authority and it will be responsible. 2. No duty is imposed upon a depositor to examine his canceled checks with a view to detecting forgeries. Decree affirmed.

WILLIAMS v COX (1897) 99 Tenn. 403.

On re-argument, of Williams v Cox, 97 Tenn. 555, on the ground that a stipulated fact had been lost from the record. The omitted fact was that the J Bank, of which defendant is receiver, was hopelessly insolvent when the check was handed to it by complainant, and that this fact was well known to the officers of the bank. The check was collected by the N Bank after J Bank had failed, and the N Bank then had funds of J Bank, most of which it remitted to defendant, as receiver. Defendant contended that the proceeds of the check were a portion of the funds retained by N Bank to indemnify itself against re-discounts it had made for J Bank.

Wilkes, J. 1. The check having been received by the bank, when it was known to be hopelessly insolvent, the complainant had the right to reclaim it, or its proceeds, if they could be identified and separated. 2. The proceeds of this check must be presumed to have come into the receiver's hands, and the money retained to indemnify the N Bank was retained from other funds previously collected. Judgment for complainant.

FARMER v BANK (1897) 100 Tenn. 187.

On forged check. H, as agent of plaintiff, sold tobacco for him and received in payment therefor a check payable to the order of plaintiff. H forged plaintiff's name to the check and gave it to the defendant bank for collection. The check was paid and H received the proceeds. Plaintiff, not being paid, sued the bank for the amount of the forged check. Defendant contended that the check having never been delivered to plaintiff, there was a want of privity between the parties. Judgment for defendant. Appeal.

Beard, J. 1. A check drawn in favor of a particular payee or order, is payable only to the actual payee, or upon his genuine indorsement. 2. Want of privity will not defeat the action, which rests not on privity, but on the ground that the lawful use and ownership of the property have been interfered with. Judgment reversed.

BANK v SHOOK (1897) 100 Tenn. 436.

Bill, to recover on note, against the makers. Defendants S, W, B, and F executed a note to complainant bank. Subsequently S desiring to be relieved, paid his proportion of the note, before it matured, and a credit was entered on the note

for this amount. Later W, who was vice-president and acting cashier of the bank and also a co-maker of the note, drew a line through S's name on the note, and told him that he was released from all liability thereon. This fact was known to the bank and all parties concerned and there was no dissent. The three remaining makers became insolvent and the note not being paid at maturity, the bank sued all four makers. S alone defended and pleaded his release. Judgment given against W, B and F, but denied as to S. Affirmed by Court of Chancery Appeals. Appeal by complainant.

Wilkes, J. 1. The bank, by its failure to disaffirm, ratified and confirmed the release, and the effect of its silence and non-action was to prejudice S and estop the bank. 2. The statute requiring releases to be in writing, has no application to this case. Merely erasing or canceling the signature of the maker, upon consideration, is effectual without other writing. 3. Payment before maturity imports a consideration for the release. Judgment affirmed.

Cited: 106 Tenn. 113.

DEADERICK v BANK (1897) 100 Tenn. 457.

Creditor's bill, to impose personal liability upon directors of a bank. The bill alleged that defendants, by their failure to exercise the proper degree of care in supervising the business of the bank, had made it possible, through the mismanagement of the cashier, for large losses to occur, whereby the bank became insolvent. Decree for complainant. Reversed by Court of Chancery Appeals. Appeal.

Beard, J. A creditor cannot, after the suspension of the corporation by insolvency, either in law or equity, set in motion litigation to hold its directors liable for losses attributable merely to inattention. Affirmed.

BANK v MEMPHIS (1898) 101 Tenn. 154.

Injunction, to restrain collection of taxes. The charter of plaintiff bank provided for a tax of one-half of 1 per cent on each share of stock subscribed: "which shall be in lieu of all other taxes." The Act of 1895 provided: "All personal property, whether belonging to individuals, corporations or firms, shall be taxed for state, county and municipal purposes." Sec. 10 provided: "No tax shall hereafter be assessed upon the capital stock of any bank, but the shareholders in such bank shall be assessed upon the market value of their shares therein." The constitution ordains that all property shall be taxed according to its value, to be ascertained in such manner as the legislature shall direct. Taxes were assessed on the complainant's capital stock. The Act of 1889 created a municipal privilege tax on banks. Defendant relied upon the constitution and res adjudicata. Decree for complainant. Appeal.

McAlister, J. 1. It was clearly within the power of the legislature to prescribe this method of taxing bank stock, and, until the system is changed, no ad valorem tax can be collected from the corporation on the capital stock. The mandate of the constitution is not self-executing, but depends for its enforcement upon appropriate legislation. 2. The plea of res adjudicata in tax cases is to be limited to the taxes actually in litigation, and is not conclusive in respect of taxes assessed for other and subsequent years. 3. The capital stock of this bank is not exempt from taxation, but is not liable in the present case because the legislature has made no provision for its assessment. 4. The three years' limitation under the Act of 1895, ch. 5, subsec. 7, being a general revenue law, cannot operate as a bar to the claim by the city for the privilege tax, for that is barred only by the six years' limitation prescribed by ch. 24, Act of 1885. Decree affirmed.

Cited: 107 Tenn. 69, 269.

BANK v PENLAND (1898) 101 Tenn. 445.

Bill, on promissory notes, against the maker. The payee discounted the notes at the complainant bank. At maturity, defendant declined to pay them, alleging that they were obtained by fraud of which complainant had notice. The notes were given for land; and complainant's cashier knew at the time they were discounted, that there was a lien on the property for unpaid purchase money. The cashier had full authority to make loans and discount paper. Decree for defendant. Appeal.

Wilkes, J. 1. As the cashier had full authority to make loans and discount paper, the bank cannot be heard to say that notice to the cashier was not notice

to the bank, in discounting the notes. 2. The bank was the bona fide innocent holder of these notes, and entitled to enforce their collection free of any equities arising between the original parties after it received them. Decree reversed.

JAMES CO. v BANK (1900) 105 Tenn. 1.

For failure to honor checks. Plaintiff had on deposit with defendant bank \$3,212. It drew checks aggregating a less sum, all of which were dishonored when presented, but paid by the defendant the day after. Plaintiff brought this action for \$75,000 damages. The declaration did not allege special damages or that the bank did not have a lien on the deposits, but did allege plaintiff was a trader. Defendant demurred to declaration, relying upon Shannon's Code, sec. 4468, providing "actions for slanderous words spoken shall be commenced within six months after the words spoken." Demurrer sustained. Plaintiff's offer to prove loss of credit of C, a customer and patron of the plaintiff, and to show by its secretary that the dishonor of the checks had impaired its credit, was rejected. Judgment for defendant. Appeal.

Beard, J. 1. The action was not in slander, and was not barred by the Statute of Limitations of six months. 2. The averment that "plaintiff is a trader" is sufficient, and it is entitled in such a case to substantial damages, though special damage is not alleged. 3. If such lien existed, it was a matter of defense to be brought forward by plea; there is no rule of pleading which required the plaintiff to negative it in its declaration. 4. The plaintiff cannot show that particular persons have ceased to deal with it, unless the loss of their custom is set out in the pleadings as special damage. 5. It was the duty of the jury, under proper instructions, to fix the damages. 6. The testimony of the plaintiff's secretary was competent. Judgment reversed.

CONTINENTAL NAT. BANK v FIRST NAT. BANK (1901) 108 Tenn. 374.

Fraud. Complainant bank alleged that defendant bank fraudulently induced it to discount paper by representing that certain parties to the paper were solvent, when they were insolvent. The issues of fact were tried by a jury. The court admitted evidence of the good business character and standing of D, one of the indorsers. To prove that defendant bank treated G and M, other parties on the paper, as solvent, the books of that bank were introduced, being proved by the cashier. A witness for defendant expressed the opinion that the suit was a black-mailing scheme, and complainant reintroduced it after defendant withdrew it, but was not allowed to contradict it. Verdict and decree for defendant. Appeal.

Wilkes, J. 1. Since the business integrity of D was involved, there was no error in admitting evidence of his good character and standing. 2. It was not necessary that the bookkeeper who made the entries should be examined as to their correctness. The cashier should be the person most competent to produce the books and vouch for their accuracy. 3. Before complainant can recover, it must show that it was fraudulently misled by the defendant to make the loan. 4. The opinion of the witness having been properly withdrawn by defendant, and the matter being collateral and immaterial, complainant cannot complain of its original introduction or of the refusal to allow him to contradict it. Decree affirmed.

TEXAS

COMMERCIAL BANK v JONES (1857) 18 Tex. 811.

Conversion. The plaintiff shipped and consigned to D \$11,000 to be placed on deposit in the defendant bank. D took the money to defendant and deposited it. Defendant knew whose money it was, and the purpose for which it was consigned to D. The money was placed to the personal credit of D and he was permitted to draw it out for his own use and to pay his personal indebtedness to defendant. Plaintiff, after learning that the money had been misapplied by D, but before learning that defendant was in any way a party to the fraud, received from D his note for the amount appropriated. Judgment for plaintiff. Appeal.

Wheeler, J. 1. D had no right or authority to deposit the money in his own name and on his own account, and the officers of the bank, knowing his want

of authority, had no right to receive and pass it to his credit on his own account. 2. The taking of D's notes and the attempt to obtain satisfaction from him, were not sufficient evidence of a ratification of his acts to release defendant. Judgment affirmed.

WILLIAMS v THE STATE (1859) 23 Tex. 264.

Information to recover penalties. The defendants were charged as an association of individuals and as officers and directors of the A Bank, an illegal bank, with issuing certain promissory notes to circulate as money in violation of the Act to Suppress Illegal Banking, passed March 20, 1848. The Congress of Coahuila and Texas in 1835, by decree No. 308, granted the privilege of establishing a bank at Brazos, to be called the A Bank, empowering defendant W to organize such bank. As soon as 3,000 shares were subscribed for, the officers could be elected. There were no express words of incorporation used. This authority to establish a bank was confirmed by the legislature in 1836. The bank was organized in 1847. Act of 1844 provided that all laws granting to an individual or corporation the authority to issue either bills or promissory notes to pass or circulate as money were abrogated. The constitution of the state provided that the rights of property and of action acquired under the republic should not be divested. And further that no corporate body should hereafter be created, renewed, or extended with banking privileges; and that the legislature should prohibit individuals from "issuing" bills and promissory notes to circulate as money. The Act of March 20, 1848, provided that any corporation, company or association of individuals, who should exercise banking privileges in the state, or who should issue any bill, check, promissory note or other paper in this state, to circulate as money, should be liable to a penalty. Judgment for plaintiff. Appeal.

Roberts, J. 1. If the officers were associated together as an organized banking company and acted together as officers in doing the thing complained of with a common interest, they were an "association of individuals." 2. When the liability arises out of a tort jointly committed, all need not be joined. 3. If a portion of the stockholders were not sued the remedy would be by plea in abatement showing who else should be joined. 4. If the defendants had not acquired a vested right as corporators previous to the Act of 1844, this privilege of issuing notes was abrogated. 5. If there were not 3,000 shares subscribed, the whole matter was in abeyance. If there was no meeting of the subscribers and no election of officers, there was no organization. W then could have no vested right as a subscriber or director up to 1847. Judgment affirmed.

Cited: 4 Tex. 219; 1 Wil. 488.

CITY BANK v FIRST NAT. BANK (1876) 45 Tex. 203.

Money paid by mistake. The T Insurance Co. issued to W a check on the plaintiff for \$20. This check was raised by W to \$2,000, and sold to J & Co. for cash. J & Co. indorsed it and sent it to the defendant for collection. It was presented by defendant to the plaintiff which paid it. The defendant then extended credit to J & Co. for the amount. The plaintiff notified defendant that the check had been raised, and demanded a return of the money which was refused. Judgment for plaintiff. Appeal.

Gould, J. 1. The indorsement of the check by J & Co. and by defendant amounted to a representation and warranty that it was genuine. 2. The plaintiff might well rely on the responsibility of defendant, and make payment when demanded, secure in being reimbursed if the check should prove to have been raised. 3. The payment being made under mistake, and to a party who substantially contracted that there was no such mistake, the plaintiff, being under no such obligation and not being otherwise estopped, is entitled to recover the money. Judgment affirmed.

Cited: 51 Tex. 6; 63 id. 612; 69 id. 607; 3 Wil. 247; 15 Tex. Civ. 190.

HARRISON v VINES (1876) 46 Tex. 15.

Injunction, to enjoin the defendant, a sheriff, from selling personal property of the National Bank of J, to collect the amount of a tax levied by the state against the stock of the bank. Plaintiff contended that the tax was illegal because it was not levied against the "shares," the personal property of each individual stockholder, but upon "stock" which he maintained was owned by the bank as

a corporate entity. It was also contended that the act authorizing this tax did not comply with the act of Congress, as it did not declare that the tax should not be greater than that assessed against other moneyed capital in the hands of individuals. Judgment for defendant. Appeal.

Moore, J. 1. The shares of stock in a national bank in the hands of the stockholders are liable to taxation by the states. 2. The words "share" and "stock" are used as of synonymous import. 3. The act of Congress authorizing the assessment does not contemplate nor require that the restrictions upon the power given to the state to levy such tax shall be embodied or set forth in the law making the assessment. Decree affirmed.

Cited: 47 Tex. 84; 51 id. 608; 53 id. 288; 59 id. 92; 67 id. 583; 1 Wil. 410.

JOCKUSCH v TOWSEY (1879) 51 Tex. 129.

To recover trust funds. The defendants were bankers. Four drafts were placed in their hands for collection by the plaintiff. Three days thereafter defendants suspended payment and later went through bankruptcy. The drafts had been forwarded to defendants' New York correspondent for collection and to apply proceeds on account. The court charged the jury that, if the drafts were received for collection and had been collected by defendants, this constituted such a fiduciary relation that their subsequent discharge in bankruptcy did not release them from liability. Judgment for plaintiff. Appeal.

Bonner, J. 1. After a collection is made, the bank becomes a simple contract debtor for the amount, less any commissions which may be charged. 2. If the party for whom the collection was made, was a regular depositor, the sum would be placed to his credit upon his regular deposit account, unless some peculiar usage or special instruction should demand a different course. 3. The facts and circumstances in regard to the receipt of the drafts and their subsequent collection and the suspension of the defendants as bankers raised the question for the jury as to whether there was a fiduciary relation between the parties. Judgment reversed.

CITY BANK v BOGEL (1879) 51 Tex. 355.

To recover taxes paid under protest. The plaintiff was situated in the City of Dallas. The legislature authorized the city to collect a tax upon real and personal property in its limits, or on any capital, money, or funds, used as a basis of operation for any trade or business carried on in the city. The city, by ordinance, levied a tax on "all property, real and personal," within its limits, and under this ordinance defendants collected a tax on the paid-in capital of the plaintiff, without reference to gains or losses. Judgment for defendants. Appeal.

Gould, A. J. The ordinances of the city were insufficient to authorize the tax on the capital of the plaintiff. The tax enacted was not the tax on property, authorized by the ordinances, but a tax on the paid-in capital of the bank, without reference to losses and gains. Judgment reversed.

WACO NAT. BANK v ROGERS (1879) 51 Tex. 606.

Injunction, to restrain defendant, a sheriff, from selling plaintiff's property for the payment of a tax levied against its stock. The Act of 1874 required the assessment to be made against the owners of the shares or stocks in a moneyed or banking association. Injunction denied. Error.

Bonner, J. It was not contemplated by the act that the shares or capital stock of the bank should be assessed against it in its corporate capacity, unless thus owned and held by it. Decree reversed.

Cited: 65 Tex. 339; 1 Wil. 410.

BAKER v KENNEDY (1880) 53 Tex. 200.

Trover, for the value of bonds. S deposited with W, a banker, \$1,500 in gold to meet a draft on S in favor of M. M refused to take the money. W turned the money over to the T Co. and received a receipt which was given "subject to the order of M, or whom it might concern, being amount of money deposited by S to pay S's draft in favor of M, which M has not called for." The T Co. gave defendant, one of its officers, a note for the amount, and the latter exchanged the note for three of the T Co.'s bonds. S assigned his rights in the bonds to plaintiff. Judgment for plaintiff. Appeal.

Bonner, J. 1. The \$1,500 deposited by S with W was a general and not a special deposit, and as such created between S and W simply the relation of creditor and debtor. 2. The action of the T Co., in placing the amount to the credit of defendant, if unauthorized, rendered the T Co. liable to the true owner, but did not create any privity of contract between S and defendant, or make such defendant such trustee of S as that any investments which might be made with the money would inure to the use and benefit of S. Judgment reversed.

BRADFORD v TAYLOR (1884) 61 Tex. 508.

Assumpsit, to recover from J and B money alleged to have been advanced to them as partners. By verified answer, B denied that a partnership existed between J and B at the time the money was alleged to have been advanced, and denied that any money was advanced to him or anybody under his authority. By verified supplemental petition the plaintiff alleged that the partnership of J and B had been dissolved, and that B had given J authority to settle the indebtedness of the firm, and that J, under such authority, had drawn five checks on the plaintiff, which had been paid. By an unverified supplemental answer B denied the authority of J to draw the check, as to bind him. On the trial the plaintiff offered the checks in evidence and proved that they had been paid. B objected to the checks being received in evidence. Verdict for plaintiff. Motion to set aside verdict. Denied. Judgment for plaintiff. Appeal.

Stayton, J. 1. The pleading of the plaintiff was sufficiently broad to authorize the admission in evidence of the five checks without proof that J was empowered to draw them and thereby bind B. 2. In the absence of a verified plea denying the authority of J, the checks are to be deemed, under the pleadings, as binding B as fully as they did J. 3. It was incumbent on the plaintiff to show that he had, at the request of J and B, so paid money on the checks pleaded, that the law would infer a promise by them to repay it. 4. No presumption arises, from the simple fact that such checks are paid, that the payment constituted a loan or payment to the drawers by way of accommodation. The presumption which would arise on such state of facts, unexplained, would be that the checks were paid out of deposits made by the drawers, or in satisfaction so far of a debt due to them by the bank. Judgment reversed.

Cited: 74 Tex. 15; 84 id. 363; 37 Tex. App. 204; 3 Tex. Civ. 11; 7 id. 131; 11 id. 340.

CITY NAT. BANK v STOUT (1884) 61 Tex. 567.

On deposit. Defendant offered to prove as a setoff that it had issued a draft on a New York bank to C, the plaintiff's son-in-law, at the request of the plaintiff, for which the plaintiff caused to be paid \$500. The draft as issued by the bank called for \$5,000 in the body of it, written out, and in the corner \$500 in figures. The draft was presented to the New York bank with the figures altered so that it called for \$5,000, and that sum was paid. The draft had been intended for C as a present and was forwarded to him by mail by defendant. The case came on for trial a year and a half after commenced. After the trial had commenced, defendant moved for a continuance to obtain a witness. Motion denied. Judgment for plaintiff. A month after the trial defendant moved for a statement of findings of fact and conclusions of law. Motion denied. Appeal.

Stayton, J. 1. A bill of exceptions should show whether an application for a continuance was a first or subsequent application, and when a witness has been subpoenaed so long before the application is made, it should clearly appear that due diligence had been used. 2. The plaintiff could become responsible to the defendant only by reason of a contract or tort. The mere fact that C was the son-in-law of plaintiff, to whom plaintiff intended to make a present of \$500, could not render the plaintiff liable to the defendant for an injury which resulted from its own want of due care and the fraud of another. 3. Applications for finding of facts should be made promptly, while the matter is fresh in the mind of the court, and, if made after an unreasonable delay, a refusal ought not to be reversed. Judgment affirmed.

Cited: 2 Wil. 678; 3 id. 24, 428.

ROUVANT v SAN ANTONIO NAT. BANK (1885) 63 Tex. 610.

On deposit. The defendant bank claimed that the money had been withdrawn by R, indorser on a draft purporting to have been drawn by plaintiff. Plaintiff

claimed the draft was a forgery. The bank then brought in R as a party. Plaintiff's name on the draft had been forged by N, with whom R was acquainted, and the draft made payable to R. R gave value for the draft, deposited it with the bank, and was not informed of its being a forgery for six weeks. R contended that the bank was guilty of laches in not sooner apprising him of the forgery. Plaintiff had judgment against the bank, and the latter had judgment against R. Appeal.

Watts, J. When the check was presented payable to and indorsed by R, the bank might well assume that there were no suspicious circumstances attending its execution, and no question as to the identity of the person who drew and signed it. At least, his receiving and indorsing the check would have a tendency to mislead, and throw the officers of the bank off their guard, and cause them to accept and pay the check without subjecting it to the same scrutiny as if it had been indorsed and presented by a stranger. Judgment affirmed.

NATIONAL BANK v BRUHN (1885) 64 Tex. 571.

On promissory note against makers. Defendant set up as a counterclaim that the plaintiff had negligently failed to sell collateral security deposited with it upon the maturity of the note, and by reason thereof the defendant was damaged by the decline of its value thereafter. The collateral had been deposited as security for a previous note of \$520 and a part of it sold to pay that note. There was no mention in the note sued upon that the deposit was collateral for it. It was objected that testimony to that effect varied the terms of the written contract. The note was payable at the rate of 2 per cent per month. The state laws permitted a contract for any rate of interest. Defendant counterclaimed for the penalty for usury provided in the National Banking Act. The court charged the jury that the note was tainted with usury. Judgment for defendant. Appeal.

Willie, C. J. 1. The defendant was entitled to have the value of such collaterals as were left after extinguishing the \$520 note, applied to the note sued on. 2. It does not vary a contract to secure it by additional collaterals. 3. National banks may charge as high a rate of interest as is allowed by the laws of the state or territory where the bank is located. Judgment reversed.

CITY BANK v WEISS (1887) 67 Tex. 331.

Money had and received. Plaintiff sent a draft, indorsed for collection, to the Bank of H. The latter sent it, indorsed for collection, to the defendant, a banker and a creditor of the Bank of H. Another draft similarly indorsed reached defendant. He collected the first draft. The Bank of H failed. He then collected the second draft. He applied the proceeds of the drafts to its debt to himself. Judgment for defendant. Appeal.

Gaines, J. A banker who has received a draft indorsed for collection from a correspondent who received it similarly indorsed from the owner, cannot collect the paper, appropriate the proceeds to a debt due him from his correspondent, and refuse to pay the owner. Judgment reversed.

Cited: 69 Tex. 495.

ISLAND CITY SAV. BANK v SACHTLEBEN (1887) 67 Tex. 420.

On deposit. Plaintiff was a depositor in a savings bank. It became insolvent. The rest of its creditors agreed to and did receive 74 per cent of their demands in full discharge thereof. Plaintiff refused to enter into the composition. The bank transferred all its assets to what purported to be a new and distinct bank, on the latter's agreeing to assume the other's obligations. This new corporation assumed the name of the old bank, used its seal, carried on business in its building, and had several of the same officers. Plaintiff sued it for the amount of his deposit in the old bank. Judgment for plaintiff. Appeal.

Gaines, J. 1. There is no rule of law to prevent the stockholders of an insolvent corporation from transferring their interest to others who are willing and able to put it upon a solvent footing, and to enable it to carry on the business for which it was originally organized. That this was done in fact, the evidence sufficiently shows. 2. There being a mere change of membership, and not a change of the corporation itself, it follows that the obligations existing against it before its insolvency continued to exist against it when reorganized. Judgment affirmed.

Cited: 70 Tex. 385; 92 id. 491.

ROSENBERG v WEEKES (1887) 67 Tex. 578.

Injunction, to restrain the collection of a tax. Complainants were shareholders in a national bank. The defendant, a tax collector, was about to sell the bank's real property, in satisfaction of taxes assessed on complainants' shares. These taxes were estimated by including the value of the bank's real property as a basis. Defendant had not placed the assessment upon the proper roll. Complainants refused to pay any part of the tax. The National Banking Law required that the value of the real estate and other taxable property of national banks should be deducted from the aggregate value of their shares, and that the state tax upon these shares should not be at a greater rate than upon other moneyed capital in the hands of individual citizens of the state. These restrictions were not embodied in the state laws. The state laws exempted certain forms of capital from taxation on ground of public policy. Judgment for defendant. Appeal.

Willie, C. J. 1. The act of Congress does not require that the restrictions set forth in the act shall be embodied in the state law of taxation. 2. National bank shares are not assessed at a greater rate than other moneyed capital in the hands of individual citizens. 3. The real estate of national banks could not be taxed for 1879 under the R. S. of Texas. The tax upon the national bank shares was valid. 4. The fact that part of the whole assessment was invalid, and that it was not placed upon the proper roll in a proper manner, does not vitiate it. 5. The shareholders should have paid or offered to pay so much thereof as was legally due on their shares, before coming into equity to enjoin the collection of the entire assessment. Judgment affirmed.

Cited: 75 Tex. 561; 9 id. 374.

GILLESPIE v GASTON (1887) 67 Tex. 599.

Injunction, to restrain the collection of taxes. The complainants owned shares in a state bank. They did not render them for taxation. Defendant, the tax collector, was about to collect taxes thereon for the year 1883. Art. 4684, R. S. of Texas, required banks to list all their property, of whatever nature, for taxation. Art. 4682, provided that no person should be required to list for taxation any share in a corporation that is required to list its capital and property for taxation. Decree for complainants. Appeal.

Stayton, J. To tax the shares of a stockholder in a corporation when all the property which gives value to shares of stock is taxed against the corporation, would be double taxation. Decree affirmed.

WEINSTEIN v NATIONAL BANK (1887) 69 Tex. 38.

To recover deposits, paid out on forged checks. Plaintiff was a depositor in the defendant for eight months. Defendant balanced his account and returned the paid checks at the end of the third month and also at the middle of the eighth month. After the last balance, plaintiff claimed to have discovered that part of the checks, some paid before and some after the first balance, were forgeries. The defendant in its original answer pleaded that plaintiff, by reason of his negligence in not sooner discovering the forgeries, was estopped, but did not allege that it had been injured by the negligence. Plaintiff excepted. Sustained. Defendant then amended to the effect that by the negligence, it was debarred the opportunity of protecting itself. General demurrer. Overruled. Judgment for defendant. Appeal.

Gaines, J. 1. The exception to the original answer was well taken. The amended answer was good on general demurrer. 2. It is the duty of a depositor to know whether an account made to him by the bank, is or is not correct, and to promptly report a forgery when detected. Should he negligently fail to make the examination and consequent discovery, when he could have discovered it, it is as if he had expressly admitted the genuineness of the checks, and he will not be permitted to deny the fact, provided the bank be prejudiced by his failure. Judgment affirmed.

Cited: 92 Tex. 439.

STOUT v ENNIS NAT. BANK (1887) 69 Tex. 384.

To recover a penalty. Plaintiffs, a firm, gave notes to defendant, a national bank. Separate notes were given for the interest, which was usurious; and pay-

ments were made thereon. National banks were prohibited from taking usury by Act of Congress, which provided that one paying usurious interest might recover twice the amount thereof. Defendant made a settlement with one of the partners in the absence of the other two. By this settlement plaintiffs were charged with the actual amount loaned and legal interest and credited with all payments made both on account of the notes given for principal and on account of those given for interest; plaintiff then gave defendant a time note for the balance and in consideration of the extension of time so procured, gave defendant a release of any action for the penalty. Defendant had no knowledge of any intent on the part of the partner giving the release to defraud his partners, though it was in fact given without their consent. Judgment for defendant. Appeal.

Stayton, A. J. 1. Though payments made on account of a usurious contract will be applied to the amount legally due where no intention to the contrary is expressed and so save one from the penalty for taking usury, the usurious interest must be regarded as actually paid where payments are specifically appropriated to such interest. 2. As the release was given for a valid consideration and apparently within the scope of the partner's authority and as defendant had no knowledge of any fraudulent intent on the part of the releasing partner, plaintiffs are bound by it, even though it may have been executed with fraudulent intent. Judgment affirmed.

CONTINENTAL NAT. BANK v WEEMS (1888) 69 Tex. 489.

Insolvency proceedings. Claim for preference. Complainant was the correspondent of C Bank. The latter was accustomed to send notes to complainant for discount, which before maturity would be sent back to C Bank "for collection and returns," under agreement that the proceeds should be preserved by C Bank as complainant's property. Shortly before the failure, C Bank had received notes from complainant "for collection and returns." Some of them were collected, the amount credited to complainant, and the proceeds mingled with the general funds of C Bank. C Bank, from the time of the collections until the failure, had a greater amount of cash in its vaults than the proceeds of these notes. For others C Bank had taken renewals which it had discounted with other banks, the proceeds being applied to the payment of its debts. Plaintiff claimed to be entitled to a preference for the full amount of these notes. Defendant resisted the claim and set up the following as a counterclaim: C Bank before its failure sent notes to complainant for discount. Complainant refused to discount the notes, but honored C Bank's drafts drawn against the supposed proceeds for \$5,000. Complainant collected the notes and claimed the right to apply the proceeds to its general balance against C Bank. Decree, disallowing the claim for preference, and giving judgment against complainant for the amount of the notes retained, less \$5,000. Appeal.

Gaines, A. J. 1. The agreement of C Bank to preserve and return the proceeds of the notes as complainant's property, made it a trustee of the amount collected. 2. Though the identical money so received cannot be traced, the cash which came into defendant's hands is representative thereof and impressed with the trust character, as the cash assets of C Bank never fell below the amount of the trust fund. 3. As the proceeds of the renewals were expended in payment of C Bank's debts and cannot be traced into specific property, complainant has no lien on the general assets for the amount. 4. To create a banker's lien there must be a contract for that purpose, either express or implied. 5. Complainant having refused the paper had no right to hold it, and has no lien thereon, except for drafts paid after its receipt. Decree reversed.

Cited: 3 Wil. 437.

SEALE v BAKER (1888) 70 Tex. 283.

Fraud. Defendants were directors of the H Bank. The petition alleged that defendants represented that the bank was solvent and reliable, which was false to the knowledge of defendants, or was within the means of their knowledge. That plaintiff, by reason of such representations, and believing them to be true, was induced to deposit money in said bank, which money he lost. Demurrer. Sustained. Appeal.

Acker, J. The directors of a banking corporation are personally liable at the suit of an individual depositor for damages sustained by reason of the insolvency of the corporation, when the depositor is induced to place money in the hands

of the corporation solely by representations of solvency made to the general public by the directors, who ought to have known—and by the use of ordinary care, such as it was their duty to have exercised, might have known—that such representations were false. Judgment reversed.

Cited: 80 Tex. 311, 359; 81 id. 413; 84 id. 119.

CITY NAT. BANK v MARTIN (1888) 70 Tex. 643.

To collect proceeds of note. Plaintiff, a customer of defendant, made a deposit. Defendant's teller, N, received the money and was asked by plaintiff to assist him in making a loan thereof. Thereafter N informed plaintiff the loan was made and offered him a note payable to N and indorsed in blank. Plaintiff requested N to hold it for collection, the understanding being that N was acting as agent for the bank. N collected the proceeds and appropriated them to his own use. Evidence was admitted of declarations of N while in possession of the note, to the effect that plaintiff was the owner. N was dead when this action was brought. Defendant contended that N had no authority to receive notes for collection. Judgment for plaintiff. Appeal.

Matthie, P. J. 1. N being dead, the declarations were admissible as declarations against interest. 2. Loaning money for others is not part of the business of a bank. 3. The collection of money for others is part of a regular business of banks. 4. If a bank does not wish the public to deal with any particular one of its officers at the regular place of business, in a particular line of that business, it should so notify the public in some effectual way. 5. As N was acting within the apparent scope of his authority as defendant's agent, when he received payment, defendant is chargeable with his knowledge of plaintiff's ownership. Judgment affirmed.

SMITH v TRADERS NAT. BANK (1889) 74 Tex. 457.

On note against makers. S, one of defendants, alleged that he signed as maker for the accommodation of the payee; that plaintiff, with knowledge of this fact, at the time the note was made, agreed to hold certain stock, belonging to the payee, as collateral for this note; that plaintiff materially altered this agreement without S's knowledge or consent, and disposed of the stock under the new agreement. On cross examination, plaintiff's cashier was questioned concerning statements made by him in the trial of another action, which statements contradicted his present testimony. Objection sustained. The court charged that if the agreement alleged was made and plaintiff failed to hold the stock as collateral S was not liable; but refused to charge that if the agreement was made, and thereafter altered without S's consent, and plaintiff sold or attempted to sell the stock in accordance with the new agreement, S was not liable. Judgment for plaintiff against S. Appeal by S.

Hobby, J. 1. A witness may be discredited by showing that he gave in another action testimony contradictory to his present testimony. 2. Alteration of the agreement in a material particular would have released S. 3. As the jury found that no agreement was made, failure to submit the issue as to alteration was immaterial and not ground for reversal. Judgment reversed.

Cited: 82 Tex. 211.

ENGELKE v SCHLENKER (1890) 75 Tex. 559.

Injunction to restrain collection of taxes. Plaintiffs held stock in a national bank. The shares were assessed at their par value less the value of the real estate. Their par value was not greater than their market value. Plaintiffs introduced in evidence the assessments of a few persons, and of a private bank, and proved that in each case the property was assessed at about one-half its true value. Upon this evidence they contended that it was the custom to assess property at one-half its value. The Act of March 31, 1885, required national banks to render their real estate for taxation and to show also the number and amount of their shares for assessment, "each share only for the difference between its actual cash value and proportionate amount per share at which its real estate is assessed." Plaintiffs contended that this amounted to discrimination between national banks and private bankers, as the latter could deduct the amount of deposit from their taxable assets. Judgment for defendant. Appeal.

Henry, A. J. 1. The evidence offered was insufficient to establish a custom.

2. The real estate of the corporation is intended to be taxed in its own name, and its personal property in the names of its shareholders; the general deposits are debts against the bank. Judgment affirmed.

BARRETT v HENRIETTA NAT. BANK (1890) 78 Tex. 222.

Trespass to try title. A was receiver of defendant, among whose assets was a promissory note, secured by trust deed. B had a mortgage on the same land to secure a much larger debt. A, without any express authority placed defendant's claims in plaintiff's hands and contracted to give him one-half of any land he might secure for defendant; in this contract the right of E Bank to an interest in the mortgaged lands, equal to that of defendant, was recognized. It was further provided that no compromise of claim should be made without the consent of plaintiff and defendant. Plaintiff attempted to sell the land, but was restrained by an injunction issued to B. B subsequently foreclosed his lien, and M purchased at the foreclosure sale. Defendant subsequently sued M and accepted a conveyance of part of the mortgaged premises in settlement of its claim. Plaintiff brought this action to establish his title under the contract. E Bank intervened, but offered no proof of its claim except the recital in the contract between A and plaintiff. Judgment for defendant. Appeal.

Stayton, C. J. 1. The law regulating the powers of receivers does not recognize the existence of such a power as this receiver has attempted to exercise. 2. Where a receiver is acting beyond the scope of his authority, his declarations will not bind the corporation he represents. Judgment affirmed.

PANHANDLE NAT. BANK v EMERY (1890) 78 Tex. 498.

To recover the amount of a note and to foreclose a mortgage. A cattle company gave plaintiff a note, and a mortgage upon 1,500 cattle to secure it. The company went out of business. The mortgaged cattle and 6,500 other cattle were apportioned to one of the members, S, upon his promising to pay plaintiff's note. S, being insolvent, and indebted to defendant bank, transferred the cattle to defendant through its president, who had actual notice of the foregoing facts. The president, as a part of the transaction, paid another of the company's creditors, who had, however, no special claim upon these cattle. Judgment for plaintiff. Appeal.

Henry, A. J. 1. The creditors of the insolvent company had an equitable claim upon its assets, which would follow them into the hands of its stockholders and others, who held them with notice, after they had been partitioned and appropriated. 2. It did not require a vote of the board of directors to invest the president with authority to bind the bank. 3. When defendant took possession of the property through its president, and with the full knowledge possessed by him of the equities with which the property was charged, and proceeded to convert the property to its own use, it thereby became liable, to the extent of the value of the property, for the payment of the debts of the cattle corporation. 4. The discharge of a debt of the company did not render defendant a creditor at the expense of plaintiff. Judgment affirmed.

GRIFFIN v HEARD (1890) 78 Tex. 607.

Injunction, to restrain collection of taxes. Plaintiffs, as partners, were bankers. They rendered statements of their assets for 1887 and 1888 in the form required by the Act of April 14, 1883. Neither statement showed either money or credits subject to taxation. The assessor, however, assessed them upon the sum of \$46,976, consisting of money and credits for each year. Plaintiffs' statements showed that they had on deposit \$49,000 in other banks, \$42,000 of which they claimed to be in treasury notes, exempt from taxation. The statute provided that the amount due on deposits should be deducted from the taxable assets. Defendant contended that plaintiffs should deduct all treasury notes placed in their hands by depositors from the amount of their deposits before subtracting the latter from the sum of their cash and credits, and, as plaintiffs failed to show what treasury notes were received from depositors, no amount should be deducted as "due on deposit." Judgment for plaintiffs. Appeal.

Gaines, A. J. 1. It was proper to deduct the whole amount of deposits. 2. Money placed by one banker with another, subject to draft, creates the relation of

debtor and creditor, and is subject to taxation. It can no longer be treated as treasury notes belonging to the depositor, even though the deposit was made in that currency. 3. The treasury notes on hand, having been received in due course of business, remain non-taxable, although one purpose of selecting and retaining them was to escape taxation on that amount. Judgment reversed.

BROWN v THOMPSON (1890) 79 Tex. 58.

On an accommodation note, and to be held a prior lienor. Defendant B sold to defendant C, a tract of land. C executed his note to B, for part of the purchase price. The note expressed that it was given for the purchase price and provided for a vendor's lien. Neither the note nor the title bond was recorded. B indorsed the note without recourse and delivered it to K for his accommodation. The note was assigned by K to plaintiffs before maturity, without notice of any defense, as collateral security for a pre-existing indebtedness. B and C rescinded the contract of sale, but subsequently B reconveyed the land to C, in consideration of five notes. These notes were delivered by B to defendant as collateral security. The deed reserved a vendor's lien for the payment of these notes. It was not proven that defendant had notice of plaintiffs' lien. Plaintiffs contended that defendant held other collateral more than sufficient to satisfy the debt due it, and that the assets should be marshaled. Plaintiffs attempted to prove this by A, defendant's president. His testimony was equivocal, he disclaimed any accurate knowledge of defendant's affairs. Judgment for plaintiffs, with a foreclosure of their vendor's lien. Appeal.

Henry, A. J. 1. Plaintiffs were bona fide holders of the accommodation paper. 2. Defendant has a superior lien on the land, as plaintiffs' note was unrecorded, though entitled to registration. 3. Although A was president of the bank, he was not the bank, nor the defendant. He was only a witness, and the plaintiff must prove his cause of action by what the witnesses testify, and not by what they omit, or refuse to testify. Judgment reversed.

Cited: 87 Tex. 183.

GIDDINGS v BAKER (1891) 80 Tex. 308.

False representations. Plaintiff had a deposit with H Bank, of which defendant B was president, and the other defendants directors. Demurrers of the other defendants were sustained, but that of B overruled. Hearing a rumor that the bank was not secure, plaintiff made inquiries of B, who informed him that it was perfectly solvent. The bank shortly thereafter failed. The statements were proven to be untrue when made. The court charged that plaintiff could not recover, unless B made the representations knowing them to be false and with intent to deceive plaintiff. Judgment for B. Appeal.

Gaines, A. J. 1. Reversal of judgment as to defendants other than B must be ordered, on the authority of Seale v Baker, 70 Tex. 283. 2. This does not necessitate a reversal as to B, as in an action of tort, recovery against one defendant does not depend on recovery against another. 3. It was B's duty, as principal officer and manager of the corporation, to use reasonable diligence to acquaint himself with the affairs of the bank, and if he could have ascertained its true condition and failed to do so, he was liable for any false representation with regard to its condition, although made in good faith, which induced plaintiff to continue dealing with the bank. Judgment reversed.

Cited: 92 Tex. 580.

BAKER v ASHE (1891) 80 Tex. 356.

False representations. Plaintiff alleged that he had been induced to deposit money in a bank by false representations as to its solvency made to him by defendants, its directors, and that he had lost it by the bank's becoming insolvent. C testified as to representations made to him by defendant, but not communicated to plaintiff. A commercial agency report was admitted to show the rating of the bank when plaintiff, with knowledge thereof, became a depositor. He was not a subscriber to the agency; and the report was compiled from a number of sources. The court charged that if the jury found for plaintiff, the measure of his damages was the amount of the principal of his debt, less the dividends paid him. The court stated that plaintiff was entitled to recover whether he had or had not been induced to act upon the false representations; and again, that he could re-

cover, without regard to whether the representations were false or not. Elsewhere he gave correct instructions on these points. Judgment for plaintiff. Appeal.

Gaines, A. J. 1. It was error to admit G's testimony. 2. The report of the commercial agency was inadmissible as it was not the declaration of defendants, and not made for plaintiff's information. 3. Where collections have been made on a claim, damages are measured by deducting from the deposits lost, the payments, and the value of the claim against the bank at the time of trial. Interest should be allowed. 4. A charge which instructs the jury to find for the plaintiff in the event they find certain facts proved by the evidence, and omits one of the facts essential to a recovery, is erroneous, and is not cured by a contradictory instruction given at the request of the other party which makes no direct reference to the erroneous charge. Judgment reversed.

HENRIETTA NAT. BANK v STATE NAT. BANK (1891) 80 Tex. 648.

On check, against drawee. A check drawn by I on defendant for \$1,800, was presented to plaintiff. Plaintiff telegraphed, "Will you pay I's check for \$1,800, on presentation?" Defendant's cashier answered by telegraph, "Yes; will pay the I check." Plaintiff thereupon discounted it. Defendant subsequently refused to pay the check. It was exhibited at the trial and showed a mark drawn through the word "hundred" in the body, but the margin showed the characters and figures "\$1,800.00." Evidence was introduced to show that the mark was not intended for an erasure. Judgment for plaintiff. Appeal.

Gaines, A. J. 1. The promise was sufficiently definite to support an action for the refusal to pay the check. 2. It was competent to prove that the mark was not intended for an erasure. 3. The mark did not relieve defendants from the duty of paying the check, though it would have justified a delay of a reasonable time to make inquiry as to its significance. Judgment affirmed.

FIRST NAT. BANK v GREENVILLE NAT. BANK (1892) 84 Tex. 40.

On certificate of deposit. Plaintiff was indorsee of the following instrument: "\$2,180. Thomas Wilkinson has deposited in this bank twenty-one hundred and eighty dollars in 'cks.' payable to the order of himself, on the return of this certificate properly indorsed one day after date." It was signed by defendant's cashier. "Cks." by admission, meant "checks." It was not shown that the checks had been collected. Plaintiff was entitled to recover if the instrument was negotiable. Judgment for plaintiff. Appeal.

Stayton, C. J. Certificates of deposit are negotiable. 2. To give an instrument the character of a certificate of deposit, the deposit on which it is based must be one of money. 3. In determining whether paper is negotiable or not, the paper alone can be looked to. Judgment reversed.

GRESHAM v ISLAND CITY SAV. BANK (1893) 2 Tex. Civ. App. 52.

To compel transfer of stock. Plaintiff's assignors, C & S, were stockholders in defendant when it suspended payments. After the bank's failure, in accordance with a resolution to which three-fourths of the stockholders assented, all the stockholders except C and S, transferred their stock to H and others, who paid the debts by the issuance of new stock, and provided \$100,000 to carry on the business of the bank under a new organization. C & S did not consent to the resolution. 1,000 shares of new stock were issued, which was subscribed for by the creditors and old stockholders. The property was turned over to the new subscribers, who took control treating the new stock as the only stock entitled to recognition. Thereafter the directors made an assessment of \$100 per share on the old stock and declared that if it were not paid in 30 days, the stock would be forfeited. C & S paid no attention to this action, although notified. Their stock was fully paid. They transferred their stock in the old bank to plaintiff, who demanded that the transfer be made upon the defendant's books, which was refused. The holders of the new stock intervened setting up these proceedings in bar. Plaintiff's exception to their petition was overruled. Judgment for plaintiff for the highest market value of the shares between the conversion of the stock and the trial. Appeal by plaintiff.

Williams, A. J. 1. The action of the stockholders and directors did not cancel the stock held by C & S, as without their consent, their shares could not be thus forfeited. 2. Having paid par value, their stock was not subject to further assess-

ment for any purpose. 3. The existence of the corporation with the powers conferred by the charter continued notwithstanding the insolvency of the bank; and the attempt of a majority to take away the legal rights of individual stockholders was beyond the power of the corporation. 4. Plaintiff acquired only such rights as his assignors had, and their delay in objecting to the unauthorized acts of defendant bar plaintiff's right in equity to be reinstated, especially as he can be compensated by money damages for the conversion of his stock. 5. The measure of damages is the value of the stock at the time of conversion with interest. 6. The time of conversion was the date of plaintiff's demand for recognition. 7. Plaintiff's exception to the plea of intervention should have been sustained in the absence of allegations that the defense would not be properly conducted by defendant. Judgment reversed.

CAMERON v FIRST NAT. BANK (1893) 4 Tex. Civ. App. 309.

On notes and overdrafts. Plaintiff was a member of a joint stock company, conducting a milling business of which defendants were the other stockholders. Two of the four directors were also officers of plaintiff, and G, plaintiff's vice-president, was general manager of the company. The power to borrow money was lodged exclusively in the board of directors. Plaintiff loaned money to the company, G paying the drafts. Part of the amount was borrowed without any affirmative action by the board. This action was brought to recover from defendants the pro rata parts of that debt. Judgment for plaintiff for full amount. Appeal.

Stephens, A. J. 1. The defense that a national bank has no power to become a partner in the milling business is inapplicable, as the bank sues as a creditor and not as a partner for profits. 2. The fact that G was agent, both of the milling company and of plaintiff, did not make his acts as manager of the former the acts of plaintiff. 3. The liability of a shareholder in a joint stock company is that of a partner. 4. Plaintiff is charged with notice of the limitation, on the power to borrow money. 5. It is also charged with G's knowledge of the failure of the board to approve certain loans, as G was acting as agent for plaintiff also in the transaction. Judgment reversed.

Cited: 18 Tex. Civ. App. 245.

WESTERN BRASS CO. v MAVERICK (1893) 4 Tex. Civ. App. 535.

To recover money, alleged to have been collected. Plaintiff sent to defendant, a banker, for collection, a draft on K. Defendant's regular collector took the draft to K, who gave him a check on defendant. The collector stamped the draft "paid" and surrendered it to K. The check was worthless, as K had no deposit with defendant. K refused to return the draft upon demand. There was no agreement between the collector and K, that the check was taken in payment of the draft. The collector was forbidden to accept anything but money in payment of drafts. Defendant refused to honor K's check, or to pay the draft. Judgment for defendant. Appeal.

Fly, A. J. 1. An agent must act within the scope of his powers in order to bind the principal. 2. An agent sent out to make collections, has no authority, in the absence of instructions to accept anything but money, and payment in anything else will not bind the principal or operate to discharge the debt. 3. If the check was not taken in payment of the debt, plaintiff is in the same position as if the check had not been taken, and has not lost his right of action against K by defendant's acts. Affirmed.

HUGGINS v CITIZENS NAT. BANK (1894) 6 Tex. Civ. App. 33.

On promissory note, against maker. The note was tainted with usury and payments made by defendants had, with their consent, been applied to the usurious interest. Defendants claim that such payments should be applied on the principal, or at least to be entitled to set off the amount of M. Judgment for plaintiff without such deduction. Appeal.

Stephens, A. J. Payment of usurious interest to a national bank, cannot be pleaded as a setoff, or counterclaim, against the principal of the note. Judgment affirmed.

ADAIR v ROBINSON (1894) 6 Tex. Civ. App. 275.

Injunction to restrain collection of taxes. Plaintiffs were assessed on shares of national bank stock. The capital stock of the bank was \$50,000. These shares were returned for taxation for 1891, at the value of \$27,884. The bank held \$33,970, in non-taxable securities, on January 1, 1891. The stockholders were summoned to show cause why they should not be assessed on the par value. The president of the bank asked the board of equalization to allow credit for the non-taxable securities, in assessing the shares, or that the assessment be allowed to remain as it was on the assessor's roll, \$27,884. The board fixed the assessment at \$100 par value on each share, refusing to make any deduction. Plaintiffs contended that the assessment was unconstitutional and illegal. Judgment for plaintiffs. Appeal.

Pleasants, A. J. 1. Taxes are equal and uniform within the meaning of the constitution, where no person or class of persons in the taxing district is taxed at a different rate, than are other persons in the same district, upon the same value, or the same thing, and the objects of taxation are the same by whomever owned or wherever they be. 2. Tax upon stock of an incorporated bank is not the same as tax upon the capital of a private banker. 3. The act of Congress authorizes each state to tax, as any other personal property owned by its citizens, the shares of each stockholder of any national bank located within its territory; and it is not the right of the shareholders of such bank to deduct from the value of their shares the sums of money invested by the bank in non-taxable securities. Judgment reversed.

WHITTLE v HIDE & LEATHER NAT. BANK (1894) 7 Tex. Civ. App. 616.

On draft. Defendants, being indebted to M & Co., sent them their accepted draft, with the name of the drawer left blank. M & Co. subsequently drew a second draft on plaintiff, for the same debt. This was refused, and notice written across the face that the previous draft had been sent. In the meantime, defendants had ordered a new bill of goods from M & Co., and this bill was added to a new draft sent by M & Co. Without any explanation, defendants signed the new draft for the amount of the original debt and the added bill. It was negotiated by M & Co. in the open market. M & Co. thereafter signed the original draft as drawers, and plaintiff purchased it in the open market without notice of the fraud. Defendants contended that there was a material alteration in the draft. Judgment for plaintiff. Appeal.

Collard, A. J. 1. The acceptors, by intrusting a draft to their creditors, with name of the drawers left blank, impliedly authorized them to fill in the blank. 2. The instrument coming into the hands of the plaintiff for value, before maturity, and without notice of any irregularity, constituted it a bona fide holder. Judgment affirmed.

FARMERS & MERCHANTS BANK v SLAYDEN (1894) 8 Tex. Civ. App. 63.

To recover a deposit. B & Co. were indebted to defendant. They bought cotton, and procured from defendant the money to pay for it, giving the warehouse receipts as security. B & Co. sold the cotton to plaintiffs, with defendant's knowledge and consent. Neither defendant nor B & Co. notified plaintiffs that defendant claimed a lien, and they had no notice of the fact. Plaintiffs drew their drafts on their foreign customers with bills of lading attached, and caused them to be placed with defendants for collection. Plaintiffs claimed that they were to be credited with the proceeds, but defendant claimed that the proceeds were to be credited to B & Co. Plaintiffs drew against the proceeds on local checks to pay the purchase price to B & Co., and claimed the balance. Plaintiff was allowed to prove a general custom of banks to pass the exchange drawn by shippers of cotton to their credit, and allow them to pay for the cotton by local checks. The court charged that defendant's lien on the cotton was immaterial. Defendant retained the balance of the proceeds of the drafts against its general balance against B & Co., who were insolvent. Judgment for plaintiff. Appeal.

Lightfoot, C. J. 1. The presumption is that when the plaintiffs placed the drafts in the bank, they were deposited to their own credit; and the burden of showing the contrary was on defendant. 2. As plaintiffs had no notice of defendant's lien, it had no effect as against them and was immaterial. 3. Proof of the

general custom of banks to give credit, as contended by plaintiff, was not only admissible, but conclusive, against the right of the bank to claim the profits of plaintiffs in their sale. Judgment affirmed.

HUNT v SMART (1894) 8 Tex. Civ. App. 425.

On promissory note. Plaintiff sent the note in question to a national bank for collection. It was collected by the bank, but the proceeds were not remitted. The money was mingled with the general funds of the bank, and when defendant became receiver more than the amount collected came into his hands. Plaintiff filed his claim with defendant, without indicating any claim to a preference. The Comptroller of the Currency made an assessment on the stock, the claim of plaintiff being considered in making the assessment. This assessment, if paid, would have been sufficient to meet all claims, but the principal stockholder was insolvent. Subsequently, plaintiff filed this suit claiming a preference. Judgment for plaintiff. Appeal.

James, C. J. 1. There is nothing in the National Banking Act that would debar a creditor holding a claim entitled to preferred payment from asserting his preference, after presenting his claim as a general creditor. 2. The general creditors have not lost, nor been placed at a disadvantage with regard to, any right they had, through plaintiff's conduct. The elements of estoppel are wanting. Judgment affirmed.

BECKHAM v SHACKELFORD (1894) 8 Tex. Civ. App. 660.

On promissory note. Defendants, S & P, made the note in question and had it discounted by a national bank. Plaintiff was appointed receiver of the bank. After its failure, defendant P procured from D a transfer of a certificate of deposit issued by the bank, and represented to plaintiff that he was the owner. Plaintiff allowed setoff sufficient to pay the note and gave P a receiver's certificate for the balance. Plaintiff surrendered the note to P, who delivered it to S. Under U. S. R. S. sec. 5234, the receiver was required to collect all debts, but could not sell or compound debts, without an order of court. Sec. 5242 declared that any application of the assets, with a view to the preference of one creditor to another, after the commission of an act of insolvency, was null and void. P contended that he was only a surety for S, and had had a lien on some lands owned by S, which he released on receiving the note from plaintiff, and that he would have no protection if a judgment was obtained against him. Judgment for defendant. Appeal.

James, C. J. 1. The suspension of the bank was an act of insolvency within the meaning of the act. 2. The receiver had no power to permit the setoff knowingly or otherwise. 3. Defendants were charged with knowledge of this want of power in the receiver and defendant P cannot assert against the estate of the bank that he was misled into parting with his lien. Judgment reversed.

DIAMOND MILL CO. v GROESBECK NAT. BANK (1894) 9 Tex. Civ. App. 31.

Negligence, in collection of draft. Plaintiff sent to defendant, for collection, a draft on T. Defendant wrote the plaintiff that the draft would be collected the next day. Plaintiff could have collected the draft itself in the meantime, but relied on defendant's promise. At the end of a month T died, and his estate was insolvent. Defendant then returned the draft to plaintiff unpaid, and plaintiff was unable to collect. Letters written by plaintiff to T's firm after the return of the draft, tending to show efforts to collect, were excluded. The court refused to submit the issue of negligence to the jury. Judgment for defendant. Appeal.

Lightfoot, C. J. 1. In accepting a collection from a customer, the bank assumes an agency, which requires the exercise of reasonable care and diligence in the discharge of the assumed duties, and if it neglects such duties, and the principal thereby incurs loss, the bank is liable. 2. The issue whether the bank was negligent in the performance of its duty should have been submitted to the jury. 3. The letters tended to show diligence on the part of plaintiff to collect the draft after its return, and should have been admitted. Judgment reversed.

FIRST NAT. BANK v DEMORSE (1894) 26 S. W. Rep. 417.

To recover dividends. Defendant was a national bank of which plaintiff was a stockholder. Defendant applied dividends on plaintiff's stock to the payment of

certain promissory notes, upon which he was indorser or guarantor for value. The maker of the first note was solvent and within the jurisdiction of the court; but no effort had been made by defendant to collect this note. The maker of the second note was insolvent and in the state penitentiary; at maturity demand was made upon plaintiff. The maker of the third note was a non-resident beyond the court's jurisdiction; moreover, plaintiff accepted this note after it had been charged against the dividends. For the fourth note plaintiff had realized in full on collateral, and the maker was a non-resident and insolvent. Plaintiff contended that defendant could not proceed against him until the remedies against the maker had been exhausted. Judgment for plaintiff. Appeal.

Lightfoot, C. J. 1. When the maker of a note is insolvent or non-resident, protest and notice, or suit at the first term, are not necessary to hold the indorser, but the debt becomes an original liability against such indorser. 2. A guarantor cannot escape liability unless he shows that the creditor has by his laches, caused such guarantor to lose a remedy against the original debtor, by which he could have saved himself harmless. 3. A bank has a right to pay a debt out of the money in its possession to the general credit of the debtor, whether derived from dividends or any other source. 4. The defendant could offset all but the first note. Judgment reformed.

BROWN v FARMERS NAT. BANK (1895) 88 Tex. 265.

On guaranty, and to establish a preferred lien. Defendant E was president, and a director, of plaintiff. Plaintiff made advances to W, an infant nephew of E, who executed to it his promissory notes, which stipulated for attorneys fees and conventional interest. At the time plaintiff made these loans, W was heavily indebted to E, but the latter promised not to attempt to enforce the collection of his debt, until plaintiff should be fully repaid. He also advised plaintiff to make the loan, and agreed orally to be responsible for the indebtedness of W. Subsequently, W made an assignment for the benefit of creditors, preferring E. Plaintiff asked to have its lien on the property in the hands of the assignee declared prior to that of E. It contended that W's promise was void because of his infancy, and that E's agreement to pay was not, therefore, within the provision of the Statute of Frauds as to guarantees. Judgment for plaintiff for the full amount, including attorney's fees. Error.

Denman, J. 1. The executory contract of an infant is not void, but voidable. 2. A promise to answer for the indebtedness of another must be in writing. 3. The president of a bank, who is also a director, is a trustee, and is liable for any funds of the bank, which are lost through his negligence or fraud. 4. A trustee, who has been guilty of a breach of trust, will not be given in equity the advantage of any lien he may have in law, to the detriment of the cestui que trust. 5. E is liable only for the amount of money lost by the bank through his negligence, with lawful interest. Judgment reversed.

FIRST NAT. BANK v CITY NAT. BANK (1896) 12 Tex. Civ. App. 318.

Negligence, in collecting a draft. Plaintiff drew a draft on B & B, at T, and forwarded it to defendant for collection and credit. The draft was received by defendant on November 13. That afternoon, it mailed the draft direct to B & B, with directions to credit its account with the amount, and to remit the balance due plaintiff. The draft was received by B & B during the forenoon of November 14. The instructions were not complied with, and the remittance was not made. About 1 p. m. on November 14, B & B, knowing that they must fail, communicated their condition to another bank at T, which, fearing a run on the T Banks, furnished B & B with \$1000 to enable them to pay local checks presented at their counter during the afternoon of November 14. B & B made an assignment the following day. Judgment for defendant. Appeal.

James, C. J. 1. The mailing of the draft direct to the drawees was not the exercise of ordinary care. 2. If, however, the draft, if sent through a third party, would have been dishonored, plaintiff was not damaged by defendant's negligence. 3. An agent would have had all of the business day of November 14, in which to make presentment. 4. The fact that the purpose of continuing the business during the day was to prevent a run on other banks, warrants the conclusion that, had the draft in question been presented for payment in the proper way at any time after 1 p. m., it would not have been paid. Judgment affirmed.

FARMERS NAT. BANK v TEMPLETON (1896) 40 S. W. Rep. 412.

On note, against makers. The defense was a release of the debt by the president of plaintiff for value. Plea in avoidance, want of authority. Reply, ratification. The only evidence of authority in the president was such as he had by virtue of his office. Judgment for defendants. Appeal.

Stephens, J. As matter of law the president had the authority to give the release. Judgment affirmed.

VAN WINKLE GIN CO. v CITIZENS BANK (1896) 89 Tex. 147.

On draft, against acceptors. A New York partnership drew a draft on defendant, a Texas corporation, for \$1,930.50. Defendant accepted it. The drawers indorsed it to the plaintiff, a bona fide holder for value before maturity. The consideration failed. The bill was protested for non-payment, and notice given to the parties. The drawers had promised to pay plaintiff's expenses if this suit should be lost. The record did not show the contents of defendant's original answer, but did show an amended answer wherein the plea of failure of consideration was set up. After filing the original answer, plaintiff's directors were interrogated, and deposed that the drawers had on deposit with plaintiff more than \$1,930.50 both then and at the time of filing suit. They were at the time interrogated as to their knowledge of failure of consideration. Judgment for plaintiff. Appeal.

Denman, A. J. 1. It should be presumed that the pleadings on file, when the depositions were taken, raised the issue of failure of consideration. 2. Plaintiff is charged with notice of failure of consideration at the time the depositions were taken, if not at the time the answer was filed. 3. Though in general the innocent indorsee will be protected as against the acceptor, the doctrine cannot be extended so as to allow such indorsee to pervert the equitable principles, upon which it is based, for the purpose of aiding one party to a commercial instrument in obtaining undue advantage over another. 4. Plaintiff was not bound to pursue the acceptor in a foreign jurisdiction before applying the drawer's deposit to payment of the draft. 5. Having the right so to apply the drawer's deposit, plaintiff was bound to do so on receiving notice of the equities between the parties. Judgment reversed.

MERCHANTS NAT. BANK v PHILLIP CO. (1897) 15 Tex. Civ. App. 159.

To recover money as a trust fund. Plaintiff was a non-resident corporation transacting business in Alabama. It deposited with defendant an amount of money to indemnify defendant for procuring sureties on a bond. T and S were respectively president and cashier of defendant. S managed its business, having absolute control. S acted in his official capacity as cashier in all the negotiations with plaintiff. The receipt for the money was executed in the individual name of T and S, and they signed the bond as sureties. This money was all checked out by T and S, to pay their liability to defendant on an indorsement. Defendant contended that the receipt was a written contract between plaintiff and T and S. Judgment for plaintiff. Appeal.

Stephens, A. J. 1. The mere fact that the receipt was executed in the individual names of T and S does not relieve defendant from responsibility for the transaction. 2. Even if the contract be treated as that of T and S, the bank had notice of its trust character and was liable upon the ground of its participation in the misapplication of a trust fund. Judgment affirmed.

IRON CITY BANK v PEYTON (1897) 15 Tex. Civ. App. 184.

Money had and received. J forged the name of W, a depositor with plaintiff, to a check and delivered it to defendant in payment of goods. Defendant, not knowing J, who represented himself to be W, sent a clerk to a bank with him to have him identified. This bank wired plaintiff if it would pay W's check. There was no further representation as to the identity of the drawer. Plaintiff answered "Yes," and later defendant accepted the checks. J took away the goods and disposed of them. Plaintiff paid the check. The forgery was not discovered for over two months. Testimony of experts was admitted to show that the forged signature was very dissimilar to the genuine one. Judgment for defendant. Appeal.

Collard, J. 1. The testimony was admissible as bearing on the question of plaintiff's negligence. 2. A bank in accepting and paying a check drawn by a customer is held to know the signature, and if a forged check is accepted and paid,

the bank, as a general rule, will not be heard to assert a mistake as to the signature. 3. The general rule is decisive only when the party receiving the money has in no way contributed to the success of the fraud, or the mistake of fact under which the payment was made. Judgment affirmed.

Cited: 19 Tex. Civ. App. 280.

COLGIN v CITY NAT. BANK (1897) 16 Tex. Civ. App. 346.

On a penalty, to recover double the amount of usurious interest paid under U. S. R. S. 5198. Plaintiff obtained loans from defendant on which the latter charged and collected interest at the rate of 12 per cent, the legal rate of interest in Texas being 10 per cent. The statute provided that the taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section, when knowingly done by a national bank, shall be deemed a forfeiture of the entire interest. In case the greater rate of interest has been paid, the person by whom it has been paid may recover twice the amount of the interest thus paid. Actions may be brought in any United States courts held within the district where the bank is located, or in any state court having jurisdiction in similar cases. The preceding section limited the rate of interest to the rate prescribed by the laws of the state where the bank is located. Defendant contended that plaintiff's petition showed that he was entitled to recover only the excess above the legal interest. The excess amounted to a smaller sum than was recoverable in the court in which the action was brought. Plea to the jurisdiction on this ground sustained. Judgment for defendant. Appeal.

Fisher, C. J. One who has paid a greater rate of interest than is allowed by law, may recover twice the amount of the entire interest thus paid. The expression "greater rate of interest than is allowed by law, and twice the amount of interest thus paid" refers to the entire interest paid, and is not limited simply to the difference between the rate allowed and that actually paid. Judgment reversed.

COLEMAN v FIRST NAT. BANK (1897) 17 Tex. Civ. App. 132.

To recover a deposit. The plaintiff alleged that she deposited with defendant money in her own name, and to her separate estate; that the deposit was subject to her personal check and order, and hers only; that there is now due her between \$4,000 and \$5,000 of said deposits, for which the defendant has never accounted to her; and that she had not knowledge of all the facts, but they were in the possession of the defendant. She also alleged that payment made to any other person was illegal and a conversion pro tanto of her funds. Defendant admitted having deposits in her name. The plaintiff was a married woman when the deposits were made, and her husband had drawn out part of the money. The statutes of Texas gave the husband the sole management of the wife's separate estate. Exceptions to the petition. Sustained. Appeal.

Bookhout, J. 1. The husband is not authorized by this statute to convey title to the separate estate of the wife, nor can he convey title to the choses in action and securities belonging to the wife without her consent. 2. The authority conferred by the statute on the husband to have the sole management of the separate estate of the wife, gives him the right to take possession of her property. 3. The bank would be protected in payment of checks properly drawn by the husband against a deposit in the wife's name, although it was known by its officers that the money was her separate property. 4. The husband, however, had no authority to convert the wife's separate estate, and if he did and the bank participated in such conversion, or knowingly received the benefits of his conversion of it, it would be liable. 5. If there was collusion between the husband and the bank for the fraudulent purpose of enabling him to convert her estate, the bank would be liable. Judgment reversed.

STATE NAT. BANK v THOMAS M'F'G CO. (1897) 17 Tex. Civ. App. 214.

On promissory note. Plaintiff delivered the note in question to defendant for collection. Defendant turned it over to the indorsers for collection. They collected it from the maker and misapplied the proceeds. Judgment for plaintiff. Appeal.

Stephens, J. The bank, receiving the paper for collection, is treated as an independent contractor. The subsequent agents are its own, and not the agents of the owner. Judgment affirmed.

HOUSE v KOUNTZE (1897) 17 Tex. Civ. App. 402.

On check. On November 12, B drew a check for \$5,000 on defendant K, a banker, payable to the plaintiff. On November 14, B made an assignment. The F Bank commenced an action against B in New York and on November 16 attached the funds of B in the hands of K. On November 17, the check drawn in favor of plaintiff was presented to K and payment refused. Judgment for defendants. Appeal.

Garrett, C. J. The holder of a check drawn by a depositor against money deposited by him in a bank, and never accepted by the bank, cannot maintain a suit against the bank. Judgment affirmed.

Cited: 22 Tex. Civ. App. 351.

SCHUMACHER v TRENT (1898) 18 Tex. Civ. App. 17.

On promissory note. The plaintiffs indorsed the note in question to the defendants for collection. They informed plaintiffs that they had no correspondent at T, where the note was payable, and could not personally undertake to attend to it, but would send it to some bank for collection. The defendants transmitted the note to a bank at T for collection, which collected it and delivered the note to the maker. The bank at T remitted to the defendants a draft on a bank at L, which refused to pay the draft. The bank at T failed and never remitted the proceeds of the note. The defendants contended that the plaintiffs authorized the appointment of a sub-agent, such sub-agent becoming the plaintiff's agent. Judgment for plaintiff. Appeal.

Pleasants, J. Where a note is received by a bank for the purpose of transmitting it to some other bank for collection, and it was upon this understanding that the holder indorsed and delivered the note to the bank, the bank, to which it is sent, is the agent of the depositor, and not the agent of the bank which transmits it to the collecting bank. Judgment reversed.

SHAPPARD v CAGE (1898) 19 Tex. Civ. App. 206.

Trespass to try title. The E Bank recovered a judgment against E, H and M. Execution was issued on the judgment and afterward an alias execution was issued, both of which were returned nulla bona. Subsequently the land in question was sold under a third execution. The sheriff's deed was made to A, as trustee for the E Bank, the bank having gone into voluntary liquidation. The title so acquired as well as all the other assets of the bank, including the judgment, were conveyed by the trustees of the bank to the plaintiff, who was also one of the trustees. The plaintiff was the highest bidder at the sale. The defendant purchased the land at a sale authorized by a deed of trust given by the original owners prior to the recovery of judgment. The plaintiff sought to recover the land from the defendant, and failing in that, to have his judgment lien foreclosed. Judgment for plaintiff. Appeal.

Stephens, J. 1. It was admissible for the vendee of the purchaser at the execution sale, who was also the owner of the judgment, to have, as alternative relief, the sufficiency of the adverse claim adjudicated. 2. The judgment recovered in the name of the bank after it had gone into voluntary liquidation, was not for that reason invalid. 3. The fact that the plaintiff was one of the liquidating trustees did not incapacitate him from becoming a purchaser at the sale by such trustees of the assets of the bank, he being one of the stockholders, after notice given of the sale to all the stockholders, who alone were interested in the matter. Judgment affirmed.

MOODY v FIRST NAT. BANK (1898) 19 Tex. Civ. App. 278.

Money paid by mistake. R Bros. were customers of the plaintiffs, having a large deposit with them. A draft purporting to be drawn by R Bros. on the plaintiffs, payable to C, was sold to the defendant by a person purporting to be C. After cashing the draft, defendant sent it to H & Co. for presentment to plaintiffs. Plaintiffs paid the draft and charged the amount to the account of R Bros. They did not discover the forgery until several days after. Defendant's cashier was not acquainted with C, but he was introduced to the cashier by A, a depositor of the defendant. Judgment for defendant. Appeal.

Fisher, C. J. 1. A bank is presumed to be familiar with the signatures of its

regular customers, and upon it rests the loss which may result from the payment of a forged draft in the name of its customer, when those that present it are not guilty of negligence in receiving it. 2. Evidence of a local custom, which would relieve the bank from the application of that principle of law which assumes that a bank is familiar with the signatures of its regular customers, is inadmissible. Judgment affirmed.

ARNOLD v SWENSON (1898) 44 S. W. Rep. 870.

On promissory note against the maker. C & F were the owners of a private bank. F was the cashier, and it was customary for him to indorse paper held by the bank, "F, cashier." The bank was the payee of the note in suit. The note was transferred for value before maturity to the plaintiff, indorsed "F, cashier." Defendant claimed that plaintiff held the note subject to the equities and defenses existing against the payee. Judgment for plaintiff. Appeal.

Fisher, C. J. The cashier of a private bank conducted by an individual, as well as of one existing under charter of the government, has a general authority to transfer by indorsement a negotiable paper held by the bank. Judgment affirmed.

AMERICAN NAT. BANK v CRUGER (1898) 91 Tex. 446.

On promissory note against surety. A, acting for P, plaintiff's cashier, induced defendant to become surety on P's note for \$3,500, payable to plaintiff in six months, to repay the cashier's overdraft for \$7,000. P's mother had given her homestead in satisfaction of \$3,500 of the debt. It was falsely represented to plaintiff that the bank wished to use and would use the note, simply to deceive the bank examiner, who was expected; that the whole amount of P's indebtedness was but \$3,500 and that his mother would discharge that by selling her homestead. The bank took the note in satisfaction of P's debt in ignorance of the means used in procuring defendant to sign it. Questions certified.

Denman, A. J. 1. The bank is not chargeable as a matter of law with the acts and representations of those who procured defendant to sign the note. If A acted for the bank as its agent, the false representations would furnish a complete defense to the suit. 2. The mere fact that the defendant believed that the bank intended to use the note for an unlawful purpose, would not prevent her from defending on account of its illegality. And the fact that the bank did not intend to so use it would be immaterial. Judgment for plaintiff.

Cited: 91 Tex. 641; 92 id. 549.

FIFTH NAT. BANK v IRON CITY NAT. BANK (1899) 92 Tex. 436.

Debt. R, as cashier of plaintiff, directed the cashier of defendant to charge the account of plaintiff with the amount of two notes which R owed defendant. This was done as appeared from the regular monthly statements from defendant. R had no property and absconded. For more than two years after receiving such statement, no objection was made to it. This action was commenced to recover the amount, claiming that R could not direct his own indebtedness to be deducted from the bank he represented. Defendant pleaded estoppel. Judgment for plaintiff. Error.

Denman, J. 1. It was the duty of plaintiff to examine the statement from defendant within a reasonable time, and notify defendant if the authority of R to have said notes charged to its account was questioned, and plaintiff's failure to do so will estop it from denying such authority, if such failure operated to the prejudice of the defendant. 2. The evidence was sufficient from which the jury might find that the defendant had been prejudiced. Judgment reversed.

ANDERSON v WALKER (1899) 93 Tex. 119.

On surety bond. Defendant, being liable on a bond for the defalcation of J, the county treasurer, brought in the A Bank as a party; prayed to be subrogated to the rights of the county against the bank; and charged the bank with misapplication of county funds. J, prior to December 9, 1896, had misapplied \$10,000 of the county's money on deposit in the bank. On that date he gave a note payable to the bank and signed by himself as treasurer, for \$10,000 and was given credit for that sum at the bank. J did this to show a committee appointed by the district attorney to inquire into his accounts, that they were correct on that day.

The bank's officials stated that the full amount was on deposit. The next day J gave the bank a check for \$10,000 on the county's funds to cancel the note. The court dismissed the claim against the bank. Judgment for plaintiff. Error.

Williams, J. 1. The bank is not estopped from denying that the money was on deposit, as its statement was made for the information of the grand jury. 2. The entry did not control the understanding under which it was made, and conferred no greater right than the parties to the transaction intended by it. 3. If the county had acquired unconditional title to the \$10,000, it could not be defeated by the application of the fund to the payment of the note, which was simply the individual debt of J. Judgment reversed.

PRIMM v FORT (1900) 23 Tex. Civ. App. 605.

To restrain collection of taxes. Plaintiffs owned shares of stock of the F Bank, of the face value of \$100 each, and of which the market value was \$130 each. The stock was assessed at \$66 a share. Plaintiffs were indebted to that extent, and no credits, except the bank stock, from which to deduct such indebtedness for purposes of taxation. Art. 5063, Tex. R. S., provides that personal property shall, for the purposes of taxation, be construed to include all shares in any bank organized under the laws of the United States. Art. 5219, U. S. R. S., provides that nothing herein shall prevent all the shares of any association from being included in the valuation of personal property imposed by authority of the state within which the association is located. Judgment for plaintiffs. Appeal.

Key, J. No discrimination is made by the state law between private and national banks in reference to the right to subtract debts from credits for the purpose of taxation. Arts. 5079, 5080, permit national banks, in listing their property for taxation, to deduct their indebtedness from their credits in the same manner and to the same extent that it does other taxpayers; and do not permit the owner of stock in a private bank to deduct his indebtedness from the value of his bank stock. The owner of shares in national banks will not be permitted to deduct his indebtedness from the value of shares. Judgment reversed.

TEMPLEMAN v HUTCHINGS (1900) 24 Tex. Civ. App. 1.

On deposit. The defendant, a banker, discounted three promissory notes for C and placed the proceeds to C's credit. C made an assignment to the plaintiff. Defendant then deducted the amount of the notes from C's account. Plaintiff immediately demanded the entire amount of the deposit. Payment was refused on the ground that a writ of garnishment had been served on defendant. This writ was afterward discharged. At maturity two of the notes were dishonored. The court held that plaintiff was entitled only to the amount of the note paid, and interest from the date of the release of the garnishment. Judgment for plaintiff to that extent. Writ of error by plaintiff.

Gill, J. A bank, holding a debt against an insolvent who makes a statutory assignment, may appropriate a deposit of the insolvent to the liquidation of the debt. Judgment affirmed.

BONNET v FIRST NAT. BANK (1900) 24 Tex. Civ. App. 613.

For refusal to issue stock. Defendant increased its capital stock from \$60,000 to \$70,000 for the purpose of consolidating with the N Bank with \$70,000 capital stock. The stockholders were notified to attend the meeting regarding the increase of stock and the consolidation, and the purposes of the meeting were stated in the notice. The plaintiff did not attend the meeting or object to the consolidation. The defendant issued \$70,000 additional new stock making the capital stock \$140,000. The court held that the plaintiff was entitled only to a pro rata share of the \$10,000 increase. Judgment for plaintiff. Appeal by plaintiff.

Neill, J. 1. If it should be conceded that the increase of the capital stock entitled the stockholders to a pro rata share thereof, the plaintiff, not having offered to subscribe for a pro rata share of the increase within a reasonable time, would be barred from afterward asserting his right. 2. The right given to national banks to consolidate cannot be regarded as an amendment to their charters, but is rather to be considered as read into and forming a part of the charter of every national bank. 3. The act of consolidation was regular and not void as being ultra vires. 4. The consolidation, as well as the means by which it was ef-

fect, if void, was void in toto, the increased stock as well as everything else connected with it, and no right could be claimed by the plaintiff to an increase of shares wholly void. Judgment affirmed.

GROOS v BREWSTER (1900) 55 S. W. Rep. 590.

On guaranty made by a national bank. Defendant drew on plaintiff for payment of a consignment. Plaintiff refused to accept the draft until the M Bank agreed to guarantee that defendant would let him collect the difference between the drafts and the amount realized on the consignment. The bank received no consideration for the guaranty. Judgment for plaintiff. Appeal.

James, C. J. A national bank has no power to lend its credit to any person, or to become a guarantor of the obligation of another, except in the ordinary course of banking. Judgment reversed.

FIRST NAT. BANK v GREENVILLE OIL CO. (1901) 24 Tex. Civ. App. 645.

On contract. Defendant agreed with plaintiffs that if they would furnish X sufficient cotton-seed meal and hulls to prepare his cattle for market at the prices agreed upon between the plaintiffs and X, that it would pay the plaintiffs for the feed furnished. The feed was furnished and X sold his cattle, depositing the proceeds with defendant, which applied the money on account of other indebtedness due from X. Plaintiffs believed the officers were acting in good faith and had authority to make the contract. Defendant contended that the contract as alleged was ultra vires. Judgment for defendant. Appeal.

Bookhout, J. 1. Where a contract between a corporation and another party has been fully performed by the other party, and the corporation has received a benefit from such performance, the corporation will not be permitted to plead that the contract was executed in excess of its charter powers. 2. Where one deals with the cashier of a bank in good faith, and without any notice of want of authority on his part, and the act done is within the apparent scope of his authority, the party so dealing may enforce the contract against the bank. Judgment affirmed.

FULTON v NATIONAL BANK OF DENISON (1901) 62 S. W. Rep. 84.

To recover property of an intestate, held as collateral, and to obtain an allowance for maintenance. Plaintiff was the widow and administratrix of F. Defendant advanced money to F to buy 72 shares of stock and some cotton. The certificate for 62 shares and warehouse receipts for the cotton were made out in the name of defendant. The certificates for the other 10 shares and for eight shares of the defendant's own stock were indorsed to defendant. The indebtedness of F exceeded the value of all of this property. F left nothing else. The statute provided that upon issuance of letters, the administrator should have the right to the possession of the estate as it existed at the death of the intestate. Verdict directed. Judgment for defendant. Appeal.

James, C. J. 1. The bank's lien on the 72 shares of the cotton had the character of a vendor's lien and was superior to any claims for allowance. 2. As to the eight shares, it devolved upon the plaintiff to show affirmatively that the bank's claim was of a character which did not take precedence of her demand for allowances. 3. A pledgee of certificates of stock is entitled to hold them as against the administrator of the pledgor, and is entitled to receive and enforce dividends or other benefits attaching thereto so long as his claim is unsatisfied. 4. A national bank, in the usual course of its business, has the power to take stock in other corporations as collateral security, and in the enforcement of its rights may become the owner of the stock. Judgment affirmed.

LEARY v INTERSTATE NAT. BANK (1901) 63 S. W. Rep. 149.

On promissory notes, against a surety. Defendant offered to show that plaintiff had levied on the goods of the makers, bought them, and then sold them to N and defendant, who paid plaintiff the amount of the indebtedness. Exception, on the ground that at the meeting of the directors confirming this sale only five out of the six directors were present, two of whom were N and defendant. Sustained. The defendant set up a judgment for N, in an action by plaintiff against N, in which the same question was litigated. The defendant was not a party to that action. Exception. Sustained. Judgment for plaintiff. Error.

Fisher, C. J. 1. N and defendant, being parties to the purchase, were disqualified from participating as directors. 2. A majority of the qualified directors is necessary to make a quorum. 3. The judgment set up, not being rendered in a controversy to which the defendant was a party, is not res adjudicata. Judgment affirmed.

SKIPWITH v HURT (1901) 94 Tex. 322.

On surety bond. This action was brought by the county judge against the county treasurer and his bondsmen, for a deficiency in the treasurer's account when he retired from office. The bondsmen brought in the F Bank. Prior to the retirement of the treasurer from office, the county commissioners demanded the funds of the treasurer for examination. The treasurer gave them a draft on the F Bank for the balance he should have on hand. The draft was presented at the bank and paid, the money was counted and returned to the bank, the draft given up and destroyed. The treasurer did not have the full amount on deposit and caused the bank to agree to honor the draft, and to take the money out, when again placed on deposit. This the bank did and appropriated the deficiency which had been advanced to meet the draft. Judgment against the bondsmen, who were denied judgment against the bank. Error.

Brown, J. 1. When the bank appropriated the money to its own use, or to the payment of a debt which the treasurer may have contracted in order to secure the money to be counted, it rendered itself liable to the county for all the funds so used. 2. The bank is estopped to deny that the money belonged to the county. 3. The sureties on the bond, after having paid the amount for which the bank was liable, became subrogated to the rights of the county against the bank, and could recover against it to the same extent that the county might have done. Judgment reversed.

COLEMAN v NATIONAL BANK (1901) 94 Tex. 605.

To recover a deposit. Money belonging to the plaintiff was deposited in the defendant by her husband. The cashier was informed that the money was part of the plaintiff's separate estate, and was deposited in the name of the plaintiff, but the husband informed the bank that it would be drawn out upon his order. The husband was a drunkard to the knowledge of the bank. The money was entirely drawn out upon checks drawn by the husband. Judgment for defendant. Error.

Gaines, C. J. 1. When a husband has deposited his wife's money in bank in her own name with the understanding that he will draw it out by checks, the bank is authorized to pay upon checks so drawn. 2. The contract, arising by implication of law from a deposit of money in a bank, is that the bank will, whenever required, pay out the money in such sums and to such person as the depositor shall designate by his checks. 3. And even when it is known that the money deposited is held by the depositor as a trustee, the bank is bound to presume, in the absence of knowledge to the contrary, that a check drawn against the money by the depositor has been drawn by him in the proper discharge of his duty as trustee, and to pay the check accordingly. Judgment affirmed.

UTAH

SALT LAKE CITY NAT. BANK v GOLDING (1876) 2 Utah 1

To recover taxes paid. An assessment was made on the capital stock of the plaintiff for territorial taxes, which was paid under protest by the plaintiff, and which it sought by this action to recover. The act of Congress organizing the territory prohibited the imposition of a tax on the property of the United States. Sec. 95 of the National Banking Act permitted taxation by the states of shares in a national bank. The defendant sought to justify the tax by contending that the shares and capital stock of a bank were the same. The plaintiff contended that the bank was not liable to taxation in any way by the legislature of the territory, as the permission to tax shares was only conferred upon the states. Judgment for plaintiff. Appeal.

While, C. J. 1. There is nothing in the Constitution of the United States, nor

in the National Banking Act, which precludes the territorial legislature from taxing banking franchises by a tax on the individual shares of stockholders in national banks. 2. The assessment, however, being on the capital stock of the bank, was unlawful, and the money, having been paid after levy and under protest by the bank, can be recovered back. Judgment affirmed.

WALKER v POPPER (1877) 2 Utah 96.

On note made by P one of the defendants, to the order of G cashier of the First National Bank, another defendant and indorsed to plaintiff. It was contended that the words "cashier, etc." were merely descriptive of the man; that there was no allegation of the demand for payment. The complaint alleged waiver of notice and protest. Defendants demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action. Overruled. Judgment for plaintiff. Appeal.

Boreman, J. 1. The complaint fully describes in what capacity G's name appeared on said note, he simply represented the bank. Proof that the bank and not G was the owner and holder of the note, prior to indorsement, can be admitted under the allegation. 2. A waiver of protest is a waiver of demand. The demurrer was the joint action of the defendants, and there was a good cause of action against defendant P. The demurrer was properly overruled. Judgment reversed.

Cited: 2 Utah 275.

MOUNT CITY PAINT CO. v COMMERCIAL BANK (1886) 4 Utah 353.

On draft. The plaintiff in St. Louis drew its bill of exchange on B and S, of Utah, payable to defendant at sight, and sent the bill for collection to defendant who, on the day of its receipt, presented it to drawers for payment. They failed to pay, but accepted it and immediately defendant notified plaintiff. Defendant held the bill for 47 days and then returned it by mail stating that they had been unable to collect. During all this time B and S were known to defendant to be insolvent, but had property largely in excess of the amount of the draft which was covered by an invalid deed of trust. Two days after return of the draft B & S assigned to defendant's vice-president, and preferred a debt due defendant to the draft. Defendant contended that the business of collecting drafts was ultra vires. Demurrer. Judgment for plaintiff. Appeal.

Zane, C. J. 1. The business of collecting commercial paper is a part of the regular business of banking, and it is not necessary that the charter of a bank should specifically confer the power to engage in it. 2. The facts admitted show such neglect of duty by defendant, with regard to the draft, as to make defendant liable for the amount and interest. Judgment affirmed.

BRIXAN v DESERT NAT. BANK (1888) 5 Utah 504.

To recover deposit. The plaintiff was a depositor in defendant's bank. Through S, a real estate agent, he loaned \$752 on a piece of property belonging to D, gave his check for the amount payable to the order of D, and received from S a note and mortgage. The bank according to practice, sent plaintiff's passbook and vouchers every month. The interest on the mortgage being overdue, plaintiff notified D, who, being shown the note and mortgage, pronounced them forgeries, as well as the indorsement on the check. He immediately notified the bank who pronounced the indorsement a forgery. Three weeks after, plaintiff tendered back the check and demanded the money. It was contended that the plaintiff was negligent in not discovering the forgery by an examination of the account, and in not tendering the check back immediately. Judgment for plaintiff. Appeal.

Boreman, J. 1. When the payee's name indorsed on a check is a forgery, and the check is paid on such forged indorsement, it is not a payment to the order of the payee. 2. In paying the money, it paid its own money and not that of the drawer. The depositor's money still remained in the bank subject to his order. 3. The depositor was not presumed to know the signature of the payee; and if the bank might have discovered the forgery, it will be held liable. 4. If the plaintiff was negligent in tendering back the check, the fact would not justify the defendant in refusing payment of the money until it should show some actual damage caused thereby. Judgment affirmed.

LONG v CITIZENS BANK (1892) 8 Utah 104.

On certificate of deposit of the defendant, payable to W, and signed by B, cashier, and purchased by plaintiff for value. It was issued before the bank was organized. It was agreed between a few men to organize a bank to do business in Utah, if arrangements could be made with B who should be made "Cashier." The bank was thereafter incorporated on June 26. The money given for the certificate never came into the bank. The court instructed the jury to find for the defendants. Judgment for defendants. Appeal.

Blackburn, J. The bank could not be a principal before it existed, much less have an agent. A banking organization cannot be held liable for anything done by promoters before its existence. To authorize a judgment against the promoters it is necessary to show that in some way they were parties to the certificate of deposit, or by fraud or negligence aided it. It is also necessary that the facts constituting the fraud or negligence be set out in the complaint. Judgment affirmed.

FLACK v NATIONAL BANK (1892) 8 Utah 193.

Where a party is indebted to a bank on an unsecured note not yet due, and his property is liable to be attached and the bank garnished by his creditors, and the bank threatens to begin attachment proceedings against him in order to save itself from loss unless he secures the note, which he refused to do, but instead thereof, authorizes the bank to appropriate sufficient of his deposit to pay the note, such payment is not a payment under duress and cannot be recovered by action; nor can such payment be treated as not having been made, and the bank held liable in damages for not honoring a check drawn against the funds thus appropriated.

MERCHANTS BANK v ROBINSON (1892) 8 Utah 256.

Money loaned. The defendant and B were organizing a bank; the defendant was to be vice-president and general manager, and B was to be cashier. The defendant drew up and signed what purported to be a certificate of stock in the bank entitling B to 25 shares. Two of these certificates were given by B to the plaintiff, as collateral to a loan made at the time by the plaintiff to B. The bank was subsequently organized, and the defendant and B elected to the positions proposed. B died. His estate was insolvent. Plaintiff contended that the defendant had fraudulently assisted B in obtaining money on the worthless certificates. Judgment for defendant. Appeal.

Blackburn, J. 1. A person who signs a certificate of stock of a bank represents to all the world that he is an officer qualified to sign such stock; that he is authorized to issue it; that the person to whom it is issued has the interest in the bank the certificate purports to give; that the bank is an existing institution; that the shares of stock the certificates mention are fully paid for, and that the certificate is in all things what it purports to be. If any of these are known to be false, he who signs the certificate is liable to any one who may be injured thereby. The fact that defendant was instructed to obtain the loan from another person does not constitute a defense to an action by a purchaser without notice. Judgment reversed.

HADRA v UTAH NAT. BANK (1894) 9 Utah 412.

Damages for wrongful protest. Plaintiff drew a check in favor of J, cashier of defendant. H, the teller of defendant, had authority to sign the cashier's name. He indorsed J's name to the check and also the name of the defendant bank. It was presented to the A National Bank and payment refused, because J himself had not indorsed it. The A National Bank was informed that H had authority to sign J's name, and this fact was communicated to plaintiff, who forbade payment of the check unless J would personally indorse it. The check was then protested. Judgment for defendant. Appeal.

Smith, J. If the plaintiff suffered any damage at all, the jury was warranted in finding that he was the author of his own injury when he forbade the payment of the check. Judgment affirmed.

WARREN v ROBISON (1899) 19 Utah 289.

Damages, for director's negligence. The plaintiffs were stockholders and the defendants were directors of the C Bank. B was cashier, without bonds, and was

\$3,600 short in his accounts. One of the directors was also a director in a brick company, and loans were made to that corporation, which were lost. Several of the directors became directors in a live-stock company, through which, by way of loans, the bank lost money. The president's firm borrowed money from the bank without security and thereby the bank lost. The management of the bank was intrusted entirely to the cashier. Plaintiffs contended that the directors by intrusting the management of the bank to the cashier became negligent in the performance of their duty. Judgment for defendant. Appeal.

Bartch, C. J. Where the directors of a corporation commit the details of its business to inferior officers, they are not relieved from maintaining a reasonable supervision, and if such inferior officers use the assets of the corporation, they are not relieved from liability on the ground that they did not know of the wrongdoing, provided their ignorance was due to lack of that care, which ordinarily prudent and diligent men would exercise under similar circumstances. The plaintiffs have proven a prima facie case. Judgment reversed.

FIRST NAT. BANK v BROWN (1899) 20 Utah 85.

On promissory note. The defendant set up in a cross complaint that the bank held money of the defendants to a greater amount than the note. The defendant had on deposit in the bank \$1,000. The cashier told the defendant that S wanted to borrow from the bank which was short of funds; that if the defendant would loan the money to S, the bank would collect the same and guarantee its payment. At that time S owed the bank \$2,100, which it desired to call in, and which S was unable to pay. S paid \$1,100 and executed a note to the bank for \$1,000. That amount was charged against defendant's account and he was given a receipt for a note for \$1,000 from S. Defendant was informed and believed that the note was payable to him. He received the interest through the bank. The note from S was paid by him to the bank, but its proceeds were not credited to the defendant. Judgment for defendant. Appeal.

Baskin, J. 1. The giving of the receipt, by the cashier, to the defendant, for the S note was a delivery, and a transfer by delivery of the note based on a good and sufficient consideration therefor, to the defendant, and the defendant became the owner and holder of the note, and the plaintiff was not entitled to any of the proceeds of said note, but it was held by the bank merely for collection. If the cashier had no authority to loan through the bank, the retention of defendant's deposit money, without crediting it back to him, was a ratification by the bank of the transaction. Judgment affirmed.

CUPIT v PARK CITY BANK (1899) 20 Utah 292.

Creditor's bill, to set aside a general assignment for the benefit of creditors. The defendant bank becoming insolvent, R the vice-president, who for a long time prior had been indebted to the bank, acting for the bank, without the authority of the board of directors, made general assignments to K, who immediately qualified and took possession of the bank's assets. K died and McL was appointed receiver at the instance of one of the creditors. He took possession. Four days after the failure of the bank, the assignment was ratified by the board of directors, but D, a director, had no notice of this or the other meetings, being a non-resident. The plaintiff, just one month after the failure, obtained judgment in an attachment suit against the bank for an amount on deposit, and offered the real estate and the bank buildings for sale under execution. McL brought suit against plaintiff and obtained an order restraining the sale. The plaintiff brought this action to have his lien declared first lien against the bank's property. Plaintiff contended that the assignment was void for want of authority. That the meetings held were void for want of notice to the absent directors; and that the ratification of the assignment was invalid. Judgment for defendant. Appeal.

McCarty, J. 1. The writ of quo warranto will not issue and cannot be invoked for the purpose of determining merely a private right in which the public is not interested. 2. Richardson's office having become vacant by operation of law, it was beyond the power of the corporation to make him a de facto or de jure officer, so long as his disability existed by reason of his indebtedness to the bank. An officer of a corporation has no inherent power by reason of his office to make a general assignment for which he assumes, unless such power is conferred on him by the corporation through its board of directors. 3. The directors were not assembled as a board, no notice having been given the non-resident directors.

The attempted ratification of the assignment was not the act of the corporation. 4. The receiver acquired no title and the property is subject to plaintiff's lien. Judgment reversed.

Cited: 22 Utah 480, 487.

TRIPLER v MT. PLEASANT SAV. BANK (1900) 21 Utah 313.

To recover a deposit. Plaintiff deposited with the defendant, in the name of T, a check drawn by himself on a Colorado bank; the proceeds were to be drawn out by T in the purchase of cattle for the plaintiff. The defendant received the deposit and placed it to the credit of T. A draft on the H Bank, sent by the Colorado Bank to cover the amount, was protested, and both plaintiff and T were notified. The plaintiff sent four checks drawn by C for the use of T to cover the first check and for the protested draft, in order to prove his claim against the Colorado bank, which had become insolvent. Defendant contended that the money was not plaintiff's, but the money of C for whom he was agent. Judgment for defendant. Appeal.

Baskin, J. 1. The check was sent to the defendant bank for collection through it, thereby creating a fund in the bank to the credit of T, to be drawn out by him in the execution of his agency. 2. The plaintiff is not the real party interested in the alleged deposit. Judgment affirmed.

COMMERCIAL NAT. BANK v CHAMBERS (1900) 21 Utah 324.

To reduce tax assessment. Action against treasurer of W County to have all taxes assessed against the bank for 1898 in excess of \$612.90 declared void. The capital stock was valued at \$80,000; real estate in the state at \$27,535; and outside of the state at \$19,500. In levying the tax, the real estate within the state was deducted from the value of the stock, but a deduction of the value of real estate outside the state was refused. The bona fide debts of resident stockholders were deducted from the value of the stock, but deductions refused for such debts of non-resident shareholders. The statutes of the state provide that all property, not exempt under the laws of the United States, or the Constitution shall be taxed in proportion to its value. In making up the amount of credits which any person is required to list, he will be entitled to deduct from the gross amount of such credits the amount of all bona fide debts owing by him; and to aid the assessor in determining the value of shares of stock, he may include the value of all real property investments. Judgment for defendant. Appeal.

Bartch, C. J. 1. The exemption authorizing a deduction of debts from credits, does not include stocks, and the refusal to deduct the individual debts of non-resident stockholders from the value of the stock is not an illegal discrimination against a national bank, and no such deduction can be enforced. 2. The power of taxation extends to all property as it exists here without reference to other states, where we have no jurisdiction; but for purposes of taxation, the real property situate without the state cannot be deducted from the value of the stock, and thus diminish the taxable cash value. Judgment reversed.

Aff'd: 182 U. S. 556.

BURRASTON v FIRST NAT. BANK (1900) 22 Utah 328.

On deposit. Plaintiff was a depositor in defendant bank. He personally attended to the business with the bank, but later his daughter looked after it. He would sometimes overdraw his account, and give notes for his overdrafts. His daughter gave several notes, while he was absent from home. Before going, plaintiff instructed the cashier to permit his wife and others of his family, on her order, to draw against his account. While away, he sent deposits by mail, and his son and other parties made deposits for his account. H, cashier of the bank prior to the time plaintiff closed his account, signed his notes for overdrafts as a witness. At his request, H and he called at the bank and examined his account, to which he made no objection. The president of the bank asked him how his account came out, and he replied, "all right." Evidence was admitted to show that L an attorney, in company with plaintiff, examined the books of defendant, and L stated to an employee of defendant, that the account was all right. At plaintiff's request the bank furnished him an itemized statement of his account covering the entire time, to which he made no objection for over three years. Defendant, over objection, introduced the books of the bank showing the plaintiff's transactions. Plain-

tiff contended that the evidence was not sufficient to show that the notes were executed and checks issued by plaintiff. Judgment for defendant. Appeal.

McCarty, J. 1. The relationship between L and plaintiff was not attorney and client, but principal and agent, and the evidence was admissible. 2. The facts, as stated in the pleadings, are prima facie proof of the execution of the notes and issuing of the checks. 3. The books, notes and checks were properly admitted in evidence; and the evidence showed that there was an account stated. Judgment affirmed.

LARSEN v UTAH LOAN & TRUST CO. (1901) 23 Utah 449.

Fraud in making loans. The plaintiff left his money with defendant trust company upon its agreement to loan it on first-class mortgage security. In April, 1894, defendant loaned \$1,500 of plaintiff's money to persons on security of their individual notes maturing January 1, 1896. The transaction was not brought to plaintiff's attention until March 1, 1898. It also loaned \$3,000 of plaintiff's money by substituting two notes made by S to plaintiff, to secure part of an existing debt, and indorsed them "without recourse." At the time, the defendant held a trust deed to cover the whole debt, which fact was not divulged to plaintiff, but on a forced sale there was a deficiency to the extent of the notes held by plaintiff. The defense as to the first cause of action was the two years' Statute of Limitations. The plaintiff testified that he knew nothing of the trust deed being given as security for the notes, as he had been informed it was on other property. Defendant claimed that plaintiff had taken the notes away and examined the property. Testimony ruled out. The court refused to allow the sheriff to tell what he had done with the money received at the sale. A was asked if he would have considered the notes set forth in the first cause of action, as ample security. Under objection, he answered, "Yes." Nonsuit as to first cause of action. Verdict for defendant as to second. Appeal.

Per curiam. 1. An action in fraud is stated, in such a case, and the statute does not begin to run until the discovery of facts sufficient to put one on inquiry. A nonsuit was improperly granted. 2. The testimony was improperly ruled out as it tends to establish the fraud. 3. The plaintiff, under the charge of fraud, had a right to know what became of his money. 4. The testimony of A was incompetent and immaterial. 5. The defendant was under a duty to use reasonable care in the selection of security; and a loss occasioned by his failure so to do must fall upon it. Judgment reversed.

VERMONT

ROSS v BANK OF BURLINGTON (1825) 1 Aik. 43.

Assumpsit, to recover against the defendant for bills of the bank held by the plaintiff and destroyed by fire. The writ contained two special counts and two counts for money laid out and expended. Demurrer to special counts. Overruled. Demurrer withdrawn by leave and general issue pleaded. The court permitted the plaintiff to show that he possessed the bills and that they were burned, and to prove their contents by his declarations made before their destruction. Plaintiff informed defendant that \$800 of its bills, owned by him, were destroyed, and demanded payment. Defendant then required no proof of their destruction. General verdict for plaintiff. Motion in arrest of judgment, for the insufficiency of the special counts. Motion for a new trial.

Hutchinson, J. 1. We cannot decide that the same declaration is bad, after verdict, which the court has decided to be good on a special demurrer. 2. The declarations of the plaintiff, made at a time when he could not have anticipated the destruction, are admissible as part of the *res gestæ*. 3. Defendant cannot now object that the demand was not accompanied by proof of the destruction of the bills. 4. Plaintiff need not apply to chancery for relief. New trial refused. Judgment on the verdict.

Cited: 20 Vt. 529; 27 id. 699; 68 id. 102; 69 id. 356, 393; 71 id. 109.

BANK OF BURLINGTON v BEACH (1825) 1 Aik. 62.

Assumpsit, on promissory note. B, C and defendant signed the note in that order. It was made for the accommodation of B and C. B and C presented it to

the plaintiff for discount, which was refused. B and C then stated to W & Co. that the note would be discounted next week, and W & Co. advanced money on it. W & Co. sent the note to plaintiff for discount, which was again refused. At the request of W & Co. plaintiff held the note at the bank building, where it was payable, for collection for the benefit of W & Co. The note was not paid at maturity and plaintiff brought this action for the benefit of W & Co. Verdict directed for plaintiff. Exceptions.

Royce, J. 1. Defendant, having enabled the holders of the note to practice this fraud, must suffer the consequences of it, rather than W & Co., who were bona fide purchasers. 2. The plaintiff, by receiving the note and keeping it in the bank, and by commencing an action upon it, must be taken to have adopted the payment made by W & Co., so that for the purposes of this suit the acceptance and payment of the note are to be considered as the acts of the plaintiff. Judgment for plaintiff on the verdict.

BANK v SCOTT (1829) 1 Vt. 426.

Assumpsit, on promissory note, discounted by plaintiff, a bank. Defense, usury. The statutes of the state provide for a forfeiture of the whole amount of usurious interest taken. It was agreed that the rule adopted and invariably pursued by the bank in discounting notes was to consider 30 days equivalent to a month. This rule was applied, and in the case at bar the interest, as computed, exceeded 6 per cent on a note of \$600 for 64 days, by about 8 cents. On agreed statement. Judgment reserved.

Hutchinson, J. The sum is so small that the presumption is against its being taken as an intentional violation of the statute. It being an invariable rule of the bank to cast interest in this way, it affords a strong presumption that plaintiff thought this conformable to the statute. If they acted honestly, but mistook the construction of the statute, their debt must not be lost. Judgment for plaintiff for the amount of the note, not including the 8 cents.

BANK v STEARNS (1829) 1 Vt. 430.

Assumpsit, on a note for \$2,000, payable 64 days from date. The defense was usury. By a statute provision of the state a note upon which usury was charged or received was void. The excess of interest over 6 per cent, the legal rate, was 29 cents. It was shown to be the invariable custom of the bank to call 30 days a month, and to use an interest table arranged upon that plan. Verdict for plaintiff. Exceptions.

Hutchinson, J. No corrupt agreement or intention to violate the statute can legally be inferred in this case. There is no difficulty in correcting the mistaken construction of the statute. The excess of interest must be deducted and judgment entered upon the verdict for the balance.

STATE v ESSEX BANK (1836) 8 Vt. 489.

Information, to vacate charter under the act incorporating the defendant. The allegations were, that the whole amount of stock was not subscribed before the bank commenced operations; that proper deposits were not made at the time of subscribing, nor before commencing business; that a large portion of the stock paid in was withdrawn from the bank before commencement of business; that the bank had exceeded its limits in contracting debts. On report.

Royce, J. The charges brought furnish sufficient probable cause for instituting this prosecution; but the power of the court to declare the charter vacated, is to be exercised with discretion. It is by no means certain that the respondents intended to violate the act. The court cannot act in this proceeding as a court of chancery, and bring the affairs of the institution to a gradual close. If we act at all, it must be in a summary and final manner. A more just and beneficial remedy may be sought under the General Law of 1831, if the case shall hereafter require it. Judgment that the charter be not vacated.

BANK v FARMERS BANK (1838) 10 Vt. 141.

Money had and received. The defendant cashed a check purporting to be signed by K, drawn on the plaintiff, charged it in the account existing between the two banks, and forwarded it to the plaintiff bank, where it was passed to the credit of

the defendant. Two months later the check was found to be a forgery, and notice was given defendant. The suit was to recover the amount of the check. Verdict and judgment for defendant. Exceptions.

Phelps, J. As the check was retained by plaintiff, and no notice given of its being forged until more than two months had elapsed, we must treat it as paid by plaintiff; for plaintiff should have repudiated it at once, if at all. Judgment affirmed.

Cited: 11 Vt. 519; 19 id. 206; 43 id. 319; 53 id. 596.

BANK OF MANCHESTER v ALLEN (1839) 11 Vt. 302.

Assumpsit, on promissory note, against indorser. The declaration described the note as dated March 27, 1827. Pleas: the general issue, and nul tiel corporation. The plaintiff introduced a note like the one described in the declaration, dated March 27, 1837. It also introduced its charter and showed that it had issued bills which were in circulation as money, and that notes were regularly discounted in its name at its banking house. Judgment by the court for plaintiff. Exceptions.

Williams, C. J. 1. The production of the charter having been made, its acceptance and the organization of the plaintiff are to be inferred from its acts, and from its exercising the privileges given it by its charter. 2. The plaintiff was not entitled to judgment on a note which bore date of March, 1837, which was described in the declaration as dated in 1827. Judgment reversed.

Cited: 28 Vt. 425; 34 id. 50.

WAINWRIGHT v WEBSTER (1839) 11 Vt. 576.

Assumpsit, on promissory note, with a count for money had and received. Plea: payment to an officer who had a writ upon the note. The payment was made in bank notes of the Bank of W, which had failed before the payment; but that fact was unknown to the parties. Judgment for plaintiff. Appeal.

Bennett, J. 1. When a bank stops payment, the bills thereof cease to be the representative of money, whether the particular billholder is apprised of the fact or not; and, from that time, the bills of such bank resume their legal character of promissory notes and mere securities for the payment of money. The party paying such bills, as money, must sustain the loss. 2. The officer held the bills as defendant's and not as plaintiff's agent. Judgment affirmed.

Cited: 53 Vt. 470.

FARMERS BANK v CHAMPLAIN TRANSPORTATION CO. (1844) 16 Vt. 52.

Trespass on the case, against common carrier, to recover for a package of bills delivered to the defendant. The defendant relied upon his usage as a carrier, to deliver packages to the wharfinger to be by him delivered to the consignees. Defendant offered to prove that the usage had been followed in this case; that the package was stolen from the wharfinger; and that the usage was well known to plaintiff. Excluded. Verdict. Judgment for plaintiff. Exceptions.

Williams, C. J. Evidence of the usage of a common carrier may be received to show the time of his undertaking, the place where, or the persons to whom, he contracts to deliver goods intrusted to his care. And if the person who employs the carrier knows of this he cannot contend that the carrier's undertaking was more extensive. Judgment reversed.

Cited: 18 Vt. 131; 23 id. 202.

BANK OF BENNINGTON v BOOTH (1844) 16 Vt. 360.

On a jail bond taken upon the commitment of the defendant on an execution in favor of the plaintiff, and assigned by the sheriff to the plaintiff. The bond, by operation of law, through its payment on a suit against a third party, became equitably assigned, to defendant's knowledge, and the assignee prosecuted this action in the name of the bank. The original consideration was money paid by the bank in discounting the notes of one of the defendants. The statute incorporating the bank provided that the bills of the bank should be received by the bank, on all judgments, executions, or demands of any nature, originally due or accruing to the bank. The defendants brought in bills of the bank to the amount of the debt and taxable costs, and the court held that they should be received in payment. The bank was then in the hands of a receiver. Judgment for defendants. Exceptions.

Bennett, J. 1. The defendants had a right to pay the bank in its own bills. 2. The defendants have the same right to pay the equitable assignee in the bills of the bank. 3. But the costs never belonged to the bank and they cannot be paid in bills of little or no value. Judgment reversed, and judgment for the plaintiff, for the amount of the costs.

CLARK v STOREGHTON (1844) 18 Vt. 50.

Assumpsit, on promissory note. The declaration set out that by their note defendants promised to pay "\$226.17" to plaintiff, for value received. Defendants demurred, assigning for cause that the declaration did not allege for what thing defendants promised, or for what said promise was made. Demurrer sustained. Exceptions.

Royce, J. The statute, requiring declarations and other pleadings to be drawn in the English language, contemplated the use of English letters and words, allowing customary abbreviations, which would not obscure the sense, and figures for the purpose of expressing numbers merely. Judgment affirmed. Motion to amend granted subsequently.

FARMERS BANK v CHAMPLAIN CO. (1846) 18 Vt. 131.

Trespass on the case, against a common carrier, to recover for a package of bills intrusted to the carrier and lost by him. The teller of the bank and the cashier were permitted to testify, against objection. Previous to the trial the bank gave the cashier a full discharge from all liability on account of the loss, and he transferred his stock to the bank. The bank's charter prohibited it from dealing in goods, wares, or merchandise, or commodities whatsoever. The defendant averred that it was its custom to deliver packages of money to the wharfinger at P, upon the wharf, as was done in this case. The court instructed the jury that this custom to be available to the defendant as a defense must have been known to the plaintiff. Judgment for plaintiff. Exceptions.

Kellog, J. 1. The teller was a competent witness in any event. 2. The cashier, having received a full discharge from the bank on account of the loss and having transferred his stock, was a competent witness; the prohibition in the charter did not incapacitate the bank from taking the stock by purchase. 3. The liability of a common carrier may be modified by contract or by general usage, or by the defendant's particular usage. The instruction to the jury, that in order to enable the defendant to avail itself of its usage as a defense, they must find that the plaintiff had knowledge of the usage, was erroneous. Judgment reversed.

Cited: 23 Vt. 202; 66 id. 294.

PORTER v BANK (1847) 19 Vt. 410.

Bill, by a married woman to enforce the execution of a trust. The plaintiff claimed stock in a bank, alleging that it was bought with her funds, but that it stood in the name of her husband upon the books of the bank. The bank held a note against the husband on which a third party was an indorser, and had commenced a suit upon the note and attached the stock as the property of the husband. The bill alleged that the indorser had deposited the amount of the note, and that the suit was for his benefit, and he was charged with notice of the trust. The bank was not charged with notice. The indorser and the bank both denied notice. The bank's answer was traversed. There was no evidence that the indorser had notice of the trust. The bank's answer denied the right of a married woman to bring an action against her husband. The husband's answer admitted the trust. Bill dismissed. Appeal.

Davis, J. 1. In a court of chancery the wife may sue her husband. The husband in this case was properly made a party to the suit. 2. Trusts in personal property may be implied from certain facts, without writing, and the husband may become his wife's trustee. 3. The husband's answer was competent evidence against the codefendants, who claimed to hold the deposit as his creditors. 4. There being no evidence of notice to the indorser, he should be dismissed from the bill. 5. As it was not alleged that the bank had notice of the trust, the bank should be dismissed from the bill, notwithstanding the fact that notice was denied by it, and the answer traversed. 6. It will be competent for the chancellor to allow an amended bill, or a supplemental bill, presenting the matter of notice. Reversed pro forma.

Cited: 32 Vt. 34; 39 id. 536; 47 id. 508; 55 id. 445; 57 id. 561; 58 id. 171, 521; 63 id. 299.

SABIN v BANK OF WOODSTOCK (1849) 21 Vt. 353.

Money had and received. S, a brother of the plaintiff, owned, in October, 1835, nearly 200 shares of the defendant bank. For the purpose of increasing his vote in the election of bank officers, he conveyed shares to 45 different persons. He continued to control the shares until November, 1839, when the defendant attached them as belonging to S and sold them. The plaintiff held four of these shares, which had not been transferred, but stood in his name upon the books of the bank. The debt upon which they were attached accrued in January, 1837. In October, 1837, two more shares were transferred to the plaintiff. All of these transfers were recorded on the books of the bank on the advice of a majority of the directors. S received all of the dividends, and the plaintiff made no claim upon the bank until 1841. The question to be determined was, whether the plaintiff was entitled to hold the six shares as against the bank. The court directed a verdict for defendant. Exceptions.

Redfield, J. 1. Reason, policy and justice seem to require that such mere formal transfers upon the books of the bank, and for the purpose of defeating the proper objects of the charter, in one particular, are to be regarded as of no force whatever as to those who are instrumental in bringing them about. They should be treated as void. The title must date as between the plaintiff and the bank from the time when he gave notice to the bank that he claimed the stock. 2. The directors, as such, had no authority to make or advise the transfer. Judgment on the verdict.

Cited: 52 Vt. 74.

ELWOOD v TREASURER OF VERMONT (1851) 23 Vt. 701.

Petition for mandamus, to require the defendant to pay over a sum of money in his hands, belonging to the bank safety fund, contributed by the Bank of St. A, since it was re-chartered. The fund was required to make up a deficiency in the redemption of bills of the E Bank, which became insolvent before the bank of St. A was created. The bank safety fund was derived from taxation of the banks in the state, and was for the purpose of paying the debts of any insolvent bank.

Redfield, J. The entire fund is made liable for the payment of all debts of any insolvent bank, and without reference to the time when the debts accrued, or when the insolvency occurred, or at what time any particular bank began its contributions. Writ to issue.

SOUTH ROYALTON BANK v SUFFOLK BANK (1854) 27 Vt. 505.

Case for malicious injury. The plaintiff had in circulation a large amount of bills, and it alleged that the defendant bought them up and held them, and refused to exchange them for other money; and called upon the plaintiff to redeem them in specie; that these acts were performed with wicked and corrupt motives, with intent to injure the plaintiff. Demurrer sustained. Judgment for defendant. Appeal.

Bennett, J. The defendant is not charged with doing any act in itself considered wrong; he may have had bad motives, but no action can be sustained on that ground. It was morally and legally the duty of the plaintiff at all times to be ready and willing to redeem its bills, and if it has operated to its injury to be called upon at any particular time to redeem a particular amount, it is *damnum absque injuria*. Judgment affirmed.

Cited: 28 Vt. 58; 49 id. 94; 68 id. 224.

ROOT v BARNES (1855) 27 Vt. 274.

Trustee process. The trustee B gave the defendant W his promissory note. Subsequently he received a notice from the Bank of R that it had discounted the note. On the same day that the note was given, it was sold to C, for value and he discounted it at the bank, giving the bank his own note as collateral. C paid the note, before suit, to the bank. The cashier of the bank had heard a rumor that B had been served with a trustee process before the note was discounted. The court decided that the trustee was not chargeable. Judgment for defendant. Appeal.

Redfield, C. J. C, having paid the bank their money, cannot protect himself under the title of the bank, but must be regarded as holding under his former title merely. Judgment reversed.

STATE v HUNTON (1856) 28 Vt. 594.

Quo warranto. The plaintiffs had a majority of the votes cast for directors, and the question was whether those votes were legal. P, a citizen of New Hampshire, advanced a large sum of money to D and others that was expended in the purchase of stock of the bank, which was conveyed to citizens of Vermont in lots of four shares each. The banking laws of the State gave to a stockholder of but four shares one vote on each share. The number of votes cast upon stock paid for by the money of P was more than five hundred.

Bennett, J. The General Banking Law of this State provides that no stockholder residing out of the State shall, either personally or by proxy, vote in meetings of the corporation. P's money was furnished to buy stock, and we think that the pretense that the stock belonged to any one else is altogether colorable. The stock, belonging in fact to P, should not have been voted, and defendants have a majority of the legal votes. Proceedings dismissed.

Cited: 48 Vt. 282.

SOUTH ROYALTON BANK v DOWNER (1856) 28 Vt. 635.

Ejectment. T, owner of the premises, mortgaged them to the plaintiff, to secure a bond; and in case the same should be assigned to the treasurer of Vermont, under an act of the state of November 17, 1851, the principal was to be paid forthwith to the treasurer. The bond was assigned to the treasurer, and this suit was brought by the bank. Subsequent to the mortgage to plaintiff, T mortgaged the same premises to defendant, who, after default, took possession before the institution of this suit. Plaintiff nonsuited. Appeal.

Bennett, J. The assignment vested in the treasurer the legal title to the bond and mortgage, though in trust; and the object of the statute required that it should be so. Until a reassignment the plaintiff cannot maintain this action for want of title. Judgment affirmed.

BANK OF REPUBLIC v BAXTER (1858) 31 Vt. 101.

Bill to compel the payment of a check. B had an arrangement that the plaintiff bank should certify checks for a larger sum than he had on deposit, with the understanding that they should be made good the same day. B became insolvent, of which fact the plaintiff was ignorant, and procured checks to be certified for \$15,000 more than his deposit, giving his note for the amount, with collateral which proved worthless. B was indebted to H for \$7,000 and one of the checks certified was for that amount and deposited by B in M Bank by direction of H, to the account of R Bank. The check was paid by the plaintiff to M Bank before it became aware of the facts. By request of the plaintiff, the banks of R and H were notified by telegraph that payment had been stopped. This bill was brought to compel M Bank to pay the amount of the check and to enjoin all proceedings on the same. Decree for defendant. Appeal.

Poland, J. The check for \$7,000 was procured by S by such fraud as to vitiate the transaction between him and the plaintiff, and such fraud as authorized the plaintiff to reclaim the check or the money as against S. The right to recover from B was not affected by the fact that the plaintiff took a worthless note from him. The debt due H from S was created without reference to this check. He performed no act, parted with no consideration, nor yielded any right or advantage on the credit of this fund. In law and equity the right of the plaintiff to the check is quite superior to that of H. Decree reversed.

KEITH v GOODWIN (1858) 31 Vt. 268.

Assumpsit, on promissory note, made payable to the V Bank, with the intention of having it discounted. The cashier discounted it on his private account, sold it to H before maturity, and indorsed it in the name of the bank. H called upon the plaintiff, guarantor, for payment, which was made and the note taken up, and suit brought against the defendant, who appeared as one of the makers of the note, although he was in fact a surety. The defendant averred that there was not a legal transfer of the note; that the bank had no interest in it; and that, as it was payable to the bank, it could not be legally discounted by any one else. Judgment for defendant. Appeal.

Redfield, J. The fact that the note was discounted by the cashier of the bank where it was made payable, and by him indorsed as the cashier, in the name of the

bank, was a sufficient recognition or adoption of the note by the bank, to render it binding upon the parties to the contract. The plaintiff is equitably entitled to treat the defendant as he held himself out upon the contract, that is, as principal. Judgment reversed.

Cited: 33 Vt. 634; 49 id. 200.

AUSTIN v BIRCHARD (1859) 31 Vt. 589.

Assumpsit. Promissory notes, payable to the plaintiff or order, were taken for a debt due the F Bank. The plaintiff acted as agent of the O Bank in obtaining the notes, which, if approved, were to discharge the debt. The notes were approved and the plaintiff indorsed them without recourse and delivered them to the bank, at whose request he then brought this suit in his own name, producing the notes at the trial. The defendant gave in evidence the charter of the bank, which provided "that no note originally due or payable to said corporation, shall be indorsed so as to enable the indorsee to maintain an action in his own name." Judgment for defendant. Appeal.

Aldis, J. The possession of the notes by the plaintiff, and his production of them on the trial, secures the defendant from possible injury in all cases where the real owner consents to the bringing of the suit. The notes were originally made payable to the plaintiff, and the legal title vested first in the plaintiff; and since the suit is brought for the benefit of the bank, it does not fall within the prohibition of the charter. Judgment reversed.

Cited: 33 Vt. 634.

BRUCE v HAWLEY (1859) 31 Vt. 643.

Assumpsit. A bill of exchange was drawn by defendant on C, payable to the defendant's order, indorsed by him and accepted by C. The plaintiff was a director of D Bank, where the bill was discounted. Before the bill matured, the cashier of the bank transferred it to the plaintiff, in payment of his deposit in the bank, in lieu of specie which he might have received. The defendant contended that the plaintiff knew the bank was insolvent at the time of the transfer; that the bill was payable to the bank, and that the bank could not so negotiate it as to deprive the defendant of the right to pay it in the bills of the bank; that the plaintiff, being a director, could not recover. Judgment for plaintiff. Appeal.

Pierpoint, J. The bill in suit was not made payable to the bank. It was not illegal for the plaintiff, although a director in an insolvent bank, to take it by transfer in good faith. While the paper was in the hands of the bank, it was by virtue of the statute payable in the bills of the bank; but upon transfer to the plaintiff, the right to pay it in those bills terminated. Judgment affirmed.

FARMERS BANK v BURCHARD (1860) 33 Vt. 346.

Assumpsit. Defendant was the surety on notes and drafts made and accepted by S, and held by plaintiff bank. Plaintiff advanced to S more than 10 per cent of its capital in its own bank bills, and took his drafts at 5 per cent payable at sight, but agreed that they should not be enforced within a year if S protected plaintiff's paper. Subsequently S failed to protect the circulation, and notes were given covering the original sum and interest, and the interest to be paid on them was in excess of the legal rate. There was no intent to discount the original drafts or to charge usurious interest, and the facts were not concealed by the bank. The defendant contended that the original transaction was a discount in excess of that allowed by law; that the original transaction was usurious; that the new agreement was void because based upon a usurious contract, and the interest charged was usurious; that the law in regard to usury in force in Michigan, where the second contract was made, was applicable. Judgment for plaintiff. Exceptions.

Barrett, J. 1. The original transaction was a loan and was not usurious. 2. The transaction was not void because the loan exceeded 10 per cent of plaintiff's capital. 3. The second agreement was not usurious. 4. The law of Michigan cannot govern in regard to the usury. 5. The new notes were legal to the extent of the legal interest charged. Judgment reversed.

Cited: 33 Vt. 634; 51 id. 352.

BUELL v WARNER (1861) 33 Vt. 570.

Case. Action to recover damages sustained by a stockholder through the violation of official duty by defendants, directors of the F Bank. C. S., ch. 48, sec. 56, provided that directors should be liable to pay creditors and stockholders all losses sustained in consequence of any violation of the provisions of the banking laws or other unfaithfulness in the discharge of duty. The allegations of misconduct were for allowing loans to be made in excess of the statutory limit. Defendants alleged that all of the stockholders must join in the action; and demurred for duplicity, but the special facts wherein it consisted were not set forth. The declaration set up that loans were made in excess of the limit, that they were allowed by the directors, and that damage resulted to the stockholders. Demurrer. Overruled. Judgment for plaintiff. Exception.

Barrett, J. 1. To require all of the stockholders to join in such a suit would be to disregard all well-known rules. The rights of the stockholders are several. 2. The demurrer for duplicity does not state specifically wherein the duplicity exists, and could not be sustained. 3. The declaration was sufficient in form and substance. Judgment affirmed.

Cited: 57 Vt. 633; 64 id. 214.

BANK OF MIDDLEBURY v BINGHAM (1861) 33 Vt. 621.

Assumpsit, upon two promissory notes against sureties. The notes were made payable to the plaintiff bank, but were discounted by W, without the knowledge of the defendants, at more than 6 per cent. The charter of the bank prohibited the taking of more than 6 per cent interest. The principal debtor sent W a draft to be applied to the payment of interest for a renewal for three months. W retained the draft and after the three months had expired, credited it as interest for three months. The defendants averred that the suit could not be maintained in the name of the bank; that the notes not having been discounted by the bank they were not holden to W upon them; that the receiving of more than 6 per cent interest released them from liability to plaintiff; and claimed release by extension of the time of payment. Verdict for plaintiff. Exceptions.

Poland, C. J. A note made payable to a particular person or corporation with the expectation that it will be discounted by the payee, may be discounted by another, and the sureties will be holden. An action may be brought in the name of the payee if he does not object. The defendants cannot claim that the notes are inoperative and void for the reason that more than 6 per cent interest was taken for discounting, contrary to the prohibition in the charter of the payee. The question of intention as to extension by the sending of a draft by the principal on the notes, and its subsequent application as interest was properly submitted to the jury. Judgment affirmed.

Cited: 35 Vt. 283, 505; 36 id. 544, 557.

TREASURER OF VERMONT v MANN (1861) 34 Vt. 371.

Debt. A was chosen director of O Bank and gave the bond sued on; he was re-elected, but never gave another bond. The alleged breach occurred after the expiration of his first term. The statutes forbade any bank director from entering upon the duties of the office until he had executed a bond; and also provided that a director should hold his office until another was elected and qualified. The question raised was, whether the defendant was liable on the bond after expiration of the term and re-election. Judgment for plaintiff. Appeal.

Poland, C. J. Bonds or obligations given to secure the performance of official duties, where the appointment is limited, only extend for the period named in the condition, or the term fixed by law; and they do not extend to or cover extension of the time by a future appointment, or subsequent election. Judgment reversed.

Cited: 34 Vt. 519; 60 id. 332; 69 id. 16.

FARMERS BANK v DRURY (1863) 35 Vt. 469.

Trustee process. D, the trustee, gave the defendant two promissory notes and consented that the defendant place the notes as collateral with M Bank for a loan for which he had arranged. Before the service of the trustee process he gave the trustee notice of what he had done, but not at request of the claimant. Trustee adjudged not chargeable. Exceptions.

Poland, C. J. No notice of the transfer of the notes to the claimant had been given to the trustee prior to the service, except by the principal debtor, and that was at the request of the claimant. Such notice was insufficient to protect the notes in the hands of the claimant against a trustee attachment. The paper was transferred to the bank as collateral for an already existing debt. The bank had not purchased the notes or advanced any money on them. Judgment charging the trustee.

Cited: 71 Vt. 390.

DANBY BANK v STATE TREASURER (1865) 37 Vt. 541.

To subject bank fund. After applying the assets in his hands to the payment of the bank's debts there was a deficiency, which complainant, receiver, contended was payable out of the bank fund. For several years after its organization the bank did not contribute the amount required by C. S. 481, which provided that the amounts so contributed should be denominated the "bank fund" and applied to the payment of its debts, in case of insolvency. Sec. 87 provided that if the directors of a bank execute bonds to redeem all its bills, the bank should not be required to contribute to the bank fund. The directors gave annual bonds under this section until 1856, but from that time until its failure the bank contributed cash to the bank fund. Decree for complainant. Appeal.

Pierpoint, J. 1. It was the intention of the legislature to exempt the banks from contribution to the bank fund, so long as the directors of said banks should furnish security for the redemption of their bills, and the payment of depositors, by bonds executed according to the provisions of the section, and no longer. 2. There was no impropriety in making the treasurer a party. He represents the State in the matter. Decree affirmed.

DANBY BANK v STATE TREASURER (1866) 39 Vt. 92.

Mandamus. Petition to compel the state treasurer to pay over to the receiver of an insolvent bank so much from the bank fund as may be in his hands, and necessary to pay the deficiencies of the bank's debts, on the order of the court of chancery.

Barrett, J. It is the right of the receiver to have, and the duty of the treasurer to pay over to him, so much of the bank fund as is now in his hands, charged by the order of the court of chancery. To this extent the court has no doubt that a peremptory writ should issue. Petition granted.

MANUFACTURERS BANK v SCOFIELD (1867) 39 Vt. 590.

Assumpsit, on promissory note, executed by the defendant. It was given on an agreement with F, the president of the bank, that the proceeds should be expended by the defendant in the purchase of horses, and that F would pay the note when it matured. F did not pay at maturity, and the defendant and D, surety on the note, called at the bank and were told by W, the cashier, that F had informed him that he was to pay the note, and ordered it to be charged to him on the books of the bank, which had been done. The defendant relied upon the statement and paid a considerable sum of money to F, who died insolvent without paying the note. The defendant set up the representations of plaintiff's cashier and claimed estoppel. The evidence of the defendant and S was admitted. Judgment for defendant. Exceptions.

Pierpoint, C. J. 1. F was dead, but the issue on trial was not the contract between F and the defendant. The defendant and S were both competent witnesses as to what the cashier of the plaintiff informed them. For the purpose of showing the reasonableness of the reliance of the defendant and D upon the statement of W, proof of the contract was relevant, and for this purpose they were competent witnesses. 2. The facts found by the court constitute a defense. W, as cashier, was the agent of the plaintiff, and authorized to give the information sought by the defendant, and the plaintiff was bound by his representations. Judgment affirmed.

Cited: 41 Vt. 314; 51 id. 591.

BELLOWS FALLS BANK v RUTLAND CO. BANK (1867) 40 Vt. 377.

Assumpsit. Plaintiff held a certificate of deposit, signed by the cashier, and indorsed to it by C, the depositor. It was not alleged that a special demand was

made. The defendant demurred upon the ground that plaintiff did not allege presentation of the certificate and a demand of payment. The plaintiff contended that the transaction was to be deemed a mere loan of money whereon payment became due, and that no demand was necessary. Judgment for plaintiff. Appeal.

Wilson, J. 1. The transaction was not a loan, but a deposit; and the rights and liabilities of the parties are to be ascertained and governed by rules of law applicable to that sort of bailment. 2. No action should be allowed without a previous demand. Judgment reversed.

HOWARD v WINDHAM CO. SAV. BANK (1868) 40 Vt. 597.

Assumpsit, for a deposit, by the administrator of A. A deposited \$200.00 of her own money in the name of B. A retained the deposit book until her death. B died before A, and there was no evidence that she knew of the deposit in her name. The plaintiff had an order from the father of B, her sole heir, for the payment of the deposit to him. Judgment for defendant. Appeal.

Wilson, J. 1. We are of the opinion that the plaintiff's intestate had no interest in the deposit at the time of her death. We think the gift was perfected, and the presumption is that B had knowledge of it. The donor lived several months after the donee died, and there is no evidence that the donor, before or after the death of the donee, asserted any right to the money. 2. A wife has a right to her separate property, and the deposit was not the property of her husband. Judgment affirmed.

Cited: 49 Vt. 249; 56 id. 289.

BRADSTREET v BANK OF ROYALTON (1869) 42 Vt. 128.

Action on an account. The plaintiff had been a director of the defendant, a bank. After plaintiff's term as director in defendant bank expired, the president, a director of the bank, and another director employed the plaintiff to work for the interests of the bank, with a promise of pay for his services. Six months later another director was informed of the employment, but the two other directors did not know of it. No time limit was fixed. The three directors continued in office for six years, and the plaintiff presented a bill for services during that period. The claim was sent to an auditor who found that the services were rendered, and awarded a sum found to be due; but submitted the questions to the court: 1, whether the contract was proper; 2, whether the contract as made was binding; 3, whether, under the statement, the plaintiff was entitled to recover for more than one year. Report accepted. Judgment for plaintiff. Exceptions.

Steele, J. The fact that the contract was not known to two of the directors is not sufficient for us to infer that the engagement was designedly concealed. The contract originally made by two directors and subsequently approved by a third, and not being limited as to time, and the same three directors continuing in office during the entire service, we should infer that it was approved by all three during the whole time. It is not necessary that the whole board of directors be consulted on every little detail of business. Judgment affirmed.

Cited: 64 Vt. 518.

CLAPP v BURLINGTON (1870) 42 Vt. 579.

Assumpsit, to recover taxes paid upon national bank stock. The plaintiff lived in Burlington, and the banks in which he held stock were located, one in S, and one in St. A. His contention was that the stock could not be taxed by the defendant city. Judgment for defendant. Appeal.

Pierpoint, C. J. The question is, where, in this state, shall national bank stock be taxed: in the town or city where the owner resides, or in the town or city where the bank is located? Under the statutes of this state, it is taxable in the place where the owner resides. This requirement of our statutes is not in conflict with the Act of Congress of June 3, 1864, creating national banks. By that act the stock of national banks must be taxed in the state where the bank is located, the only object being to secure equal and just taxation. Judgment affirmed.

NEWMAN v WAITE (1871) 43 Vt. 587.

Trespass on the case. An act required cashiers to transmit to the town clerks lists of national bank stockholders living in such towns; and provided a forfeiture

of \$500 for a failure to comply, to be recovered in an action by the treasurer of the town for the benefit of the town. This action was against a cashier, who pleaded limitation of two years, under ch. 62, sec. 5, of the general statutes of the state. Judgment for defendant. Appeal.

Wheeler, J. The forfeiture is for the benefit of the town, as damages. The defense rests upon the provisions of the statute limiting criminal prosecutions and actions on penal statutes. This action is for a remedy given to a party aggrieved, and it is not barred by provisions of that act. Judgment reversed.

Cited: 44 Vt. 461; 67 id. 80.

HALL v BOWKER (1871) 44 Vt. 77.

Trustee process. The banks of N and S appeared as claimants. Both had received the notes in question in good faith in the usual course of business, and had no knowledge of the trustee process. The principal defendant borrowed money from C and transferred to him notes of W, the trustee, of which C did not give W notice, but got the notes discounted at the claimant banks. The trustee process was served upon W before the discounts. The general statutes of the state, sec. 47, ch. 34, provided that negotiable paper, assigned or transferred to any bank in the state before it became due, should be exempt from trustee process. Judgment charging the trustee. Exceptions.

Barrett, J. The provision of the statute means that the fact of a transfer to a bank has the active operation of exempting paper not then due from the trustee process; and in this respect it makes no difference whether, previous to such transfer, process has been served that would hold the debt if the paper had not been transferred to the bank. Trustee discharged.

Cited: 47 Vt. 44; 51 id. 599, 600.

BRATTLEBORO v WAIT (1872) 44 Vt. 459.

Case, against a cashier for damages, for neglect to return to the town clerk names of the stockholders in the W Bank, as required by Act of 1865, No. 6. The question turned on whether the defendant was liable for damages or only for the penalty prescribed by the act. Demurrer. Sustained. Judgment for defendant. Appeal.

Ross, J. 1. The principle that the law will furnish a remedy to a party injured by the neglect or non-performance of a duty imposed on an individual by statute, where the statute itself furnishes no remedy, is well established. 2. But if the statute which imposes a new duty also provides a particular remedy, that remedy is usually the only remedy the injured party has. 3. The acts under which the suit is brought, do not give a double remedy. They provide for a penalty, but not for damages. Judgment affirmed.

NEWMAN v WAIT (1874) 46 Vt. 689.

Case, by a town treasurer, to recover penalty from the cashier of a national bank for failing to furnish the town clerk with a list of stockholders according to the provisions of the Act of 1865, No. 6. Plea, not guilty. Defendant contended that, being cashier of a national bank, he was not amenable to the statute law of the state creating the duty and imposing the penalty. Judgment for plaintiff. Appeal.

Peck, J. The issue was as to the truth of the declaration, not as to its sufficiency in law. If the defendant desired to raise the question as to the validity of the statute as applicable to a cashier of a national bank, he should have done it by demurrer to the declaration, or motion in arrest of judgment after verdict. He had no right to require the court to entertain and decide a question outside the issue he had tendered; and it was not error in the court to refuse to do it. Judgment affirmed.

WILEY v FIRST NAT. BANK (1875) 47 Vt. 546.

Trover. When the plaintiff made demand for the bonds which defendant's cashier had receipted as a special deposit for safe-keeping, he was told by the cashier that they had been stolen. The defendant bank offered no evidence, but asked the court to hold as matter of law that under the National Currency Act of June, 1864, national banks could not be held liable for special deposits; and that the

cashier could bind only himself by the receipt. Verdict for the plaintiff. Exceptions.

Wheeler, J. The cashier could not bind the bank by an express promise to keep the bonds safely. The undertaking to keep, implied from the mere acceptance of a deposit, is outside the authorized business of this bank. The cashier did not act as the agent of the stockholders in receiving the bonds. Judgment reversed.

Cited: 50 Vt. 393.

FIRST NAT. BANK v HUBBARD (1876) 49 Vt. 1.

Assumpsit, on a promissory note, in a state court. Sec. 59 of the National Banking Act of 1863 provides that all action by or against a national bank may be had in any circuit or district court of the district in which the bank is located. Sec. 57 of the Act of 1864 provides that actions against such banks may be had in the same courts, or in any state, county or municipal court in the county or city in which the bank is located, having jurisdiction in similar cases. Defendant demurred to the jurisdiction of the court, contending that a national bank could sue only in the United States courts. Overruled. Judgment for plaintiff. Appeal.

Royce, J. 1. The word "by" has doubtlessly been omitted by accident in the Act of 1864. It cannot be supposed that Congress intended to exclude the association from suing in the courts where they can be sued. 2. There are no words of exclusion in the act, and it is a general rule of jurisdiction that to confer it upon one court, does not operate to oust other courts, otherwise possessing it, for the reason that concurrent jurisdiction is not inconsistent. Judgment affirmed.

DOW v IRASBURGH NAT. BANK (1877) 50 Vt. 112.

Assumpsit, for usury. The plaintiff sought to recover in a state court the amount of interest on notes paid above the legal rate. U. S. R. S., sec. 5198, provided for a penalty for usury recoverable in the federal courts. By the National Banking Act of 1864, jurisdiction is conferred on state courts in proceedings against national banks, if such courts have jurisdiction in similar cases under state laws. The defendant moved to dismiss on the ground that the court had no jurisdiction. Motion sustained. Judgment for defendant. Appeal.

Barrett, J. 1. The case does not fall within either the constitutional or statutory provision by which exclusive jurisdiction is given to the federal courts of all cases, or matters of crime arising under the constitution and laws of Congress, for the plaintiff has not sued for the penalty. 2. As the county courts of Vermont have jurisdiction of suits to recover money paid as usury, this case is within the terms and intent of the act of Congress. Judgment reversed.

Cited: 56 Vt. 586.

WHITNEY v FIRST NAT. BANK (1877) 50 Vt. 388.

Case, for negligence in keeping a special deposit of bonds. Plaintiff left bonds with the cashier of the defendant bank, for which he received a receipt, as for a special deposit. When demanded, the cashier informed the plaintiff that they were gone; the plaintiff then demanded pay for them, which was refused. Judgment for defendant. Appeal.

Dunton, J. The directors of a national bank are trustees of the shareholders, and their authority is limited by the act of Congress to such powers as are thereby directly conferred upon them, and such, in addition thereto, as are necessarily incidental to the business of banking. The receiving of special deposits for safe-keeping is not authorized by the National Banking Act, and is not an act necessarily incidental in the banking business. Judgment affirmed.

HOWARD NAT. BANK v LOOMIS (1879) 51 Vt. 349.

Foreclosure of mortgage given to the plaintiff bank to secure the payment of a debt. The defendants contended that the mortgage was given in good faith; but that a national bank had no authority to take a mortgage to secure a pre-existing indebtedness. Decree for plaintiff. Appeal.

Powers, J. 1. Under the evidence no question can be made as to the good faith of the bank in taking the security. 2. The mortgagor has no right to avoid the mortgage deed on the ground of the want of power in the bank to take it. 3. The doctrine of ultra vires ought not to be invoked to effectuate injustice, when it can be avoided. Decree affirmed.

SARGENT v WOOD (1879) 51 Vt. 597.

Trustee process. The trustee, P, gave the defendant his promissory note, and later received notice from the R Bank that it held the note as collateral security for defendant's note, after which P was served with a trustee process. Under G. S., ch. 3, sec. 47, negotiable paper assigned, negotiated, or transferred to a bank in this state, before it becomes due, shall be exempt from attachment by trustee process. On the maturity of the note, P caused the sum for which it was placed with the bank to be paid, and took up the note. The court held that P was not chargeable as trustee. Exception.

Ross, J. The question is, whether P can be held as trustee, for the balance of the note above the deduction which he is entitled to have, for payment made to the bank. The note not having been actually assigned to the bank by pledging it as collateral for the payment of another note, but only so much of it as was necessary to make that payment, the trustee is chargeable for so much of the note as was not required to satisfy its pledge to the bank. Judgment reversed.

RUTLAND SAV. BANK v RUTLAND (1880) 52 Vt. 463.

Assumpsit, to recover taxes. Plaintiff bank paid under protest taxes on stock of national banks, in which it invested some of the deposits of the bank. The tax was levied under G. S., ch. 83, sec. 18, which applied to "banks and other corporations." Judgment for defendant. Exceptions.

Barrett, J. 1. The plaintiff is not a business corporation, operated for its own emolument. It has no stockholders; it receives money to invest in a safe and profitable manner for depositors. Such institutions were not meant by the language of the statute. 2. Deposits of less than \$250 are exempt from taxation, but the taxation imposed by the defendant would compel the depositors to pay a tax on all sums. Judgment reversed.

WHITNEY v FIRST NAT. BANK (1882) 55 Vt. 154.

Case, for negligence. The plaintiff left bonds with the defendant for safe-keeping, without promising or obliging himself to pay for the service. The bonds were stolen. Evidence was given to show that during banking hours the safe was left open and that there was no rail to prevent persons getting to it; also, that at noon but one person was left in charge. No demand was made for the defendant's books. The court charged that there was evidence tending to show that the bank would be benefited by the deposit, by the sale of the coupons, or otherwise; and that the failure of the bank to produce its books on the trial might be considered by the jury to its prejudice. Judgment for plaintiff. Appeal.

Redfield, J. 1. The possible conjectural benefit that might accrue to defendant by purchasing the coupons, if the depositors should offer to sell them to the bank, is too remote to be evidence of a reward. 2. A gratuitous bailee is answerable only for fraud or for gross neglect, and not for such ordinary inattentions as may be compatible with good faith. The measure of diligence is that which the bailee uses in his own affairs. 3. The facts proved were not such as could be accounted negligence, much less gross negligence. 4. If the plaintiff wished the books in evidence, he should have called for them in some proper way. Judgment reversed.

BARNES v HALL (1883) 55 Vt. 420.

Assumpsit, to recover the price of bank stock. The plaintiff, a collector of the village of A, sold to the defendant, under a tax warrant, certain shares of bank stock for which the defendant specially promised to pay. The defendant contended, that under the statute, as it stood prior to the Act of 1882, No. 11, bank stock could not be sold by virtue of a tax warrant. Judgment for plaintiff. Exceptions.

Rowell, J. 1. Prior to the passage of the statute expressly providing therefor, there was no mode provided by law for selling bank stock on a tax warrant. 2. The defendant's promise is nudum pactum ex quo non oritur actio. Judgment reversed.

Cited: 59 Vt. 134; 60 id. 650.

POPE, EX'R v BURLINGTON SAV. BANK (1883) 56 Vt. 284.

Assumpsit, by the executor of B, for a deposit in the defendant bank, in which C, a grandchild, appeared as claimant. B deposited money in the bank in the

name of C, but payable to himself. He kept the passbook, withdrew part of the deposit, and afterward directed the treasurer to add to the entry, so that it read "payable to B, during his life, and after his death to C." B had made a will before the deposit, in which he provided: "I hereby confirm all gifts I have made or shall make to my children." He said nothing else in relation to the deposit, and C had no knowledge of it until B died. The bank treated B as the depositor. Judgment for plaintiff. Exceptions.

Veazey, J. A delivery is an indispensable prerequisite to a gift; and it must, as a general rule, be such a delivery as terminates the donor's possession, dominion and control of the article. Here there was no delivery; nothing was said indicating an intention to hold the deposit book in trust for C, and the transaction did not create a trust between the claimant and B. Judgment affirmed.

Cited: 60 Vt. 11; 64 id. 576.

DEWEY v ST. ALBANS TRUST CO. (1884) 56 Vt. 476.

Petition, for a receiver. The petition alleged that the plaintiff, inspector of finance, believed defendant company to be insolvent. The company was enjoined from transacting business, until further order. The charter of the company, Statutes of 1868, No. 157, provided, "that in case of dissolution, the debts due to minors, insane persons, or married women, shall be satisfied before other debts were paid." It was not shown that the defendant was in such a financial condition that it could not resume business, but it appeared that it could not meet its obligations in due course. Temporary receiver appointed. Appeal.

Rowell, J. 1. The object of this proceeding is to protect and preserve the corporate assets for the benefit of creditors. 2. The court may discharge the receiver, and allow the corporation to resume the management if satisfied that the interests of all parties would be best subserved in that way. 3. Such a receivership cannot be said to operate as a virtual dissolution of the corporation. 4. No class of creditors can be preferred. Decree affirmed.

Cited: 60 Vt. 8.

HILL v NATIONAL BANK (1884) 56 Vt. 582.

Assumpsit. Plaintiff sued in state court to recover excess over legal interest paid to the defendant. The plaintiff had previously brought a suit in the circuit court to recover the penalty prescribed by U. S. R. S., sec. 5197-8, for usury, and obtained judgment. Judgment for defendant. Exceptions.

Rowell, J. Whether assumpsit is the proper remedy in this case, we say nothing; for the plaintiff has no rights in the premises except those conferred by the federal statutes, and those have been fully realized and enforced by suit in the federal court. This action does not lie. Judgment affirmed.

DEWEY v ST. ALBANS TRUST CO. (1885) 57 Vt. 332.

Petition, by the receiver, for an assessment on stockholders. Plaintiff alleged that the capital stock of defendant company had been impaired, and that the directors had refused to levy an assessment, as required by the charter. The provision in the charter (St. 1868, No. 157) was, "if at any time the capital stock paid into said corporation shall be impaired by losses or otherwise, the directors shall forthwith repair the same by assessment." The plaintiff contended that by virtue of this provision the stockholders were bound to contribute, to the amount of their capital stock, toward the payment of creditors of the company, the assets being insufficient. Certified.

Rowell, J. The language of the provision is not fairly adequate to express an intention to impose personal liability on the stockholders. It looks rather to a continuance of business by the company, and was intended to prevent such continuance with an impaired capital. Petition dismissed.

Cited: 73 Vt. 171.

GREEN v ST. ALBANS TRUST CO. (1885) 57 Vt. 340.

Quo warranto. A creditor sought a judgment of forfeiture of the corporate rights of the defendant, alleging that the company had become insolvent, had refused payment to depositors, and had invested in improper securities. A receiver had entered upon his duties. Defendant set up that forfeiture would greatly embarrass him in prosecuting suits. On report.

Rowell, J. 1. Franchises are special privileges conferred by government upon individuals. 2. The abuse of a franchise is a public rather than a private injury. 3. The proceedings for a forfeiture of a franchise to the state ought to be instituted by the public prosecutor or other authorized representative of the state, and not left to the control of private parties who have no interest but their own to subserve. Complaint dismissed.

DARBY v FIRST NAT. BANK (1885) 57 Vt. 370.

To recover penalty for usury. The plaintiff, desiring to borrow money, was taken to the defendant, where its cashier, from its vaults, gave plaintiff \$3,100. The plaintiff executed his note and mortgage to the cashier for \$3,600, which was paid at maturity with interest at the full legal rate. Judgment for plaintiff. Appeal.

Veazey, J. 1. A finding, that the transaction between the plaintiff and the cashier was the transaction of the bank, when it occurred, and was conducted by the cashier as a mere cover of an usurious transaction by the bank, is essential to the plaintiff's right of recovery. 2. The report also fails to show that the defendant subsequently adopted the transaction as it took place. It is not found that the bank ever became a party to, or a beneficiary of, the usurious feature of the transaction. Judgment reversed.

Cited: 58 Vt. 452; 58 id. 470.

CROWN v BRAINERD (1885) 57 Vt. 625.

Case, against the directors of the St. Albans Trust Company, by a director, under charter which provided that the directors should be liable for loss sustained through their unfaithfulness in the discharge of official duty. The company was in the hands of a receiver. The defendants insisted that no action at law could be maintained by a creditor upon that provision of the charter, but that the remedy, if any, was in equity. Judgment for defendants. Appeal.

Veazey, J. The provision of the charter should be construed so as to provide the most complete, convenient, comprehensive, and equitable remedy of which its language will admit. A process in chancery would furnish such a remedy, and a suit at law would not. There should be an equitable distribution of the funds to all the depositors, and a court of equity alone can do that. Judgment affirmed.

Cited: 72 Vt. 41.

VILAS NAT. BANK v STRAIT (1886) 58 Vt. 448.

On promissory note, payable to the plaintiff bank, at Plattsburg, New York. The defendant had transacted business for some time with the plaintiff. The president of plaintiff agreed with the defendant that he might pay the notes to D, who would forward the proceeds to the bank. The notes were paid to D, and the proceeds were forwarded. Plaintiff contended that the president had no authority to make the agreement. The case was submitted to a referee, who failed to find as matter of fact whether D was the agent of the plaintiff or of the defendant, but submitted the question to the court. Judgment for defendant. Appeal.

Veazey, J. 1. The president of the bank had the right, in behalf of the bank, without special authority, to agree upon the agency; and parol evidence is admissible to prove such agency. 2. The question of agency was one to be decided by the trier of the facts, and not by the court. Where parties elect to have a referee to find the facts, they are entitled to have that tribunal, not another, find them. Judgment reversed.

SOWLES v SOULE (1886) 59 Vt. 131.

Assumpsit, to recover taxes paid under protest. Defendant, a tax collector, without authority of law, distrained plaintiff's bank stock and advertised it for sale. Plaintiff, knowing all the facts, paid the tax. Judgment for plaintiff. Appeal.

Veazey, J. Plaintiff, having paid the tax with full knowledge of the facts, made a voluntary payment and cannot recover. Judgment reversed.

DEWEY v ST. ALBANS TRUST CO. (1887) 60 Vt. 1.

To obtain a preference. The inspector of finance obtained an injunction restraining the defendant from carrying on business, as a corporation. A receiver

was subsequently appointed. The receiver was instructed by the court to divide the surplus equally among the creditors, on the ground that insolvency did not dissolve the corporation. Some of the depositors, who were minors, married women, or insane persons, claimed a preference and appealed. Upon an appeal the decree was affirmed and remanded. Subsequently, a petition was filed by K, a married woman, a depositor who had proved her claim, on behalf of herself and all others in like circumstances, and divers other persons in like interest, including some who appealed from the former decree. This petition is based on the fact that the corporation had been in a state of suspended animation since the decree was rendered. Defendant's charter provides, that, in case of dissolution by act of law or otherwise, debts incurred by deposits in favor of married women, minors, or insane persons, are entitled to preference. Decree dismissing petition. Appeal.

Rowell, J. 1. In cases where the parties are so numerous that it is impracticable to bring them all before the court, equity will let a few represent the whole. 2. The former decree is not binding to the extent of precluding all inquiry into matters arising since the institution of the former proceedings; for the doctrine of estoppel by judgment, has no application to a case that is ambulatory in its nature, and has ceased to be the same by progression. 3. Mere insolvency, however hopeless, is not sufficient evidence of a surrender of corporate rights. Decree affirmed.

Cited: 71 Vt. 435.

WITTERS v SOWLES (1889) 61 Vt. 366.

Foreclosure of mortgages, and leases, conditioned to pay all sums due to depositors or creditors of the bank of which petitioner became receiver. The defendant demurred to the petition on the ground that the depositors and creditors of the bank were not made parties. The court thereafter allowed the petitioner to amend, by striking out the clause referring to depositors and creditors. The defendant contended that the court could not allow the amendment after demurrer. The defendant maintained that he could not be held individually, because one of the leases was assigned to the bank by him as executor. The defendant also moved to dismiss for want of jurisdiction, averring that the petitioner being a national bank in process of liquidation, the federal courts had exclusive jurisdiction. Decree for plaintiff. Appeal.

Taft, J. 1. Permission to amend in respect to time, after the demurrer, was not error. 2. The petitioner alleged that defendant was the owner of the lease; by demurrer this was admitted, and no other party, in respect of this question, was necessary. 3. The receiver had the duty of collecting the assets of the bank; in the collection of debts he may invoke the aid of any court such as this, having jurisdiction in other respects. Decree affirmed.

SAFFORD v FIRST NAT. BANK (1889) 61 Vt. 373.

On book account. The defendant bank demurred, and moved to dismiss for want of service. The bank was located in New York and the service was made by leaving a copy of the writ in the hands of the trustee. Sec. 5242, U. S. R. S. provides that no attachment, injunction, or execution shall be issued against a national bank or its property before final judgment in any suit, action or proceeding in any state, county or municipal court. Demurrer and motion overruled. Exceptions.

Royce, C. J. The service of a trustee writ, is in legal effect, attaching property, and is therefore void. Judgment reversed.

GIFFORD v RUTLAND SAV. BANK (1890) 63 Vt. 108.

Assumpsit, for a deposit. The deposit was sent through the mail by checks. When the first was sent, a passbook, containing the rules of the defendant bank, was forwarded to the plaintiff. The by-laws provided that a depositor should subscribe his name to a signature book as assenting to the rules. This was not done by the plaintiff. The by-laws also provided that the bank would not be responsible if money were paid to the wrong person upon presentation of the deposit book, unless notice of the loss of the book had been given. The plaintiff had never been to the bank, and he and his signature were not known to its officers. The brother

of the plaintiff stole his deposit book, and received payment upon it. Judgment for defendant. Exceptions.

Rowell, J. 1. The subscribing of a depositor's name to a book kept for that purpose is not the only method in which he may assent to the rules of a bank. His receiving and holding the deposit book, with the by-laws printed in it, may be taken as an assent. 2. Payment to the wrong person on presentation of the book, before notice of its loss, without circumstances to excite suspicion, was sufficient to relieve the bank. The bank was not bound to require the thief to identify himself as the depositor further than by the production of the book. Judgment affirmed.

GOODELL v BRANDON NAT. BANK (1891) 63 Vt. 303.

Assumpsit, to recover an overcharge in the plaintiff's account. The plaintiff alleged that the overcharge was made in 1868, and he did not discover it until 1889, when he demanded payment and brought suit. During all this time he kept a deposit book, which was settled and returned to him every two months. More than six years prior to the commencement of the suit he drew out his balance, and for two years had no account at the bank. The defendant pleaded estoppel, and Statute of Limitations. There was no evidence that defendant had been injured by plaintiff's delay. Judgment for defendant. Appeal.

Ross, C. J. 1. To establish an estoppel in pais, it must appear that the defendant has been put to material disadvantage by the neglect and delay of the plaintiff in making the discovery, or that, by reason of it, the defendant had neglected some action or lost some right. 2. The Statute of Limitations is not a bar, because the plaintiff had never drawn a check for the sum claimed, or demanded it until 1889, and no right of action arose in his favor for its recovery until then. Judgment reversed.

Cited: 65 Vt. 399.

BALLARD v BURTON (1892) 64 Vt. 387.

Assumpsit, on a certificate of deposit. The plaintiff held certificates of deposit on the F Nat. Bank. During a run on the bank, he presented them for payment. The officers requested that he leave the funds there. The plaintiff consented to this, if the bank would give him a new certificate signed by defendant. A new certificate was then furnished, payable to the order of plaintiff, with the indorsement of the president and cashier and of the defendant. Attached to the defendant's name was the word "surety." Three months later, the bank went into the hands of a receiver. A demand of payment was made on the receiver, but no notice of non-payment was given to the defendant, and no demand was made on the president and cashier of the bank. Defendant contended that his signature had been given without consideration; that under sec. 5242, U. S. R. S., a payment by the bank would have been void, it being then insolvent, and that the plaintiff was not damaged by his promise to forbear. Plaintiff testified that he went to the bank to withdraw his money and would have done so but for defendant's promise. The court instructed that in the absence of information, plaintiff had the right to consider defendant a maker rather than an indorser. The court admitted evidence of what occurred before and at the time of executing the certificate. Judgment for plaintiff. Exceptions.

Start, J. 1. A promise to forbear and give further time for the payment of a debt, if followed by an actual forbearance for a reasonable time, is a valid consideration for a promise to pay the debt of a person other than the debtor. Notwithstanding the statute and the insolvency of the bank, the plaintiff waived a legal right in consideration of the defendant's promise. 2. The bank having been closed and a receiver appointed, a return of the certificate, properly indorsed, to the receiver, was all that was required. No other demand or notice was necessary before bringing suit. 3. The word "surety" affixed to the defendant's name, only indicated, to the plaintiff, the fact that the defendant was surety for the bank. 4. It was immaterial that defendant receive a consideration, and he was not prejudiced by the court's telling the jury, that signing the certificate to prevent a run on the bank was a sufficient consideration. 5. It was not error to allow the plaintiff to state that defendant's promise kept him from withdrawing his money. 6. The evidence of what occurred at the time of the transaction was proper to show whether defendant was an indorser. Judgment affirmed.

Cited: 66 Vt. 172, 577; 71 id. 186.

SPRAGUE v FLETCHER (1894) 67 Vt. 46.

Case. Plaintiff alleged that defendant, a tax collector, levied on and sold plaintiff's bank stock to satisfy a pretended tax on such stock. The declaration concluded, "whereby plaintiff was divested of his title to his stock and wholly lost its use and value." Demurrer. Overruled. Judgment for plaintiff. Exceptions.

Ross, C. J. The allegation that defendant pretended to hold a tax against plaintiff falling short of an allegation that he held a pretended tax, there was no allegation of injury sufficient to support an action on the case. Judgment reversed.

Cited: 69 Vt. 72; 73 id. 93.

FIRST NAT. BANK v BRIGG'S ASSIGNEE (1894) 69 Vt. 12.

On cashier's bond. B was elected by the directors of plaintiff, cashier of the bank, and gave a bond, with defendants' assignor as surety. The bond was to continue as long as the cashier held the position. The board of directors were empowered by the U. S. R. S., sec. 5136, subdivs. 6 and 7, to appoint a cashier and dismiss him at pleasure. Plaintiff passed a by-law that the cashier should hold his office at the pleasure of the board. B was first elected for a year, and was thereafter annually elected. The defaults occurred after the first year. Defendants' assignor having gone into bankruptcy, the action on the bond was brought against his assignees. Defendants contended that the term of office of the cashier was for one year. The instrument was in the form of a bond, but without seals. Judgment for plaintiff. Appeal.

Munson, J. 1. The case discloses nothing to place the surety in any other position, as regards the by-laws, than that of a stranger, and the doctrine is that by-laws of this nature are merely provisions for the government of the corporation, that strangers are not bound to know them, and that notice of them will not be presumed. 2. Such an instrument is valid if executed upon a sufficient consideration and delivered to take effect as security. Judgment reversed.

GREGG v BEANE (1895) 69 Vt. 22.

On check. Defendant drew a check in favor of plaintiff on M, bankers, at Bristol. It was received by plaintiff on August 9, on same day forwarded to F Bank, of Ithaca, New York, for collection, which, on August 10, mailed it for collection to N Bank in New York City. The bank received it on August 11, and on August 12, mailed it for collection to the M Bank, of Burlington, Vermont, which received it on the morning of August 14 (August 13 being Sunday), too late to send it to Bristol by the morning mail. M closed its doors on August 14, at 10 a. m. Defendant's contention was, want of due diligence. Judgment for plaintiff. Appeal.

Munson, J. A check must be presented to the bank on which it is drawn, if the bank be in the same place with the holder, or forwarded by mail if the bank be in another place, by the next secular day after it is received, and the depositing of a check in a local bank for collection does not give the holder the benefit of an additional day. This rule seems not to permit the collection through a correspondent so remote as to delay presentment a day beyond the time so allowed. Judgment reversed.

KAVANAGH v VERMONT SAV. BANK (1896) 68 Vt. 494.

Assumpsit, for a deposit, made by the plaintiff in the name of M K, and in whose name the deposit book was taken by the plaintiff. M K declined to transfer the book to plaintiff and immediately presented the book and drew a portion of the deposit. The bank alleged that its contract was with M K. Judgment for defendant. Exceptions.

Munson, J. The rendition of a judgment for the plaintiff would not be determinative of the defendant's liability to M K. The court will of its own motion reverse the judgment pro forma and remand the case, so that M K may be cited under par. 4089 of the statutes, and the matter be disposed of with all possible interests represented. Judgment reversed.

SPRAGUE v FLETCHER (1896) 69 Vt. 69.

Case, for the seizure and sale by the defendant, as tax collector, of the plaintiff's bank stock, to satisfy a tax alleged to have been illegal. The plaintiff bid it in and paid for it. The stock stood in the plaintiff's name upon the books of the

bank and no transfer was made. The defendant averred that the plaintiff was not a resident of Vermont, and that by the provisions of the Acts of 1892, No. 17, he was entitled to no deduction from taxable personal property by reason of his debts. The plaintiff claimed to be a resident of the state and gave in evidence his inventory to the listers of taxes, showing his personal property and debts. The jury found that the plaintiff was not a resident of the state. Judgment for plaintiff. Appeal.

Start, J. 1. The seizure and sale of the stock was such an invasion of the plaintiff's right in the stock as was actionable. 2. The act referred to by reason of its discrimination against non-residents is in conflict with art. 4, sec. 2, of the Federal Constitution. The plaintiff having shown by his inventory that his indebtedness exceeded his personal property, situated in this state, was entitled to be exempt from taxation. Judgment affirmed.

Cited: 69 id. 444.

WATSON, ADM'R v WATSON (1896) 69 Vt. 243.

Trover, for a savings bank deposit book. B, the depositor, delivered the book to defendant with instructions to hold it until plaintiff, her son, was dead, and then divide the deposit among her other children. B died, and plaintiff was appointed her administrator. Plaintiff contended that he was entitled to the deposit book to collect the deposit, even if the deposit belonged to defendant. Judgment for defendant. Exceptions.

Thompson, J. 1. The delivery of the deposit book to defendant consummated the gift, and no other formality was necessary to constitute the actual delivery of the bank deposit, and vest the possession and title in the donee. 2. If the donor is dead, an action for the collection of the deposit can be brought against the savings bank by the donee in the name of the donor's administrator. Judgment affirmed.

FIRST NAT. BANK v BRIGG'S ASSIGNEES (1898) 70 Vt. 594.

On note, made by defendant's assignor to B, his brother, and discounted by plaintiff bank. At the time B was cashier and defendant's assignor, a director in the bank. When defendant's assignor and B became insolvent, with consent of the defendant's assignor, as a director, B, the cashier inventoried the notes and all assets of the plaintiff, and gave himself credit in his loan account, making an indorsement on the note that it was for B to pay. The plaintiff had no notice of the insolvency. Defendant contended that the plaintiff was chargeable with notice. Judgment for plaintiff. Appeal.

Ross, C. J. Knowledge acquired by the officers as agents of a corporation, while not acting for the corporation, but while acting for themselves, is not imputable to the corporation. The general rule, which imputes the knowledge of the agent to his principal and charges the latter with it, is based upon the principle, that it is the duty of the agent to act for his principal upon such notice, or to communicate the information obtained by him to his principal so as to enable the latter to act upon it. Judgment affirmed.

BRANDON BANK v BRIGG'S ESTATE (1898) 70 Vt. 599

Negligence. The intestate was cashier of the plaintiff bank, and the bank sought to charge his estate, on the ground of negligence in not presenting notes for the approval of the directors before they were discounted; in allowing a note to become barred by limitation; for allowing an overdraft by a depositor; for paying his own creditor from funds of the bank; and for non-payment of notes from without the state, indorsed by the intestate, and not paid by the makers. The last notes were presented for payment, and the protest attached to them stated that the protesting notary, a non-resident of the state, duly and seasonably forwarded by mail, to the intestate, notice of the dishonor. Judgment for plaintiff. Appeal.

Ross, C. J. 1. Assuming that the claims on the notes not presented to the directors for approval, and on the note barred by limitation, were lost in whole or in part by the intestate's neglect to perform a duty, such neglect was a tort which did not survive him. 2. The payment of claims against the intestate arising from the appropriation of bank funds should be allowed against the estate. 3. The notarial certificate of protest without the state was not competent evidence to prove notice to the intestate of the dishonor of the notes indorsed by him, either by the common law or by statute, and his estate is not liable for their payment. Judgment reversed.

STATE v BRADFORD SAV. BANK (1898) 71 Vt. 234.

To recover franchise tax. Defendant for some years paid taxes to the plaintiff as provided by secs. 583, 584, R. S., which provide that every savings bank shall semi-annually pay a tax upon the average amount of its deposits. Plaintiff, the inspector of finance, enjoined defendant from doing business on the ground that it was insolvent, and a receiver was appointed. Defendant's assets were less than its liabilities. After the suspension of business, the commissioner of taxes proposed to tax defendant, but the receiver refused, contending it was not liable to the tax, having been enjoined from transacting business, and that it was a franchise tax. Judgment for defendant for costs. Appeal.

Thompson, J. Where the bank was enjoined from doing business, it ceased to transact its ordinary business or any other, and ceased to be doing business in this state within the meaning of sec. 583, and ceased to be liable to pay the franchise tax. Judgment affirmed without costs.

HAWLEY v HURD (1898) 72 Vt. 122.

On negotiable note. The trustee attached the note. The plaintiffs and the trustee were residents of Vermont, and the defendant a resident of New York. The note, made by the trustee in Vermont, payable to the defendant at the N Bank of Hoosic Falls, New York, was discounted by that bank in the regular course of business before notice of trustee process. The trustee contended that paper transferred to a bank in Vermont before it was due was exempt from trustee attachment, and that to hold it as trustee would be a discrimination against national banks without the state, from which they are protected by art. 4, sec. 2, of the Federal Constitution, and art. 14, sec. 1, of the amendment thereto. Judgment for plaintiffs. Exceptions by trustee.

Munson, J. 1. A resident trustee is chargeable, in this state, upon a debt payable to a non-resident in the state of his domicile. 2. Negotiable paper transferred to a bank in this state before due is exempt from trustee attachment under our statute. 3. Federal supremacy secures to a national bank protection only from such legislation as tends to impair its utility as an instrumentality of the Federal Government. 4. The act is not in conflict with the constitution. Judgment affirmed.

RUTLAND PROVISION CO. v HALL (1899) 71 Vt. 208.

Assumpsit, on a check. B was indebted to the plaintiff and sent it two checks, which were credited on the account. Subsequently they were protested for non-payment, and sent back by the plaintiff. Thereupon B obtained an accommodation check from the defendant, and sent it to the plaintiff to apply on the account. This also went to protest, and was charged back, leaving B's account still unpaid. The plaintiff retained the check, and sued on it. Judgment for plaintiff. Error.

Rowell, J. When a negotiable security, whether payable on demand or at a future date, is given on account of a pre-existing debt, the creditor taking the same becomes a bona fide holder for value. Judgment affirmed.

MANN v BRADFORD SAV. BANK (1899) 71 Vt. 346.

To terminate the affairs of an insolvent bank. Defendant was organized as a savings bank and trust company. Plaintiff, the inspector of finance, appointed petitioner receiver to take charge of the assets. On his application the court ordered, that upon the dissolution of defendant, the debts of the creditors specified in the charter were preferred, and were to be paid out of assets in the receiver's hands. Sec. 4062, R. S., provides that the distribution of the assets of an insolvent bank in the hands of a receiver shall be applied: 1, to payment of costs of proceeding; 2, to payment of circulating bills; 3, to moneys deposited by savings banks; 4, to payment of other creditors. There were no circulating bills or notes or debts in favor of savings banks. Decree for petitioner. Appeal.

Start, J. The assets remaining in the hands of the receiver, after paying the expenses of the receivership, must be applied pro rata to the payment of such debts as have been proved and allowed. Judgment reversed.

BARTON NAT. BANK v ATKINS (1899) 72 Vt. 33.

To enforce stockholders' liability. Sec. 9 of the charter of the insolvent company, in which defendants were stockholders, provided that "the stockholders shall be personally liable for the indebtedness of the company beyond their stock, to an amount equal to the par value of their stock." The defendants contended that this provision of the charter was repealed by No. 79 of the Laws of 1886, and that the bill was without equity. The defendants demurred, and averred that they were not liable unless they were stockholders when the debts were incurred; that the action, if any, should be at law; and that the suit, if it could be maintained, should be by the receiver. Judgment for defendants. Appeal.

Watson, J. 1. By the Laws of 1886, all private corporations organized under special acts of the legislature were made subject to the provisions of secs. 3291-2-3, R. L., and the provision in sec. 9 of the charter of the company was thereby repealed. 2. The defendants would have been liable under the charter provision, even though they were not stockholders when the debts to the defendants were contracted. 3. A complete, convenient and comprehensive remedy can be had only in equity, in a case of this nature. 4. The suit should be by the receiver. Judgment affirmed.

FARR v BRIGGS' ESTATE (1900) 72 Vt. 225.

To enforce liability of director of an investment company, organized under a statute of South Dakota. The company had a place of business in South Dakota, and one in Vermont, and transacted a banking business. The statute of South Dakota, under which the company was organized, made the directors liable for debts to the creation of which they assented. The defendant demurred to the declaration on the ground that the liability arising under the statute of South Dakota was so far penal that it could not be enforced in Vermont, and that the right of action to enforce it did not survive. The company guaranteed notes sold to plaintiff. Demurrer sustained. Judgment for defendant. Appeal.

Tyler, J. The statute is not penal in its nature, and action under it may be brought in any state. The directors created the debts in this jurisdiction and the statute of a sister state fixes the liability. Judgment reversed.

MONTPELIER SAV. BANK v MONTPELIER (1901) 73 Vt. 364.

Assumpsit, to recover taxes paid under protest. H, guardian of a minor, deposited with plaintiff as trustee the sum of \$21,000. Defendant assessed this amount and plaintiff paid the tax under protest. Defendant contended that the tax was properly collected under the Laws of 1896, which provided that every savings bank or trust company should pay a tax of seven-tenths of one per cent upon the average of its deposits, including money received as trustee or otherwise, deducting therefrom the amount of "individual" deposits in excess of \$1,500 each; and that no other tax should be assessed on such deposits, except on individual deposits exceeding \$1,500. Judgment for defendant. Appeal.

Munson, J. The word "individual" was not used to distinguish between ordinary bank deposits and funds held in special trust, but to resolve the aggregate as previously made up into its several holdings as a basis for exempting \$1,500 each. It was not the intention of the legislature to relieve from taxation all funds that could be placed in trust. Judgment affirmed.

VIRGINIA

SKIPWITH v GIBSON (1810) 4 H. & M. 490.

It is not usury to sell bank stock at a price above its current value, since to constitute usury, there must be a treaty for the loan or forbearance of money.

Cited: 2 Munf. 436; 5 Rand. 385.

WINCHESTER v BANK OF ALEXANDRIA (1811) 2 Munf. 339.

For supersedeas. Plaintiffs were drawers of a note held by the defendant, and negotiable at its bank. Defendant sued plaintiffs, and before the writ was returned by the sheriff obtained a judgment against them by default. Plaintiffs then filed

this petition for a supersedeas. Petition overruled under sec. 20, of defendant's charter, providing that a supersedeas would not lie in suits on notes negotiable at the bank. Appeal.

Roane, J. The power of granting writs of supersedeas is taken away from the appellate court in relation only to judgments rendered pursuant to the provisions of the charter, and upon writs of *capias ad respondendum*, issued and served. Judgment reversed.

BANK OF VIRGINIA v WARD (1818) 6 Munf. 166.

A bona fide owner of a bank note, who transmits one-half thereof through the mail, and retains one-half, cannot demand payment from the bank, merely by proving that one-half has been lost or stolen and producing the other half; but he is entitled to demand the whole amount on giving the bank satisfactory indemnity against loss by payment on the other half.

Cited: 4 Rand. 187, 188; 21 Gratt. 562.

WILSON v SPENCER (1822) 1 Rand. 76.

On promissory note. An act passed in 1805, interdicted unincorporated banks from issuing notes. In 1816, an act was passed making such notes absolutely void. Later in the same year another act was passed suspending the operation of the former act. Before the first Act of 1816 went into effect, defendant gave plaintiff the note in suit. Defendant pleaded that plaintiff was an unchartered bank and had given, in payment of his note, illegal bank notes. Demurrer to pleas. Sustained. Judgment for plaintiff. Appeal.

Roane, J. The bill was given for a consideration utterly prohibited by the Act of 1805. In making a further declaration, in the Act of 1816, that notes issued contrary to its provisions should be null and void, it cannot be inferred that those made contrary to the Act of 1805 are valid. The suspension of the former does not necessarily carry with it the repeal or suspension of the latter. Judgment reversed.

Cited: 3 Rand. 142; 2 Gratt. 127.

BANK OF MARIETTA v PINDALL (1824) 2 Rand. 465.

On a promissory note. Defendant made a note in Virginia payable at the plaintiff's bank in Ohio, which was assigned in Ohio by the payee to the plaintiff. Defendant pleaded that the plaintiff was not a Virginia corporation and could not sue in Virginia. Demurrer to plea overruled. Judgment for defendant. Appeal.

Cabell, J. A banking company, incorporated by the law of a foreign state, can prosecute an action in Virginia in its corporate name and character to enforce a contract made in such foreign state.

Cited: 9 Leigh 241, 243; 5 Rand. 329; 5 Leigh 475; 7 id. 210; 10 id. 481; 13 Gratt. 774; 16 id. 130, 131, 133; 75 Va. 657.

BANK v POITIAUX (1825) 3 Rand. 136.

Specific performance of contract. The plaintiffs, incorporated banks, bought real property on which to erect their banking houses, after building which there was left on either side a vacant lot. To better protect their banks, they erected fire-proof tenements on these lots, one of which the defendant verbally agreed to buy, and he paid thereon \$5,000. He refused to further carry out his contract. Defendant pleaded: Statute of Frauds, want of corporate seal, and provisions of their charters, that the lands it shall be lawful for them to hold, shall be only such as shall be requisite for their immediate accommodation, or acquired in satisfaction of debts. Judgment for defendant. Appeal.

Per curiam. 1. The contract, having been partly performed, is taken out of the Statute of Frauds. 2. The objection that the contract was invalid, because not made under the common seals of the banks, is unfounded. 3. The object for which the purchase was made, rendered the purchase legal. A purchase lawfully made does not cease to be legal, nor the banks cease to have a right to hold or convey lands lawfully acquired, merely because the object, which induced the purchase, has been accomplished, or no longer affords an inducement to hold it. Judgment reversed.

Cited: 3 Gratt. 22, 24; 31 id. 250, 251; 75 Va. 325.

COMMONWEALTH v SCOTT (1826) 4 Rand. 143.

On an information against the members of an unchartered bank, under the Act of 1816 (2 Rev. Code 111), which prohibits the circulation of notes emitted by unchartered banks, Held, that the Court of Appeals has no jurisdiction, as the act is penal.

Cited: 5 Leigh 738.

FARMERS BANK v REYNOLDS (1826) 4 Rand. 186.

To recover the amount of bank notes. J of Ohio, sent to the plaintiff R, his partner in Baltimore, three notes of the defendant. The notes were cut in halves, and sent in separate letters. One of the letters miscarried, and the three halves contained therein, were either lost, or stolen. The plaintiffs advertised the loss, and R presented the halves received by him to defendant for payment. He offered sufficient security to indemnify defendant, but submitted no proof of ownership on demand, except his own affidavit and that of J. Payment was refused. Decree for plaintiffs with interest from the time of demand, and costs. Appeal.

Cabell, J. 1. The plaintiffs are bona fide owners of the bank notes and are entitled to recover the amount, of said notes, upon giving the defendant a bond of indemnity. 2. The presentation of a moiety of the notes and the demand for payment should have been accompanied by such evidence of ownership as ought to have satisfied the bank; and plaintiffs, having failed to do this, are not entitled to either interest or costs. Decree affirmed.

PORTER v NEKERVIS (1826) 4 Rand. 359.

On promissory note, against the maker. The note was indorsed by A, the first indorsee, to plaintiff, "cashier of the F Bank." Plaintiff declared as "cashier," and stated that he protested the note in behalf of the bank. Defendant was not allowed to offset joint notes executed by one of the indorsers and his partners and assigned to him. Judgment for plaintiff.

Carr, J. 1. The assignment vested in the plaintiff himself, the legal right to sue. 2. The description of the plaintiff was mere surplusage. 3. Joint and separate demands cannot be offset against each other. There is no distinction between joint debts and partnership debts. Judgment affirmed.

Cited: 2 Leigh 505; 3 id. 83; 6 id. 84; 22 Gratt. 764; 75 Va. 217.

STRIBBLING v BANK OF THE VALLEY (1827) 5 Rand. 132.

On promissory note. Defendant executed his note to secure a loan from plaintiff. The note was discounted by plaintiff at a higher rate of interest than that allowed by the banking laws, but not usurious by its charter. In payment of the note defendant received cash, and a number of the plaintiff's shares, for which he was obliged to allow more than their market value. The court refused to instruct the jury that if they found certain facts, the contract was usurious. The first section of the banking law directs that no "person" shall take illegal interest on any contract; that all such contracts shall be void. Judgment for plaintiff. Appeal.

Carr. 1. The bank laws are public laws of which the court will take judicial notice. 2. Although a corporation is not a person, it can make a contract, and is therefore within the words of the section. 3. The usury law applies to banks. It may be modified, but not repealed, by their charters. 4. It is not usury to take interest in advance on discounts or loans. 5. When the jury finds the facts, it is for the court to determine whether in law they amount to usury. 6. The sale of the stock and the loan are one transaction, the object of which was to raise money. This was a usurious contract, and the court should so have instructed the jury. Judgment reversed.

Cited: 5 Rand. 364, 406, 408; 3 Leigh 586; 5 id. 213, 260, 263, 264, 267; 7 id. 26, 55; 8 id. 256; 12 id. 87; 1 Rob. 589, 590; 9 Gratt. 130; 17 id. 43; 87 Va. 115.

ALLISON v FARMERS BANK (1828) 6 Rand. 204.

On bond of an accountant. Defendants were sureties on the bond of F, conditioned for the faithful performance of his duties as plaintiff's accountant. The declaration set out the breaches generally but did not allege its damages there-

from, but stated that an action thereby accrued to plaintiff. F stole money from the teller's drawer, to which he had no legitimate access. He used his position as accountant to manipulate the entries so that his thefts were not discovered, until after he had absconded. Judgment for plaintiff. Appeal.

Per curiam. 1. The breaches and the resultant damage to the plaintiff need not be set out in minute detail in the declaration. 2. The breaches complained of being wholly unconnected with the office of accountant, the sureties are not liable. Judgment reversed.

Cited: 6 Rand. 241; 86 Va. 94; 95 id. 489.

FORD v THORNTON (1832) 3 Leigh 695.

Injunction, to restrain execution of judgment. Defendant and plaintiff were indorsers on a note made by G and discounted by the V Bank. G died before maturity of the note, having on deposit a sum exceeding its amount. Defendant, as administrator of G's estate, gave his check as such on G's deposit to pay the note. He then sued the plaintiff for contribution of one-half the amount so paid, and obtained a judgment by default. Plaintiff filed this bill for an injunction, setting forth the above facts, and alleging surprise. Defendant answered that the note was paid under a special agreement that if G's assets were not sufficient to pay superior debts, defendant would refund the amount drawn from the deposit, and that the assets were insufficient. Decree for plaintiff. Appeal.

Tucker, P. 1. The bank had a right to apply the deposit to the payment of the debt due it. It was only the debtor of G for the balance. 2. The administrators cannot be responsible for the amount to superior creditors, because no such creditor could have any right to the application of funds, which were appropriated to the discharge of this bank's debt. Decree affirmed.

Cited: 99 Va. 60.

BERKSHIRE v EVANS (1833) 4 Leigh 223.

To recover against cashier for defalcation. Plaintiffs were stockholders in an unchartered company, which circulated private bank notes in violation of the statutes of 1792 and 1804, 2 Rev. Code, ch. 207, and which were suppressed by the statute of 1816, id., ch. 208. Defendant was cashier of the company. He defaulted in the sum of \$364. Defendant contended that plaintiffs could not enforce their contract with him because it was an illegal company. Judgment for plaintiff. Appeal.

Per curiam. Judgment affirmed.

Note: No opinion.

Cited: 21 Gratt. 270.

CRUMP v NICHOLAS (1834) 5 Leigh 251.

Ejectment. A made a deed of trust to secure the F Bank for a loan of \$6,000. A subsequently sold the property to the plaintiff. The bank had previously sold it to defendants. The loan for which the trust had been given, had been made by discounting a note for sixty days, on which the bank had charged interest for sixty-four days, in accordance with an established usage. Plaintiffs contended that the deed to the bank was usurious. Judgment for defendant. Appeal.

Tucker, P. The custom of taking the discount for sixty-four days, on notes which are payable the sixty-fourth day from date, including the day of the date, having been uniformly established since the foundation of the banks, must be considered now as forming part of the law which is to govern the discount of commercial paper. It is not usury. Judgment affirmed.

Cited: 8 Leigh 253, 256; 2 Gratt. 386, 387.

BANK OF VIRGINIA v CRAIG (1835) 6 Leigh 399.

For misappropriation of ward's estate. A bequeathed a share of his estate to plaintiff, then an infant, to be invested in bank stock. F was appointed guardian; and shares of stock in defendant bank were transferred to him by a former guardian, by power of attorney. F was about to sell the stock when the sureties on his official bond filed a bill to restrain him, and against the bank to restrain it from making the transfer on its books. The bank was made party under the name of "The President and Directors of the Bank of Virginia." Its corporate

name was the "President, Directors and Company of the Bank of Virginia." A restraining order was then served on the president of the bank. F sold the stock and executed a power of attorney to the purchaser, who had the stock transferred to his name on the books of the bank. The bank, and F, and his sureties were made defendants in this suit. Decree for plaintiff. Appeal.

Tucker, J. 1. The plaintiff has no cause of action against the bank. 2. A guardian has authority to dispose of the personal property of his ward and the bank could not legally refuse to permit the transfer upon its books. 3. There being a misnomer of the bank in the restraining order it was not bound thereby. 4. The unofficial knowledge by the bank's officers of the proceedings will not render the bank liable. Decree reversed.

Cited: 9 Leigh 281, 283, 292; 7 Gratt. 83; 11 id. 131; 22 id. 667, 669; 73 Va. 217; 77 id. 374, 784; 78 id. 454; 80 id. 626; 87 id. 455.

GODDIN v CRUMP (1837) 8 Leigh 120.

To determine validity of taxes. A joint stock company was incorporated in 1784, and its powers enlarged subsequently for the purpose of navigating the Ohio River to Richmond. The Assembly passed an act in 1832, authorizing the V Bank, with the consent of its stockholders, to purchase shares in this company. The company was not to become a body corporate until a certain number of shares were paid in. The bank purchased the shares necessary to bring the subscription up to the prescribed amount. The Legislature at the request of citizens of Richmond authorized the city to purchase stock of the company, and levy a special tax for that purpose. Defendant, the city tax collector, accordingly levied a tax upon plaintiff. Plaintiff contended that all these laws were unconstitutional. Decree for defendant.

Tucker, P. 1. An amendment to the charter of a city, giving new powers and privileges at the instance of a majority, or accepted by them, is valid. 2. The test of the corporate character of an act is the probable benefit to the community within the corporation. The community itself is to decide whether a proposed measure is for its benefit. 3. The act authorizing the subscription by the bank was constitutional. Decree affirmed.

Cited: 5 Gratt. 642, 644; 13 id. 87, 99, 584; 14 id. 424; 20 id. 664; 31 id. 698; 77 Va. 337; 78 id. 276.

COMMONWEALTH v HORNER (1840) 10 Leigh 735.

Information. Defendants organized as a savings bank, under the act of March 25, 1839. The by-laws adopted in 1840 allowed the bank to issue certificates only on actual deposits of money. They issued certificates on promissory notes, and on checks of third parties issued to the borrowers. They discounted other notes. The certificates circulated as bank notes and were used in the payment of debts. Defendant H, one of the directors, admitted that he paid out the certificates as money. Act of February 24, 1816, provided that it should be illegal for any corporation not chartered, to deal and trade as a bank, to discount notes, or to issue bills, and that the officers of such corporation should be punishable as for a misdemeanor. An amendment passed March 20, 1832, provided that savings institutions might issue certificates for money received on deposit, but may not emit drafts or bills for its own benefit.

Per curiam. The evidence is sufficient to warrant the filing of an information against H.

TOMPKINS v BRANCH BANK OF VIRGINIA (1840) 11 Leigh 372.

Assumpsit. The action was brought against the "President and Directors of the Office of Discount and Deposit of the Bank of Virginia at Charleston," who were president and directors of a branch of the Bank of Virginia, which branch was situated at Charleston. The branch bank was not incorporated, and the obligation sued on was contracted by the branch bank as agent for the mother bank. Plaintiff contended that the action was properly brought under the Act of March 19, 1882, providing that actions "which by law could now be maintained against the mother bank on any controversy against any branch bank" might be brought in the county where the office of discount and deposit of such branch bank was established. Demurrer to the declaration. Sustained. Judgment for defendant. Error.

Stanard, J. 1. The Act of March 19, 1882, authorizing actions against branch banks, merely authorizes the issuing and serving of the summons in the place where the branch bank is situated. The action must still be brought against the mother bank. Judgment affirmed.

MASON v FARMERS BANK AT PETERSBURG (1841) 12 Leigh 84.

Assumpsit. The Farmers Bank of Virginia was an incorporated bank, having a branch for discount and deposit at Petersburg, which was not incorporated. A statute permitted suits against branches of banks in certain cases. The first count in the declaration was in these words: "the president, directors, and company of the office of discount and deposit of the Farmers Bank at Petersburg," etc. Plaintiff claimed that the error was mere misnomer, cured by the statute of jeofails. (1 Rev. Code, ch. 128, sec. 103). Judgment for defendants with costs. Error.

Tucker, P. The statute permitting actions to be brought against branches of banks does not authorize an action against the president and directors of the branch, individually; the action must still be brought against the principal corporation. There is no cause of action against the president, directors, etc., of a branch bank, and the error is not therefore merely a misnomer cured by the statute of jeofails. Judgment affirmed.

Cited: 11 Gratt. 206; 15 id. 397; 75 Va. 217.

COMMONWEALTH v FARMERS BANK (1844) 2 Rob. 737.

For allowance of claim. On March 28, 1838, during a suspension of specie payment by the banks, the legislature passed an act whereby the banks which were state depositories became entitled to a credit for the difference between the value of specie and bank notes, for all payments on state warrants made in specie. The banks resumed payment in 1839, but later suspended again. On warrants subsequently drawn the complainant paid specie. It claims to be entitled to a credit for the premium thereon under the Act of 1838. Decree for complainant. Appeal.

Allen, J. 1. The act did not justify the charge for premiums except when the payment was made during a legalized suspension. 2. The suspension in 1839 was illegal, and until it was sanctioned no payment made during its continuance could confer a right to charge the Commonwealth. 3. The application was properly addressed to the chancery side of the court. Decree reversed.

EDMUNDS v DIGGES (1845) 1 Gratt. 359.

On bank notes. Defendant held \$400 in notes of the M Bank. At defendant's request plaintiff gave him \$400 in larger notes of the Virginia banks, defendant telling plaintiff he could exchange the M Bank's notes for Virginia notes again. The notes of the M Bank were then at par and defendant had no intimation of a pending failure. The M Bank failed next day and its notes became valueless. Defendant refused to re-exchange the notes. Judgment for plaintiff. Appeal.

Baldwin, J. 1. There is no implied warranty of value on the sale or exchange of current money of the country. 2. There is but a single guarantee which those who circulate money can be understood to give, to wit: that it is what it purports to be, genuine and not counterfeit. In the absence of express warranty, or fraudulent misrepresentation or concealment, the receiver takes it at his own risk. 3. The representations of the defendant did not constitute an express warranty. Judgment reversed.

BANK OF VIRGINIA v ROBINSON (1848) 5 Gratt. 174.

Mandamus. The Act of March 22, 1837, gave power to the governor to appoint one director of the banks therein mentioned, and provided that any vacancies in the board occurring between elections should be filled by the board. The governor appointed R, who refused to act. The governor then appointed B, who brought this proceeding to enforce his right to act. Judgment for plaintiff. Appeal.

Allen, J. The power conferred on the executive to appoint is fulfilled and finished when the executive has made a valid appointment. After the power had been exercised, and vacancies occurred in the board, the power of filling such vacancies, was given to the board without regard to the fact, whether the director,

whose place had become vacant, received his original appointment from the executive, or had been elected by the stockholders. Judgment reversed.

Cited: 12 Gratt. 309.

HAYS v NORTHWESTERN BANK (1852) 9 Gratt. 127.

On promissory note, against maker and indorsers. The declaration averred that P made a note for \$1,040 to H's order, payable at the M Bank, located in another state; that H indorsed it to B, he to E, and E to plaintiff bank, and that the note was protested for non-payment. Plaintiff's charter placed all notes negotiable at its bank on the same footing as foreign bills of exchange. The Act of March 22, 1837, made all notes payable at a particular bank negotiable. Demurrer to declaration. Overruled. Plaintiff proved all the facts alleged in the declaration but the protest. Judgment against maker only. Appeal.

Lee, J. 1. It was a note negotiable at the plaintiff bank and other banks in Virginia, because it was payable at a bank, though that bank was in another state. 2. For want of proof of a demand and protest for non-payment, the indorsers were exonerated, but it was not necessary for plaintiff to prove presentation and demand of payment to enable it to recover against the maker. 3. The act for the plaintiff's incorporation is a public act, of which the courts will judicially take notice. Judgment affirmed.

STAINBACK v BANK OF VIRGINIA (1854) 11 Gratt. 260.

On bill of exchange, against indorser. The bill was drawn on a London banking firm. The notary presented it at the drawee's counting house for acceptance. He was told by a clerk that it could not be paid, and thereupon, in accordance with the custom, protested it for non-payment on April 5. Notice of protest was sent by the next steamer carrying the regular mail to America, which left on the 19th. This was the usual method of transmitting letters. They might be sent by packets, which left London before the steamer. The steamer would probably reach New York first. Plaintiff proved by parol the usage in London as to the presentment and acceptance of bills of exchange, and set it out in his certificate. Judgment for plaintiff. Appeal.

Samuels, J. 1. The protest in itself is sufficient to prove a proper demand, and there was no error in permitting the protest and the evidence to go to the jury, as the parol evidence established a proper demand. 2. The notice was sent in a mode which would bring it into the hands of defendant at the earliest possible day and was sufficient. Judgment affirmed.

Cited: 18 Gratt. 363.

BOOKER v YOUNG (1855) 12 Gratt. 303.

Mandamus. The plaintiff was president and one of the seven directors of the N Bank. At a meeting of the directors to elect a new president the plaintiff obtained three votes and the defendant four. Both parties voted for themselves. By statute, directors were prohibited from voting where they had any personal interest. Defendant proceeded to act as president. Plaintiff contended that defendant had not been properly elected and that he was entitled to hold over under his former election. Judgment for defendant. Appeal.

Samuels, J. If a majority of the directors be present and qualified to vote, and do vote, the election may be made by a majority of the votes given, although they be not a majority of the whole board. The votes of the parties interested were given contrary to law and should not be counted. Judgment affirmed.

ROBINSON v GARDNIER (1868) 18 Gratt. 509.

On deposit. In 1861, plaintiffs deposited in the F Bank \$2,000. The Act of 1866 provided for the liquidation of banks and stipulated that the assets could be conveyed to trustees, "the proceeds to be distributed among all creditors according to the legal rights and priorities at the date of the deed." In 1867, the F Bank, under this act, made a deed to defendants, to apply the proceeds of the redemption of its outstanding note ratably among the holders. Plaintiff filed this bill objecting to the preference given in the deed. Judgment for plaintiff. Appeal.

Joynes, J. 1. No objection can be made to the act on the ground that it takes away a vested right of the corporation, or impairs the obligation of the

contract between the corporation and the state. 2. The provision plainly contemplates that the deed shall recognize and respect existing priorities, which neither the bank nor the legislature could destroy or impair; but it gave no authority to create new ones. 3. In case no deed is made, each creditor of the bank is entitled to his "ratable share" in "a fair pro tanto distribution" of the assets. 4. The noteholders of an insolvent bank stand upon the same footing as other general creditors. Judgment affirmed.

Cited: 19 Gratt. 745, 746; 99 Va. 58.

EXCHANGE BANK v KNOX }
 FARMERS BANK v ANDERSON } (1870) 19 Gratt. 739.

On note. The plaintiffs in both cases were banks, holding notes, on which defendants were makers, due in June 1861. An act was passed in 1866 for the liquidation of insolvent banks, in such a way that all creditors not having a specific lien should be placed on an equal footing and share ratably in the assets. Under this act plaintiffs assigned its assets to trustees. After the assignment defendants purchased worthless notes of the banks and sought to set them off to the full amount of the note sued on, under a provision of the bank's charter that all notes issued by it "shall be received in payment of debts due the bank." Judgment for defendants. Appeal.

Christian, J. 1. The rights of all the creditors attach equally to all the assets, and whoever takes the bank bills afterward, (being indebted to such corporation), takes them subject to this right of all the creditors and to share equally in all the assets. 2. As between the banks and the billholder, the law does make a contract that the bank shall receive its own notes in payment of a debt due to it by a billholder, but it must be a debt due to the bank, and when assigned to a third party for value, it is then a debt due to the assignee, and not to the bank, and there is no obligation on the assignee to receive the notes of the bank obtained after notice of the assignment, but the debts must be paid as other debts are paid. 3. Trustees and beneficiaries in a deed of trust to secure bona fide debts are purchasers for valuable consideration. Judgment reversed.

Cited: 20 Gratt. 328; 22 id. 260, 847, 854, 873, 885; 25 id. 380, 382, 384; 26 id. 80; 27 id. 379; 28 id. 667; 30 id. 291, 297; 75 Va. 404; 79 id. 47; 91 id. 400.

SAUNDERS v WHITE (1871) 20 Gratt. 327.

Notes of an insolvent bank, purchased by the debtors of the bank after the deed of assignment to trustees by the bank has been executed, and notice thereof given to the debtors, cannot be set off against the indebtedness, and the bank being insolvent, the trustees are the trustees for the benefit of all the creditors of the corporation, and are purchasers for valuable consideration.

Cited: 25 Gratt. 380.

BANK OF THE OLD DOMINION v McVEIGH (1871) 20 Gratt. 457.

Assumpsit on notes. Defendant gave plaintiff four notes, payable in legal currency at its bank in A. In 1864 an act was passed authorizing the payment of debts payable in gold at the mother bank, at a branch bank and vice versa, and authorizing the payment in confederate money. At that time confederate money was the only kind in circulation in Virginia. Defendant paid the notes in question to the branch bank in P with confederate notes. In 1866 the mother bank sued to recover the amount of the notes. Judgment for defendant. Appeal.

Christian, J. 1. Any law which changes the terms of defendant's contract, or releases a part of his obligation, must, in the literal sense of the word, impair it. The act must be condemned as unconstitutional and void. 2. If the act did not authorize the payment in confederate funds, the payment was not a compliance with the act, and the debt was not discharged. If it did, then the act attempted to make confederate money a legal tender, and was, for that reason, unconstitutional and void. Judgment reversed.

Cited: 21 Gratt. 601, 603; 22 id. 288, 876; 26 id. 794, 821; 28 id. 217; 32 id. 530; 80 Va. 71, 78.

YEATON v BANK OF OLD DOMINION (1872) 21 Gratt. 593.

Assumpsit. The defendant was indebted to the plaintiff bank. The plaintiff was located at Alexandria, within the Federal lines and had a branch at P, within the Confederate lines. The branch bank did business during the war and up to its close. The branch bank, in obedience to the acts of the confederate legislature of March 29 and May 16, 1862, issued notes of less than five dollars, which were signed by its president and cashier and exchanged for Confederate States' currency. The branch bank was indebted to the plaintiff. The acts authorized the banks to issue notes of less than five dollars not exceeding 10 per cent of their capital, and if any bank was disabled from complying with the act by reason of its being within the enemy's line, each branch bank not within the lines, was required, within 90 days, to issue such notes. Sec. 53, ch. 58 of the code preserves to the legislature the right to repeal, alter or modify the charter of any bank, and sec. 16 of the same chapter provides that all notes of a bank shall be received in payment of debts due the bank, whether contracted at the parent or branch bank. Defendant tendered in payment of his debt the notes of the branch bank and contended that the Acts of 1862 amended the charter of plaintiff. Judgment for plaintiff. Error.

Christian, J. 1. The legislature had the authority to repeal the charter, but could not modify it without the bank's consent because that would be impairing the obligation of contracts. 2. The Acts of 1862 do not require banks to receive the small notes issued under its authority in payments of debts due to it. If they did so in terms or implication they would be void, as impairing obligations of contracts, in requiring the bank to receive in payment of debts due to it worthless currency issued by its branch bank, without consent, and in direct violation of the charter. Judgment affirmed.

HODGES, EX'R v FIRST NAT. BANK (1872) 22 Gratt. 51.

Debt, on notes. Defendant's testator, H, was indebted to the B Co. In July, 1866, the company's treasurer, F, who was also president of plaintiff bank, drew two bills on H. The bank discounted them and sent them to H to be deposited by him in a Washington bank for collection. H, who was a director in plaintiff bank, retained the drafts in his own possession. In August, 1866, the B Co. drew two more drafts on H for the same debt, which the bank also discounted, and which H paid, the proceeds being paid the B Co. In March, 1867, F, as president of the bank drew on H again to cover the first drafts, and furnished him the money with which to pay them, H giving the demand notes sued on, and F certifying the notes were given merely as vouchers, until it could be ascertained whether H had paid the B Co. in full. H died and the bank sued his executor. Defendant answered that the liability to the bank was dependent upon H's liability to the B Co. Judgment for plaintiff. Appeal.

Moncure, P. 1. F had no authority, in virtue of his office of president, to bind the bank on the certificate. 2. The directors of the bank cannot release, without consideration, a debt due the bank, and they cannot empower the president to do so. 3. As the corporations were not the same, as the stockholders in each were not the same, as there were other stockholders besides H, whose interests are entitled to the protection, which the act of incorporation was designed to afford, the pretense that, before he accepted the draft of March, 1867, he had fully paid all he owed the B Co., cannot be sustained. Judgment affirmed.

Cited: 29 Gratt. 585; 31 id. 667; 82 Va. 454; 84 id. 460, 490.

PURCELL v ALLEMONG (1872) 22 Gratt. 739.

On checks, against drawer. In February, 1862, defendants mailed to plaintiff their check on the F Bank, then located in W. Plaintiff was confined in bed with a broken leg. The bank was removed from W to F on March 7, 1862. At the time the country was at war, but the enemy was not occupying that part of the country. Up to July, 1862, defendants had enough in bank to meet the check, and the check would have been paid after that, if presented, though the funds were insufficient. The check was not presented until after the bank failed. The drawers were not notified of its non-presentment. Judgment for defendants. Appeal.

Anderson, J. 1. The holder was not excused for non-presentment on the ground that on July 1, the credits had been so reduced that they would have fallen short of paying the check, if it had been presented. 2. The holder was not excused on

account of his inability, by reason of the state of the war or of the broken limb, to go to W to present the check. There was no necessity for him to have gone in person. 3. No presentment being made until after the bank had become insolvent, nothing more is necessary to negative the plaintiff's right of action to charge the drawers. The presentment after the bank had failed was of no value for any purpose. Judgment affirmed.

BANK OF THE VALLEY v MARSHALL (1874) 25 Gratt. 378.

On notes, against indorser. Under the Act of February 12, 1866, providing for the liquidation of banks, all the assets of plaintiff bank, including the notes, were assigned to B, trustee. After the assignment and with notice thereof, defendant purchased bank notes of plaintiff, and when this suit was brought filed the bank notes in court and pleaded payment, tender and set off. By a decree of the United States Circuit Court, appointing a receiver for plaintiff bank, the receiver was directed to accept the bank's notes in payment of claims. Defendant contended that such decree authorized him to buy the notes and tender them as a payment. Defendant did not acquire the notes relying on such decree. That decree was afterward rescinded. Judgment for defendant. Appeal.

Christian, J. 1. The notes tendered by the defendant were not legal tender in any sense, but were such notes as should not be received in payment of debts due the bank, because they were acquired after notice of the bank's assignment of its assets for the benefit of its creditors. 2. The decree of the United States Court was no defense to the action. Judgment reversed.

McVEIGH v THE BANK OF OLD DOMINION (1875) 26 Gratt. 188.

Assumpsit. Plaintiff bank was located in Alexandria, and defendant was its president. In 1861 defendant left Alexandria and located permanently within the confederate lines. In 1863, as president, he collected \$26,697 for the bank, and invested it in merchandise in the name of a firm of which he was a member. This merchandise was destroyed by fire. Plaintiffs sued for the sum collected. Defendant answered that he could be held on no contract with the bank arising when he was within confederate lines, a public enemy. Judgment for plaintiff. Appeal.

Staples, J. 1. Having undertaken to act as president, defendant cannot set up the illegality of his own conduct, to avoid the just responsibility arising out of the agency he assumed. 2. The defendant, having appropriated the plaintiff's money, and invested it in trade and speculation, must of course account for it, however unfortunate the speculation may have proved. The defendant is to be regarded simply as a borrower of the fund. Judgment affirmed.

Cited: 28 Gratt. 213; 32 id. 530; 78 Va. 670.

McVEIGH v BANK OF OLD DOMINION (1875) 26 Gratt. 785.

On notes, against indorser. Defendant was indorser of notes, discounted by the plaintiff bank at Alexandria, and was president of the bank. On May 24, 1861, before the maturity of the notes, the federal troops took possession of Alexandria. Defendant and the maker left and went within the confederate lines, leaving behind all his official papers at the bank, and his furniture in his house with a servant in charge. He engaged in business in Richmond. The notes were protested at maturity and notices were left at his residence in Alexandria and at the bank. Defendant claimed these notices were insufficient. Judgment for plaintiff. Appeal.

Anderson, J. 1. It is unlawful for the maker to pay, or the holder to receive payment, by reason of their being separated as enemies of war, and therefore the makers could not be held in default for non-payment. 2. The attempted service of notice on the indorser was wholly inoperative and void; and to fix his liability, it was necessary that the holder should have notified him of their dishonor in a reasonable time after the impediment was removed, by the termination of the war. 3. The fact that the indorser was the president of the bank cannot affect the question of his liability. He stands precisely upon the footing, as to his rights and liabilities that he would if he were not president, and can be held liable no further than his contract makes him liable. Judgment reversed.

Cited: 29 Gratt. 546, 553, 556, 595; 31 id. 147; 32 id. 530; 84 Va. 47, 49, 50, 51; 87 id. 666.

FINNEY v BENNETT (1876) 27 Gratt. 365.

Debt, on note, by receiver of payee against makers. The P Bank was payee. Defendants pleaded in setoff certain certificates of deposit issued by P Bank to S and assigned by S to defendants. P Bank had been ruined by the war and a bill was filed by certain creditors on behalf of themselves and all other creditors, stating that no officers had been elected or business transacted for several years and praying distribution of the assets. Plaintiff was appointed receiver in that proceeding. Among the liabilities included in the report were the certificates of S. A dividend of 30 per cent was declared. Thereafter, S assigned the certificates to defendants. Plaintiff contended that the bill was in the nature of a creditors' bill and that defendants could set off only 30 per cent of their claims under the decree. The record of the chancery suit was admitted in evidence. Judgment for plaintiff. Supersedes.

Moncure, P. 1. The assets of the bank were a trust fund, distributable among the creditors and without a trustee; and, as the law affords no adequate remedy in such a case, it calls for equitable relief in the nature of a creditors' bill. 2. Defendants acquired only S's rights to a ratable proportion of the said assets with the other creditors. 3. As defendants were in effect parties to the chancery suit, the record was properly admissible. Judgment affirmed.

Cited: 76 Va. 109; 94 id. 260, 264; 95 id. 389.

BANK OF OLD DOMINION v McVEIGH (1877) 29 Gratt. 546.

On notes, against indorser. Defendant was president of plaintiff, a bank in Alexandria. He indorsed certain notes before the war which plaintiff discounted. When the war began he left Alexandria and crossed the lines. The notes matured during the war, and were protested for non-payment. Defendant was never notified. The war ceased, and defendant was in Alexandria and communicated with plaintiff there on May 23. On July 18, 1865, the stockholders passed a resolution to the effect that the notes were still due plaintiff. It was not proved that defendant was present when this resolution was passed. Defendant pleaded want of notice. Judgment for defendant. Supersedes.

Anderson, J. 1. Plaintiff's duty to give notice was only suspended until the obstructions caused by the war were removed. In a reasonable time after they were removed it should have given the notice. 2. It was not reasonable to delay two months after May 23, to give the notice, even taking the resolution as equivalent to notice. 3. The presumption that defendant was not present when the resolution was passed is conclusive in the absence of positive proof to the contrary. Judgment affirmed.

Cited: 32 Gratt. 530; 77 Va. 374; 84 id. 47, 49, 50.

WROTEN'S ASSIGNEE v ARMAT (1879) 31 Gratt. 228.

To enforce judgment lien on real estate. Plaintiffs were judgment creditors of E Co. E Co. owned the real estate in question, and while indebted to plaintiffs borrowed money from F National Bank to erect a hotel. A trust deed was given to the bank to secure the loan and recorded in 1866. W erected the buildings and received most of the money advanced by the bank. For the balance of the cost of the building, E Co. gave W in 1867 a trust deed to the premises subject to the trust deed of the bank. As by statute an attempt to secure one creditor inured to the benefit pro rata of all creditors existing at the time, the court held that the trust deed to the bank inured to the benefit of plaintiffs and the bank; and that W's lien was subordinate thereto. Decree accordingly. Bill of review by W. Dismissed. Appeal.

Moncure, P. J. 1. A national bank has implied power to loan money on the security of real property. 2. W is estopped to deny the right of priority of the bank. 3. The bank's lien covered the property with the buildings thereafter erected. Decree affirmed.

Cited: 75 Va. 246; 81 id. 721; 83 id. 93.

CARDWELL v ALLAN (1880) 33 Gratt. 160.

Injunction, to restrain sale under deed of trust. Plaintiff conveyed land to defendant A, as trustee, to secure payment of two notes made by B, indorsed by R and plaintiff, and discounted by defendant E Bank. The deed stipulated that A should carry out the trust upon default in payment. The notes were not paid

at maturity. Defendants threatened to sell the property, and plaintiff filed this bill, alleging want of demand and notice. No notice was given either to plaintiff or to R. Plaintiff, after dishonor of the notes, had repeatedly promised to pay them, and procured postponement of the sale thereon. Decree dismissing bill. Appeal.

Staples, J. 1. The right of the bank to enforce the trust was complete, upon default being made, as there was no provision in the deed for demand and notice to plaintiff. 2. If such demand and notice were necessary, plaintiffs repeated acknowledgment of liability and promise to pay must be held sufficient proof of waiver. 3. The bank was under no obligation to give notice to the first indorser for the benefit of plaintiff as second indorser. Nor was it essential it should do so in order to preserve its rights against plaintiff. Judgment affirmed.

BOHMER v CITY BANK (1883) 77 Va. 445.

To enforce lien on bank stock. Plaintiff was organized by an act of 1870 giving it a prior lien on the shares of its stockholders for loans and discounts made to them, and providing that transfer of stock could be made only on plaintiff's books. The certificates were on their face "transferable only on the books of the bank." The general corporation law provided that the assignee of stock had the legal as well as the equitable title. Defendant was assignee of the shares in question, but they had not been transferred on plaintiff's books. The record owner was indebted to plaintiff at the time of the assignment. Decree for plaintiff. Appeal.

Lacy, J. 1. Where the general corporation law is superseded by an act incorporating a bank, assignees of the bank stock are chargeable with notice of the provisions of the act. 2. Where such act gives the bank a prior lien on the shares of stockholders for all loans and discounts to them, the lien is binding as against all assignees thereof. 3. Under such an act, the bank is not bound to call for a surrender of its certificate of stock, when it makes a loan to a stockholder. Decree affirmed.

FECKHEIMER v NATIONAL EXCH. BANK (1884) 79 Va. 80.

To compel transfer of stock. The by-laws of defendant, a national bank, provided that no stock should be transferred by any stockholder indebted to defendant and this stipulation was indorsed on the certificates. U. S. R. S., sec. 5201, provided that no national bank should take its own shares as security. L and S, being indebted to defendant, made a general assignment to plaintiff, who filed this bill to compel defendant to transfer on its books to him 20 shares of stock standing in the names of L and S. Defendant contended that plaintiff's remedy was at law for damages. Decree for defendant. Appeal.

Lacy, J. 1. The provision contained in the by-laws is in contravention of the laws of Congress, and is therefore void. 2. Though plaintiff does not ask specific enforcement of any express contract with defendant, he claims what he is clearly entitled to, and we are not able to see that these objects might be attained at law, or that plaintiff could be compensated in damages, if the jurisdiction of the chancery courts on this subject could now be held an open question. Decree reversed.

STATE BANK v CITY OF RICHMOND (1884) 79 Va. 113.

To recover taxes paid under protest. Plaintiff was a bank capitalized at \$250,000. \$159,804 was paid in cash by the shareholders, and demand notes given for the balance. A tax levied by the city on the full amount of the capital stock was paid under protest, plaintiff claiming that the notes, and the stock held by persons outside of the city, should not be taxed. Judgment for defendant. Error.

Fauntleroy, J. 1. The situs of a debt for the purposes of taxation is the domicile of the creditor. The notes were a part of the productive capital of the bank, and constituted a valuable asset and they were properly included in the assessment of the personal property of the bank. 2. As capital stock of a bank is to be distinguished from shares in the hands of shareholders, no deduction should be made for shares owned by non-residents. Judgment affirmed.

Cited: 98 Va. 84.

CITIZENS BANK v LAY (1885) 80 Va. 436.

Injunction, to restrain sale under deed of trust. P purchased a lot from C, who owed upon it \$2,440, evidenced by his note, secured by a deed of trust. P covenanted to pay the note. G, the holder, deposited it for collection with F Bank. On the last day of grace, P borrowed the amount of the note from M Bank, took it up from F Bank and deposited it with M Bank as collateral security for its loan before the close of the business day. When this loan became due P borrowed the amount from defendant, took the note from M Bank and deposited it as collateral with defendant. P conveyed the property to plaintiff, telling him that the note was paid. Defendant advertised it for sale under the trust deed. Decree for plaintiff. Appeal.

Lewis, P. 1. The transfer by F Bank to P was not a sale, as the former had power only to collect the note, and not to sell it. 2. Payment by P to F Bank was therefore payment of a debt which P had covenanted to pay, and the note was thereby extinguished. 3. Even if the transaction was a sale and the note valid in M Bank's hands, defendant taking it after maturity from P, took it with all its infirmities, including P's inability to recover thereon against C. 4. If P be estopped to deny the validity of the note, such estoppel does not extend to plaintiff. 5. The trust deed was discharged by payment of the note. Decree affirmed.

Cited: 97 Va. 8, 9.

ROANOKE NAT. BANK v HAMBRICK (1886) 82 Va. 135.

Damages for negligence in not collecting note. Plaintiff deposited a note for collection with defendant, which could have been collected at maturity by the exercise of due diligence. Defendant failed to protest the note, and took a renewal note, which it subsequently handed to plaintiff, who kept it long enough to find out it could not be collected, and then returned it to defendant. Defendant claimed plaintiff had ratified its conduct. The court left the question of ratification to the jury. Judgment for plaintiff. Error.

Hinton, J. Mere receipt by plaintiff of the renewal note does not amount per se to ratification, and the question was properly left to the jury. Judgment affirmed.

KELLY'S EX'R v TALIAFERRO (1887) 82 Va. 801.

To determine amount due on confessed judgment. F & Co. were indebted to M Bank on a note for \$19,000, on which K and T were indorsers. F & Co. failed and M Bank agreed to extend the loan upon F & Co.'s drawing three renewal notes for \$6,333.33 each, to be indorsed by said K and T, who were each to confess judgment to M Bank for \$19,000, as collateral security. The agreement was carried out in all things, except that T failed to confess judgment. M Bank subsequently promised to sue T, but failed to do so. K's executor, complainant herein, claimed that there was such negligence on the part of M Bank in failing to obtain a judgment against T by confession or suit, that the judgment confessed by K could not be enforced; or that M Bank should suffer half the loss. Judgment for defendant. Appeal.

Hinton, J. 1. The failure of F & Co. to procure a confession of judgment from T, in accordance with the agreement, cannot affect the bank. 2. The subsequent promise of the bank to bring suit against T was nudum pactum and could neither impose upon the bank an obligation to do an impossible thing; namely, to compel T to confess a judgment, nor, upon a failure to sue, deprive it of its rights fairly acquired by the confession of judgment by K. Decree affirmed.

SPILMAN v PAYNE (1888) 84 Va. 435.

Creditor's bill. H was sheriff of F County. F Bank obtained a judgment against him. After this judgment H deposited money with a branch of said bank at A, which was lost by the insolvency of F Bank. H died, having several judgments against him, and owing the state for taxes collected by him. F Bank's judgment was assigned to plaintiff. Defendant was H's administrator. He claimed a right to apply money collected for taxes by H's deputies to the payment of the state's claim as against H's general creditors; and a right to set off H's deposit with the branch bank against the judgment assigned to plaintiff. Decree denying the right to set off, and allowing the preference of the state. Appeal.

Fauntleroy, J. 1. The state has no statutory priority in the disbursement of an insolvent decedent's estate except for taxes due from him as an individual. 2. The doctrine of "ear marking," however, applies to the money in the hands of H's deputies, collected by them on tax bills due the state, and the administrator had the right to apply the several sums collected by him from them to the debt due by H, as sheriff, to the exclusion of the other creditors of H. 3. The judgment assigned to plaintiff was not discharged by the subsequent deposit of H, subject only to his check. Decree affirmed.

BROWN v BANK OF ABINGDON (1888) 85 Va. 95.

Debt, on a note, against maker and indorsers. Judgment was entered by default against all defendants but B, an indorser. B's place of business and residence was within 200 yards of the post office in the town in which both plaintiff and B resided, though not within the actual corporate limits of the town. At the maturity of the note, B was out of the state, but his family was in his residence and his bookkeeper in his office. The note was protested and notice thereof dropped into the post office addressed to B. He received this notice 16 months thereafter. Mail was not delivered by carriers. B claimed the notice was insufficient. Judgment for plaintiff. Error.

Fauntleroy, J. As B lived in close proximity to the bank, he was entitled to personal service of notice, or to written notice left at his dwelling house or place of business; and notice by drop-letter in the post-office of the town, without any special carriers for delivery of mail matter, was not good as a substitute service of notice. Judgment reversed.

MARSHALL v FARMERS SAV. BANK (1889) 85 Va. 676.

To enforce directors' liability for mismanagement of a bank. Plaintiff sues in behalf of himself and all other creditors. The charter provided for weekly meetings of the board of directors, and periodical examination of the papers and accounts. The directors met only three times in 1873, twice in 1874, once in 1875, 12 times in 1876, five times in 1877 and once in 1878. In May, 1878, a receiver was appointed. The evidence showed the affairs of the bank had been left entirely in the hands of one or two persons, who recklessly loaned to insolvent corporations and persons without sufficient security. Defendants were not shown to have been guilty of bad faith or dishonesty. Decree for defendants. Appeal.

Lacy, J. 1. Ignorance of any fact in the bank's affairs, which it is the directors' duty to know, can never be set up by them in defense, or exculpation of any act which the existence of that fact should have prohibited. 2. The directors of a bank hold the relation to stockholders, depositors, and creditors of trustees to cestuis que trust, and as such are personally responsible for frauds and losses resulting from gross negligence and inattention to their duties. Decree reversed.

FIRST NAT. BANK v PAYNE & CO.'S ASSIGNEES (1889) 85 Va. 890.

To establish a trust. Plaintiff, and P & Co., defendants' assignors, were corresponding bankers, running accounts with each other. On January 8, 1885, plaintiff received checks on P & Co. amounting to \$929.13. These checks were credited to the accounts of the various depositors and charged to account of P & Co. They were mailed to P & Co. the same day, with directions to credit plaintiff. Before their receipt next morning, and before banking hours, the firm of P & Co. was dissolved by P's death. The checks when received were charged to the drawer's accounts and credited to plaintiff. On January 12, the surviving partner of P & Co. assigned to defendants for the benefit of creditors. Defendants took possession of all the assets including said sum of \$929.13. Decree for defendants. Appeal.

Lacy, J. 1. As a surviving partner has no right to incur a new debt after dissolution of the partnership, the credit given plaintiff was unauthorized. 2. As the remittance was clearly traceable on P & Co.'s books, defendants were bound to return the remittance or the proceeds to plaintiff. Decree reversed.

LOYD v LYNCHBURG NAT. BANK (1890) 86 Va. 690.

Debt. Plaintiff was in the habit of discounting notes and drafts for B & Co., a firm composed of all defendants except L. Defendant L indorsed a note for

\$5,000 drawn by B & Co. to secure plaintiff for discounting a \$3,700 note. The collateral note stipulated that "if B & Co. should come under any other liability or enter into any other engagement with the bank while it holds this obligation," the note should apply to such additional liabilities also. Thereafter the holder of a draft accepted by B & Co. had it discounted on his own credit by plaintiff, which contended that the collateral note was security for the draft. Judgment for plaintiff. Error by L.

Hinton, J. 1. The provision of the collateral note must be construed as applying only to transactions in which B & Co. and plaintiff were participants. 2. Collateral deposited with a bank for one debt or class of debts cannot be appropriated to a different debt or class of debts. Judgment reversed.

Cited: 94 Va. 694.

STOCKHOLDERS OF BANK *v* SUPERVISORS (1891) 88 Va. 293.

Injunction, to restrain collection of taxes on bank stock. By statute a tax was levied for state purposes on bank stock without regard to the residence of stockholders. Code of 1887, sec. 833, required the board of supervisors of each county to levy for county purposes on "all property assessed with state taxes within the county." The shares of plaintiffs, resident and non-resident stockholders of a bank situated in the county of which defendants were supervisors, were levied upon by defendants. Decree for defendants. Appeal.

Fauntleroy, J. 1. Though at common law the situs of the stock for the purpose of taxation is with the stockholders, by statute of the state, such stock is taxable where the stock is located. 2. The state may legislate to authorize a county to levy a tax for county purposes upon the shares of stock of a bank located within the county where the property is protected by the county. Decree affirmed.

Cited: 94 Va. 319.

NATIONAL BANK *v* NOLTING (1897) 94 Va. 263.

Assumpsit. Defendant was D's banker. In exchange for cash, D gave a stranger a check upon defendant for \$10. The check when presented had been raised to \$500, and was paid by defendant. There was no evidence that the check was carelessly filled out. Plaintiff, D's agent, acted for D, as undisclosed principal, in this transaction and brought this action in his own name. Upon the trial it appeared that D was the real party in interest, and the court allowed an amendment substituting as plaintiff, "N, for the benefit of D." Judgment for plaintiff. Error.

Harrison, J. 1. Either agent or principal may sue on a contract not under seal, made in the agent's name for an undisclosed principal. 2. Where a banker pays out money on a depositor's check he must bear the loss, if the order be not genuine, not in signature only, but in every respect. 3. Negligence of the depositor, such as will relieve the banker from loss due to forgery, must be directly connected with the forgery. Judgment affirmed.

UNION BANK *v* CITY OF RICHMOND (1897) 94 Va. 316.

To recover taxes paid under protest. By statute the capital of state banks was exempt from taxation. A tax, however, upon the market value of bank shares in the hands of stockholders, was authorized, such tax to be paid by the bank into the state treasury. Plaintiff paid the tax on the shares of its stockholders, and brought this action, claiming that the tax was illegal, so far as a certain amount was concerned, as being a tax on the capital of the bank. An amendment was denied, setting up that the tax on certain shares was illegal, in that the owners thereof had never been residents of the state. Judgment for defendant. Error.

Harrison, J. 1. A tax assessed upon the market value of shares of bank stock in the hands of shareholders, but to be paid by the bank, is not a tax upon the capital of the bank. 2. Under Acts 1883-4, p. 568, sec. 17, the situs of bank stock for the purposes of taxation is where the bank is located, and it is immaterial where the stockholder resides. Judgment affirmed.

SMOOT *v* PEOPLE'S BUILDING ASS'N (1898) 95 Va. 686.

To have contracts declared void for usury. Defendant was chartered by the corporation court of the City of Roanoke; and, by an act quoting said charter, the legislature expressly declared that the contracts therein provided for were legal.

These contracts, under the general laws, would have been usurious. Complainant claimed that they were void, as the statute referred to was unconstitutional, under art. 1, sec. 6, of the Bill of Rights, providing that "no man or set of men are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services; which, not being descendible, neither ought the offices of magistrate, legislature, or judge to be hereditary." Decree for defendant. Appeal.

Keith, P. 1. The legislature has the power to render certain transactions valid, which would otherwise be tainted with usury. 2. Art. 1, sec. 6, of the Bill of Rights, bears no reference to the exercise of such a power. Decree affirmed.

BURROWS v SMITH (1898) 95 Va. 694.

Injunction, to restrain collection of a tax. Act of 1889-90, provided that each person should exhibit a statement of all "bonds, notes and other evidences of debt" due him in excess of \$100, and be permitted to deduct "from the aggregate amount thereof" his indebtedness to others; and provided generally for the assessment of property. Complainant claimed that he was entitled to deduct from the value of the national bank stock assessed to him, the amount of his debts which exceeded the value of such stock. He further contended that the act was in conflict with U. S. R. S., sec. 5219, prohibiting the taxation of national bank stock at a higher rate than other moneyed capital. Decree for defendant. Appeal.

Harrison, J. 1. Bank stock is property and not an evidence of indebtedness. 2. Act of 1889-90, as it does not discriminate between national bank stock and other bank stock, is not in conflict with U. S. R. S., sec. 5219. Decree affirmed.

NOLTING v NATIONAL BANK (1901) 99 Va. 54.

To enjoin the enforcing of a judgment. Defendant N was agent for D, under agreement by D to reimburse him for any losses. He advanced \$5,000 to run the business and deposited it with complainant, the account being with "N, Cashier." Complainant cashed a forged check, and judgment was obtained by defendant in an action for the loss sustained. At the time this check was paid, the only deposit made was the original \$5,000. Upon the trial, it appeared that N was agent for D. D was insolvent, and in debt to complainant. He was also indebted to N, and had assigned his interest in the judgment to N. Complainant claimed that, as D was the real depositor, it had the right to apply the amount of the judgment to its claims against D. Decree for complainant. Appeal.

Phlegar, J. 1. The contract of deposit is between the bank and the depositor alone. 2. The holder of a beneficial interest in a bank deposit, who has assigned his interest to the depositor in accordance with a contract made prior to the deposit, will have no standing in equity as the owner of the fund, nor is his general creditor in any better position. 3. The nature of the contract of deposit is in no way changed by the addition of "Cashier" to the name of the depositor. Decree reversed.

WASHINGTON

PAUL v MCGRAW (1891) 3 Wash. 296.

Mandamus. The plaintiff, tax assessor of K County, demanded of defendants, officers of national banks, an inspection of a full and correct list of the names and residences of all shareholders therein, with the number of shares held by each and some evidence of their value. Upon their refusal, plaintiff procured an alternative writ of mandamus. Motion to dismiss for want of jurisdiction denied. Defendants answered, setting up that they had furnished a list showing the capital stock, surplus, and undivided profits as required by sec. 21 of the General Revenue Law of 1891. Sec. 5210, U. S. R. S., requires national bank officers to keep such lists as here demanded, subject to inspection of shareholders, creditors and officers authorized to assess taxes under state authority. Writ granted. Appeal.

Stiles, J. 1. The contention that sec. 5210 is inoperative, because not supplemented by state legislation empowering some taxing officer to make the demand, is not valid. 2. The state court had jurisdiction of this proceeding under the general provision of the U. S. R. S., making national banks subject to local courts

except as to suits involving the Federal Government. 3. Mandamus will not lie to compel the bank officers to furnish a list of the names and residences of stockholders, the information furnished, under sec. 21, as to the number of shares, par value, amount paid up and surplus, being sufficient for the assessment. Judgment reversed.

Cited: 3 Wash. 433; 6 id. 66.

FIRST NAT. BANK v CHEHALIS CO. (1893) 6 Wash. 64.

Injunction, to restrain a levy, by the county treasurer on the property of the bank for collection of taxes. The assessor refused to assess the stock to the holders individually, but assessed it to the whole corporation. The complaint set forth that there was other unassessed moneyed capital in the state and county, but failed to state the character of the institutions thus favored. Injunction refused. Appeal.

Stiles, J. 1. The assessment as made is not forbidden by U. S. R. S., sec. 5219. 2. Under the pleadings an injunction will not lie. Judgment affirmed.

Cited: 9 Wash. 609; 18 id. 275.

WASHINGTON NAT. BANK v PIERCE (1893) 6 Wash. 491.

On promissory note. The plaintiff bank had discounted, before maturity, a note, made by defendant payable to C's order one year after date. The note was not paid. Defendant's answer averred fraud upon C's part in procuring the note, and that plaintiff had notice of these things when it took the note. To prove this notice, defendant showed that, before the note was discounted, while he and the president of plaintiff bank were together at the office of an insurance company of which both were directors, he had told the president that this note had been procured from him by fraud. Judgment for plaintiff. Appeal.

Dunbar, C. J. The communication not having been made at the bank, or to the president as such, and the bank being in no way interested in the note at that time, nothing in the law will charge him with remembering such a remark or the bank with notice. Judgment affirmed.

FIRST NAT. BANK v ANDREWS (1893) 7 Wash. 261.

On promissory note. The defendant gave a real estate mortgage to secure two notes payable to F. F transferred one to the plaintiff bank in payment of a debt. Y thereafter bought the other. The mortgage was delivered and part of it assigned to Y, but no part of it was assigned to the plaintiff. Plaintiff commenced an action on its note and Y was made a party. An action commenced by Y, to foreclose the mortgage, was consolidated with that of plaintiff. The U. S. R. S. allowed a bank to take a real estate mortgage to secure the payment of a previously contracted debt. Judgment for plaintiff, allowing it a preference in the proceeds of the mortgaged premises. Appeal.

Dunbar, C. J. 1. Under U. S. R. S., secs. 5136-37, a bank can take a mortgage on real estate as security for a note and can sell the land to collect the note. 2. The assignees of two notes, secured by the same mortgage, are entitled to share pro rata therein. Judgment reversed.

ROBERTS v WASHINGTON NAT. BANK (1894) 9 Wash. 12.

Motion for a receiver, to take possession of certain notes. Plaintiff was receiver of a savings bank, which had borrowed money from defendant, a national bank, to pay its depositors. It gave as security, the notes in question. Both banks acted in good faith and through the same agent. Prior transactions between them were shown to have been illegal, but there was no such proof in regard to this transaction. Order granted. Appeal.

Hoyt, J. 1. On appeal this court can fully examine the law and facts, and determine whether or not the order was properly authorized. 2. There was no fraud shown justifying the appointment of a receiver. Order reversed.

Cited: 18 Wash. 89; 20 id. 170; 26 id. 432.

NATIONAL BANK v KING CO. (1894) 9 Wash. 607.

To restrain the collection of a tax on the grounds of discrimination. The complaint alleged there existed "taxable moneyed capital owned by individual citizens

of the state, resident in said county, and there invested in interest-bearing loans, discounts and securities to them payable," and "all the moneyed capital in the state owned by resident individual citizens, except that invested in incorporated banks," was purposely omitted from assessment and taxation. Demurrer sustained. Judgment for defendant. Appeal.

Stiles, J. Until it appears that there is some considerable amount of moneyed capital employed, like that of national banks, which has been exempted by operation of law, or the willful act of assessors, a case is not made, showing a discrimination against national banks. Judgment affirmed.

Cited: 18 Wash. 275.

BOWMAN v FIRST NAT. BANK (1894) 9 Wash. 614.

To establish and enforce a trust. The defendant bank collected a note, sent by the plaintiff for that purpose, put the money in its vault with its general funds, and sent a draft on the A Bank according to the usual custom. The defendant failed and the draft was dishonored when presented by plaintiff. Judgment for plaintiff. Appeal.

Hoyt, J. The bank became the plaintiff's debtor and not a trustee, and the funds were not impressed with a trust. Judgment reversed.

Cited: 19 Wash. 24, 27, 29.

WOLVERTON v EXCHANGE NAT. BANK (1895) 11 Wash. 94.

To recover statutory penalty for usury. The plaintiff claimed to be entitled to the penalty by reason of having paid interest in excess of 7 per cent to the defendant, a national bank. U. S. R. S., sec. 5197, provides that when no rate of interest is fixed by the laws of the state, the bank may take a rate not exceeding 7 per cent. The state statute made the legal rate of interest 10 per cent, but any rate might be lawfully contracted for. Judgment for plaintiff. Appeal.

Gordon, J. It was the intention of Congress to place national banks on the same footing as state banks, viz, that they should not be permitted to take more, nor required to accept less. Judgment reversed.

Cited: 11 Wash. 109; 15 id. 207.

TAGGART v FIRST NAT. BANK (1895) 12 Wash. 538.

To recover amount of an accepted order. The plaintiff was the holder of a chattel mortgage upon a boom of logs owned by L. The logs were sold through D and cut into shingles, and the proceeds of the shingles were to be paid to the defendant bank, which was to hold the bills of lading. The proceeds, coming into defendant's possession, were to be held to settle the plaintiff's claim, and the balance checked out by D. D gave plaintiff an order for the amount of his claim, which was deposited with the defendant. At no one time was there a sufficient deposit to meet plaintiff's order, the defendant having paid out the money received to D. Judgment for plaintiff. Appeal.

Scott, J. The bank had no right to pay out the proceeds upon checks given by D, without retaining enough to pay the plaintiff's claim. Judgment affirmed.

BLAKE v STATE SAV. BANK (1895) 12 Wash. 619.

To rescind contract of deposit. The plaintiff alleged that on April 30 he had \$443 on deposit in defendant bank, and that between that day and May 11, he deposited \$986, and during the same time drew out \$1,261; that during the month of May the bank was insolvent to the knowledge of the bank and its officers, but that fact was wholly unknown to the plaintiff; that the money received during the month of May was accepted with the intention to defraud plaintiff. The bank having gone into the hands of a receiver, the plaintiff prayed that the balance remaining unpaid on his account be paid over to him in full by the receiver. Demurrer. Sustained. Appeal.

Anders, J. 1. The title to the money passed to the bank and plaintiff became the bank's creditor to the extent of the amount of the deposits. 2. The specific fund sought to be recovered is not impressed with a special trust in favor of plaintiff, nor has it been identified and traced into the hands of the receiver. Judgment affirmed.

Cited: 19 Wash. 25.

DEARBORN v WASHINGTON SAV. BANK (1895) 13 Wash. 345.

To recover trust funds. The plaintiff deposited \$1,500 in the defendant bank and received a duplicate deposit slip, such as it was the custom to use when a general deposit was made by a customer whose dealings were not expected to be numerous enough to justify his having a bank book. Upon the slip were the words "security for signing bond to be held by bank." Subsequently a check for \$800 was drawn and a certificate of deposit was issued for it, and the original slip was surrendered and a certificate of \$700 issued. Defendant failed and plaintiff contended that the deposit was a special one and that the bank was liable as trustee. Judgment for plaintiff. Appeal.

Hoyt, C. J. The fact that the deposit was entered by the bank upon this kind of slip would in itself be very strong proof that it understood that it was a general deposit, and that, in receiving it, it became the debtor of the depositor, and not his trustee. Judgment reversed.

WILSON v BOOK (1896) 13 Wash. 676.

To enforce liability of stockholders. The plaintiffs were creditors of a bank in which the defendants were stockholders. Art. 12, sec. 11, of the constitution, provides that each stockholder of any banking corporation shall be personally liable equally and ratably for all debts of such corporation to the extent of the amount of their stock therein in addition to the amount invested in such shares. The complaint alleged that the bank was insolvent, and demanded payment of their claims from the stockholders, without attempting to collect them from the bank. Demurrer. Sustained. Appeal.

Hoyt, C. J. 1. Corporate creditors, before they can proceed against the stockholders upon their statutory liability, must first exhaust their remedy against the corporation and its assets. The statutory liability of the stockholders is secondary, not primary. 2. The fund can only be reached by a proceeding in equity for the benefit of the creditors in a suit by the receiver. Judgment affirmed.

Cited: 14 Wash. 511; 15 id. 514; 24 id. 381, 382, 385.

COMMERCIAL BANK v CHILBERG (1896) 14 Wash. 247.

A check drawn on a general deposit does not exempt the sum, for which such check is drawn, from garnishment, when presentment is made subsequent to the service of the writ of garnishment.

NATIONAL BANK OF COMMERCE v GALLAND (1896) 14 Wash. 502.

On promissory note. The defendants executed the note to B, who turned it over to the plaintiff for value, writing on the back, "payment guaranteed," and signed his name. One of the defendants was a non-resident of the state, and claimed that the action should be transferred to the United States courts; that a national bank could only sue in such courts; that the contract of guaranty did not amount to an indorsement. Judgment for plaintiff. Appeal.

Hoyt, C. J. 1. The non-residence of the petitioner furnished no ground for a removal, for the reason that some of his codefendants were residents of this state. 25 Stat. at Large 436, in express terms provides that national banks shall, for the purposes of jurisdiction, be considered citizens of the state in which they were organized. 2. The universal custom is to treat such contract of guaranty as a transfer of the title of the payee to the person to whom the guaranty is made. Judgment affirmed.

BANK OF BRITISH COLUMBIA v JEFFS (1896) 15 Wash. 230.

On promissory note, against the maker. The note was executed to plaintiff bank, by A, M, E and J, who signed their names in this order. The note was given to secure a loan from plaintiff to A, who from time to time paid interest on the note in full. Defendant was not allowed to prove that he was merely a surety. He contended that the acceptance of this interest, was an extension of time without his consent, which released him as such surety, and that A's deposit should have been applied on the note. Demurrer. Overruled. Judgment for plaintiff. Appeal.

Gordon, J. 1. The defendant had the right to show by parol, that he was a surety, and that this fact was known to the payee, when the note was taken. 2.

Where a creditor without inadvertence or mistake, receives a payment of interest in advance on the note of a debtor, and does not expressly reserve the right to sue before the expiration of the period for which interest is paid this is an extension of the time for that period. 3. It was not the duty of the plaintiff to have applied the amount which was on deposit to the credit of A in part payment of the note. Judgment reversed.

TACOMA v GERMAN AMERICAN BANK (1896) 15 Wash. 294.

Debt. The plaintiff sued the defendant bank to recover a balance of money deposited by a former city treasurer from 1892 to 1894. Part of this was subsequently paid to the city upon warrants by its treasurer M, who had succeeded B, the former treasurer. The defendant answered admitting that it had received certain warrants which were entered in a passbook as money, but alleged that no money had in fact been deposited, and the warrants were void. No attempt to avoid the transaction was taken by the defendant until 1895. Demurrer to answer. Sustained. Appeal.

Per curiam. 1. The defendant had no right to accept the warrants, and should not at this time be permitted to interpose the defense set up. 2. It was incumbent upon the defendant to return or offer to return the warrants. Judgment affirmed.

WATTERSON v MASTERSON (1896) 15 Wash. 511.

To enforce liability of stockholders. The P Bank failed and a receiver was appointed. One of the creditors of the bank commenced this action against the stockholders, to enforce the contingent liability of the stockholders under the provisions of the state constitution. The receiver was joined as a party defendant. Judgment for plaintiff. Appeal.

Hoyt, C. J. The enforcement of the contingent liability of the stockholders is a part of the duties of the general receiver, and the creditors are not authorized by the provision to proceed directly against the stockholders to enforce it. Judgment reversed.

BARTO v NIX (1896) 15 Wash. 563.

To recover unpaid subscriptions on stock. The stock of the P Bank was issued and 60 per cent of its par value paid in. One of the stockholders, C, being indebted to the bank, turned over his holdings to the bank in satisfaction of the debt. The bank reissued the stock to S on his note for 70 per cent of the par value. S held the stock two years and returned it to the bank. The stock was then issued to the defendants, who were directors, on their notes for 70 per cent of the par value. The defendants claimed a secret agreement with the bank that they should not be held liable on the stock so taken by them. The bank failed and the plaintiff was appointed receiver. Judgment for plaintiff. Appeal.

Hoyt, C. J. 1. The transaction with C was authorized and thereby the bank became the owner of the stock and had the right to reissue it. 2. As between the creditors and these defendants, this secret agreement is without any force. The effect of the agreement would be contrary to the provisions of our statute and public policy. Judgment affirmed.

Cited: 20 Wash. 15; 22 id. 195.

BAKER v KING CO. (1897) 17 Wash. 622.

Bill, to cancel an assessment. In April, an assessment was made against the stock of the M Bank in the hands of the stockholders. It was not paid by the stockholders. In May, the bank failed. The county sought to collect the assessment from the plaintiff, receiver for the bank. Decree for plaintiff. Appeal.

Gordon, J. 1. No suit for the tax can be maintained against the receiver of an insolvent bank, where the property represented by the shares has disappeared. There being nothing from which the receiver can be reimbursed, the tax will fall upon the assets of the bank which belongs to its creditors, and thereby violate the rule that the state cannot tax the capital stock of a national bank. 2. In the absence of fraud or malice the action of the assessors is final. Judgment affirmed.

Cited: 18 Wash. 329; 25 id. 380.

PULLMAN STATE BANK v MANRING (1897) 18 Wash. 250.

Injunction to restrain collection of tax. A tax was levied against the stock of plaintiff bank in the hands of its stockholders and the board of equalization refused to deduct the debts of stockholders from the value of the stock. The defendant was county treasurer. The state constitution declared "that the legislature shall provide by law a uniform and equal rate of taxation," and "deductions of debts from credits may be authorized." Laws of 1895, p. 508, provided for deductions of debts from credits, but made an express exception to deductions from bank stock. Defendant demurred. Sustained. Appeal.

Reavis, J. 1. The term "credits" embraces shares of stock in corporations. 2. The refusal to include the shares of bank stock in the state banks in credits of the shareholders from which his debts may be deducted, infringes upon the rule of equality required by the constitution and the exception is invalid. 3. Shares in national bank stock are only taxable by permission of Congress with such limitations as Congress may establish, and hence the argument founded upon such discrimination could not avail plaintiff. Judgment reversed.

Cited: 18 Wash. 273, 330, 422, 695; 20 id. 683.

NEWPORT v MUDGETT (1897) 18 Wash. 271.

Injunction, to restrain collection of tax. The plaintiff was the owner of shares of stock in a national bank. An assessment was made against him for the value of the stock, and the assessors refused to deduct from the value thereof, the debts owed by the plaintiff. The defendant was county treasurer and was about to collect the tax. Bal. Code, sec. 1657, prohibited deductions being made from bank stock, in making deductions of debts from credits for the purposes of taxation. Sec. 5219, U. S. R. S., prohibited taxation upon national banks at a greater rate than that assessed upon other moneyed capital. Judgment for defendant. Appeal.

Reavis, J. 1. Stockholders in a bank, organized under the laws of this state, are entitled to have their debts deducted from their credits, including shares in the capital stock of a state bank. 2. Moneyed capital invested in a state bank is in direct competition with money invested in the capital stock of a national bank. 2. In so far as Bal. Code, sec. 1657, excepts other bank stock, it is unconstitutional, and in so far as it includes money with credits, from which debts may be deducted, it is invalid. Judgment reversed.

Cited: 18 Wash. 330; 20 id. 683.

HEWITT v TRADERS BANK (1897) 18 Wash. 326.

To recover taxes. In 1894 an assessment was made against the stockholders of the defendant bank. Thereafter defendant became insolvent, and the stockholders not having paid the assessment, the tax was sought to be collected from the bank. In 1895 and 1896 assessments were made against the assets of the bank in the hands of the receiver of the bank. The plaintiff as county treasurer sought to collect these taxes. The trial court disallowed the claim for 1894 and permitted the receiver to deduct the debts owing to the bank in the assessments for 1895 and 1896. Judgment for defendant. Appeal.

Reavis, J. 1. Before the liability had attached or any lien following the same, the bank became insolvent. There was nothing belonging to the stockholders upon which a lien could attach in favor of the bank, and the tax on the stock could not be collected from the receiver by proceedings in the nature of a garnishment as provided by the revenue act. 2. The taxes for 1895-96 assessed against the receiver upon all property in his possession, must be paid by him, and no deduction of bank debts can be allowed from the credits in the hands of receiver. Judgment modified.

Cited: 18 Wash. 423.

BRAMEL v MANRING (1898) 18 Wash. 421.

Injunction, to restrain collection of tax. The T Bank was dissolved in 1896, and the plaintiffs, who had been directors, were appointed trustees for the creditors and stockholders. In 1895, a tax had been assessed against the stockholders for the amount of stock of the bank held by them. Deductions for the debts owed by the stockholders were not allowed and the assessment was not paid. This action was to enjoin the defendant, county treasurer, from collecting the tax from the plaintiff. Defendant demurred. Sustained. Appeal.

Reavis, J. 1. The stockholder of a state bank, has a right to have his share of the capital stock included in the sum of his credits, from which his debts shall be deducted. 2. The dissolution of a corporation does not discharge it from liability for taxes assessed against its capital stock prior to such dissolution. 3. The liability for taxes may be enforced by distraint and levy. Judgment reversed.

BARTHOLOMEW v FIRST NAT. BANK (1898) 18 Wash. 683.

Damages, for wrongfully protesting a draft. Plaintiff was an attorney at M C where he published the M C M, a newspaper, under the name of the M P Co. Plaintiff made the draft payable to himself and signed it the M P Co. It was drawn on the "M C M via E N Bank," and indorsed by plaintiff to R. Defendant received the draft in the regular course of business. It was presented to the E Bank, and upon payment being refused, duly protested. Plaintiff based his action on the fact that the draft was presented to the E Bank and not to the drawee. Demurrer. Sustained. Appeal.

Gordon, J. 1. The language used was ambiguous, and the defendant was warranted in presenting the draft for payment at the Bank. 2. While the court will take judicial notice of the geography of the state it will not take notice of the location of a bank. Judgment affirmed.

HALLAM v TILLINGHAST (1898) 19 Wash. 20.

To recover trust funds. The plaintiff delivered to the C Bank, of which defendant was appointed receiver, a draft for collection only. The bank collected the draft but before the proceeds were paid over to the plaintiff, the bank failed. At the time of the failure it had more than sufficient cash on hand to equal the money received from the draft. The plaintiff contended that this should be considered a trust fund, and that he should receive payment prior to general creditors. The respondent on appeal moved to strike out the statement of facts on the ground that it was settled by the judge after his term of office expired. (Laws of 1893, p. 116, sec. 12.) Judgment for plaintiff. Appeal.

Scott, C. J. 1. The transaction established between the plaintiff and the bank the relation of creditor and debtor and not that of cestui que trust and trustee. 2. The settlement of the statement is judicial; and the act relating thereto is unconstitutional and invalid. Judgment reversed.

Cited: 19 Wash. 31; 25 id. 604.

KIGGINS v MUNDAY (1898) 19 Wash. 233.

Where a banking corporation, engaged in other distinct lines of corporate business, becomes insolvent, and the shareholders pay in the sum due under their statutory liability as shareholders in the banking corporation, such sum should be applied exclusively to the payment of claims of the creditors of the banking corporation.

SCANDINAVIAN BANK v PIERCE CO. (1898) 20 Wash. 155.

Shares of non-resident stockholders in a bank organized under the laws of this state and doing business in this state, may be taxed in this state for general, state, county, and municipal purposes.

PRONGER v OLD NAT. BANK (1899) 20 Wash. 618.

For fraud. The plaintiff alleged that the defendant fraudulently induced him to enter into a partnership with it in conducting a bank at C; that the plaintiff put his money in such enterprise, but that the defendant failed to keep its part of the agreement and only entered into same for the purpose of defrauding plaintiff and passing upon him worthless paper; that such paper was passed upon plaintiff to his damage. Demurrer. Overruled. It appeared that the negotiable paper was held by plaintiff, after discovering the fraud, and an attempt made to negotiate it. Judgment for plaintiff. Appeal.

Fullerton, J. 1. A corporation is liable to the same extent as a natural person, for the consequences of its wrongful acts. 2. In such cases the doctrine of ultra vires has no application. 3. The affirmance of the contract after the discovery of

the fraud does not extinguish the right to an action for damages on account of the fraud. 4. The fact that the weight of evidence may appear to be with either side, is not alone sufficient to warrant a reversal. Judgment affirmed.

Cited: 22 Wash. 300; 24 id. 651.

PACIFIC NAT. BANK v PIERCE CO. (1899) 20 Wash. 675.

Where a bank sought to obtain a deduction of the fair cash value of stock held by it in other domestic corporations, which corporations had been assessed for such stock, from the aggregate value of the bank's shares assessed to its shareholders, Held, there was no discrimination between the individual shareholder, when taxed upon his shares, and the individual citizen who is by statute taxed upon all personal property owned by him; the assessment was therefore not in contravention of art. 7, sec. 2, of the Constitution, or U. S. R. S., sec. 5219.

SHUEY v HOLMES (1899) 21 Wash. 223.

To enforce statutory liability of a stockholder. The bank was incorporated in June, 1891, and defendant became a stockholder in July. In 1897, the bank became insolvent and plaintiff was appointed receiver. After an accounting and an assessment, he was authorized to bring this action. The complaint did not allege, and it did not appear, that the indebtedness of the bank was incurred while defendant was a stockholder. Art. 12, sec. 11, of the State Constitution, provides that each stockholder shall be liable for debts "accruing while they remain stockholders." Judgment for defendant. Appeal.

Gordon, C. J. 1. The defendant is not liable, unless the whole or some part of the indebtedness was created while she was a stockholder of the bank. 2. There is no presumption that the indebtedness was incurred after and not before she acquired her shares. 3. This must appear affirmatively, and is not a matter of defense to be established by defendant. Judgment affirmed.

SHUEY v HOLMES (1900) 22 Wash. 193.

On promissory note, against the maker. Plaintiff was the receiver of an insolvent bank. Defendant, who was a director and trustee of the bank, gave the note in payment for shares of stock. He set up three defenses: 1, that he took the stock and gave the note to accommodate the bank, with the understanding that he was not to be held liable thereon; 2, that no assessment had been made on the capital stock by plaintiff, nor had the amount of the corporate indebtedness been determined; 3, that the note was made for the accommodation of the bank and not for the benefit of the community, and cannot be satisfied out of the property of the community, consisting of defendant and his wife. Demurrer to defenses. Sustained. Appeal.

Gordon, C. J. 1. A director cannot relieve himself of liability to creditors by setting up a secret agreement. 2. The defendant cannot occupy a better position than if he had originally paid for his stock. His duty is to pay for his stock, and after the corporate debts are discharged, he may share with the other stockholders, similarly situated, in a division of the remaining assets. 3. The demurrer to the third defense was properly sustained, in accordance with what was said on this branch of the case in our former opinion. Judgment affirmed.

S. c.: 20 Wash. 13.

CITIZENS NAT. BANK v COUNTY OF COLUMBIA (1900) 23 Wash. 441.

For relief against excessive taxation. Plaintiff's cashier, in giving defendant's assessor the verified list of its shareholders required by statute, was informed that the assessment would be the same as that of the previous year. Plaintiff relied on this representation and did not go before the board of equalization. Defendant assessed plaintiff's stock at a much higher rate than that agreed on. Plaintiff did not know of the exorbitant valuation until after the adjournment of the board of equalization. Plaintiff offered to pay into court the amount of its tax at the agreed valuation. Bal. Code, sec. 4825, provides that a trustee of an express trust may sue, without joining the beneficiary. Demurrer. Overruled. Judgment for plaintiff. Appeal.

Dunbar, C. J. 1. The plaintiff is a trustee for its shareholders. It had authority

to sue under sec. 4825 of Ballinger's Code. 2. Plaintiff had a right to rely on the representations of the assessor, and the complaint stated a cause of action. Judgment affirmed.

SHUEY v ADAIR (1901) 24 Wash. 378.

To enforce stockholders' liability. Plaintiff was appointed receiver of an insolvent bank, in which defendants were stockholders. The superior court found the amount of the bank's assets and liabilities, and assessed each stockholder his pro rata share to make up the deficiency. The defendants did not pay the assessment, and plaintiff was authorized to bring this action. Defendants were husband and wife, and plaintiff asked for a judgment against the husband, and a lien on the community property. It did not appear how long defendants had been stockholders, or when the liabilities accrued. Sec. 12, art. 12, of the State Constitution, and Ballinger's Code, sec. 4266, provide in substantially the same language that stockholders of a bank shall be individually liable for all debts of the bank accruing while they are stockholders. Complaint dismissed. Appeal.

Fullerton, J. 1. The order of the superior court is valid and binding on the stockholders of the bank, in so far as it determines the amount which may be properly charged to them as a whole on their superadded liability. 2. The proofs submitted made a prima facie case, and the defendants should have been put on their defense. 3. There is a community liability, enforceable against the defendants. Judgment reversed.

LADD v GILSON (1901) 26 Wash. 79.

To equalize assessments. Plaintiffs were stockholders of a bank. After the bank's taxes had been assessed, defendant, the board of equalization, gave it notice to appear and "show cause why the assessment should not be raised." After the hearing, the board increased the valuation of the bank's capital stock. Plaintiffs contend that the assessment was raised without notice to, or appearance by them. Secs. 1677-1680, Bal. Code, provide that the bank is to pay the tax; that shares are taxable where the bank is located; that the bank must list its stock for the assessor, deducting the value of its real estate. Judgment for plaintiffs. Appeal.

Per curiam. 1. The object of the law is to put the bank in the place of the owner for the purpose of taxation, and for such purpose, to make the bank the general agent of the owner. 2. The statute requires no particular form of notice. It was within the scope of the bank's agency to recognize the jurisdiction of the board, to submit to the same, and to litigate to a conclusion the matter in controversy. Judgment reversed.

WEST VIRGINIA

EXCHANGE BANK v COOKMAN (1865) 1 W. Va. 69.

On promissory note, against maker and indorsers. The note was payable at plaintiff bank. The maker paid to the credit of plaintiff the amount of the note into the L Bank, on October 17, of which no notice was given plaintiff until December 4. The L Bank in the meantime failed. By custom between the maker and plaintiff the former could deposit his indebtedness to the latter in any bank and was not bound to pay it at the plaintiff. Plaintiff authorized the maker to make payment on this demand at the L Bank. The court refused to charge that it was the custom of the L Bank to give prompt notice to plaintiff of deposits, and that if defendant did not receive credit on his indebtedness until plaintiff received such notice there was no payment. Judgment for defendant. Error.

Pololey, J. The special agreement superseded the custom. By authorizing the defendant to make the payment in the L Bank, it was by implication the agent of plaintiff to receive the money, and was in no respect the agent of defendant. Payment there discharged the obligation. Judgment affirmed.

FARMERS BANK v GETTINGER (1870) 4 W. Va. 305.

Assumpsit. S, a debtor of defendant bank, was garnishee. He subsequently bought up the depreciated bank notes of defendant, which he sought to set off against the debt he owed defendant. The affidavit on which the attachment was

issued, through an oversight, had no jurat signed by the officer, who administered the oath. It was contended that defendant was not a foreign corporation, and could not be proceeded against by foreign attachment. Defendant was incorporated by the laws of Virginia prior to 1861. Sec. 8, art. 11, of the constitution provides, that the statutory law of Virginia, not repugnant to the constitution, shall be the law of West Virginia until altered or repealed by the legislature. Judgment for plaintiff. Error.

Brown, P. 1. Under the constitution, defendant's charter continues and is not liable to be proceeded against by foreign attachment. 2. The omission in the affidavit was not sufficient to vitiate the attachment. 3. The bank notes which the garnishee held bona fide at the date of the service of the attachment was a good setoff against the claim of the attaching creditor of the bank. But the notes acquired after service of the attachment could not be applied. Judgment reversed.

Cited: 4 Va. 342; 7 id. 42, 51; 12 id. 536; 14 id. 628, 632; 38 id. 603; 44 id. 405, 487, 488.

SEAMON v BANK OF BERKELEY (1870) 4 W. Va. 339.

Where depreciated notes of a bank were procured by a garnishee after attachment levied, Held, that they could not be set off against, or paid upon, the garnishee's indebtedness to the bank.

MORRISON v LOVELL (1870) 4 W. Va. 346.

On certificate of deposit, issued by the T Bank located within the Confederate lines, to defendant, which was, by defendant, assigned to plaintiff inside the Federal lines, for a debt. Defendant contended that the certificate, being issued inside the Confederate lines was void. Judgment for plaintiff. Error.

Maxwell, J. 1. A certificate of deposit executed within the Confederate lines is null and void, being in violation of law and of the policy of the United States, forbidding intercourse with the rebels. 2. The assignment of the certificate of deposit was a new contract, entirely disconnected with the illegal act, founded on a new and valuable consideration and is to be governed by the law of the place where made. 3. The plaintiff can recover against defendant without attempting to collect from the T Bank, as it is apparent such action will avail him nothing. Judgment affirmed.

Cited: 4 W. Va. 345; 41 id. 31.

FORD v McCLUNG (1870) 5 W. Va. 156.

On check against the drawer. The check was drawn on the F Bank payable to P and was indorsed to and cashed by plaintiffs in 1862. The bank had sent its funds away for safety. The defendant had a deposit in the bank largely in excess of the check drawn, principally confederate money. The check was not presented until after the war. Plaintiffs asked the court to instruct that if the defendant had no deposit except confederate money, at the date of the check, he was not entitled to notice of dishonor, and if he had no funds in the bank, and knew it, no notice was necessary. The court declined, and instructed that if it was notoriously known that the effects of the bank had been removed, then presentation was not necessary. Judgment for defendant. Error.

Berkshier, J. 1. The request was properly overruled. Nor was there anything in the instructions given, of which the plaintiff can complain. 2. Failure to present the check and give notice in case of dishonor implies injury to the drawer. Judgment affirmed.

Cited: 19 W. Va. 317.

PARKER v DONNALLY (1871) 4 W. Va. 648.

Creditor's bill. Defendant's testator was indebted to the W Bank, which had a branch at C. During the war the bank was within the Union lines and the branch within the Confederate lines. The branch had been in full charge of M. After the war commenced, no new officers were elected by the bank for its branch, but the old officers continued to act. The debt was paid to M. Petitioner was a

creditor of the bank, which had become insolvent, and issued an attachment against the defendant for the debt which defendant's testator had owed the bank. Petitioner contended that the payment to M was void as M's authority was suspended by the war and by the failure of the bank to re-elect officers for the branch. Decree for defendant. Appeal.

Berkshire, P. 1. The personal representatives of a deceased debtor are not, as such, the debtors of the creditors of their testator or intestate. 2. The personal estate in their hands should be administered according to law and is not subject to garnishment. 3. The payment to M was valid, and without injury being shown on the part of creditors at large of the bank, the petitioner had no ground of complaint. Decree affirmed.

Cited: 14 W. Va. 630; 15 id. 156; 18 id. 232, 233, 234.

PARKERSBURY NAT. BANK v ALS (1871) 5 W. Va. 50.

On deposit. Defendant requested the court to make a charge that assumed that a settlement made between parties on a date named, when the plaintiff's account was stated and entered by defendant bank, was binding upon the plaintiff, whether it contained errors or not. Refused. Interest was allowed on deposits which were subject to check, before a demand was made for them. Judgment for plaintiff. Error.

Maxwell, J. 1. The instruction asked was properly refused because it assumed that the settlement was conclusive whether there was a mistake or not. 2. The instruction that the execution of a note in settlement of an account, is conclusive upon the items charged in it, unless some accident or mistake is shown, was correctly given. 3. A bank is not chargeable with interest on sums deposited to the credit of customers to be drawn against by check, until payment is demanded, unless by special contract. Judgment reversed.

Cited: 20 Va. 477; 23 id. 80; 27 id. 409; 39 id. 104.

FARMERS BANK v WILLIS (1873) 7 W. Va. 31.

To recover the assets of an insolvent bank. Defendant's note to W, dated June, 1861, was discounted by the bank for the accommodation of defendant. The bank assigned to plaintiffs for the benefit of creditors. Defendant pleaded tender and payment, made in the notes of the bank. The notes of the bank tendered were acquired by defendant after the assignment. The case continued in court until 1873, when it was enacted by the legislature (Acts 1872-3, ch. 40) that debts, due the banks of Virginia prior to April 5, 1865, might be paid in the issue of such banks. Judgment for plaintiff. Appeal.

Hoffman, J. 1. The bank had unquestionably the right to assign its assets for the benefit of creditors. 2. When the assignment is to trustees, to secure antecedent debts, these constitute a valuable consideration, adequate to sustain the assignment, which becomes effectual to protect the creditors against demands thereafter acquired by any one. 3. The provision of the Act of 1873, applies only while the debts remain due and payable to the bank. Judgment affirmed.

Cited: 9 W. Va. 331; 25 id. 821.

NATIONAL BANK v NATIONAL BANK (1874) 7 W. Va. 544.

On check, against acceptor. L drew a check payable to plaintiff upon the defendant. Defendant orally agreed to accept the check, if certain drafts deposited by L were paid. The Act of Congress of 1869, makes it unlawful for any officer of a bank to certify a check, unless the drawer has funds at the time equal to amount of the check. The court refused to instruct the jury that an oral acceptance made by an officer of a bank was void. To show that the drafts were paid, evidence of a telegram received by plaintiff from defendant's cashier was admitted. There was no evidence to show that the telegram was a genuine paper or that it was written or sent by the party whose name it bore. Judgment for plaintiff. Appeal.

Paull, J. 1. It was necessary for plaintiff to show that the telegram was genuine and was written and sent by the person whose name it bore. 2. The conditional oral acceptance or the oral promise to pay a check, is valid and can be maintained. The acceptance was made conditional and satisfactory proof of payment of the draft must be established by competent testimony to authorize a recovery. Judgment reversed.

COX v BOONE (1875) 8 W. Va. 500.

On check against maker. The check was received by plaintiff, by mail, in exchange for his note. By immediately mailing it to his correspondent at W, where the bank was located, it would have been received in time to obtain payment before the bank failed. But this would have necessitated plaintiff going three miles to mail it that night. He, instead, took it to W before the following mail got there. That day the bank failed about noon and the check was not presented. It was tendered to the defendant and demand made for a return of the note, which was refused. Defendants claimed that the check was not seasonably presented, and that its acceptance, under the circumstances, constituted payment. Judgment for defendant. Supersedeas.

Haymond, P. 1. The presumption is that the check was received only as a conditional payment and not in satisfaction of the debt. 2. There was no unreasonable delay on the part of the plaintiff and it cannot be held that plaintiff was guilty of negligence. Judgment reversed.

Cited: 12 W. Va. 652; 19 id. 316, 317.

ZINN v MENDEL (1876) 9 W. Va. 580.

Negligence. Defendants were directors of the W Savings Bank. Plaintiff was a depositor in the bank. The defendants were charged with mismanagement of the affairs of the bank, whereby the bank became insolvent and the plaintiff lost his deposit. Demurrer. Sustained. Error.

Haymond, P. Directors of banking institutions and other corporations are not liable at law to the creditors thereof in damages for the negligence in the management and disposition of the money and property of the corporation, although the corporation might lawfully complain thereof. Judgment affirmed.

HALL v BANK OF VIRGINIA (1878) 14 W. Va. 584.

Attachment. Plaintiffs made affidavit that the defendant bank had property in the county, where the suit was brought, in the hands of W, who was in charge of a branch of defendant. Property in the hands of W was attached. The bank had been incorporated by the laws of Virginia prior to 1861. Pendente lite, the bank conveyed all its assets under authority of an act of Virginia to trustees for the benefit of creditors. A suit was instituted by a creditor in the U. S. Court in Virginia to have the trustees act under its direction. That court ordered the trustees to sell the assets of the bank. I & Co. purchased the assets attached by plaintiffs. The court decreed the payment of the plaintiff's claim out of the attached assets. Appeal.

Green, P. 1. A corporation created by a state is deemed a citizen of that state. 2. The attachment was properly issued as against a non-resident. 3. The notes payable at branches in Virginia were attachable in the hands of the branch in West Virginia. 4. The conveyance by the defendant bank of the attached assets could not defeat the attachment. Decree affirmed.

Cited: 17 W. Va. 872; 25 id. 822, 829.

FIRST NAT. BANK v KIMBERLANDS (1880) 16 W. Va. 555.

On promissory note, against the maker. Defendant set up that he had given an order to the plaintiff bank on the M Co., out of which the note was to be paid, which order was accepted by the company, and taken by the plaintiff in full satisfaction of the note. K, the president of plaintiff, was also the president of M Co., and had made the agreement with defendant. It appeared that the business of plaintiff was done by the president and cashier, and that the directors seldom met. No special authority in the president so to satisfy the debt was shown. No payment of the order was made. Judgment for defendant. Error.

Green, J. 1. A president of a bank has no authority by virtue of his office to enter into contracts or agreements which will bind the corporation. 2. Authority to do a particular act may be inferred from proof of his habitually doing such acts with acquiescence of the directors, or where there is no such authority inferable, a ratification of the act will bind the corporation. 3. The acceptance of the benefits of a contract made by the president is an implied ratification of the act. 4. The order operated as an equitable assignment of the fund. Judgment reversed.

Cited: 18 W. Va. 229, 230; 19 id. 802; 20 id. 32; 25 id. 169; 26 id. 50, 51; 28 id. 682, 684; 31 id. 466; 34 id. 655, 727; 39 id. 554; 42 id. 231; 43 id. 244; 47 id. 122; 50 id. 186.

SMITH v LAWSON (1881) 18 W. Va. 212.

On promissory note, against drawer and indorser. The note was payable at the Branch Bank of Virginia, to the order of N, and by him indorsed and discounted at that bank, for the accommodation of the drawer. It matured during the war and was never protested. Three years thereafter, M, president of the branch bank, assigned it to plaintiff for the bank notes of the Bank of Virginia and delivered it to him without indorsement. N, a year after, paid the note by a deposit in the Bank of Virginia to the credit of M. At the time of the payment defendants believed that it was still owed by the branch bank and in possession of M. Defendants contended that M had no authority to assign the note. Judgment for plaintiff. Error.

Green, J. 1. The president of the branch bank had no power ex officio to transfer the note, in consideration of the surrender of notes at the Bank of Virginia. 2. The president not having been authorized to make the assignment, plaintiff is not a bona fide holder although he gave value. 3. Payment at the mother bank of a note payable at a branch bank will discharge the parties thereto. Judgment reversed.

Cited: 25 W. Va. 169; 28 id. 660; 37 id. 671; 38 id. 67.

NORTHWESTERN BANK v MACHIR (1881) 18 W. Va. 271.

Debt. Defendant pleaded payment. Art. 11, sec. 8, of the constitution of West Virginia, continued in force in West Virginia the laws of Virginia not repugnant thereto. Plaintiff had been incorporated in Virginia prior to the adoption of the constitution. Plaintiff did not prove its corporate existence. Judgment for defendant. Error.

Patton, J. 1. This corporation existing under the laws of Virginia prior to the formation of the state of West Virginia, was continued in existence by the constitution. 2. The act incorporating the plaintiff was a public act, of which the court will take judicial notice. Judgment reversed.

COMPTON v GILMAN (1882) 19 W. Va. 312.

On draft, against acceptor. The plaintiff and defendant exchanged checks for the purpose of using them in different places. It was subsequently found that it would be unnecessary to use them. Plaintiff failed to satisfactorily account for his check. The amount thereof had been drawn from the bank. Defendant sought to offset the amount of the check held by him against the draft in suit. Plaintiff claimed to have destroyed the check given by defendant and contended that defendant was barred by not having presented the check for payment. Judgment for defendant. Appeal.

Patton, J. 1. The necessity of a presentment of a check may be waived by representations and conduct of the drawer. 2. The drawer is not released by a failure to present the check promptly. He must show that by such failure he has been injured or suffered loss. Judgment affirmed.

MERCHANTS BANK v JEFFERIES, ADM'R'X (1883) 21 W. Va. 504.

Bill, for an accounting against the administratrix of the cashier of the plaintiff bank for money lent by him from the funds of the bank to irresponsible persons, without the consent of the directors. The bill alleged that the books and papers showed a large deficiency in the assets, and prayed that the matters be inquired into by a commissioner, and that the defendant be held liable therefor. The bill did not allege that any of the money loaned by the cashier had not been repaid, or that the cashier misapplied the funds, or that he was in default; or that the plaintiff had sustained any loss by reason thereof; or how much money was loaned, or to whom it was loaned. Defendant contended that equity did not have jurisdiction. Demurrer. Overruled. Decree for plaintiff. Appeal.

Woods, J. 1. The bill is too vague, indefinite and general in its statements to require an answer, and we are unable on account of the imperfect character of the bill to determine whether any cause of action exists. 2. The duties devolved

upon the cashier, to be discharged for the benefit of all persons interested in the assets of the bank, created him a trustee for that purpose, and a court of equity was the appropriate tribunal in which he should be compelled to settle the account of his trust. Decree reversed.

Cited: 26 W. Va. 440; 39 id. 131.

LYNCH v MERCHANTS NAT. BANK (1883) 22 W. Va. 554.

Assumpsit, against a national bank to recover the penalty for usurious interest. Secs. 5197-5198, U. S. R. S., provide that a party paying a bank usurious interest may recover twice the amount paid in an action in the nature of debt, provided such action is commenced within two years from the occurrence of the usurious transaction. Demurrer to jurisdiction and to form of action. Overruled. Defendant pleaded the general issue and Statute of Limitations. Interest was received by the defendant from January 1, 1865, to January 1, 1881. The court instructed the jury that they could not find for the plaintiff the amount of any interest, or twice the amount of any interest, which was not paid within two years before bringing of the suit upon the notes or renewals executed more than two years prior to the bringing of the suit. Judgment for plaintiff for an amount less than the claim. Error by the plaintiff.

Snyder, J. 1. National banks can sue and be sued in the state courts. 2. Our statute has to a great extent made the action of assumpsit concurrent with the action of debt. 3. The right of action for the prescribed penalty accrues at the instant any excessive interest is paid, whether it be on the original or any subsequent renewal, and each payment is in itself a cause of action, against which the Statute of Limitations commences to run. Judgment reversed.

Cited: 25 W. Va. 204; 26 id. 557.

LAMB v CECIL (1884) 25 W. Va. 288.

Bill, by the assignee of an insolvent bank, to charge a director for the withdrawal of his deposit, knowing the bank was insolvent. Demurrer. Overruled. The plaintiff tendered an amended bill, setting up negligence and fraud of the directors, and praying for a decree against them for the amount of loss to the bank. None of the directors except the original defendant, were made defendants. The court refused to allow the amended bill filed. Two days before the bank failed defendant withdrew his deposit and was paid in discounted securities of the bank, without the authority of the directors. Defendant contended that the assignment could not be proved by an authenticated copy, and that by paying dividends, the assignee had settled with him. The assignee did not know of the fraud until eight years after the transaction. Decree upon the original bill, for amount of deposits withdrawn, and interest on the principal and interest. Appeal.

Johnson, P. 1. All of the directors should have been made defendants, but if it is to be regarded as a bill to compel the defendant to pay the amount of his deposits improperly withdrawn, then it is multifarious. 2. It was error to decree interest on the principal and interest. 3. The director had no right to take from the cashier, and the cashier had no right to give him in payment of his deposits, the discounted bills and notes of the bank. 4. A bank may make an assignment for the benefit of creditors, and an authenticated copy of the deed of assignment is sufficient to prove the assignment. 5. The assignee was not guilty of laches in bringing the action and the payment of dividends was not an estoppel. Decree reversed.

Cited: 25 W. Va. 299, 301, 322; 26 id. 229; 28 id. 340, 654, 656, 659; 43 id. 436, 440; 45 id. 450, 708; 48 id. 531; 50 id. 522.

LAMB v PANNELL'S ADM'R (1884) 25 W. Va. 298.

The same points arose and were relied on in this case as in the next preceding case, and were decided in the same way.

Cited: 28 W. Va. 665.

LAMB v LAUGHLIN (1884) 25 W. Va. 300.

Bill, to charge a bank director for withdrawing his deposit, knowing the bank was insolvent. Defendant arranged with the cashier of the bank, of which plaintiff was trustee, to pay him the amount of his deposit as soon as there were sufficient

funds in the bank. The case proved was not the one alleged in the bill and the court refused to allow the plaintiff to amend his bill. Decree for defendant. Appeal.

Johnson, P. 1. If a creditor, with knowledge of the insolvency of an institution, makes an arrangement with the acting cashier, by which a check is to be paid, not in the ordinary course of business but as soon as there is sufficient money deposited in the bank to pay it, and the arrangement is carried out, such arrangement is fraudulent and equity will compel a return. 2. The points in *Lamb v Cecil*, 25 W. Va. 289, are approved and followed. 3. The plaintiff should have been allowed to amend his bill so as to state the real case. Decree reversed.

Cited: 25 W. Va. 837; 30 id. 134, 136, 137; 42 id. 526; 50 id. 132.

NATIONAL EXCHANGE BANK v BOYLEN (1885) 26 W. Va. 554.

Debt, on a note made by defendants to plaintiff bank. The plaintiff charged and received 10 per cent on the original note. The note was renewed from time to time, and on each renewal there was charged and paid to plaintiff 10 per cent for the time the respective renewals had to run. Defendant paid most of the original note, giving a note for the balance without including interest. The U. S. R. S., secs. 5197-98 prescribe as a penalty for taking usurious interest, that the person paying such interest may, in an action of debt, recover twice the amount so paid. Defendant contended the right to set off the usurious interest against the principal. Judgment for plaintiff for principal and interest. Error.

Snyder, J. Usurious interest paid a national bank on renewing a series of notes cannot, in an action by the bank on the last of them, be applied in satisfaction of the principal of the debt. Judgment affirmed.

Cited: 33 W. Va. 166.

LAMB v CECIL (1886) 28 W. Va. 653.

Bill, by an assignee to recover the amount of deposits withdrawn from a bank. The defendant, a director, knowing the bank was then insolvent, drew checks upon the bank for a large amount, and the cashier, without authority from the board, gave him in payment discounted notes and bills held by the bank, not then due. The defendant demurred to the bill as amended, because the cause of action alleged differed from that in the original bill, in form and substance. The cause of action and the relief sought were substantially the same as in the original bill. A deposition read in the original suit was read on the hearing of the amended bill. Decree for plaintiff, which did not recognize the right of defendant to dividends, which had not been declared or paid because of the pendency of the suit. Appeal.

Snyder, J. 1. The plaintiff had the right to amend his bill. 2. The cashier without positive authority from the board could not make such preference in favor of any depositor or creditor, whether he was a director or not. 3. An amended bill is not the commencement of a new suit and relates to the time of filing the original bill so far as the Statute of Limitations is concerned. 4. The amended bill not being a new suit, it is proper to permit the reading of a deposition taken and read upon the hearing of the original bill. 5. The defendant is entitled to offset the amount of dividends and interest due him. Judgment reversed.

Cited: 28 W. Va. 665, 670; 29 id. 23; 34 id. 259; 39 id. 739; 40 id. 48; 41 id. 757, 804; 47 id. 607.

LAMB v PANNELL'S ADM'R (1886) 28 W. Va. 663.

Bill, by an assignee of an insolvent bank, for proceeds of notes paid the defendant's intestate P by the bank. P was a director in the bank, and as the result of an investigation learned that it was insolvent. The cashier, who also knew the condition of the bank, gave P the several notes in payment of his deposits. The defendant pleaded an offset of the deposits of the intestate, and of the deposits of the sureties on the notes. Decree for plaintiff, giving credit to defendant for the amount of dividends to which the intestate was entitled as a partial payment on the amount of plaintiff's demand. Appeal.

Snyder, J. 1. The defendant's intestate and the cashier, both knowing of the insolvency of the bank, could not arrange to pay the deposit by surrendering the bank's assets. 2. The court erred in regarding the dividends to which the intestate was entitled as partial payments on the plaintiff's demand. They were in the nature of a setoff and should have been so allowed. Decree reversed.

Cited: 30 W. Va. 135, 137, 453.

CARROLL v EXCHANGE BANK (1887) 30 W. Va. 518.

Assumpsit, to recover the amount of a draft, payable to the P Bank. The P Bank and the defendant had mutual dealings, and the P Bank failed May 26. On May 24, it sent the draft to the defendant bank for collection, which was entered at once to the credit of the P Bank and collected on May 26, before P Bank failed. In the afternoon the defendant received notice that the P Bank had failed. After credit of the draft there was a balance due from the P Bank to the defendant of \$200. The plaintiff drew and was the owner of the draft, but the defendant was ignorant of the fact. It was indorsed by the cashier of the P Bank, "for account of P Bank." Judgment for plaintiff. Error.

Johnson, P. As the collecting bank had no notice that the bank sending the remittance was not the owner, and received it in the usual course of mutual dealings, by which balances were suffered to remain in the hands of the remitting bank, to be met by proceeds of such paper, the collecting bank was entitled to retain it against the real owner for the balances due from the bank transmitting it. Judgment reversed.

McLAIN v LOWTHER (1891) 35 W. Va. 297.

Assumpsit, upon a check drawn on the Bank of P: The plaintiff indorsed the check to M, who presented it to the bank a week later, and payment was refused. This was repeated several times, and there were no funds to meet it. After the plaintiff closed his case, the defendant demurred to the evidence. Judgment for plaintiff. Error.

Lucas, P. A check is always presumed to be drawn on actual funds, and when the holder has been guilty of laches in not presenting in due time or in failing to give notice of non-payment, it becomes incumbent upon him to show that the drawer has not been injured by the delay; yet if he shows that the drawer has no funds in the bank against which he drew, the burden of proving actual damages is shifted upon the drawer. Judgment affirmed.

BANK OF BRAMWELL v COUNTY COURT (1892) 36 W. Va. 341.

Petition, for the correction of an assessment of taxes. Defendant contended that the court had no jurisdiction. The cashier of the plaintiff bank was applied to by the assessor for a list of the shares held by the different stockholders; he declined to give it because the stockholders had agreed among themselves to have the stock listed by the stockholders. The stock was then assessed as to the bank, charging it in excess of its true value. By sec. 64 of the code the assessor was required to ascertain from the officers of a bank, the actual value of the capital stock invested, make the assessment, and when the property was so assessed, the shareholder was not to be otherwise assessed on it. Judgment for defendant. Affirmed by the Circuit Court. Error.

English, J. 1. In all controversies exceeding \$100 this court has appellate jurisdiction under sec. 3, art. 8 of the constitution. 2. The directors and stockholders cannot withhold the information, and the names of the stockholders, and when the assessor goes to the bank officers or agents, he is entitled to the information enabling him to assess the property to the bank. 3. The bank being a corporation organized under the laws of the state, there is nothing in the tax law in violation of the state or federal constitutions, the legitimate object of the statute being to tax the stock in the county where the bank is located. Judgment affirmed.

Cited: 38 W. Va. 186; 41 id. 674; 42 id. 93.

WATSON v TOWN OF FAIRMOUNT (1893) 38 W. Va. 183.

To recover tax, paid to defendant on bank stock, under protest. The F Bank was located in the defendant town. The town and county did not assess the capital stock of the bank, but the town authorities assessed the bank stock of the plaintiff to him. He resided in another county and gave in his stock to be assessed in the district where he resided. By sec. 54 of the Act of 1875, every person was required to list his shares of bank stock, if they had not been assessed to the bank as part of its capital. Judgment for defendant. Error.

Dent, J. Plaintiff having done his legal duty, the law will not permit the town assessor to assess him with his shares of stock, because they are part of the capital of the bank. The tax was illegally assessed and collected. Judgment reversed.

DONALLY v HEARNDON (1895) 41 W. Va. 519.

Bill, to substitute plaintiff to the rights of the K Bank in reference to stock taken by it from defendant H as collateral security. The defendant, H, pledged to the K Bank stock in the H Bank for his indebtedness, present and future, giving the bank the right to determine to which indebtedness it would apply dividends or proceeds of sale, should it be sold. The plaintiff had indorsed and paid for H several notes at the K Bank, and the bank had elected to apply the stock to the payment of other notes. Plaintiff claimed the right to be subrogated, to the extent of his payments, to the rights of the K Bank, as against the stock pledged. Plaintiff contended that K Bank could not apply the stock to the payment of a note made by H and defendant R; that H Bank, which did not have notice of the pledge, could not deduct H's debts from dividends payable to him. Decree for plaintiff. Appeal.

Holt, P. 1. The assignment of the stock was a right which may be lawfully given, between the parties, and be valid against creditors and subsequent assignees of the owner. 2. Up to the date of notice, the H Bank was protected in paying dividends to the recorded stockholders. 3. Without notice of the transfer, H Bank was justified in deducting H's debt from dividends payable on the books to him. Decree reversed.

WISCONSIN

STATE BANK v CORWITH (1858) 6 Wis. 551.

Attachment, under Act of 1854, which gave authority to creditors of a foreign corporation, which had ceased to act as a body corporate, to commence an action to enforce satisfaction out of any property of the corporation. Defendant was an Illinois corporation. Plaintiff offered in evidence a number of certificates issued by defendant, to the effect that they would be received for the amount named in payment for any debt due defendant. Across the face of each was written an acknowledgment of the receipt of a dividend out of the assets of defendant. These certificates were issued to the holders of bills of defendant under the provisions of an act of 1843, of the Illinois legislature providing for the liquidation of defendant, for pro rata dividends to its creditors annually and for the ultimate winding up of its affairs after a number of years. Defendant had accepted the provisions of the act. The court charged that the certificates entitled the plaintiff to a verdict. Judgment for plaintiff. Error.

Whiton, C. J. 1. As between the bank and those of its creditors who assented to the Illinois statute, the act was a contract, which must be the measure of their rights and duties. 2. The owner of the certificates, having received a dividend under the act, must be held to have assented thereto. 3. Plaintiff cannot now repudiate the contract and collect his debt as though the contract had no existence. Judgment reversed.

MARSHALL v AMERICAN EXPRESS CO. (1858) 7 Wis. 1.

Breach of contract, against common carriers. Plaintiff delivered to defendant a package of money to be delivered to the bank at M. The package arrived at M about five o'clock and was immediately sent to the bank. Defendant's messenger found the outside door of the bank locked, but it was opened by one of the clerks. The messenger offered the package to the teller, who refused to receive it, because it was after banking hours. The package was taken back to defendant's office where it was locked in the safe. During the night the safe was opened and the package stolen. The banking hours were from nine a. m. to four p. m. Judgment for defendant. Appeal.

Smith, J. 1. The receiving of packages is not part of the banking business, limited to banking hours, and the bank had no more right to refuse to receive the packages, after what it called banking hours, than any merchant to decline to receive packages after a certain hour. 2. If the carrier delivers or offers to deliver the goods or property at the proper time, at the proper place, and to the proper person, his liability as a common carrier from that moment is at an end. 3. Delivery to a proper agent of a banking corporation is the same as delivery to a natural person. 4. Defendant after discharging its duties as carrier could only be held as mandatory and liable for gross negligence. Judgment affirmed.

Cited: 41 Wis. 507; 44 id. 349; 45 id. 532; 49 id. 378; 77 id. 556.

TOWNSENDS v BANK OF RACINE (1858) 7 Wis. 185.

On bill of exchange. Plaintiff sold to defendant a bill of exchange on New York. In paying for the bill, defendant gave \$900 in bills of a Maine bank which had failed to redeem its bills in gold, and had suspended payment on December 22, 1856. At the time of the sale of the bill, plaintiff did not know who was the purchaser, the purchase being made by an agent. On the trial, plaintiff tendered the bills. Judgment for defendant. Appeal.

Whiton, C. J. 1. The refusal of the Maine bank to redeem its bills was *prima facie* a failure of the bank. 2. Payment for the draft in bills of a bank which had failed was no payment. 3. Failure to return or offer to return the bills before bringing suit could only affect the measure of damages. 4. If the bills were returned, or offered to be returned, within a reasonable time after plaintiff learned that defendant was the purchaser of the draft, plaintiff can recover the full amount of the bills. Judgment reversed.

Cited: 29 Wis. 168.

ROCK RIVER BANK v SHERWOOD (1860) 10 Wis. 230.

On note, by payee against maker. The note bore interest at 12 per cent. Plaintiff was a bank. The Banking Law of 1859, sec. 15, provided that banks may demand and receive a rate of interest not exceeding 10 per cent; no penalty or forfeiture was provided in case a bank charged more. The General Usury Law of 1856 limited the rate of interest to 12 per cent; and provided that any one seeking to avoid an usurious contract, or to support a plea of usury, must prove tender of the principal sum. Defendant's answer set up that plaintiff had no power to make such a contract and that the note was therefore void. Demurrer. Sustained. Judgment for plaintiff for principal and 10 per cent interest. Appeal.

Cole, J. 1. Where a corporation in the exercise of a lawful power, and in conducting its legitimate business, exceeds the limits fixed by law, the contract is not absolutely void. 2. When a bank reserves a greater interest than is allowed by its charter, the usury law applies, though the rate charged does not exceed the rate prescribed by such usury law. 3. Plaintiff may recover principal and interest where usury is not set up in the answer and a tender of the principal is not proved on the trial. Judgment affirmed.

Cited: 11 Wis. 349; 12 id. 387, 489; 13 id. 222; 17 id. 376; 18 id. 105, 108; 21 id. 347; 43 id. 426; 55 id. 546; 90 id. 169; 103 id. 47.

STATE, EX REL. v HASTINGS (1860) 10 Wis. 518.

Mandamus, to compel payment of an account. The bank comptroller ordered blanks for bank statements to be printed by R. R furnished the blanks, and his account was audited by the secretary of state. R assigned to relator, who demanded payment of respondent, the state treasurer. Payment was refused. Motion to quash the writ, on the ground that the bank comptroller had no authority to order such blanks. Sec. 12, ch. 6, R. S. of 1858-59, provided that the printing of the several departments should be subject to the order of the respective officers thereof; and that no order should be given for work "not absolutely required for the use and convenience of such office." Relator contended that the bank comptroller in ordering the blanks was exercising a discretion with which the court would not interfere.

Paine, J. 1. Though, where the officer's authority is clear, the court will not interfere with his discretionary exercise of his power, the court is not bound by the officer's interpretation of the law declaring his powers. 2. As it is doubtful whether or not the bank comptroller was authorized to order printing of this kind, the writ must be quashed on the ground that relator has not shown a clear right thereto. Motion sustained.

Cited: 52 Wis. 427; 83 id. 260; 107 id. 352.

STATE, EX REL. v HASTINGS (1860) 12 Wis. 47.

Mandamus, to compel the state treasurer to deliver interest coupons. Relator, a bank, deposited state bonds with respondent to secure its circulating notes. Interest was due thereon, and the bank comptroller directed respondent to deliver the coupons to relator. Respondent refused. In its return, respondent set up that he held the coupons as security for unpaid taxes and forfeits under sec. 20, ch. 71, R. S., which provided for a tax on the capital stock of banks and for a lien on its

bonds in the hands of respondent for the amount of unpaid taxes and forfeit. The tax so provided was similar to others which had been held unconstitutional. Demurrer to return, on ground that the statute establishing the lien was unconstitutional. By art. 11, secs. 4 and 5, of the constitution, the legislature could pass no banking laws, without submitting them first to the people; and sec. 20, ch. 71, R. S., was passed in the manner thereby provided.

Dixon, C. J. 1. The reservation under secs. 4 and 5, art. 11, of the constitution, of power to the people to prescribe banking laws is absolute and unqualified. 2. The people having reserved the power, the restrictions of the constitution cannot be applied to its exercise; sec. 20, ch. 71, R. S., is therefore constitutional. Demurrer overruled.

Cited: 17 Wis. 654; 18 id. 105; 46 id. 379; 90 id. 169; 103 id. 46, 47.

RACINE CO. BANK v LATHROP (1860) 12 Wis. 466.

On drafts. Defendants, to purchase wheat, bought on the joint account of M V & Co. and defendants and had drafts drawn by them on M V & Co. discounted by plaintiff. The drafts were accepted by M V & Co. and assigned to B C & Co. Before maturity, both M V & Co. and B C & Co. failed and the drafts were protested. B C & Co. were indebted to plaintiff on an account in a sum greater than the amount of the drafts. This account plaintiff's cashier assigned for plaintiff to M V & Co., by written assignment, stipulating that plaintiff would do nothing to hinder recovery thereon. M V & Co.'s note, payable one day after date, was taken in exchange. With a view to making the assignment, the cashier had requested M V & Co. not to pay the drafts; and after the assignment he notified defendants that he had arranged to relieve them from the drafts. For two years thereafter defendants had extensive dealings with M V & Co. upon the understanding that the drafts were paid. Thereafter the drafts were re-assigned to plaintiff by B C & Co. to be applied on their account with plaintiff. The note given by M V & Co. appeared in the statement of plaintiff's assets given to the bank comptroller and was regularly entered on the books of the bank. The court excluded evidence of a parol agreement between M V & Co. and plaintiff at the time of the assignment that M V & Co. were to hold the account merely for the purpose of setoff against the drafts in the hands of B C & Co., and that the account was to be re-assigned in case the setoff failed. Judgment for defendants. Appeal.

Paine, J. 1. Even if the cashier acted beyond the scope of his authority, the subsequent actions of plaintiff amounted to a ratification of this transaction. 2. Plaintiff's action in interfering with the regular discharge of the paper for the purpose of collecting its claim against the holders, is as effectual to discharge the drawers as if plaintiff had been the holder. 3. The transaction amounted to an extension of time to the acceptors at least for the time the note had to run. 4. Plaintiff is estopped by the representations of its cashier upon which defendants relied in their subsequent dealings with the acceptors. 5. As the drafts were to be applied on the account assigned to M V & Co., they should be regarded as paid with the property of M V & Co. Judgment affirmed.

Cited: 66 Wis. 456.

STACY v DANE CO. BANK (1860) 12 Wis. 629.

Breach of contract, for failure to collect note. Plaintiff mailed from Chicago to defendant at Madison, for collection, a note of M, indorsed by G. M resided at S, where there was no bank. Defendant gave the note to the A Express Co. for collection. The A Express Co. gave it to a notary before maturity. The notary presented it one day before maturity and mailed notice of dishonor to G, whose residence was in S. M being insolvent, the debt was lost. It was customary for banks to intrust the A Express Co. with paper for collection in towns where there were no banks; and the company was reputed to be a reliable agent. Judgment for defendant. Appeal.

Paine, J. 1. Where a note is given for collection to a bank at a distance from the place where it is payable, there is implied authority to employ a sub-agent, and if the bank exercises reasonable care and skill in selecting one, it is not afterward liable for his default. 2. Even if the A Express Co. be regarded as defendant's agent alone, delivery of the note by it to a notary public at the residence of the maker, in due season to make presentment and protest, is a good defense. Judgment affirmed.

Cited: 76 Wis. 343.

DURKEE v CITY BANK (1860) 13 Wis. 216.

To recover penalty for usury. Plaintiffs borrowed money from defendant on notes, paying 10 per cent interest and the exchange between K and New York. None of the notes were transmitted to, or used in, New York, but were discounted and paid by defendant at K. The Statute of 1851 restricted banks from charging more than 10 per cent. The statute against usury provided that the person paying the usurious interest could bring an action to recover treble the amount of the money paid as usurious interest. Plaintiff alleged that charging for the exchange was done to evade the statute against usury. Demurrer. Sustained. Appeal.

Dixon, C. J. 1. Money claimed and paid as exchange between different places, with intent to evade the statute, is usury. 2. The fact that the principal is not paid, would not preclude the borrower from bringing suit. It is the payment of the usury as such, which gives the right of action. 3. The usury law applies as well to banks as to natural persons. Reversed.

ROCKWELL v ELKHORN BANK (1861) 13 Wis. 653.

On promissory note, against maker and indorsers. The cashier of defendant, R Bank, made a note payable to the order of defendants S & M. The note was indorsed by S & M before delivery and given to plaintiff for a balance due him for money deposited with R Bank, and for his salary as president of R Bank. The Banking Act of 1858, ch. 71, sec. 7, declared that all notes and bills issued and put in circulation as money should be signed by the president, or vice-president, and cashier. Defendants contended that the note was not properly executed. Judgment for plaintiff. Appeal.

Dixon, C. J. 1. The Act of 1858, ch. 71 sec. 7, does not apply to negotiable paper, but only to circulating notes payable at the banking office on demand and without interest. 2. Banking associations have the implied power to issue negotiable notes and bills in contracting debts in regular course of business. 3. Such notes may be signed by the cashier or any other agent properly designated. Judgment affirmed.

Cited: 16 Wis. 133, 681; 26 id. 668; 74 id. 390; 79 id. 36; 96 id. 6; 103 id. 48, 51; 106 id. 114.

COLEMAN v WHITE (1862) 14 Wis. 700.

To enforce stockholder's liability. This action was brought at law by a creditor of a bank, under the General Banking Law, ch. 71, sec. 18, against the stockholder of the bank, to recover a debt due from the bank. The statute made stockholders individually responsible, to the amount of their shares, for all the indebtedness and liabilities of the corporation. Judgment for plaintiff. Appeal.

Dixon, C. J. 1. The liability of the stockholder is primary and absolute, and attaches the moment the debt is contracted by the bank. 2. It is a liability of all the stockholders to all the creditors, and more nearly resembles that of co-partners than any other with which it can be compared. 3. The remedy should be by suit in equity by all the creditors or by some for the benefit of all, against the bank and all the stockholders, unless it be impossible to bring them all before the court. Judgment reversed.

Cited: 17 Wis. 549; 19 id. 438; 23 id. 457, 458; 55 id. 605; 67 id. 588; 78 id. 200; 87 id. 220; 96 id. 194, 199, 519; 105 id. 101, 102; 106 id. 264, 265, 279, 280, 568, 628, 630, 632; 109 id. 140, 151; 111 id. 646.

BALLSTON SPA BANK v MARINE BANK (1862) 16 Wis. 120.

On promissory notes, against maker and indorsers. Defendant, M Bank, executed the notes signed by its cashier making them payable to defendants, H & M, who indorsed them to plaintiff, a New York corporation, for a loan of bank bills, issued by plaintiff. M Bank's directors allowed the notes to be renewed several times and paid interest thereon. M Bank assigned notes and mortgages to plaintiff as security for the loan, for which the latter gave a receipt. Defendants H & M offered to prove by parol, that, at the time the collaterals were delivered to and the receipt given by plaintiff, the latter agreed to renew the notes until the collaterals were due. Excluded. M Bank contended that the cashier had no authority to make the notes. Judgment for plaintiff. Appeal.

Dixon, C. J. 1. It was competent for the cashier, as agent for the board of directors, to execute the promissory notes in question, and bind the bank by such

execution. 2. A subsequent ratification is equivalent to a previous express authority. 3. Failure of the directors to repudiate the cashier's act, after knowledge, amounted to ratification thereof. 3. The circulation of foreign currency is not prohibited in this state. 4. The receipt did not purport to be the contract upon which the collaterals were deposited and parol evidence of such contract should therefore have been admitted. Judgment affirmed as to M Bank and reversed as to H & M.

Cited: 16 Wis. 681; 26 id. 668; 30 id. 687; 37 id. 268; 44 id. 111; 48 id. 109; 50 id. 326; 53 id. 418; 54 id. 576; 62 id. 546; 70 id. 77; 74 id. 390; 77 id. 347; 86 id. 660; 96 id. 6; 107 id. 527.

AIKEN v MARINE BANK (1863) 16 Wis. 679.

On promissory note, against indorser. A gave his promissory note, payable at defendant bank, to defendant, which indorsed it to plaintiff. The indorsement was as follows: "Pay to the order of Albert J. Paine, Marine Bank, by John S. Harris, Prest." Plaintiff offered in evidence the notice of protest, which was directed "to John S. Harris, Prest.," described the note, gave its amount, stated that it was dishonored and the holder looked to him for payment, but did not state when or where the note was presented. This was the only note of A which defendant had of that amount and date; and Harris personally never had any note of A. The notice was left at the bank addressed to Harris, Prest. Excluded. Plaintiff offered to prove in connection with said notice that it was the custom of bankers to address the president of the bank, and not the bank by name. Excluded. Judgment for defendant. Appeal.

Paine, J. 1. The indorsement was sufficient to bind the bank. 2. A notice of protest is sufficient if it conveys the necessary information, so that the person notified could not have been misled. Judgment reversed.

Cited: 78 Wis. 226.

CENTRAL BANK v ST. JOHN (1863) 17 Wis. 157.

On notes. From 1857 to 1860, C borrowed money from plaintiff, by having his notes discounted at 10 per cent, the highest legal rate. In 1859, under arrangement with plaintiff's cashier, C drew on his consignees, and plaintiff cashed the drafts, and charged him 10 per cent interest, and one-quarter of one per cent for collection. C's testimony that it was his understanding that this was done to evade the usury laws, was excluded. The notes in question were given to take up the drafts held by plaintiff. The notes were indorsed by S and L. Defendants were S's administrators. Judgment for plaintiff. Appeal.

Dixon, C. J. 1. It was lawful for plaintiff, in addition to the lawful rate of interest, to bargain for and receive the usual current rate of exchange, as compensation for collecting the drafts; provided it was not resorted to as a device to avoid the statute against usury. 2. C's understandings or inferences were not evidence. Judgment affirmed.

Cited: 26 Wis. 480; 30 id. 336; 49 id. 378; 65 id. 8.

FARMERS BANK v DETROIT R. R. CO. (1863) 17 Wis. 372.

Damages, for negligence. Plaintiff, a bank, delivered to defendants several shipments of flour at Milwaukee to be transported to New York, and through the negligence of defendant the flour was damaged. R. S., ch. 71, sec. 4, authorized banking associations to carry on business "by loaning money on real and personal securities." Defendant objected to plaintiff's introducing any evidence on the ground that plaintiff had no power to make the contracts disclosed in the complaint; that it had no power to become a dealer in or shipper of flour. Sustained. Judgment for defendant. Appeal.

Dixon, C. J. 1. R. S., ch. 71, sec. 4, impliedly confers power to make such securities available according to the ordinary course of business. 2. It being competent for plaintiff lawfully to acquire the property, the presumption is that it was so acquired. 3. If the contract of purchase were illegal, defendants could not take advantage thereof as they were not parties thereto and their own contract with plaintiff was legal. Judgment reversed.

Cited: 17 Wis. 462.

CLEVELAND v MARINE BANK (1863) 17 Wis. 545.

To enforce stockholders' liability. Plaintiff brought this suit in behalf of himself and all other creditors of defendant bank, against the bank itself, and the stockholders by their individual names. R. S., ch. 148, sec. 25, provided that if such application were made by a creditor of a corporation whose directors or stockholders were made liable in law for the payment of the debt, they could be made parties at the commencement, or at any subsequent stage of the proceedings, when necessary to enforce their liability. Sec. 26 provided that a creditor after obtaining a judgment against the corporation could proceed against the stockholder by filing a complaint founded upon the judgment. Demurrer. Sustained. Appeal.

Dixon, C. J. 1. Sec. 26 is no more than an extension of the remedy to such creditors as may choose to proceed to judgment before resorting to the equitable proceeding, and does not imply a denial of the action expressly authorized by sec. 25. 2. Sec. 25 allows the creditor to join the corporation and the stockholders in the first instance. Reversed.

Cited: 19 Wis. 436; 33 id. 662; 55 id. 605, 606; 67 id. 588; 87 id. 522; 96 id. 195, 519; 105 id. 101; 106 id. 629.

VAN STEENWYCK v SACKETT (1864) 17 Wis. 645.

On bond. The bond was executed to the bank comptroller by defendants S and L, the former being the sole owner of, and the latter surety for, P Bank. It was executed under sec. 17 of the General Banking Laws to secure the circulating notes of P Bank. A warrant was given by defendants voluntarily, to the attorney-general, authorizing him to appear for them in an action on the bond, containing a power to release errors in judgment or execution, and declaring that said warrant was executed in pursuance of sec. 7, ch. 47, Laws of 1855. This statute provided that such warrant should be executed. The Laws of 1855 amending the banking laws had not been submitted to the people, but were the direct act of the legislature. Judgment for plaintiff. Defendants moved at circuit court to set aside the judgment. Judgment set aside. Appeal.

Paine, J. 1. The banking law was in the nature and had the force and effect of a constitutional provision, and could not be amended without submitting the amendment to the people; ch. 47, Laws 1855, not having been submitted to the people for vote, is, therefore, of no force. 2. Defendants, however, having voluntarily executed this warrant, and the judgment rendered having been, in all respects regular, should not be set aside merely because they could not be compelled to execute such warrant. Reversed.

Cited: 18 Wis. 106; 19 id. 573; 21 id. 165; 34 id. 354; 40 id. 389; 43 id. 637; 46 id. 379; 57 id. 128; 72 id. 577; 75 id. 60; 90 id. 169; 103 id. 47, 49.

BROWER v HAIGHT (1864) 18 Wis. 102.

On note. D Bank could by its charter charge only the 10 per cent interest. In June, 1859, defendant gave his note to L for \$1,500, payable in three years, with interest at 12 per cent. The loan was really made by D Bank, which received a mortgage as security; but in order to avoid the usury laws the note was made payable to L. The note was transferred to D Bank. In 1861 D Bank made an assignment. Subsequently, in actions against D Bank all its notes, money and credits were attached and delivered to plaintiff as sheriff, who was ordered to collect the notes. The constitution provided that no banking law should be passed or amended by the legislature without acceptance by the vote of the people. The usury law of 1859 was not submitted to the people; and sec. 9 provided that it should not operate to affect the banking law. This act made usurious contracts void. Judgment for plaintiff, with 10 per cent interest. Appeal.

Paine, J. 1. In applying the usury law to a contract made by a bank in violation of its charter, there is no attempt to amend or interfere in any way with the banking law. It is only allowing the legislature to say what shall be the effect, if the bank violates that law and the general law of the state in a matter which the banking law makes no attempt to regulate. 2. Sec. 9 is only disclaimer and does not exempt banks from the operation of the usury law. 3. Whether the bank's charter or the usury law of 1859 be applied, the usurious contract is void. Judgment reversed.

Cited: 46 Wis. 379; 90 id. 169; 103 id. 47.

STATE BANK v CITY OF MILWAUKEE (1864) 18 Wis. 281.

Injunction, to restrain collection of a tax upon personal property. Defendant imposed a tax on accumulated profits owned and retained by plaintiff for banking purposes, and not divided among its stockholders. Sec. 20 of Banking Law provided that every bank should pay to the state treasurer, a semi-annual tax on the amount of capital stock, which should be exempt from all other taxes. The revenue laws of the state subjected to taxation "all personal property," including capital stock and undivided profits. Judgment for plaintiff. Appeal.

Cole, J. 1. The "capital stock," within the meaning of the banking law, is the fund paid in by stockholders to be used and managed by the association for banking purposes. 2. The accumulated profits of a bank are not in such a sense its "capital stock" as to be exempt from taxation, but fall at once into the mass of other taxable property. Judgment reversed.

Cited: 25 Wis. 119; 45 id. 568; 95 id. 595.

DOLPH v RICE (1864) 18 Wis. 397.

On check. The complaint alleged the making and delivery of the check, setting out a copy thereof, and that on the same day, payment thereof was duly demanded at the bank on which it was drawn and refused; that there was still due and payable thereon the amount specified on its face, with interest from its date. Demurrer. Overruled. Appeal.

Cole, J. The payee of a check must allege, in an action against the drawer, due presentment to the bank or drawee, and notice of dishonor to the drawer, or facts dispensing with such presentment and notice. Reversed.

LINDSEY v McCLELLAND (1864) 18 Wis. 481.

On note, by payee against maker. At maturity, defendant brought a certificate of deposit on B Bank to plaintiff for nearly the whole amount of the note. This certificate was payable "in current funds." Six days after plaintiff received the certificate of deposit, he presented it for payment. Payment was refused, B Bank having failed in the meantime. The court charged the jury that the law relating to commercial paper on questions of diligence did not apply to an instrument of that kind, and that if there was not an express agreement to take the certificate in payment, plaintiff was entitled to recover. Judgment for plaintiff. Appeal.

Cole, J. 1. As the certificate was payable "in current funds," and not in money, it was non-negotiable. 2. Even if it were negotiable, the holder would be entitled to a reasonable time in which to present it, as in the case of a promissory note. 3. As money is not deposited to be immediately withdrawn, the keeping of this certificate for six days before presenting it for payment was not want of diligence. Judgment affirmed.

Cited: 26 Wis. 526; 47 id. 555, 556, 562, 563, 631; 50 id. 136; 74 id. 360.

BALLSTON SPA BANK v MARINE BANK (1864) 18 Wis. 491.

On order to show cause why the president of defendant should not be punished for contempt. Plaintiff having obtained a judgment against defendant, issued execution and commenced proceedings to reach the property of defendant in the hands of H, the president. On the examination before the referee, H stated that he had nothing in his hands belonging to the bank, except what he held as president; that he owed it nothing; that the bank was closed in 1860, since which time it had been settling up its affairs. H refused to answer any questions referring to the disposition of the bank's assets. The proceedings were instituted under ch. 134, sec. 91, R. S. H contended that R. S., ch. 148, provided for an exclusive remedy in cases where the judgment debtor was a bank or other moneyed corporation. Motion denied. Appeal.

Dixon, C. J. 1. The property of a private corporation is liable for its debts, whether such property is found in the hands of its president, or any other person. 2. Sec. 91, ch. 134, R. S., refers to cases where a corporation is a debtor. 3. R. S., ch. 148, does not afford an exclusive remedy in cases where banks are debtors; and a creditor may therefore proceed under sec. 91, ch. 134, R. S. Reversed.

Cited: 38 Wis. 258; 39 id. 287; 41 id. 402, 403; 60 id. 28; 94 id. 612.

CARR v COMMERCIAL BANK (1865) 19 Wis. 272.

To set aside a judgment. The summons and complaint was served on D, as managing agent of the defendant. D made the application on the ground, that he was not at the time the president, or other officer, or the managing agent. It was shown that D was elected president at one time and no one had since been elected to that office; that semi-annual statements of defendant were filed, signed by D as president; that subsequently a sworn statement was made to the bank comptroller, subscribed by D as "attorney," stating that the bank had no president, or cashier, and its affairs were being wound up. The attorneys for defendant consulted with D regarding the bank's affairs. Motion denied. Appeal.

Cole, J. D was what the law regards as a "managing agent of the corporation, and authorized to receive service of process." Affirmed.

Cited: 57 Wis. 404; 110 id. 653.

MERCHANTS BANK v CHANDLER (1865) 19 Wis. 434.

To enforce stockholders' liability, and for an accounting. Plaintiff brought this action on behalf of himself and all other creditors of defendant bank, against the bank and its stockholders. Plaintiff had obtained a judgment against defendant bank and two other defendants, in an action for the foreclosure of a mortgage. The property was sold and a deficiency judgment obtained. An execution issued which was returned unsatisfied. Demurrer by C. Overruled. Appeal by C.

Dixon, C. J. 1. A creditor before or after judgment, and whether or not his judgment has been docketed and execution issued against the bank's real estate, may maintain an action in behalf of himself and all other creditors against the bank and its stockholders jointly. 2. A judgment against the bank is prima facie evidence of the indebtedness of the bank in an action against the stockholders. It is not strictly *res adjudicata* against the stockholders, but such strong evidence of the indebtedness, that it can only be questioned on the ground of fraud or mistake. Affirmed.

Cited: 33 Wis. 662; 55 id. 605; 67 id. 588; 87 id. 522; 96 id. 195, 519; 105 id. 101; 106 id. 629.

BANK v VAN NORSTRAND (1866) 21 Wis. 159.

On bond. Defendant executed a bond to plaintiff, the bank comptroller, to secure the holders of bills of K Bank. K Bank having failed to redeem its circulating notes when presented for payment, its securities were sold, and the proceeds applied ratably to the payment of outstanding bills, leaving a balance due on the bills issued after execution of the bond. Defendant, when the bond was executed, was the sole owner of the stock, and he sold the stock to S. Plaintiff allowed defendant to take away his bond, on S filing a bond. Laws of 1855, ch. 47, sec. 6, provided that the bank comptroller might, in his discretion, permit the original stockholder's bond to be withdrawn, and a new bond substituted to be as binding as the original bond. Plaintiff contended that Laws of 1855, ch. 47, sec. 6, was unconstitutional because not submitted to vote of the people as required by the constitution in the case of banking laws. He also contended that exchange of bonds was due to mistake as to the validity of the statute. Demurrer. Overruled. Appeal.

Cole, J. 1. As the bank comptroller is the obligee named in the bond, he is the trustee of an express trust. He, and not the receiver, is the proper party to bring suit thereon. 2. Sec. 6, ch. 47, Laws of 1855, is invalid, and the comptroller had no authority to exchange these indemnifying bonds; defendant is therefore liable on this bond. Affirmed.

Cited: 46 Wis. 379, 383; 90 id. 169; 103 id. 48.

STATE, EX REL. v RUSK (1866) 21 Wis. 212.

Mandamus. The State sold its bonds to the R Bank, receiving 70 cents on the dollar, and the bank's bond conditioned for the payment of 30 cents more on the dollar in semi-annual instalments, with an arrangement that the bonds should be deposited with the bank comptroller as security for its circulation. After the bonds were deposited with the bank comptroller, the bank withdrew them and substituted specie. The bank assigned to the relators all its securities and money that might be in the comptroller's hands after the time limited for the redemption of its bills

had expired. At the end of that time the comptroller refused to pay over the balance left, insisting that it belonged to the State. Motion to quash.

Downer, J. 1. In the absence of an agreement, the State had no lien on the bonds deposited with the comptroller, as a substitute for the money received, for the payment of the instalments. 2. A deposit with the bank comptroller does not create an indebtedness of the State which can be set off against the bank. Motion overruled.

Cited: 46 Wis. 383. S. c.: 23 id. 636.

KENNEDY v KNIGHT (1867) 21 Wis. 340.

Foreclosure of mortgage. Defendant and wife executed the mortgage in favor of the F Bank of New York, as security for their note of \$5,000 at 10 per cent, payable in 1858, in this state. The note and mortgage were transferred to plaintiff; the note by a blank indorsement of the president, the mortgage by a written assignment executed by the president, with the bank's seal affixed. A New York statute provided that no assignment of property over the value of \$1,000 should be made by the president without the consent of the directors; that all conveyances of real estate should be made to the president; and that only 7 per cent interest should be charged. Pleas: usury, and Statute of Limitations. The defendant was in the service of the army from the year 1861 to the year 1865. This action was commenced in 1864. Judgment for plaintiff. Appeal.

Cole, J. 1. The mortgage was not void because made to the bank and not the president. 2. The bank alone can raise the objection that the mortgage was assigned without authority of the board of directors. 3. There was no attempt on the part of the bank to exercise banking power within this state without authority. 4. The contract was governed by the laws of the state which allow 10 per cent interest. There was no usury. 5. The Laws of 1863, ch. 32, exempted the defendant from civil process for three years. The statute did not bar the remedy on the note. Judgment affirmed.

Cited: 48 Wis. 242; 54 id. 519; 69 id. 114; 97 id. 414.

STATE, EX REL. v RUSK (1869) 23 Wis. 636.

Application for mandamus. The State sold to the Bank of C its bonds receiving 70 per cent on the dollar, and the bank's bond conditioned for the payment of the remaining 30 per cent in semi-annual instalments; with an agreement that the bank would deposit the bond with the bank comptroller, as security for its circulation. After the bonds were deposited, the bank deposited specie and withdrew the bonds. The bank assigned to the relator its right to any balance in the hands of the comptroller, and on demand, payment was refused. The return of the comptroller to the writ showed that there were several instalments due on the bonds unpaid. The relator answered that the only lien the State had on the bonds was for accruing interest on that portion remaining unpaid, and this was extinguished by the delivery of the bonds. Demurrer to answer.

Cole, J. The property's having been changed by the bank in violation of the agreement, does not divest it of the trust to secure the outstanding circulation, and to pay interest on the bonds. Demurrer sustained.

Cited: 46 Wis. 383. S. c.: 21 Wis. 212 (ante p. 1404.)

VAN SLYKE v STATE (1869) 23 Wis. 655.

Money had and received. The assessor of D County assessed upon each of the shares of the F National Bank a tax of one and a half per cent, which was paid under protest. Sec. 41 of the National Banking Act provided that the tax imposed upon a national bank, under the laws of any state, should not exceed the rate imposed upon the State banks; and that any tax upon the shares of a national bank should not exceed the rate imposed upon those of the State banks. The Act of 1865, provided a tax of one and a half per cent upon the capital of the State banks. Sec. 3 of this act provided that the shares of a national bank should be taxed on their par value. Demurrer to complaint for insufficiency.

Dixon, C. J. 1. The states may lawfully tax the capital of their own banks, and the shares in the national banks, provided such taxation be not unequal or so imposed as to discriminate in favor of the State banks, and against the national banks. 2. The complaint is defective as it failed to show that the shares were

worth less than par, and that the assessment was not greater than upon other moneyed capital. Demurrer sustained.

Cited: 25 Wis. 117, 118; 30 id. 505; 41 id. 250; 42 id. 511. Aff'd: 154 U. S. 581.

BAGNALL v STATE (1869) 25 Wis. 112.

Money had and received. The plaintiff was a shareholder in a bank, organized under the National Banking Law. He paid taxes reassessed against his shares under the Act of 1868, for 1865 and 1866, and then brought this action under the provisions of sec. 14. The Act of 1868, sec. 2, provided that the local assessor should assess the shares of a national bank owned by any person or corporation at their true cash value, but not to exceed their par value. Sec. 4 provided for a re-assessment of the bank shares for 1865 and 1866 which were unpaid. Sec. 41 of the National Banking Act, provided that the tax imposed upon a national bank should not exceed the rate imposed upon the state banks where the national bank was located. Demurrer, for not stating a cause of action.

Cole, J. 1. The legislature had authority to pass the law providing for a re-assessment. 2. A tax on the capital of a bank is a tax on its franchise, and is not equivalent to a tax on the shares of stockholders. 3. On the authority of Van Slyke v State (23 Wis. 655) the demurrer is sustained.

Cited: 30 Wis. 505; 41 id. 250. Aff'd: 154 U. S. 581.

HOUGHTON v FIRST NAT. BANK (1870) 26 Wis. 663.

On promissory note. C made the note payable to W at the M Bank. The note was indorsed by the payee to the defendant bank, which indorsed it to G, who indorsed it to plaintiffs. B, the cashier of the defendant, indorsed the note for the accommodation of the payee, adding to his name the word "Cas." Before the plaintiffs purchased the note, B told them that his indorsement as cashier was all right, that the bank had security, and that the note would be paid. The plaintiff purchased the note before maturity, G indorsing it without recourse. Judgment for defendant. Appeal.

Cole, J. 1. The bank was effectually bound by the indorsement of the cashier, even if it was made for the accommodation of the payee. 2. The cashier is the person authorized to indorse notes for the bank, and a purchaser in good faith before maturity is not bound, when he takes it thus properly indorsed, to inquire whether or not the bank owned it when it was indorsed. Judgment reversed.

Cited: 51 Wis. 231; 74 id. 389; 106 id. 115, 116.

CRAVATH v ESTERLY (1870) 26 Wis. 675.

On promissory notes. Defendant made the notes payable to the order of H & Co. at the A Bank, and H & Co. indorsed them to C & Co. The notes were then indorsed by them to an express company, for collection. The notes were paid at maturity by the bank, and charged by the cashier to "bills receivable." Thereafter, the bank made an assignment to the plaintiffs. The defendant was an accommodation maker, and had no account at the bank. H, one of the payees, was the president of the bank. At the request of H, the cashier paid the notes with the money of the bank. No notice was given to the defendant that the notes were held by the bank. Judgment for plaintiffs. Appeal.

Dixon, C. J. As the money was paid at the payee's request and on his credit, he became a debtor to the bank. The liability of the defendant was extinguished. Judgment reversed.

Cited: 51 Wis. 150.

RUSK v SACKETT, ADM'R (1871) 28 Wis. 400.

On bond. The defendant's intestate, the owner of the P Bank, gave the plaintiff, the bank comptroller, a bond to secure the holders of the bills issued by the bank, in case the securities deposited should be insufficient. The securities depreciated and the bank having failed to pay the deficiency, a judgment was obtained on the bond against the intestate in D County. While the estate was in progress of settlement by the County Court of W County, the bank comptroller presented his certificate showing the amount due on the bond, and asked to have the sum allowed out of the estate. The claim was disallowed and on appeal to the Circuit Court of W County, the plaintiff obtained a judgment. Appeal.

Lyon, J. 1. The judgment of the D County Court was for a contingent liability, and no execution could lawfully issue therefrom until the sum actually due on the bond could be ascertained. 2. The court which rendered the judgment had exclusive jurisdiction to determine the amount actually due, and to award execution, or any other appropriate remedy for the collection thereof. Judgment reversed.

JONES v HEILIGER (1874) 36 Wis. 149.

On check. The defendant gave the plaintiff a check on the B Bank for \$80, in part payment of a note. The bank's bookkeeper signed a slip showing that it had \$80 on deposit, and that the check would be good "when we resume." The next day the bank presented a draft drawn on the plaintiff for \$100. The plaintiff gave the bank messenger the check and \$20 in payment of the draft. The bank refused to accept the check and demanded the money, which the plaintiff paid. The next day the check was again presented to the bank and payment refused. The bank made an assignment. The check was protested several days after the presentment. Judgment for defendant. Appeal.

Ryan, C. J. 1. The attempt of the plaintiff to pay his liability to the bank with the check had no other significance than an attempt to collect the check. 2. As between the plaintiff and the bank, the former had no right to apply the check on the draft, and the bank was not obliged to receive it. 3. The plaintiff showed diligence in presenting the check. 4. No protest of the check was necessary to fix the drawer's liability and the delay is immaterial. Judgment reversed.

Cited: 44 Wis. 480; 50 id. 135.

SUMMONS v ALDRICK (1876) 41 Wis. 241.

Damages for fraudulent concealment by the defendant of unpaid taxes on bank stock. Plaintiff purchased from defendant stock of the K Bank. Defendant furnished plaintiff with what he represented to be a statement of everything affecting this stock, but in this statement no reference was made to the fact that the taxes on this stock for the years 1865 and 1866 imposed by virtue of ch. 400, Laws of 1865, had never been paid. The bank paid the taxes, the amount of which plaintiff was subsequently obliged to pay to the bank. Ch. 23, Laws of 1872, provides that if any bank shall pay the taxes imposed upon its stock, the bank shall have a lien upon each of such shares for the taxes so paid. Judgment for plaintiff. Appeal.

Lyon, J. 1. The Act of 1865, ch. 400, which imposed the taxes in question is a valid law. 2. That law makes the taxes which it imposes, a lien upon the shares of stock taxed. 3. The defendant having concealed this fact, which rendered the value of the stock less than it otherwise would have been, and that difference being the amount of the judgment awarded plaintiff in the home court, it necessarily follows that the plaintiff is entitled to the judgment. Judgment affirmed.

Cited: 57 Wis. 504.

STATE v COYLE (1876) 41 Wis. 267.

Indictment. The defendant was charged with uttering a forged bill of exchange for the payment of money, of the form commonly known as a bank check. In the left corner of the check were the figures \$150 and in the body was written "pay W T C, jr., or bearer, one fifty . . . dollars, in current funds." Under sec. 1, ch. 166, R. S., the false making, alteration, or forging of any bill of exchange or order for money, with a fraudulent intent, constituted forgery. Verdict of guilty. Motion in arrest of judgment: 1, the check set forth in the information is not a bill of exchange, not being for the payment of money; and that 2, the check as drawn would not deceive any one, nor could any action be sustained on the check without first reforming it. Case certified.

Cole, J. 1. The check is for the payment of money, or the payment of current funds which pass as money between banks, or banks and their customers, and, as the order or check on its face, professed to be drawn by one who had funds in the bank, which he could control, the check constituted the crime of forgery. 2. The check was apparently a valid obligation, and had a tendency to defraud. Certified accordingly.

Cited: 74 Wis. 397.

KINYON v STANTON (1878) 44 Wis. 479.

On check, against the makers. The defendants, on August 2, made and delivered to the plaintiff their check upon the C Bank. The check was never presented for payment, and subsequently, on August 10, the bank failed. The check would have been paid by the drawee, had it been presented at any time up to the day of its failure. On that day, the defendants withdrew all their funds on deposit with the bank. The assignee in bankruptcy subsequently recovered from the defendants the amount drawn out by them on that day. Judgment for plaintiff. Appeal.

Ryan, C. J. By drawing out their entire account before the bank's failure, the drawers intended to protect the check, and the negligence of the payee did not prejudice them. Judgment affirmed.

Cited: 44 Wis. 637.

CORK v BACON (1878) 45 Wis. 192.

On check, against the drawer. The defendant had an account with T, a private banker. He filled in a blank check on the F N Bank of M, payable to W. He erased the words F N and the check read "T, Bank of M." W resided in the same village with T, and knew him personally. W, on September 9, sold the check to the plaintiff who kept a store next door to T and frequently transacted banking business with him. T failed on September 18, before the check was presented to him. Judgment for plaintiff. Appeal.

Orton, J. 1. If the drawee is sufficiently designated upon the face of the check itself, or if the holder knows, in proper time, upon whom or what bank the check is drawn, the burden of proof is on the holder to show that there were no funds in the hands of the drawee, or the bank upon which the check was drawn, for its payment. 2. The payee was guilty of laches in not presenting the check to the drawee before he failed. 3. The situation of the parties, and the nature of the subject matter of the contract, may always be shown by parol in construing it. Judgment reversed.

PORTER v STATE (1879) 46 Wis. 375.

On judgment. The complaint alleged that in 1869 T held a large amount of unredeemed bank notes of an insolvent bank; that S was liable on a stockholder's bond for the redemption of the notes; and that T had demanded of R, the bank comptroller of Wisconsin, that he prosecute an action in New York against S. During the pendency of the suit of R against S, S died, and his executors were substituted as defendants. They obtained a judgment for costs against R, which judgment was assigned to the plaintiff. Plaintiff alleged that R was a public officer of Wisconsin and was bound, under the banking law, to prosecute these bonds; that, as bank comptroller, R was acting for the State; that R had no funds to pay costs, but such costs had always been paid by the State. In 1870 the office of bank comptroller was discontinued and his effects transferred to the State treasurer. Demurrer.

Ryan, C. J. 1. The bank comptroller was a public officer having duties to perform toward the State but these concerned the policy of the State, not its interest. 2. The State takes no title to the bonds; and has no interest in them, except as a possible holder of the currency which they secure. The title to them remains in the bank, but they are held by the State treasurer, by way of pledge, in trust for the currency holders. 3. The State assumes the compensation of the comptroller, but assumes no other expense or risk. 4. The comptroller had no power from the State to pay out the entire proceeds of the sale of public bonds and to bring the action at the risk of the State; nor did he owe a duty to his cestuis que trustent to commence the action without reserving enough to indemnify himself. 5. If the bank comptroller cannot charge the State with these costs, the defendants in the original action could not do so. Demurrer sustained.

KLAUBER v BIGGERSTAFF (1879) 47 Wis. 551.

On certificate of deposit. The bank issued the certificate for \$1,000, payable to S in currency on the return of the certificate. S indorsed it to the defendant for a valuable consideration. The plaintiffs, in an action against S, garnished the bank as being indebted to S, or having in its possession personal property belonging to

him. The bank paid the \$1,000 into court and the defendant was interpleaded. The court held that the certificate was not negotiable, and that the fund was liable to garnishment. Judgment for plaintiffs. Appeal.

Ryan, C. J. 1. The ordinary form of a certificate of deposit is negotiable like a promissory note. 2. The true test whether an instrument is negotiable under the Statute of Anne, is whether it is payable in money. This certificate is made payable in currency, which also means money, and was, therefore, negotiable. Judgment reversed.

Cited: 55 Wis. 308; 68 id. 19.

RUGGLES v CITY OF FOND DU LAC (1881) 53 Wis. 436.

To recover money paid for taxes. The plaintiff was the holder of 526 shares of stock of the F National Bank, for 375 shares of which he was indebted. The defendant's assessors assessed such stock at its value. Plaintiff, after appealing to the board of review and also to the common council for relief, paid the taxes under protest. U. S. R. S., sec. 5219, provides that shares of stock in national banks shall not be taxed at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state. R. S., sec. 1038, exempts from taxation so much of the debts due or to become due to any person as shall equal the amount of bona fide and unconditional debts by him owing. The defendant's charter provides that no action shall be maintained against the city on contract until the claimant shall have presented a statement of his claim to the council. Demurrer: that the complaint stated an equitable cause of action; and if true, it must result in a reassessment of taxes; voluntary payment; failure to allege presentation to the common council of the claim for repayment; and that there was no averment that the indebtedness stated had not been once allowed. Overruled. Appeal.

Lyon, J. 1. The amount of plaintiff's indebtedness should have been deducted from the value of his stock, in assessing the same. So long as R. S., sec. 1038, exempts, for the purpose of valuation, assessment and taxation, from the credits of an individual, an amount equal to his individual indebtedness, the same exemption because of sec. 5219, U. S. R. S., must be made from the ascertained value of national bank stock, if the owner thereof owes bona fide and unconditional debts. 2. The plaintiff's complaint states only a legal cause of action. Plaintiff's payment was compulsory and he is on that point entitled to bring this action. 3. The complaint here is not of an action on contract, and so does not come within the true intent or meaning of the provision in the city charter. 4. Plaintiff need not negative in his complaint that he has received the benefit of the exemption from taxation, on account of his individual indebtedness. Order affirmed.

Cited: 56 Wis. 170, 171, 245; 65 id. 479; 81 id. 645; 88 id. 389; 93 id. 447; 94 id. 105.

BAKER v THE STATE (1882) 54 Wis. 368.

Habeas corpus. The plaintiff was arrested on a warrant for feloniously receiving money on deposit from S, knowing at the time that he was insolvent. R. S., sec. 4541, provides that any officer, director or stockholder of any bank or banking association, or any person engaged in such business, in whole or in part, who shall accept or receive on deposit any money for safe keeping when he knows he is unsafe or insolvent, shall be punished by imprisonment. Prisoner remanded. Error.

Cassoday, J. 1. The prohibition of the act is aimed at the persons so engaged as well as the employees named, and the act charged brings the plaintiff within the provisions of this section. 2. The act is not in violation of any expressed or implied provisions of the State, nor of the 14th amendment of the Federal Constitution. Order affirmed.

Cited: 64 Wis. 227; 80 id. 256; 88 id. 509; 90 id. 170; 96 id. 6; 111 id. 365, 436.

JUNG v SECOND WARD SAV. BANK (1882) 55 Wis. 364.

On deposit. Plaintiff wrote the defendant bank from W, in Germany, requesting it to remit by draft his deposit, so that he could draw the money at F. The defendant drew its bill of exchange on a bank at F, payable at sight to the plaintiff's order, addressed to him at W, and transmitted it by mail in the usual course of business. Subsequently, the drawee of the bill returned the bill indorsed "paid." The

plaintiff never received the bill, as the postal officials at W delivered it to another person of the same name, who indorsed the bill and received the money. Judgment for defendant. Appeal.

Cole, C. J. 1. When the bill was properly mailed and addressed to the plaintiff at W, it became his property, and the defendant discharged its obligation to him. 2. It was the duty of the plaintiff to take precautions that the letter should not be delivered by the post office officials to the wrong person. Judgment affirmed.

CLEVELAND v BURNHAM (1882) 55 Wis. 598.

Creditor's bill, to enforce stockholder's liability. The plaintiff began the action in 1862, on behalf of himself and of all other creditors, against defendant bank and its stockholders. The defendants set up several counterclaims in favor of the bank, but no specific defense was made by any of the stockholders. In 1869 it was adjudged that the bank had surrendered its corporate right, and the referee reported that the bank was indebted to the executors of the plaintiff C; that defendant B was a stockholder at the time when the indebtedness was incurred; and that B and the other stockholders were liable for the amount of their stock. Judgment on the report was entered in 1881. Defendant moved to set aside the judgment, and for leave to file his answer, on the ground that U, his attorney, who had since died, informed him that the suit would not be pressed. B denied that he was a stockholder of the bank to November 12, 1859, or January 3, 1861, as stated in the amended complaint in the first action, or when the second cause of action accrued. Plaintiff contended that this carried an admission of being a stockholder at some other time. Motions denied. Appeal.

Cole, C. J. 1. Defendant made out a case of excusable neglect within the statute and was entitled to defend against the default. 2. The complaint went on the erroneous theory that only those shareholders were liable who were shareholders when the indebtedness was contracted; and that those who subsequently became shareholders and were such when the suit was commenced, were not liable. The answer squarely meets the real issues of the complaint. Order denying defendant's application to file answer, reversed. Order denying motion to vacate judgment, sustained.

Cited: 64 Wis. 248; 67 id. 188, 588; 78 id. 201; 89 id. 145; 96 id. 521.

HURLBUT v MARSHALL (1885) 62 Wis. 590.

Creditor's bill, to enforce directors' liability. The plaintiff was a depositor in the S Bank. It stopped payment owing him \$1,000. The defendants were directors of, and owned stock in the S Bank, and a short time before its failure declared and paid a dividend of 5 per cent. The action is brought under sec. 1765, R. S., by a creditor, and in behalf of all other creditors, to close up the business of the bank; and to charge the directors. The defendants demurred that the plaintiff had no claim against the bank as creditor when the misappropriation of the funds was made, and could not be joined with the creditors existing at that time; and that the banking law provided for no such officer as director. Demurrer. Overruled. Appeal.

Orton, J. The plaintiff must be joined with all the creditors in this suit, and cannot sue alone in another action. 2. The power to have a board of directors is inherent in all private corporations. Orders affirmed.

Cited: 73 Wis. 233; 87 id. 398; 101 id. 396, 603; 105 id. 362; 106 id. 630; 109 id. 417, 418; 111 id. 651.

HURLBUT v TAYLER (1885) 62 Wis. 607.

Creditor's bill, to enforce stockholder's liability. The action was brought by a creditor to enforce the defendant's liability for unlawfully appropriating the funds of the bank in receiving and appropriating unearned dividends. These dividends were received before plaintiff became a creditor, and since then the defendant transferred his stock to another. Sec. 22, p. 600, R. S., provided that every person becoming a shareholder by transfer should, in proportion to his shares, be subject to all the liabilities of prior shareholders. Demurrer. Sustained. Judgment for defendant. Appeal.

Orton, J. The wrongful conduct of a stockholder, by which he has secured and appropriated to himself the funds of the corporation, without the semblance of

right or authority, is strictly personal. It is beyond the province of legislation to allow him to transfer his liability to another. Judgment reversed.

Cited: 111 Wis. 651.

BENJAMIN CO. v MERCHANTS BANK (1885) 63 Wis. 470.

Trover. The notes in question were delivered by B to the defendant bank for collection, before their assignment to the plaintiff. B was indebted to the bank and executed a bond conditioned for the payment of this indebtedness. At the time the bank held no other collateral except the notes, and when the demand was made by the plaintiff for the notes, two of them had been forwarded to other parties for collection, and were not in the bank's possession. The jury gave a verdict for the full demand including the two notes. Verdict for plaintiff. Order granting new trial. Appeal.

Lyon, J. 1. It was error to include in the verdict the two notes which had been transmitted for collection, as they were not in the defendant's possession and were not reached by the demand. 2. The granting of new trials is left to the discretion of the trial courts. Order affirmed.

Cited: 110 Wis. 530.

BANK OF NEW LONDON v KETCHUM (1885) 64 Wis. 7.

On promissory note. The note was made by defendant K, indorsed by defendant H, and owned by plaintiff bank. Defense, counterclaim. P carried on a private banking business under the name of "The Bank of New London." He executed six notes for \$1,000 each, which were indorsed by defendant K and others, and a New York bank advanced him \$3,500 on them. Subsequently, P becoming insolvent, the New York bank proposed that the plaintiff take over the assets of P's private bank and pay its liabilities, which was accepted. The six notes were renewed and ultimately paid by the indorsees, defendant K paying one-fifth. Defendant contended that the plaintiff agreed to pay the liability of P, including these notes. Judgment for plaintiff. Appeal.

Lyon, J. The fact that the plaintiff became the owner of the assets of the banking house, or of all of P's assets, does not charge it with the payment of this debt, unless the plaintiff, as part of the consideration, agreed to pay it. Judgment affirmed.

CLEVELAND v BURNHAM (1885) 64 Wis. 347.

Creditor's bill, to enforce stockholder's liability. The plaintiff obtained a judgment against the bank for \$18,000. The assets collected by the receiver amounted to \$5,000. The defendant, J B, was the owner of \$3,000 worth of bank stock. Subsequently he agreed to purchase of S & F \$2,000 of stock of the bank. S & F surrendered their certificate to the bank, which executed and delivered a certificate for \$2,000 of its stock to defendant. By a mistake, the bank inserted the name of G B and defendant did not discover the mistake until after the judgment was entered. After this transfer the bank filed with the register of deeds a list of its stockholders, and the number of shares owned by each. J B was credited as a shareholder to the amount of \$5,000. The stock and transfer, and other books of the bank, were lost, and defendant contended that he was not liable on the \$2,000 worth of stock issued to G B. Judgment for defendant. Appeal.

Orton, J. 1. When an instrument is made to a person by a wrong christian name, it may be proved by parol and corrected. 2. The possession of the stock certificate and the purchase and payment of the stock, are presumptive evidence of title. 3. The liability of the stockholder became fixed and certain from the date of the judgment by which it was ascertained that the assets of the bank had been exhausted and that the balance of the judgment exceeded the amount of the stock. Judgment reversed.

Cited: 66 Wis. 379; 67 id. 390; 96 id. 193, 521; 102 id. 363; 108 id. 33.

MCLEOD v EVANS, ASSIGNEE (1886) 66 Wis. 401.

To recover the proceeds of a draft. The plaintiff had a New York draft and went to the bank of defendant's assignor, H, to have it cashed. H, not being in funds, offered to collect it for the plaintiff, but suspended payment before paying over the proceeds. H did not send the draft to New York for collection, but to a Chicago bank, which gave him credit for it, against which he drew his checks.

The plaintiff filed his claim with the assignee and received a six per cent dividend. Judgment for defendant. Appeal.

Cole, C. J. 1. It is sufficient if the trust fund can be traced into the estate of the defaulting agent or trustee. 2. The plaintiff lost no rights in proving his claim, as he acted in ignorance of his legal rights. The rights of no one have been prejudiced by his receiving this dividend. No one has changed his position or lost any advantage which the law gave him in consequence of the plaintiff's acts; and there are no facts upon which a waiver or equitable estoppel can be predicated. Judgment reversed.

Cited: 69 Wis. 118, 119, 122, 123, 124; 71 id. 135, 136, 137; 76 id. 515; 86 id. 348; 87 id. 244.

CURRAN, ADM'R v WITTER (1887) 68 Wis. 16.

On certificate of deposit. Pleas, payment, and Statute of Limitation of six years. The plaintiff's intestate had deposited money with the defendants, and received a certificate of deposit payable on demand. Defendant offered in evidence the testimony of his clerk, based on the entries in his books, to show that the money deposited by the intestate was drawn out previous to the intestate's death. The clerk testified that the entries were correct, and in his handwriting. Objection. Sustained. The intestate died in 1872, and the action was commenced in 1885. No demand was made until 1885. Judgment for plaintiff. Appeal.

Lyon, J. 1. The certificate of deposit is in substance and legal effect a negotiable promissory note. The money, therefore, was payable at the date of the certificate and this suit is barred by the Statute of Limitations. 2. The testimony of the clerk should have been received, though he had no independent recollection of the transactions entered. 3. Sec. 4234, R. S., providing that if a person entitled to bring action die before the expiration of the time limited therefor, his representative may bring action one year after death, does not apply. 4. Sec. 4230, R. S., excepting suits on evidences of debt issued, or put into circulation as money by a bank, from the operation of the Statute of Limitations, does not apply, as the certificate of deposit was not issued by a bank, neither was it put into circulation as money. Judgment reversed.

Cited: 73 Wis. 11, 12; 74 id. 358; 82 id. 459.

FRANCIS v EVANS, ASSIGNEE (1887) 69 Wis. 115.

Money had and received. The plaintiff sent a deed of his farm to an insolvent banker, with instructions to deliver it to R, on the payment of \$2,000. R called for the deed and paid the banker \$400 in bills, and the balance in certificates of deposit issued by the banker. That night, the banker suspended payment, and the defendant was chosen assignee. The assignee received \$500 from the estate, but this money did not include the \$400 in bills. Plaintiff, supposing all claims would be paid in full, filed his claim and accepted dividends. The plaintiff contended that the fund in the hands of the assignee was impressed with a trust in his favor. Judgment for defendant. Appeal.

Cole, C. J. 1. To enforce the trust, it was sufficient if it could be traced into the estate of the defaulting agent or trustee which had the benefit of it. 2. The proceeds of the certificates must be presumed to have gone into the mass of the estate of the insolvent, and to have contributed to the accumulation of his assets, to the benefit of his estate. 3. In accepting a dividend the plaintiff neither lost, nor waived his right to insist on his equitable lien. 4. There was no defect of parties, as the assignee represented the creditors for the purpose of this litigation. Judgment reversed.

Cited: 71 Wis. 135, 138; 76 id. 515; 86 id. 348; 87 id. 243, 244.

BOWERS v EVANS, ASSIGNEE (1888) 71 Wis. 133.

To recover proceeds of securities. The plaintiff deposited with H, a banker, the assignor of the plaintiff, six United States bonds. The bonds were afterward deposited by H with the I Bank, as collateral security for his note. Subsequently the plaintiff directed H to sell the bonds and remit the proceeds to her. H notified the bank to sell the bonds and apply the proceeds on his note, which was done. H suspended payment and made an assignment to the defendant. The plaintiff contended that the fund in the assignor's hands was impressed with a trust in her favor. Judgment for plaintiff. Appeal.

Cole, C. J. 1. The proceeds of the bonds found their way into the insolvent estate and went to increase the assets of the bank, which were assigned and it would be inequitable that the general creditors should profit by, or have the benefit of, the fraud committed by the assignor. 2. The plaintiff has a paramount right to be first paid out of the assets. Judgment affirmed.

Cited: 76 Wis. 515; 86 id. 348; 87 id. 244.

MANUFACTURERS NAT. BANK v NEWELL (1888) 71 Wis. 309.

On promissory note. The C Co., through an agent, sold the defendants a machine, taking in part payment the note for \$800. The machine was sold with a warranty, but proved worthless. The president and cashier of the plaintiff bank were directors of the C Co., and E, the treasurer, was a stockholder in the plaintiff. E deposited the note through plaintiff's cashier, who credited the amount of the discount to the C Co. On that day the C Co. had a credit balance of \$42,000, and in the subsequent months an increased balance. The president and cashier of the bank had no personal knowledge of the purchase of the machine, or of the warranty. Judgment for defendants. Appeal.

Cassoday, J. 1. The acts of the agent were, in legal effect, the acts of the C Co., and it must be presumed to have constructive notice of the infirmity of the note. 2. The officers of the bank did not have such constructive notice as to preclude it from becoming a bona fide purchaser. 3. Mere discount and credit did not constitute the plaintiff a purchaser for value. Judgment affirmed.

Cited: 87 Wis. 283.

WAGNER v SECOND WARD SAV. BANK (1890) 76 Wis. 242.

Replevin, to recover a passbook. The plaintiff, who had an account with the defendant of \$700, was robbed of his passbook by E. E presented the passbook at the bank the following day, when the deposit was paid. It was not ascertained that the passbook was stolen until after the bank had paid the money. The jury found defendant guilty, and plaintiff not guilty, of negligence. Among the regulations printed in the passbook was one, requiring thirty days' notice in writing before drawing out sums of \$50, or over. Demurrer. Overruled. Judgment for plaintiff. Appeal.

Cole, C. J. 1. The question of negligence was for the jury. 2. The bank is liable for the payment of money to the wrong person, where the officers of the bank fail to exercise reasonable care and diligence in ascertaining whether the person presenting the passbook is the real owner to whom the money is due. Judgment affirmed.

BLAKESLEE v HEWETT (1890) 76 Wis. 341.

On promissory note. The note was made by defendant C, payable to the order of the plaintiff. It was indorsed by the other defendants before delivery for the purpose of giving credit to C. The note had been left with the S Bank for collection. The S Bank sent it to the C Co. Bank, where it was made payable. The cashier of the latter bank, who was a notary, demanded payment of the note at the bank and protested it, giving immediate notice to each of the indorsers. Judgment for plaintiff. Appeal.

Cole, C. J. 1. Where a bank is designated for the payment of a note, the common usage is for the holder to send it to such bank for collection, and the party bound for its payment can call and take it up. 2. Under such circumstances, the bank becomes the agent of the payee to receive payment. The C Bank was the agent of the S Bank to collect the note for the plaintiff. Judgment affirmed.

Cited: 103 Wis. 295.

OATMAN, ASSIGNEE v BATAVIAN BANK (1890) 77 Wis. 501.

On deposit. R, an insolvent, made a voluntary assignment to the plaintiff, on January 2. He then had on deposit with the defendant bank over \$700 and the bank held his promissory note for \$1,000. The note had been extended to January 31. The plaintiff demanded of the bank the payment of the deposit, which was refused on the ground that the note was a setoff. Judgment for plaintiff. Appeal.

Orton, J. 1. The insolvency of the debtor is no ground for making a bank an

exception to the other creditors. 2. The demand claimed to be a setoff must have matured before the date of the assignment. Judgment affirmed.

Cited: 85 Wis. 267; 91 id. 80.

GOFF v STOUGHTON STATE BANK (1890) 78 Wis. 106.

On draft. The plaintiff delivered to the cashier of the defendant, early in the day, a draft, and at the same time delivered his passbook to be written up. Shortly after the passbook was returned to him, the plaintiff discovered that he had not been credited with the amount of the draft. He requested the cashier to give him this credit. The cashier refused, claiming that plaintiff had been paid for the draft. Numerous transactions between the bank and other parties intervened before the cash was made up. The draft was not entered in the bank's book until the close of the day's business. When the entries were made in the cash book and the cash was balanced, the plaintiff was not present. The defendant proved that, at the close of business on that day, the cash account and the actual cash balanced, which could not have occurred unless the plaintiff received the money. Judgment for defendant. Appeal.

Lyon, J. 1. It was not competent for the defendant to prove its own acts in respect to the draft, unless the acts were part of the *res gestæ*. 2. The entries in the cash, and the balance of the cash were not contemporaneous with the transaction; and therefore these processes did not pertain to the *res gestæ*. Judgment reversed.

Cited: 84 Wis. 22. S. c.: 84 Wis. 370.

CROOK, ADM'R v FIRST NAT. BANK (1892) 83 Wis. 31.

On deposit. The plaintiff's intestate, L, deposited bonds and coupons with the defendant, directing it to sell and collect them, and to place the proceeds to her credit. Defendant's cashier gave her a receipt. The day preceding her death, L indorsed on the receipt an order on defendant to pay over the amount of the receipt to her nephew, M. This order was presented to the bank by M, a month after L's death, and was paid. The answer alleged that plaintiff had sued M for this money and obtained a judgment against him. Plaintiff demurred. Overruled. Appeal.

Pinney, J. 1. The receipt was in the nature of a certificate of deposit. 2. The delivery of the receipt with the order indorsed, constituted a valid gift. 3. The action against M was one *ex contractu*. Where a party has a choice between two inconsistent rights or remedies, and deliberately makes his choice, such choice becomes conclusive upon him, and precludes him from subsequently adopting the other. Plaintiff cannot, therefore, maintain an action against defendant for wrongful payment. Order affirmed.

Cited: 98 Wis. 549; 99 id. 48; 102 id. 443, 645; 108 id. 568; 110 id. 82.

GOFF v STOUGHTON STATE BANK (1893) 84 Wis. 369.

On deposit. The plaintiff, a depositor in the defendant bank, delivered the check, the proceeds of which are in question, to defendant in April, with his bank book, and requested that his book be balanced. The check was not indorsed by the plaintiff. Neither plaintiff's bank book nor defendant's books showed any entry of the check. The cashier testified that the plaintiff requested cash for the check, and that he gave plaintiff the money. Defendant's ledger showed that the plaintiff's account was balanced March 30, and the plaintiff claimed that the balance was struck in April. One item in the bank book tended to sustain the plaintiff's claim. Judgment for plaintiff. Appeal.

Winslow, J. 1. Plaintiff's bank book was admissible to show that he had an open account with defendant, and to show that the balance had been made after March. 2. The burden of proof was on the defendant to prove the payment of the check. Judgment affirmed.

BROTHERS, ADM'R v BANK OF KAUKAUNA (1893) 84 Wis. 381.

Bill, to cancel and set aside a note and mortgage, on the grounds of undue influence and fraud. The plaintiff's intestate was induced by defendant F to execute a note for \$6,000 to F's order, secured by a mortgage executed by the intestate and his wife on their homestead. There was no consideration for the note and

mortgage. T, the cashier of the defendant bank, took the intestate's acknowledgment. At the time the intestate signed the note and mortgage, he was mentally unsound, and incapable of transacting business, and had been in that condition for several years. Defendant F was in financial straits, being indebted to the bank, to which he at once transferred the note and mortgage as collateral for his indebtedness. The intestate's widow and one of his heirs joined as plaintiffs. Judgment for defendant. Appeal.

Pinney, J. 1. The defendant bank is chargeable with notice of all the material facts, of which the cashier had notice, and cannot be regarded as a bona fide purchaser of the note and mortgage. 2. The note and mortgage were void as to plaintiff's intestate; they can not, therefore, bind his wife either as to her dower or homestead right. 3. As the defendant is affected with notice through its cashier, it cannot insist on an estoppel by matter in pais or an equitable estoppel as against the plaintiffs. Judgment reversed.

Cited: 86 Wis. 169; 93 id. 167, 351, 591.

JONES v PIENING, ASSIGNEE (1893) 85 Wis. 264.

Insolvency proceedings. The T C S Banking Co. made a voluntary assignment to the defendant. It was then indebted to the plaintiff for about \$4,500, and the plaintiff was indebted to it on notes for over \$7,000. Part of the plaintiff's indebtedness was past due. The plaintiff petitioned the court to allow the \$4,500 to be set off against the \$7,000 due to the bank. The court allowed plaintiff to set off the part past due, but not the part not due at the time of the assignment. Appeal by plaintiff.

Cassoday, J. 1. The rights of the creditors and debtors of an insolvent assignor become fixed immediately upon the completion of the assignment. 2. A debtor to an insolvent estate whose debt was not due at the time of the assignment, may waive the time of credit, which was secured for his own benefit, and pay the debt at once in money, or by way of setoff of the amount due from the estate. Order reversed.

Cited: 91 Wis. 80; 92 id. 417; 94 id. 33.

NORTHERN NAT. BANK v WEED (1893) 86 Wis. 212.

Attachment. W & Co. executed to B and E a bill of sale and a deed, covering the property belonging to W & Co. On the same day, B and E gave W & Co. an instrument, stating that the bill of sale and deed were given as collateral security for the payment of notes to which W & Co. were parties, held by the defendant banks. W & Co. were insolvent, and at the time were not indebted to B and E. W & Co. were dissuaded from making a general assignment by B and E, and at their suggestion executed the several instruments. B and E were directors of the banks that held W & Co.'s notes. The plaintiff, a creditor, brought this action, claiming that the defendants had obtained an unlawful preference. Attachment dissolved. Appeal.

Cassoday, J. An assignment by W & Co. would have been void, had it given any preference to one of their creditors over another creditor. W & Co. cannot be allowed to do, by way of indirection and circumvention, what the statutes have prohibited them from doing directly. Order reversed.

Cited: 91 Wis. 32; 94 id. 523.

THE GARDEN CITY BANKING CO. v GEILFUSS } (1893) 86 Wis. 612.
 ASCHERMANN v COMMERCIAL BANK }

Insolvency proceedings. The bank made an assignment to the defendant for the benefit of creditors. Subsequently A recovered judgment against the bank, and execution was returned unsatisfied. A then filed a petition for sequestration, and defendant was appointed receiver under secs. 3216 and 3217, R. S. Milwaukee County filed its claim in A's suit praying that it be declared a preferred creditor under sec. 3245, S. and B. Ann. Stats. The defendant filed his report as assignee and asked that he be discharged as assignee. The application was opposed by creditors of the bank on the ground that the defendant had not administered his trust as assignee. Motion granted. Appeal. In the case of A against the bank the court found that Milwaukee County was a preferred creditor and ordered the defendant to pay \$50,000 to the county, out of the funds in his hands, on account of the claim. Appeal.

Pinney, J. 1. The bank had an absolute right of disposition of its property and assets, as full and ample as a natural person. 2. The property and assets of the corporation had become vested in the defendant as assignee, when the second action was commenced, and the corporation had no property to be sequestrated. 3. The statute (S & B. Ann. Stats., secs. 3216, 3217) is purely remedial; it was not intended that it should disturb existing rights, or have any retroactive effect. Orders reversed.

Cited: 87 Wis. 373, 398; 89 id. 287; 92 id. 229; 97 id. 92; 101 id. 5; 103 id. 50, 55, 369; 106 id. 340; 107 id. 177.

NONOTUCK SILK CO. v FLANDERS, ASSIGNEE (1894) 87 Wis. 237.

Insolvency proceedings. The defendant's assignor, P, owned the Bank of W. The plaintiff sent a draft on L to the Bank of W for collection. It was paid by a check on the Bank of W, which sent its draft on a bank at C, to plaintiff. The draft was presented to the bank at C and payment refused on account of no funds. The bank at C had collaterals left there expressly to protect overdrafts. P assigned, and the assignee took possession of all his property, including the Bank of W. The assets consisted of commercial paper, stocks and real estate. All money in the hands of P, after receiving the L check, was used in paying his debts, so that no money or the proceeds of the money in the Bank of W, or the plaintiff's collection, or the proceeds of said collection, ever came into the assignee's hands. The plaintiff moved to have its claim declared preferred. Motion granted. Appeal.

Cassoday, J. The plaintiff had no legal right to a preference over the other creditors in the distribution of the insolvent's estate in the assignee's hands, into which no part of the plaintiff's money had been traced. Order reversed.

Cited: 87 Wis. 385; 88 id. 368; 89 id. 366, 367, 388; 90 id. 480, 633; 91 id. 59, 102, 103, 104; 103 id. 568; 104 id. 90; 111 id. 366, 367.

IN RE PLANKINTON BANK, PETITION OF VAN DYKE (1894) 87 Wis. 378.

Insolvency proceedings. D loaned and invested money on bond and mortgage on real estate for his clients, and had collected, on account of the petitioner's loans, over \$15,000, all of which he deposited in the P Bank to his individual account. The deposits were made by D personally, or his servants, in the usual manner through the tellers of the bank, and without the intervention of any officers of the bank. D was at the time president and managing officer of the bank, and was heavily indebted to it. The bank knew that D conducted a loan business, deposited only with it, and kept no separate account. The bank made an assignment to P, and D subsequently made an assignment to M. The petitioner seeks to have this money declared a trust fund, and paid over to him in preference to the other creditors, on the ground that the bank was chargeable with notice that it was held in a fiduciary capacity. No part of it was traced into P's hands. Petition denied. Appeal.

Pinney, J. 1. Where an officer or agent of the corporation deals personally with the corporation, it will not be charged with notice of the information which he possesses relating to the transaction and which he does not disclose, for the reason that he does not represent the corporation, but is acting for himself. The corporation in such a case is in reality the adverse party. 2. The tellers were not only innocent of any wrong, but had no knowledge of it, and the knowledge D had while converting the funds in question, cannot be imputed to the bank. 3. So long as the bank did not participate in any breach of trust, there is no liability on its part for the money. Order affirmed.

Cited: 89 Wis. 366, 388; 90 id. 480; 91 id. 102; 103 id. 569.

HENRY v MARTIN, ASSIGNEE (1894) 88 Wis. 367.

To recover the amount of a deposit. The plaintiff sent the money to M to invest. M deposited the money in S's Bank in his own name, with notice that it belonged to third parties. The bank assigned to the defendant and a small sum of money came into the assignee's hand. The plaintiff contended that S knew the bank was insolvent, when the money was received, and that the deposit was a trust fund in the hands of the assignee. Demurrer. Sustained. Judgment for defendant. Appeal.

Newman, J. The plaintiff did not make a special deposit in the bank, and the bank became the plaintiff's debtor, not his bailee. The plaintiff's relation to the assets of the bank are the same as the other creditors. Judgment affirmed.
Cited: 91 Wis. 59, 102.

KOETTING v THE STATE (1894) 88 Wis. 502.

Indictment, of defendant, a bank cashier, for receiving \$250 on deposit and for safe-keeping, with good reason to know that the bank was insolvent. Sec. 4541, R. S., provides that if a bank cashier shall receive on deposit, or for safe-keeping, any money when he has reason to know that the bank is insolvent, he shall be punished. The defendant moved for a change of venue. Motion denied. The judge of the fifth judicial circuit (a circuit not adjoining Milwaukee County), tried the case at the request of the judge of the Milwaukee Municipal Court. Defendant pleaded no jurisdiction. Overruled. Ch. 435, Laws of 1887, provides, that in a case pending in a circuit court, the judge may retain the case, and call upon any other circuit judge to try it. Sec. 2500, R. S., provides that the general provisions of law relative to circuit courts in cases of crimes and misdemeanors shall be in force in the Municipal Court of Milwaukee County as far as applicable. The deposit was a general one. Verdict of guilty. Error.

Orton, C. J. 1. The calling of the judge from the fifth district to hold said court for the trial of this case was legal and proper. 2. There is only one act charged and that is for safe-keeping. 3. The court erred in not directing a verdict of not guilty, on the ground that there was no evidence whatever of the specific offense contained in the information. Judgment reversed.

Cited: 104 Wis. 534.

GIFFORD v HARDELL (1894) 88 Wis. 538.

On checks. M drew four checks on the C Bank of Milwaukee. Defendant, on July 17, 1893, sold and indorsed them to the plaintiff. On July 19, the checks were delivered to a bank at New Richmond for collection, which mailed them at once to its Chicago correspondent. The Chicago bank forwarded them to its Milwaukee correspondent, but they were not presented for payment until July 21. On July 20, the C Bank suspended payment. There was a direct mail route from New Richmond to Milwaukee, and the checks could have been presented by 10 a. m. on July 20, when the bank was honoring its checks. Judgment for defendant. Appeal.

Pinney, J. 1. The necessity of presentment and notice, in order to charge the indorsers of bills of exchange in general, apply as well to an indorser of a check. 2. The period of reasonable time for presentation, as between the plaintiff and defendant as indorser, began when the checks were delivered to the plaintiff's agent. 3. The checks were not presented for payment within a reasonable time after the indorsement and delivery by the defendant. Judgment affirmed.

BURNHAM v BARTH, REC'R (1895) 89 Wis. 362.

In insolvency proceedings. The defendant was appointed receiver of the bank for the purpose of winding up its affairs. The plaintiff filed an intervening petition as general guardian for the minor children of S, claiming a lien on the assets of the bank for a trust fund. K, as special guardian of the minors, had deposited with the bank \$11,000, which money had been mingled with the other funds of the bank. At the time of the deposit the bank was known, by its officers, to be insolvent. When the bank suspended, less than \$2,000 of money came into the hands of the defendant. The court held that the plaintiff was entitled to a lien for the full amount upon the collateral and securities of the bank. Judgment for plaintiff. Appeal.

Pinney, J. 1. The owner or beneficiary of a trust fund, to be able to regain it from the estate of an insolvent trustee, must trace it into, and identify it in, the hands of the assignee, or receiver of his estate. 2. There is no presumption that the trust funds, to any extent, are included or represented in securities, the legal title to which is vested in the bank. 3. The burden of proof is on the claimant to show the facts which entitle him to claim as owner, and not merely as a creditor. Judgment reversed.

Cited: 90 Wis. 478, 480; 91 id. 59, 102, 103; 104 id. 90.

THUEMMLER v BARTH, REC'R (1895) 89 Wis. 381.

In insolvency proceedings. The defendant B was appointed receiver of the savings bank. The intervener filed a petition, claiming that she had deposited with the bank a draft for \$1,000 for collection. The bank sent the draft to their Chicago correspondent for collection and credit, and subsequently drew against it. The Chicago bank collected the draft and retained the proceeds to be applied to an overdraft made by the savings bank. The Chicago bank held collaterals belonging to the savings bank, deposited as security for overdrafts. The complainant prayed for an order requiring the defendant to pay over to her \$1,000. Order granted. Appeal.

Pinney, J. 1. The intervener, having failed to trace the proceeds of the draft or any property into which it was converted into the hands of the receiver and not having shown that any property or estate he received has been improved or enriched thereby, cannot be a preferred creditor. 2. The receiver not having redeemed the collaterals and not being obliged to do so, if the proceeds of the draft were traced to the collaterals, the remedy of the intervener is to proceed against them and not against the general assets in the hands of the receiver. Order reversed.

Cited: 89 Wis. 367; 91 id. 59, 102; 103 id. 569.

IN RE KOETTING (1895) 90 Wis. 166.

Habeas corpus. The petitioner was the cashier of a state bank and was held in custody upon an information charging him with having received, for deposit, a sum of money when he knew the bank was insolvent. The sheriff made return that the detention of the petitioner was under sec. 4541, R. S., which provides any officer of a bank or any person engaged in such business in whole or in part, who shall receive or accept a deposit from any person of any money when he knows, or has good reason to know that such bank is insolvent, shall be punished by imprisonment. The law was not submitted to, or approved by a vote of the people. The constitution required the submissions of any banking law to a vote of the people. Before the passage of any banking laws there were statutory provisions regarding the termination of affairs of insolvent corporations of any sort. Demurrer. Overruled. Appeal.

Winslow, J. This law was not an amendment to the banking law, but a general law, applying alike to banks and natural persons, which affects no banking right or privilege, but punishes an act fraudulent in its nature, for which the banking law provides no punishment. Demurrer overruled.

Cited: 96 Wis. 6; 103 id. 50, 52, 53, 55.

MANITOWOC COUNTY v FRUMAN (1895) 91 Wis. 1.

On bond. Defendants were sureties on a bond given by a bank as a depository for funds of plaintiff county. Sec. 693, R. S., provides that the county board might annually or as often thereafter as they shall determine choose some bank as a depository, provided such bank give bond in the same manner as the county treasurer, which bond should be approved by plaintiff, and a contract should be made with the bank for its payment of interest. The bank was selected at an annual meeting and some months later the contract for interest at 3 per cent on monthly balances and 4 per cent for deposits remaining over a year, was ratified and the bond approved. The bond given followed the form prescribed for a treasurer's bond after leaving out the inappropriate clauses. A year after the selection of the depository the plaintiff adopted a resolution that the bank had agreed to continue the arrangement for another year. Deposits were made for another six months, when the bank made an assignment. Defendants contended that the bond expired at the end of the year, and that it and the contract were not valid. Judgment for plaintiff. Appeal.

Cassoday, C. J. 1. The word annually as used in the section should not be construed as a mandatory requirement that a new selection of a depository and a new contract and new bond be made at the expiration of every year. 2. The contract for the payment of interest was valid at common law, notwithstanding the attempt may have been to execute it pursuant to a statute, with the terms of which it does not strictly comply. 3. The bond was approved by the county board, and was given substantially in the same manner as prescribed by the statute and was valid. 4. The resolution of the board was nothing more than a de-

termination not to withdraw the funds from the bank or to ask for any different agreement as to interest and security. Judgment affirmed.

Cited: 96 Wis. 9; 110 id. 294.

CANTERBURY v BANK OF SPARTA (1895) 91 Wis. 53.

On inland bill of exchange. The plaintiff drew the bill on C & Co. and had it discounted at S Bank. The S Bank sent the bill to the defendant bank for collection. When the defendant received the draft, C & Co. had overdrawn their account. C & Co. accepted the draft and requested the defendant to pay it. The defendant mailed its draft to the S Bank, stating it was sent in payment of C & Co.'s draft. The defendant entered the plaintiff's draft as paid. C & Co. failed, and the defendant obtained the draft and letter from S Bank's post office. The next morning the defendant protested plaintiff's draft and returned it to the S Bank, which assigned it to the plaintiff. Judgment for defendant. Appeal.

Cassoday, C. J. In mailing and sending the draft, the defendant acted as the agent for the S Bank, and such mailing was, in legal effect, a delivery of the draft to the S Bank. Judgment reversed.

STEVENS v WILLIAMS, ASSIGNEE (1895) 91 Wis. 58.

Insolvency proceedings. T, a banker at S, made an assignment to the defendant for the benefit of his creditors. The petitioner, as treasurer of M County, had deposited county money in T's bank. T knew petitioner deposited county money. Petitioner applied to have the claim adjudged a preferred claim and paid in full, on the ground that he had identified the sum of money, which came into the assignee's hands, as the money he had deposited. Petition denied. Appeal.

Newman, J. By the same method and amount of proof each creditor can claim the fund, and as each one of the creditors cannot have the entire fund, each must be content with his own fair share of it. Order affirmed.

Cited: 111 Wis. 366.

DEVINE v BANK OF BALDWIN (1895) 91 Wis. 68.

On deposit. The plaintiff deposited \$500 with the defendant bank, receiving a certificate of deposit payable in six months. This certificate was surrendered, the plaintiff receiving \$100 and interest and a certificate for \$400. The plaintiff returned this certificate and obtained \$100 and interest and a certificate for only \$200. Later he obtained \$100 on this certificate. When he called for the amount due, he claimed that there was a \$100 more due him than the last certificate called for. There had been \$100 paid and indorsed on the \$400 certificate which the plaintiff had not received. The defendant contended that the plaintiff was estopped from making the claim after receiving the certificate of \$200, and waiting over 14 months. The defendant was unable to produce any evidence to show to whom the money was paid, or that it was injured by the delay. The plaintiff proved that he could neither read nor write, and could count very little, and his wife could read but little; that on the day the payment was indorsed on the certificate he was in another city. Judgment for plaintiff. Appeal.

Pinney, J. 1. The question of negligence is one of fact depending upon inferences to be drawn from the evidence, and whether the plaintiff was negligent or not, is a mixed question of law and fact for the jury, under proper instructions from the court. 2. The estoppel relied upon, depends on whether the defendant has been prejudiced by the plaintiff's negligence. Upon the facts there can be no inference that the defendant was or might have been prejudiced by plaintiff's failure to discover and communicate the improper payment. Judgment affirmed.

JOHNSTON v HUMPHREY, ASSIGNEE (1895) 91 Wis. 76.

Insolvency proceedings. G transacted a private banking business and made an assignment to the defendant. The plaintiff at the time was indebted to G, part of the indebtedness was due before the assignment was made. Between the time of the failure and the assignment, he, in good faith, purchased certificates of deposit issued by G, and moved that these certificates be allowed as a setoff against the amount of his indebtedness due when the assignment was made. R. S., sec. 4258, provided for the right of setoff of claims due at the commencement of suit. Motion denied. Appeal.

Cassoday, C. J. 1. Equity will not refuse a right of setoff expressly given by statute. 2. The plaintiff purchased the certificate for a valuable consideration and in good faith, and could set them off. The fact that the bank failed did not prevent such purchase in good faith. Order reversed.

Cited: 103 Wis. 65; 105 id. 567.

VOSHKIM v URQUHART (1895) 91 Wis. 513.

Garnishment. The T Bank was a private banking institution at Medford, owned by defendants H and M as co-partners. The bank failed and H made a voluntary assignment to the garnishee, defendant U, for the benefit of creditors. The plaintiff, a creditor of the bank, commenced an action against H and M, and at the same time garnished the defendant U. M absconded just before their bank failed. Plaintiff contended that H could not assign the bank property. Judgment for plaintiff. Appeal.

Winslow, J. Defendant H had a right to make an assignment of the bank, as property of the co-partnership, and it was in law a valid assignment. Judgment reversed.

Cited: 99 Wis. 637.

DIRIMPLE v STATE BANK (1895) 91 Wis. 601.

Money had and received. S entered into a contract with R to cut timber. S sublet this contract to C and K. Later S assigned his contract to the defendant bank as security for his notes. C and K assigned to the plaintiff all their interest in the contract. The plaintiff notified defendant's cashier of the contract and of S's acceptance of the assignment. S, in consideration of the plaintiff discontinuing an action against him, agreed to release all claims he had on the contract, and instructed the defendant to pay what was due to the plaintiff. The defendant claimed it had no notice of this agreement between S and the plaintiff until some time after. Judgment for defendant. Appeal.

Pinney, J. 1. The order given by S on the bank, after notice to the bank, operated as an assignment of the fund. 2. S's acceptance of the assignment of C and K's contract to plaintiff did not transfer any part of the fund received from R through defendant. Judgment reversed.

Cited: 98 Wis. 89; 106 id. 539.

LLOYD v OSBORNE (1896) 92 Wis. 93.

On check. The defendants sent to the plaintiff a check on a Minneapolis bank, addressed to him at N. The plaintiff was accustomed to receive mail through the N post office from the defendant and others, though he lived at S, between which towns there was a triweekly mail. The letter reached N on June 19, and the bank failed on June 22. If the plaintiff had received the check on June 19, it could have been presented by June 21, at which time the defendants had funds to their credit in excess of the check. The check was not received until June 24, when it was forwarded at once for collection. Judgment for plaintiff. Appeal.

Marshall, J. The evidence does not show laches on the part of the plaintiff, as the check was not actually received by him, until it came into his hands at S. Judgment affirmed.

Cited: 93 Wis. 554.

BURNHAM, TRUSTEE v MERCHANTS EXCHANGE BANK (1896) 92 Wis. 277.

Replevin, to recover a promissory note. K, the cashier of S Bank and trustee of the S estate, held the note. The S Bank obtained a loan and as collateral security, delivered to plaintiff a large number of promissory notes. On July 14, the S Bank authorized, in writing, B to transfer these notes to the defendant bank, to be exchanged for certificates of deposit of the same amount. The president of the S Bank took the note in question and another note of the same value, both indorsed by K, as cashier, and substituted them for other notes. Neither B nor the defendant knew that the S Bank had not full legal title to this note. The defendant obtained judgment against the S Bank. Later B delivered this note to the defendant in settlement of the judgment. The trustee of the S estate was not a party to that suit. Judgment for plaintiff. Appeal.

Newman, J. 1. The defendant derived no better title to the note than the S

Bank. 2. The writing of July 14 was a gratuitous option and without consideration. As an executory contract, it is void for want of mutuality. It was not an executed contract for no specific notes were conveyed by it. 3. To be a bona fide purchaser of negotiable paper, not only must value be given, but the paper must be obtained in the usual course of business. Judgment affirmed.

Cited: 92 Wis. 416.

MERCHANTS BANK v FULDNER (1896) 92 Wis. 415.

On promissory note. The defendant executed a note to S Bank, by which it was transferred to B with other notes as collateral security for a loan. The defendant paid \$7,500 to B upon this note and claims an offset large enough to extinguish the balance of \$2,500, as when the S Bank suspended, it owed him over \$2,600. S Bank was insolvent when it pledged the note to B. The plaintiff received the note after maturity. Judgment for plaintiff. Appeal.

Newman, J. 1. The setoff would have been good against the S Bank, when it put the note in B's hands. 2. It would have been good against the note in the receiver's hands or of an assignee of the bank in insolvency. The plaintiff stands in no better position. Judgment reversed.

GRANGE v REIGH (1896) 93 Wis. 552.

On check. On July 20, the defendant gave the plaintiff a check for his indebtedness after banking hours. The check was not presented for payment on that or the succeeding day. The bank was open all day on July 21, and would have paid the check if presented for payment, but did not open after July 21. Judgment for defendant. Appeal.

Marshall, J. 1. If a person receives a check on a bank, he must present it for payment within a reasonable time. 2. A reasonable time at the very latest is before the close of banking hours on the succeeding day. 3. The plaintiff's failure to comply with the law in this respect discharged the defendants from all liability. Judgment affirmed.

BANK OF TOMAH v WARREN (1896) 94 Wis. 151.

Injunction, to restrain the use of a trade name. Previous to 1885, T had carried on the banking business in T under the name of plaintiff. To comply with the requirements of the Laws of 1885, T prefixed his name and thereafter it was known as "T & Co.'s Bank of T." The bank was known as the "Bank of T" and was the only banking institution in T until 1889, when defendants organized a private banking house under the name of W & Son. In 1893, T became insolvent and closed the bank from that time to August 4, 1893, when he assigned to B. On August 12, 1893, the defendants changed their firm name to W & Son's Bank of T, and claimed all mail addressed "Bank of T." B qualified and entered into possession of the bank, of its good will and name. He received all mail addressed to the "Bank of T" until February 4, 1894, when D and others organized the plaintiff bank, and B transferred to G, for the benefit of the plaintiff, the building, fixtures, good will and name of the "Bank of T." On March 6, 1894, the plaintiff commenced doing business as such bank. Judgment for plaintiff. Appeal.

Cassoday, C. J. 1. The good will of the bank included benefits and advantages to the proprietor, in addition to the specific value, of the property, and hence constituted a specie of asset or property. 2. The mere intermission of the business of the bank for a short time did not operate as an abandonment of such good will or trade name. 3. The wrongful use of a trade mark or trade name may be enjoined without proof that any one had been actually deceived. Judgment affirmed.

MERCHANTS BANK v STATE BANK (1896) 94 Wis. 444.

On promissory notes. The plaintiff bank was the indorsee of promissory notes, payable at the defendant bank in P. It mailed these notes to the defendant, but before they were received, defendant's banking house was destroyed by fire. The defendant resumed business in a temporary structure. The notes were received and the maker notified. They were not paid at maturity, and the defendant failed to protest them for non-payment. A few days later the defendant returned the notes to the plaintiff, which at once notified the indorsers, who were solvent, but denied liability for failure to give them timely notice of non-payment. The maker was insolvent. Judgment for plaintiff. Appeal.

Newman, J. 1. The indorsers were released by the failure to notify them of the dishonor of the notes. 2. Having under the circumstances undertaken to collect the notes defendant was bound to the exercise of reasonable diligence in performance, and the plaintiff is entitled to recover such sum as it has lost by reason of the defendant's negligence. 3. This sum is, *prima facie*, the amount of the notes. Judgment affirmed.

SECOND WARD SAV. BANK v MILWAUKEE (1896) 94 Wis. 587.

Injunction, to enjoin the sale of real estate for taxes. The plaintiff, a state banking corporation with a capital of \$200,000, furnished the assessor of defendant city a statement of the value of the stock owned by the stockholders. The assessor fixed the taxable value of the shares at \$450,000 and assessed the stock to the stockholders at that valuation. The assessment was confirmed by the board of review of the defendant. The surplus of the bank amounted to \$300,000, a large portion of which was composed of the real estate on which the defendant had levied taxes. Laws of 1866, ch. 102, sec. 1, declared that no tax shall be assessed upon the capital of any bank, but the stockholders in the banks shall be taxed on the value of their shares of stock therein. The plaintiff set up double taxation in that the real estate had already been taxed at its full value in the assessment of the shares of the capital stock to its stockholders. Judgment for defendant. Appeal.

Pinney, J. 1. This tax is in no legal sense a tax on the capital of the bank, but on its surplus. 2. The shareholders, as such, are not the owners of the capital, or property of the bank, the title to which is vested in the bank. 3. It is not a double taxation either as to person or subject. Judgment affirmed.

Cited: 95 Wis. 362.

PIENING, ASSIGNEE v ENDRESS (1897) 95 Wis. 242.

To recover promissory notes. On April 9, the defendants purchased notes of the B Bank with their checks on the bank. The bank was actually insolvent on April 1, but did not make an assignment until April 12. The defendants had no knowledge of the bank's insolvency, and purchased the notes in good faith for value. Plaintiff was assignee of the bank. Judgment for defendants. Appeal.

Winslow, J. Where customers of a bank purchased notes of the bank in good faith, giving in payment their checks on the bank, with no knowledge of its insolvent condition, or notice of any fraudulent interest on the part of the officials, or of any fact which should have put them on inquiry, then the transaction must be sustained. Judgment affirmed.

HAMACKER v COMMERCIAL BANK (1897) 95 Wis. 359.

Insolvency proceedings. M, receiver of defendant bank, qualified and took possession of its assets. M paid a personal property tax that was assessed against the bank in 1894, and paid money to a surety company for signing his bond as receiver. This action was commenced by a creditor against the bank. M resigned and P was appointed in his place. The intervening creditors and P objected to these items in M's account. The court disallowed the first item and allowed the second. Appeal.

Winslow, J. 1. The taxes were a preferred claim against the estate, but could be paid only pursuant to an order of the court. Though the payment was unauthorized when made, still, if the claim were a valid one against the estate, the court will not disallow the payment because made without authority previously obtained. 2. The law allows the execution of the bond by such surety company, and it was entirely competent for the legislature to make such a law. The part of the order disallowing the item paid for taxes is reversed, and the part allowing the item paid the surety company, is affirmed.

Cited: 110 Wis. 583.

BRYANT v BANK OF COMMERCE (1897) 95 Wis. 476.

For commissions, on a sale of real estate. At a meeting of defendant's directors, a committee of four was appointed to negotiate for the purchase of real estate, specified in the resolution, on which to erect a block to be used for a bank, and other purposes. The committee were instructed not to pay more than \$35,000 for either of the properties specified. The negotiations with the plaintiff, for the purchase of the property, were conducted by the president and cashier of the de-

fendant bank, two of the committee, and culminated in their instructing the plaintiff to buy the property, for the defendant, at \$50,000. The other two members of the committee had nothing to do with the transaction. Judgment for defendant. Appeal.

Cassoday, C. J. 1. The transaction was not within the scope of the ordinary business of the bank, nor incident to such business; but involved the exercise of power given specially by statute, for a specific purpose, and with prohibitory restrictions. 2. The president and cashier had no power, by virtue of their office, to delegate the authority to the plaintiff. Their only authority to act was by virtue of the resolutions. Judgment affirmed.

Cited: 100 Wis. 446.

STATE v SHOVE (1897) 96 Wis. 1.

Indictment. The defendant was indicted under sec. 4541, R. S., for receiving on deposit \$300, when the bank, of which he was president and manager, was insolvent. G presented a matured certificate of deposit at defendant's bank for \$200, surrendered it and gave the defendant's cashier \$90 in addition, for which she received a certificate for \$300 payable one year after date. The State proved the amount of the demand and time deposits, and the indebtedness of the debtors to the bank, to show the value of this indebtedness as an asset of the bank. The defendant contended that the transaction was a loan and not a deposit within the meaning of the statute, and excepted to the method of showing insolvency. Case certified.

Cassoday, C. J. 1. While a certificate of deposit payable at a fixed future time may be technically regarded as a loan, yet in view of the purpose of the action, the transaction was a deposit within the meaning of the statute. 2. The fact that a portion of the amount paid consisted of a certificate of deposit did not change the transaction, from what it would have been, if the whole amount had been deposited in cash. 3. There was no error in the method of proving the insolvency of the bank at the time of receiving the deposit. The evidence was material, relevant, and pertinent, hence competent. Exceptions overruled.

Cited: 103 Wis. 51.

DOCTER v RIEDEL (1897) 96 Wis. 158.

Tort, for the abuse of process. The plaintiff gave the defendant bank a judgment note for \$5,000 payable on demand, secured by a mortgage on real estate. The defendant bank assigned the note to defendant R, who entered judgment on the note and issued execution. The sheriff broke into the plaintiff's store and levied on his whole stock, worth over \$13,000. The plaintiff contended that the levy was made with the malicious intent of destroying his business, and that the bank should have applied \$850, which he had on deposit with it, on the judgment. Demurrer. Overruled. Appeal.

Winslow, J. 1. The defendant acted strictly within his rights; and where one exercises a legal right his undisclosed motives are immaterial. 2. It is doubtful whether the bank had the right to apply the plaintiff's balance upon the note; but if it had the right, it was not obliged to do so. Order reversed.

GIANELLA v BIGELOW, EX'R (1897) 96 Wis. 185.

Creditor's bill, to enforce the liability of stockholders. Plaintiff, for the benefit of himself and all other creditors brought this action, as the assets were not sufficient to satisfy the claims against the bank. The Laws of 1852, sec. 47, provided that the stockholders of every corporation organized under the act, should be individually responsible to the amount of their respective shares for the corporation's indebtedness. Sec. 22 provided that the shares of such corporation should be deemed personal property, and be transferable on the books. No transfer had been made to defendant, executor. Judgment for plaintiff. Appeal.

Pinney, J. 1. This liability of the shareholder does not die with him, but survives in respect to his estate in the hands of his executor or administrator. 2. The executors in this action are chargeable for such liability only to the extent of the assets severally received by them. 3. No assignment of the stock was necessary, and their personal representatives continued the legal personality of the deceased stockholders. Judgment affirmed.

Cited: 96 Wis. 518; 97 id. 564; 101 id. 603; 105 id. 102; 106 id. 264, 265, 568, 630; 108 id. 530; 109 id. 152; 111 id. 646, 651, 653.

BOOTH v DEAR (1897) 96 Wis. 516.

To enforce stockholders' liability. The bank made an assignment for the benefit of creditors, with liabilities of \$135,000 and assets of \$20,000. It had ceased to do business, and had no property subject to execution or sequestration. The debt due the plaintiff was incurred more than six months before the assignment. The plaintiff brought the action on behalf of himself and the other creditors of the bank. Demurrer. Overruled. Appeal.

Marshall, J. It is sufficient to warrant proceeding to judgment in this action, that it be made to appear that the liability of the stockholders will have to be resorted to, in order to fully pay the corporation debts. Order affirmed.

Cited: 97 Wis. 564; 101 id. 603; 105 id. 102; 106 id. 264, 265, 274, 568, 630.

WILLIAMS v MELOY (1897) 97 Wis. 561.

To enforce the liability of stockholders. The complaint alleged that S Bank made a general assignment for the benefit of its creditors, having liabilities exceeding \$57,000 and assets not exceeding \$20,000; that defendants own \$50,000 of the bank stock; that the plaintiff is a creditor of the bank and has proved his claim; that the plaintiff brings the action as assignee of the bank in behalf of all the creditors, and also as creditor of the bank in behalf of himself and of all other creditors. Demurrer. Overruled. Appeal.

Winslow, J. 1. The liability of the stockholders is an original, primary liability to be enforced in equity by one creditor in behalf of all. 2. The complaint set forth a good cause of action. 3. If the plaintiff is entitled to maintain the action in either capacity, the complaint is not demurrable. 4. The objection that the assignee must be joined as a party defendant is untenable. Order affirmed.

Cited: 101 Wis. 603.

BARTH, REC'R v KOETTING (1898) 99 Wis. 242.

Bill, to have the title to real estate adjudged to be held in trust. Complainant was appointed receiver of S Bank. Several years previous to its insolvency, the bank purchased a judgment of foreclosure on a farm and took an assignment of it, in the name of defendant K, the cashier. The land was sold by the sheriff and bought in by defendant K, in his own name and behalf, and it was agreed that he should become the bank's debtor for the purchase money. An open account of K's father-in-law at the bank was to stand as security. Subsequently defendants R and M obtained a judgment against K, and the land was sold to them in satisfaction thereof. Judgment for defendants. Appeal.

Winslow, J. A cashier may borrow money in good faith of his bank, with the consent of the managing body of the corporation, and no trust arises in favor of the bank. Judgment affirmed.

Cited: 109 Wis. 362.

ROANE IRON CO. v WISCONSIN TRUST CO. (1898) 99 Wis. 273.

Garnishment. A manufacturing company made a voluntary assignment to the defendant Trust Co. for the benefit of its creditors. The defendant accepted the trust and took possession of the assignor's property. The plaintiff, a creditor of the assignor, garnisheed the trust company and claimed that the assignment was void. The defendant was organized under the Law of 1891, as amended by ch. 160, Laws of 1895, which authorized it to act as receiver or assignee, and was not required to take any oath or give a bond or security, other than the deposit of securities with the state treasurer. The plaintiff contended that the law was unconstitutional, as special legislation conferring corporate powers, and as discriminating in favor of a class; and that the act attempted to confer banking powers and hence was void, not having been submitted to a vote of the people. Judgment for defendant. Appeal.

Winslow, J. 1. The law authorizing the organization of such corporations is a general, and not a special or private law. The fact that it gives no bond except in the discretion of the court cannot be considered an unjust discrimination. 2. The act confers no banking powers on such companies. Judgment affirmed.

GORES v DAY (1898) 99 Wis. 276.

To compel directors to account, under secs. 3237, 3239, R. S. 1878. The bank made an assignment to defendant P. The defendants owned most of the stock, con-

trolled its affairs, and constituted its board of directors. They had allowed defendant D, its president, to borrow large sums of money from the bank without adequate security, and to purchase bank stock in his own name, and pay for it out of the bank's funds. The plaintiffs as creditors asked for an accounting, the appointment of a receiver, and that the defendants be held liable for the deficiency. Defendant D demurred, on the ground that no cause of action was stated against him, and that the court had no jurisdiction. Sustained. Appeal.

Marshall, J. 1. Directors are liable to be charged as trustees of property fraudulently misapplied or wasted by them, independent of any statute on the subject, and the plaintiffs can maintain the action. 2. The court has jurisdiction as the action is equitable. Order reversed.

Cited: 100 Wis. 256, 261, 603; 103 id. 54; 105 id. 360; 106 id. 560, 574; 109 id. 411, 415.

PRITCHARD v BARNES, INTERVENER (1898) 101 Wis. 86.

Where a national bank on resolution of its board of directors went into liquidation, Held, under 5220, U. S. R. S., it was not dissolved for the purposes of suing and being sued.

UNION & PLANTERS BANK v JEFFERSON (1899) 101 Wis. 452.

On draft. J, at the time of his death, was a depositor, and was indebted to the plaintiff bank on three notes. The defendant was administrator of J's estate and the plaintiff transferred the deposit balance to him. Shortly after, P and the defendant gave their own notes to the plaintiff, in place of the three notes. The new notes were discounted by the bank and the proceeds placed to the credit of the defendant as administrator. Two of the notes were paid and the draft in question was given for the third. After giving the notes, the defendant drew out the money on deposit. Pleas, want of consideration, fraud and mistake of fact. Judgment for plaintiff. Appeal.

Winslow, J. 1. The bank was entitled to offset the money on deposit against the notes, and to prove the balance against the estate. 2. The defendant cannot now repudiate liability on the note, when the bank, because of reliance on him, has materially changed its position. 3. The defendant cannot rescind a contract without returning what has been received by virtue of it. 4. The same facts which estop defendant from pleading a mistake, will also estop him from pleading want of consideration. Judgment affirmed.

GAGER v BANK OF EDGERTON (1899) 101 Wis. 593.

Injunction. M, a stockholder, brought this action against defendant bank alone, praying for the appointment of a receiver, and to enjoin the bank and its officers from exercising any corporate rights. T was appointed receiver, and immediately qualified. M subsequently amended his complaint by alleging that he was a creditor. The court ordered all creditors to file their claims and become parties. H, a creditor, commenced an action on behalf of himself and all other creditors against the officers, directors and stockholders of the bank. Afterward, the plaintiff and other creditors petitioned the court that they be made plaintiffs and that M, the directors and stockholders be made defendants. Order, granting petition and that H's action be enjoined, and that he be allowed to come in with all the privileges of a party. Appeal.

Winslow, J. The action commenced by M is the exclusive action, and all the creditors must seek their remedy therein. The liabilities of the officers and stockholders must be enforced in this action. The second action would reach the same results, which might be readily reached in the action already pending. Order affirmed.

Cited: 101 Wis. 608; 103 id. 139; 105 id. 362; 106 id. 574, 630.

NORTHWESTERN NAT. BANK v CITY OF SUPERIOR (1899) 103 Wis. 43.

Insolvency proceedings. Action by the plaintiff for itself and other creditors against the bank, for the appointment of a receiver, winding up of its affairs and distribution of its assets. S, was appointed receiver. The defendant filed its claim praying that its claim be preferred under secs. 3217-3245 R. S. These sections provided that claims of the United States, the state and any county, city, or village shall be preferred out of the assets of an insolvent corporation. The plaintiff con-

tended that these laws, as applied to banks, were unconstitutional, not having been submitted to a vote of the people. Motion granted. Appeal.

Dodge, J. Neither the express words of the Constitution nor the necessary implication therefrom, or the words of the Banking Act, prohibit the legislature from regulating the administration of insolvent banking corporations in common with others, and the distribution of their assets. Judgment affirmed.

Cited: 103 Wis. 257; 111 id. 439.

DILLMAN v CARLIN (1899) 105 Wis. 14.

Garnishment. Defendant S, having \$250 to his credit in the savings bank, gave his check for the full amount to defendant C, to pay for a horse and other personal property. The deposit was not subject to check, or otherwise than by the depositor, or his assignee presenting the depositor's book. That condition was not known to either of the defendants at the time, but on learning of it, S delivered his depositor's book to C. Before C presented the check, the bank was garnished by the plaintiff. The bank deposited the money in court and C interpleaded. Judgment for defendant. Appeal.

Marshall, J. If the owner of a bank credit gives a check thereon for value to another, with intent to transfer such credit to such other, the latter will be at least the equitable owner of such fund, or sufficient to satisfy the check, and will be preferred to the owner or any subsequent claimant, whether by assignment or by legal process served upon the drawee. Judgment affirmed.

Cited: 112 Wis. 596, 598.

THOMPSON v GROSS (1900) 106 Wis. 34.

To enforce the liability of stockholders. In 1894, the bank was insolvent. In order to have the bank resume business, the stockholders gave a note for the amount set opposite each of the names, to be used only in case of shortage, to cover liabilities to creditors, and for stock; but only \$100,000 to be paid thereon. It was further agreed that, on paying respective amounts, the stockholders should be discharged from payment of their statutory liability. Subsequently the bank again failed. There was a deficiency in the amount required to pay the debts, of \$50,000, after paying the statutory assessments. Demurrer, no cause of action. Overruled. Appeal.

Marshall, J. 1. Any money paid in under the agreement would constitute a trust fund, and the statutory liability of those, who signed the agreement, would be discharged pro tanto. 2. The action was not prematurely brought, as the complaint showed there was a deficiency, and an accounting is necessary to determine the exact amount, and to enforce the agreement accordingly. 3. The agreement is treated as an asset of the bank, and not the statutory liability. The receiver could sue. 4. The promise of each stockholder to the bank constituted a sufficient consideration. The fact that the creditors were not parties does not invalidate the agreements. Order affirmed.

FINNEY v GUY (1900) 106 Wis. 256.

To enforce stockholder's statutory liability. The defendant is a citizen of Wisconsin. The bank, located in Minnesota, became insolvent, and the complainant, as receiver, brought an action against the corporation, and its stockholders, and obtained a judgment against them, for the amount of their pro rata shares of the bank's indebtedness. This is an ancillary action to enforce against the defendant, the judgment so obtained. The statutory liabilities of stockholders is the same in both states, but by a recent decision in Minnesota, it was held that the bringing of a single equitable action in the domicile against the stockholders of a corporation, does not preclude the bringing of an ancillary action in another state, against stockholders, who could not be reached in the first instance. Judgment for plaintiff. Appeal.

Marshall, J. 1. When a statutory right is created, coupled with a specific remedy to enforce it, such remedy is exclusive and cannot be pursued outside the home jurisdiction. 2. The remedy contemplated by these statutes is a single action, in which all persons having or claiming any interest in the said action shall be joined or properly represented, and their rights and liabilities finally settled and determined. 3. In an action to enforce the liability of the stockholders, the corporation is not a party, unless there are corporate assets to be reached, and it does

not represent the stockholders in any sense. 4. By comity a liberal course in the enforcement of the laws of other states should be the rule; but the paramount duty of our federal system is to safeguard our own state policy, and prevent injustice to our own people, within reasonable limits. Judgment reversed.

Cited: 106 Wis. 630, 633; 109 id. 140, 151, 153; 110 id. 409; 111 id. 647.

KILLEN v BARNES (1900) 106 Wis. 546.

To enforce the liability of stockholders. The defendant purchased \$2,000 of the bank stock in 1885, paying par value, and continued to hold it until the bank became a state bank. He was the vice-president and a director, but did not actively participate in managing the business. The bank examiner had regularly examined the affairs of the bank but had discovered nothing to criticise in the management. Nothing impairing the bank's safety was brought to the defendant's notice. At the suggestion of the managers of the bank, it was changed into a state bank. No subscription to the stock of the state bank was made, as the defendant and other outside stockholders supposed their interest in the national bank was a full equivalent for a like interest in the state bank. The managers prevented the outside stockholders from learning the bank's true condition. One of the means was to declare dividends which were paid only to the outside stockholders. In 1893 the managers declared a 7 per cent dividend, which was paid to the defendant and two other stockholders. Prior to declaring this dividend the plaintiff's assignor made a deposit in the bank, and made another one after the dividend was declared. Shortly after, the bank made an assignment to the defendant, who paid into the trust fund his statutory liability of \$2,000, and the amount of the 7 per cent dividend paid to him. The plaintiff and his assignor shared in all the distributions of the assets of the bank. Judgment for defendant. Appeal.

Marshall, J. 1. The directors of a corporation are trustees for it, and bear no other relation to its creditors than the agent of an individual to his creditors. 2. The balances due for unpaid subscriptions to the capital stock are a part of the bank's assets, and under a general assignment the title vests in the assignee and carries with it the duty to collect them so far as it is necessary to pay all credits. 3. The liability of the defendant for the payment of the dividend was not assignable, because the liability was penal. Judgment affirmed.

Cited: 109 Wis. 154, 412; 111 id. 652.

GORES v ELLIOTT (1901) 108 Wis. 465.

Where an action is brought by a creditor against the officers of a bank to recover for a loss sustained by reason of negligence and mismanagement, the complaint must allege that the parties defendant were officers when the acts complained of took place.

REHBEIN v RAHR (1901) 109 Wis. 136.

To enforce the liability of stockholders. This action was brought by the plaintiffs for the benefit of the creditors of the bank, which became insolvent, having liabilities largely in excess of its assets. Preliminary to the organization of the bank, the defendants R and W signed their names to the certificate of incorporation with the understanding that their brother, the other member of the firm, must sign it for the purpose of making the firm a stockholder. M, the brother, disappeared, and a few days later, defendant W notified S that they refused to become stockholders. S filed the certificate with the names of R and W, specifying among the stockholders W R Sons for 25 shares. Subsequently S tendered W a certificate of 25 shares which was not accepted. The officers of the bank in their reports to the state treasurer continued to include the firm among its stockholders. Most of the plaintiffs had newspaper information that W R Sons were stockholders. The Banking Act, sec. 2024, subsec. 47, provides that stockholders shall be liable ratably or in proportion to their holdings. Judgment for defendants. Appeal.

Dodge, J. 1. By signing the certificate and filing the same with the register, defendants agreed to become stockholders, and in the absence of a rescission of such agreement the defendants continued as stockholders. 2. The defendants are obligated to pay up to the full limit of the stock-holdings. Judgment reversed.

GORES, ADM'R v FIELD (1901) 109 Wis. 408.

To enforce the liability of bank officers. The action was brought by plaintiff's intestate as a creditor against the officers of an insolvent bank to recover funds and property of the corporation lost by the negligence and fraud of the directors and managers. The complaint alleged that defendant F was a creditor up to February 23, 1893, and that defendant E succeeded him as director after that date. Defendant M as cashier was made a party. The plaintiff also alleged that the fraudulent acts were not known to him until after filing the inventory. The defendant contended that sec. 4252, R. S., Laws of 1898, which provides that actions against directors and stockholders of a bank, to recover a forfeiture imposed, or enforce a liability "created by law" may be brought within six years after the discovery of the facts by the aggrieved party, applied. Demurrer that neither the bank nor the assignee was made a party. Overruled. Appeal.

Winslow, J. 1. Even if the allegation in question implied the bringing of an action, it would not necessarily follow that such action was a winding up action. 2. The words "liability created by law" in the statute refer to a statutory liability. The liabilities attempted to be enforced in this action are common law liabilities and the section does not apply. 3. The assignee of the bank in his official capacity is a necessary party to the action. 4. The allegation "directors and managers" would include the cashier. 5. The complaint does not present a case of misjoinder of actions. Order reversed.

HYLAND v ROE, REC'R (1901) 111 Wis. 361.

Insolvency proceedings. The petitioner transacted business with the bank of which defendant became receiver, believing it to be solvent. He delivered to the president a check on another bank, receiving from him a certificate of deposit for \$1,000 and the balance in cash. At the time the bank was insolvent, which fact was known to the president. The day following the receipt of the petitioner's check, the bank closed its doors. The proceeds of the check were paid over to the defendant, who refused to give the money to the petitioner. The petitioner prayed for an order compelling the receiver to pay over this money. Demurrer. Sustained. Appeal.

Bardeen, J. 1. The acceptance of a deposit by an insolvent bank constitutes such a fraud as entitles the depositor to reclaim his money if it can be traced and identified. The proceeds of the check never came into the possession of the bank and were never intermingled with its funds, and the receiver could obtain no better title than the bank had. 2. The right of the petitioner to rescind the transaction and to reclaim his money was absolute if fraud were proven. 3. The proceeding is equitable in its nature and the petitioner merely alleged a demand and refusal, but no offer to rescind the contract and return the certificate of deposit. The petition is insufficient and it can be cured by amendment. Order affirmed.

GAGER v PAUL, ADM'R (1901) 111 Wis. 638.

Insolvency proceedings. The action was commenced in October, 1897, by a stockholder of the bank for the appointment of a receiver. In 1898, the plaintiffs, creditors of the bank, intervened and prayed that all the directors and stockholders be made defendants. M, at the time of his decease, in 1894, held two shares of the original capital stock, on which he had paid \$300, par value \$1,000, which passed to his executors. The defendant's intestate received part of M's residuary estate in June, 1897. The plaintiffs claimed the statutory liability against her estate, besides the unpaid consideration for the stock, and the dividends illegally paid while the bank was insolvent. Subsec. 16, sec. 2024, R. S. 1898, provides that every stockholder who sells or transfers his stock shall be held liable for the amount of his stock for six months after such transfer. Judgment for plaintiffs. Appeal.

Dodge, J. 1. After the stockholder's liability has expired, no action can be maintained to revive it. 2. The cause of action to enforce payment sufficient to make up the original par value of the stock never existed in the corporation. The creditors never had an opportunity to enforce it against the estate, because they had no cause of action at law, and only a right to sue in equity, where they must necessarily join the corporation. 3. The liability to the corporation for these unlawful dividends has been extinguished by the Statute of Limitations, and the plaintiffs cannot recover in its right, what the corporation could not have recovered at the time the action was commenced. The judgment modified.

WYOMING

WILSON v ROGERS (1872) 1 Wyo. 51.

Breach of contract. The petition alleged that plaintiff had given defendant \$5,000 to pay over to F Bank as the first instalment of stock subscribed to by plaintiff; and that defendant failed to pay over the money, but converted it to his own use. The proof showed that plaintiff had given defendant his check drawn to the order of F Bank for \$5,000, and took a receipt therefor signed by defendant, as cashier of F Bank. The check was put in evidence; it was indorsed by defendant as cashier. Plaintiff offered to prove that defendant received the money, but failed to pay the instalment. Offer refused. Verdict directed. Judgment for defendant. Error.

Carey, J. 1. Plaintiff's remedy was against the bank. 2. If an agent transcends his agency, so as to render his principal inaccessible or irresponsible, or if he acts in bad faith, he makes himself personally liable; but such facts cannot be proved where no agency is alleged. 3. The proofs must correspond with the allegations. Judgment affirmed.

WILSON v FIRST NAT. BANK (1873) 1 Wyo. 108.

For diversion of money deposited. Petition alleged the incorporation of defendant; that plaintiff delivered \$5,000 to defendant; that defendant, in consideration thereof, agreed to appropriate the same to the payment of an instalment on shares of its capital stock subscribed for by plaintiff; and that defendant failed to perform such agreement. Demurrer. Sustained. Error.

By the court. 1. The fact of plaintiff having subscribed to the capital stock of defendant did not debar him from bringing an action against the same for breach of contract. Judgment reversed.

FOSTER v RINCKER (1893) 4 Wyo. 484.

To establish a trust. Plaintiff sent a note to C Bank for collection only. The maker paid the note by giving C Bank a draft on X Bank for the amount. C Bank sent this draft to F Bank for collection and credit, and sent plaintiff its draft on F Bank for the net proceeds of the collection. F Bank collected the draft on X Bank and credited C Bank with the amount. The same day C Bank failed. Plaintiff duly presented C Bank's draft for payment, but payment was refused, though the balance to C Bank's credit with F Bank exceeded the amount of the draft. Thereafter defendant was appointed receiver and received payment of the amount due C Bank from F Bank. Plaintiff contended that defendant took the fund charged with a trust. Defendant contended that plaintiff was a general creditor only. Demurrer. Overruled. Decree for plaintiff. Appeal.

Clark, J. 1. The relation existing between the parties was that of principal and agent, and the proceeds of the note collected by the agent were as much the property of the principal as the note. 2. The bank could not by drawing and mailing the draft, by its own act, unauthorized by plaintiff, transform the relation of principal and agent into that of creditor and debtor. 3. Equity will follow a fund through any number of transmutations and preserve it for the benefit of the true owner as long as it can be identified. Decree affirmed.

ROCK SPRINGS NAT. BANK v LUMAN (1894) 5 Wyo. 159.

To recover proceeds of draft. P, cashier of defendant, was indebted to plaintiff on a mortgage which was a valid lien on certain sheep. The mortgage permitted the sale of some of the sheep from time to time, the proceeds to be applied to the extinguishment of the debt. P was also indebted to K & Co., K being president of defendant. November 5, P left the bank to go to his sheep ranch, and was not again at the bank or in the performance of duties as cashier until November 29. During all of his absence, G, the vice-president, acted as cashier. During this time and with the consent of plaintiff, P sold some of the sheep and purchased a draft for the purchase price, payable to himself. This draft he indorsed and mailed to G, with instructions to place it to his credit. G applied the amount on account of P's indebtedness to defendant and to K & Co. P testified that the amount of the draft was so applied without his knowledge, but that when his attention was called

to it he made no objection. Statements made by P after the appropriation of the proceeds were admitted in evidence. Defendant offered to prove that P was not acting for the bank or receiving salary from November 5 to November 29. Excluded as immaterial. Judgment for plaintiff. Error.

Corn, J. 1. As in the entire transaction P was acting in his individual capacity and not as agent or officer of defendant, declarations or conversations after the transaction were not therefore evidence against defendant. 2. The excluded testimony was material to the subject of notice to defendant. 3. The declarations of P must have been admitted on the theory that they bound the bank; and it will be presumed on appeal that the case was tried on the theory indicated by the ruling. Judgment reversed.

STATE v FOSTER
BOARD OF COMMISSIONERS v SAME } (1894) 5 Wyo. 199.

To establish a trust. The treasurer of the State and of L County had for 18 years deposited the public funds with K a private banker. This was done under no express authority, but with the knowledge of the people and of the State and county officials. K failed and made a general assignment to defendant. A small amount of money in the vaults of the bank and on deposit with other bankers to K's credit came into the hands of defendant. The treasurer's deposits could not be traced into specific property. Plaintiffs, the State and county, contended that they were entitled to a preference. The constitution provided that no obligation held by the State should be released except by actual payment. Reversed for opinion.

Groesbeck, C. J. 1. Under the common law, which is not changed by the Statute of Assignments, title passes by an assignment for the benefit of creditors and the transfer defeats any preference or priority, to which a State or county, as such, might be otherwise entitled. 2. The provision of the constitution does not create a preference, but merely prevents a dividend from operating as a release of the unpaid balance. 3. Public moneys in the hands of State and county treasurers remain public funds and their character is not changed by being placed to the credit of the trustee. 4. K having knowledge of the character of the funds was chargeable as trustee. 5. In following trust funds, the corpus must be in esse in some form or it cannot be identified. 6. Where a trustee mingles trust funds with his own and afterward pays out money, he will be taken to have drawn out his own money in preference to the trust money; as to the money in the vaults or on deposit with other bankers, plaintiffs were entitled to a preference

Cited: 7 Wyo. 377.

ROCK SPRINGS NAT. BANK v LUMAN (1895) 6 Wyo. 123.

To recover proceeds of draft. P, defendant's cashier, mortgaged certain sheep to plaintiff. P, under a power given him in the mortgage, disposed of part of them and took a draft in payment. At the time he was away from the bank attending to his sheep business, he indorsed the draft and remitted it to defendant with instructions to place it to his credit. G, defendant's vice-president, who was acting as cashier during P's absence, applied all but \$813 of the draft to pay a pre-existing indebtedness of P to defendant. On P's return he made no objection to G's act; and with P's consent the residue was applied to a debt due from P to K & Co., whose principal member was president of defendant. It appeared that G and other directors of defendant knew that P was engaged in the sheep business, was away probably attending thereto, and would probably receive no large sum from any other source; they also had notice of the mortgage. Declarations of P, after the appropriation of the proceeds, were admitted; and evidence that P received no compensation as cashier while away was excluded. The case was tried without a jury. Judgment for plaintiff. Reversed. Rehearing.

Groesbeck, C. J. 1. If a court arrives at the correct result, errors, if not prejudicial, are cured. 2. Neither the admission of P's declarations nor the exclusion of defendant's offered testimony can be regarded as prejudicial errors, as the facts covered are substantially established by the other evidence. 3. Defendant was chargeable with knowledge of fact sufficient to put it on inquiry, and this is sufficient to sustain a finding on notice. 4. Where a depositor seeks to pay his own debt to the banker with funds which the latter knows are held in a fiduciary capacity, the latter becomes a party to the unlawful diversion of the funds. 5. But where payment is made to a third person at the direction of the depositor, the banker is not liable. Judgment reversed, unless reduced by \$813.

Cited: 6 Wyo. 517; 7 id. 328.

FIRST NAT. BANK v SCHOOL DISTRICT (1896) 6 Wyo. 485.

On school warrants, issued by defendant's officers and drawn upon its treasurer. Defense, payment. Defendant's treasurer deposited taxes collected to meet the warrants with C Bank, and notified H, who was an officer of C Bank, and also of D Bank, plaintiff's assignor, to send the warrants to C Bank for payment. The treasurer also directed B, C Bank's cashier, to pay the warrants out of the funds. H admitted that D Bank was owner of the warrants, told defendant's treasurer that C Bank was "all right," and afterward directed the treasurer to leave the funds with C Bank. They remained there for two years. C Bank failed. The warrants had not been presented. Thereafter they were assigned to plaintiff. Judgment for defendant. Error.

Groesbeck, C. J. 1. The warrants were non-negotiable paper, being overdue, and plaintiff took them subject to all equities. 2. Acceptance by the holder of the arrangement to pay the warrants from the sum deposited constituted payment. Judgment affirmed.

KINNEY v HYND S (1897) 7 Wyo. 22.

On certificate of deposit. The certificates were issued by defendant F Bank to K and indorsed to plaintiff for value. The bank set up a claim of K to the certificates, and K was allowed to interplead. K had the certificates cashed at their face value, and used the money in gaming and in repaying money borrowed which had been expended in gaming. A statute provided that no assignment of any bill, bond or evidence of debt, where the whole or part of the consideration should arise out of gaming transactions should in any manner affect the person making the assignment. Another statute provided that all contracts made for reimbursing or paying any money or property knowingly lent or advanced to persons gaming should be void. Gaming was licensed by statute. Judgment for plaintiff including interest to be paid by F Bank. Error.

Corn, J. 1. As K was paid the face value in money, it is immaterial what he did with the money thereafter; and the transfer was not void as based on a gaming transaction. 2. In the absence of any proof that the certificates were pledged and not sold, the statute avoiding contracts to repay money loaned or advanced for gaming debts does not apply. 3. Gaming being licensed, no action lies to recover money lost at gaming. 4. The bank is not chargeable with interest. Judgment affirmed.

ESTATE OF BEARD (1897) 7 Wyo. 104.

Administration of insolvent estate. Motion for preference. Decedent, a stockholder in C National Bank, died a few days after the bank failed. H was appointed his administrator, and F, receiver of the bank, claimed a preference out of the assets of the estate for the amount of an assessment on the decedent's stock, on the ground that the amount due was a trust fund, and formed no part of the general assets. U. S. R. S., secs. 5151 and 5234, provided that the stockholders of a national bank were individually responsible for its debts to the amount of their stock and additional thereto.

Conaway, C. J. 1. There is no room for the application of the trust-fund doctrine to the extent of giving the receiver, or the creditors of an insolvent corporation, preference in payment from the estate of an insolvent stockholder as against his general creditors. 2. The trust can have no greater effect on the property in the hands of the administrator than in the hands of the assignee. Motion denied.

McLAUGHLIN v O'NEILL (1897) 7 Wyo. 187.

To enforce stockholders' liability. Plaintiff's testator was the holder of a certificate of deposit of P Bank, a Utah corporation. He obtained a judgment for the amount of the certificate, against P Bank, which was insolvent. On the same date, the bank made an assignment. Defendant's testator was a citizen of Wyoming, and a stockholder in the bank. Plaintiff, in a proceeding in Utah, was appointed receiver of P Bank, and authorized to bring suits against the stockholders, to recover the various sums for which they were respectively liable. The laws of Utah provide that a stockholder of a banking corporation should be individually liable, equally and ratably, for contracts, debts and engagements of the corporation, to the

amount of his stock therein, in addition to the amount invested in such stock. General demurrer. Reserved for decision.

Potter, C. J. 1. The stockholders' superadded liability is secondary, and is not to be resorted to, unless the assets of the corporation are themselves insufficient to discharge all its liabilities. 2. Such liability is several in its nature and cannot be made joint, the stockholders are not liable one for another. 3. The enforcement of the liability calls specifically for the exercise of the powers of a court of equity. 4. No inquiry open to the courts of this state would result in any ascertainment of the indebtedness of the corporation, which would be binding upon it, its assignee, stockholders, or creditors, not voluntarily submitting themselves to its jurisdiction; no recovery therefore can be had in this state against a single stockholder, until the courts in Utah have judicially ascertained the amount of the deficiency for which the stockholders are liable. Demurrer sustained.

